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A JEWISH PHILOSOPHY OF PROPERTY: RABBINIC INSIGHTS ON INTESTATE SUCCESSION

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THERE IS ONLY ONE SMALL PARAGRAPH in the Bible that deals exclusively with the Jewish law of inheritance. Yet Talmudic literature on the subject is vast. One might have expected this. There are many owners of property and they too must die. Their property must be disposed of in an orderly fashion if there is not to be a disruption of the social order by an unbridled "grab" of the deceased's assets by everyone present at the time of death. Moreover, the law must provide for the satisfaction of whatever obligations the deceased had. His death must not cause his creditors to sustain loss.

This paper will undertake to interpret several aspects of the Jewish law of intestate succession. An attempt will be made to glean ethical insights from the Talmud's treatment of the subject. The Talmud does not explicate these ethical considerations but they are implicit in the rules. Whether or not the rabbis had them in mind may be questioned. Therefore, what is here offered is more a Midrash on the applicable rules of law than a scholarly analysis of rabbinic teleology.

While the rules are no longer applicable to the estates of most Jews, they are a part of Torah and for those who deem Torah the will of God it is important that they try to fathom that will and see how Jewish sages coped with it through the ages—sometimes supportively and at other times manipulatively. The least that the study will yield is another instance of a Biblical ideal that was compromised radically in the course of Jewish history. How this was done in connection with testate succession Professor Solomon Zeitlin has already demonstrated.[1]

[1] **See his "Testamentary Succession: A Study in Tannaitic Jurisprudence," JQR (75th Anniversary Volume, 1967), pp. 574-587.**

But the Biblical pattern and the early Talmudic views merit more analysis and rationalization than they have heretofore received. This is the burden of this paper.

I

The one basic norm of the Jewish law of property is that the earth is the Lord's. While a man lives, God indulges him some power over things, especially their use and enjoyment. However, after his death his power to dispose must revert to the Master. That is why it was held in the Talmud that the laws of inheritance as set forth in the Bible must be obeyed.[2] An owner of property has no control over the manner in which his belongings shall be distributed after his demise. That is up to God, the Ultimate Owner.

This position is in bold contrast to that of Roman law which had a deep-rooted dislike of intestate succession.[3] Roman law preferred wills even though a will may be—in the words of one of its critics—the expression of the will of a man who no longer has any will, respecting property which is no longer his property, and the act of a man no longer accountable for his acts to mankind. Yet Roman law was very much private property oriented and it was inevitable that the champions of private property should aggrandize man's control over that which he acquires in his lifetime so that he can retain control even after his death.

Jewish law in time succumbed to the same pressures and many ways were devised to enable an owner to dictate how his estate shall be divided. The most commonly used technique was to make gifts during one's lifetime to take effect upon death.[4] Human nature being what it is, one could have expected that this would come to pass. People crave economic

[2] **B. BB. 130a האומר האיש פלוני יירשני במקום שיש בת, בתי תירשני במקום שיש בן לא אמר כלום שהתנה על מה שכתוב בתורה.**

[3] **See Carl Salkowski, "Institutes and History of Roman Private Law/' trans. E. E. Whitefield (London: Stevens and Haynes), 1886, p. 770.**

[4] **See Zeitlin, supra, Note 1.**

power and relish the exercise of that power even from the grave. However, the spirit of the Biblical and Talmudic position ought not to be forgotten. That position clearly held that a man is without power over his assets after his death. That decision God makes. He decrees who are heirs, and in what proportion. And even a written document altering the Biblical pattern was deemed a nullity.[5]

This position also eliminated the possibility that heirs would quarrel with each other and charge fraud or undue influence on the testator. They could complain only against God for that which they failed to receive or received in inadequate measure. The fixity, or immutability, of the pattern of inheritance never threatened family solidarity as so often do the patterns presently prevailing.

Yet there was a more basic reason for the rule against altering the Biblical pattern. When it was impossible for owners of land to dispose of their holdings in accordance with their own desires and only lawful heirs could get it, one could more readily hope that the laws of the J ubilee year would be respected. Their observance would create minimum economic upheaval.

Thus, if one's lands had never been sold to anyone at all, then the redistribution of land in the Jubilee year would affect no one other than heirs, who in any event were in possession of the land. Perhaps there would be some change insofar as some would lose or gain a fraction. However, it was unlikely that there would be strong resistance on their part to the turn-over, which would result in the expropriation of no one.

If one's lands had been alienated, then resistance to the redistribution could be expected from those who purchased the fields before the Jubilee. But if the Torah had in addition permitted owners to bequeath their holdings to anyone they chose, including non-heirs, then resistance would also come

[5] **Maimonides, MT, Nahaiot, vi: 1 אין אדם יכל להוריש למי שאינו ראוי ליורשו ... בין על פה בין בכתב.**

from those persons who benefited from such bequests. Not only would the resistance be compounded by the fact that more people would be adversely affected but the resulting economic upheaval would exacerbate social tensions and hostilities. More people would have to give up altogether what they had learned to cherish and the entire Biblical plan for a redistribution of the land every half century would be in greater jeopardy of non-fulfillment because of the wider circle of people resenting it.

It was when the laws of the Jubilee were no longer practiced or enforced that the Biblical pattern of inheritance could also be altered.

The first major deviation from the Biblical pattern came when the Talmud permitted a man to])refer one heir to another.(i True he was limited to the class of heirs who, according to the Bible, would be entitled to take. If he had sons, who, according to the Bible, were the first group entitled to inherit, he could prefer one to another (except for the share of the first-born) but he could not prefer his daughters to his sons since daughters had no share in the estate if sons survived.

Not all the sages of the Talmud agreed with this deviation. But it finally prevailed. Nonetheless, the Talmud urged fathers not to disinherit their children. Their rationale was based on the religious concept of penitence. One should not expropriate a child in anger or resentment for the child might repent. Or the child's offspring may prove worthy of the estate. Saints are often born to parents who are villains.[7]

However, a deviation that was limited to preferences among those whom the Bible deemed heirs anyway would not complicate the redistribution of land in the jubilee year. At least it would not increase the number of people affected and thus the number of resisters to the great upheaval of the

[s] **B. BB. 130a ר' יוחנן בן ברוקה אומר אם אמר על מי שראוי ליורשו דבריו קיימין... אמר רבא מאי טעמא דרבי יוחנן בן ברוקה אמר קרא והיה ביום הנחילו את בניו התורה נתנה רשות לאב להנחיל לכל מי שירצה.**

[7] *ibid.* **1338 הכותב את נכסיו לאחרים והניח את בניו מה שעשה עשוי אלא אין רוח חכמים נוחה הימנו**

Jubilee was not enlarged. In this instance too, no one would suffer total expropriation which would have been the case if one could skip heirs altogether or an entire generation of them.

II

According to the Bible sons inherit their fathers.[8] This appears natural enough and was taken for granted in all the Biblical narratives dealing with the patriarchs. However, in all those instances it was assumed that the deceased was not survived by his own father. But if a man was survived by his father and his sons, it was not apparent that the sons had a right prior to that of the father. The Talmud suggests the possibility that the father may come first and rejects it.[9] Why was the hypothesis even considered ?

One must understand that in a patriarchal society the patriarch virtually owns his offspring and certainly their belongings. If the patriarch died he would be succeeded by his son but until that time neither sons nor grandsons had private property. This was true in the Roman law of paterfamilias, unless the paterfamilias had emancipated the filiusfamilias. By the Roman system the clan's property was kept intact. Moreover, the family as a unit would continue its religious rites as a family. There was a religious basis for the patriarchal system.

Yet despite the fact that Jewish law was certainly religio-centered, it upset the patriarchal system by denying the father any power whatever over the life and death of his sons and daughters and they enjoyed separate property rights which upon their death passed to their issue—and not to the deceased's father. Only if there were no descendants whatever did the father have any rights in the estate of his child. If he had predeceased his son or daughter, his other sons would

[8] **Num. 27:8 ...איש כי ימות ובן אין לו והעברתם את נחלתו**

» B. BB. 108b ... שהאב קודם לאחיו יכול יהא קודם לבן ת״ל הקרוב קרוב קרוב קודם.

succeed to his rights. But the descendants of the deceased always had priority.

The Bible, surprisingly enough, makes no mention whatever of the rights of a father to his offspring's estate even when the offspring had no descendants. Perhaps this is too tragic an eventuality for Moses to have referred to it. Indeed, it is not pleasant to contemplate the death of a child before the parents. Yet the Bible does not hesitate to refer to an even more tragic situation in which the parent is responsible for the child's execution.[10] Therefore, the more reasonable explanation of the omission is to assume that the Bible sought to place the accent where it was needed in ancient times—on the rights of descendants rather than ascendants. Only when there were neither sons nor daughters, nor grandchildren nor greatgrandchildren, could the father or the brothers of the deceased take the estate.

Ill

The Bible itself acknowledged that its law of inheritance disadvantaged women and it gives us one of the earliest accounts in history of a protest by women with regard to their status. The daughters of Zelafhad complained that they saw no reason why their father's share in the land of Canaan should be denied them simply because their father had no sons. Apparently they would not have complained if there were sons. This would indicate that when there were sons to take the father's estate there was adequate provision for the needs of the daughters. This was certainly the case according to later Talmudic law [11] which probably gave expression to what had been the custom in Jewish society almost from the beginning. In any event, as a result of the protest of the daughters of Zelafhad, it was ordained that when there are

[10] **Deut. 21:18-21 כי יהיה לאיש בן סורר ומורה ... ותפשו בו אביו ואמו והוציאו אותו ... ורגמוהו כל אנשי עירו ...**

[11] **Ket. 4:11 בנן נקבן דיהוין ליכי מנאי יהוץ יתבן בביתי ומתזנן מנכסי עד דיתנסבן לגברין חיב שהוא תנאי בית דין.**

no sons, daughters will inherit their father. However, the Bible and Talmud shed much light on why it is that the males enjoy the preference. Apparently it was the tribal form of social organization from which there was derived the maxim that only "the father's family is deemed family".

The people of Israel were divided into tribes and as tribes they divided the land of Canaan among themselves. When a woman married a man of a different tribe, she and her children became a part of the husband's tribe. In early Jewish history the areas belonging to the twelve tribes were like states or provinces. Even for military recruitment, judges and kings called upon tribes to furnish manpower. Thus the tribal form of organization had military and economic significance. National solidarity was slow in coming and was not achieved for many centuries.

To maintain the integrity of the areas allocated to the tribes, it was necessary that upon the death of a person his land should go to males who belonged to the same tribe. If a female took the land by inheritance, she might, as a result of marriage to a man of another tribe, cause the land to be transferred to the tribe of her husband—if he inherited her estate—or to the tribe of her children, whose tribal affiliation was their father's tribe.

Even Moses faced this problem. Indeed, the pattern of land distribution was upset whenever a woman inherited from her parent and her estate passed to husband or children who were identified with a tribe not hers or her father's. When Moses confronted the problem it was ordained that all women who inherit estates from their fathers must marry within their father's tribe.[12]

One of the boldest instances of rabbinic legislation was the ruling that this mandate of Moses was limited to his generation. It would not be applicable thereafter. The freedom of Jewish women to marry any Jewish male was more important

Num [12]. 36:6 אך למשפחת מטה אביהם תהיינה לנשים

than the preservation of tribal solidarity and the integrity of the tribe's land holdings.[13]

So important was this decision to the development of national unity that the day the decision was made became a national holiday—the fifteenth of Av, and it was celebrated especially with an eye to "boy meets girl"—the "Sadie Hawkins" day of Jewish history.[14]

The prior right of males to inherit was not disturbed. Family and tribal association was determined by the fathers. Mothers and daughters were to be protected in other ways, although daughters would take in the absence of sons. But national unity was not to be placed in jeopardy and the intermarriage of Jews with each other was safeguarded.

IV

An important assumption of Jewish law—implied in the concern of the Rabbis that daughters who inherit from their fathers may be responsible for the transfer of land from one tribe to another—is the rule that sons inherit from their mothers as well as from their fathers. The Talmud expresses concern that the transfer of land from one tribe to another may come to pass in one of two ways.[15] A daughter may marry a man of another tribe, and if he inherits from her, his sons—who belong to his tribe—will ultimately inherit from him. However, after her marriage, her husband may predecease her, but her sons by that husband—who are members of their father's tribe—may also inherit from her directly. This too would result in the alienation of holdings from one tribe to another.

[13] **B. BB. 121a ... אמר שמואל יום שהותרו שבטים לבא זה בזה מאי דרוש זה הדבר דבר זה לא יהא נהוג אלא בדור זה.**

[14] *ibid.* **תנן התם א מר רשב״ג לא ה יו ימ ים ט וב ים לישר אל כ חמשה עשר באב וכיו ם הכפור ים שבהן בנות ירושל ים יוצאו ת בכלי לבן .. . חמ שה עשר באב מאי היא אמר רב יהודה אמר שמואל יום שהותרו שבטים לבא זה בזה.**

[15] *ibid.* **112b-n3a תני א בסב ת הבן ותני א בסב ת הבעל תני א בסב ת הבן ... לא ת סוב נח לה ל בני י שראל ממ טה אל מטה ב סבת ה בן הכ תוב מ דבר תניא אירך ולא תסוב נחלה ממטה למטה אחר בסבת הבעל הכתוב מדבר ...**

This right of a son to inherit from his mother is not specifically mentioned in the Bible, although there is an allusion to the daughter inheriting from her mother.[16] The Rabbis ignored a third possibility that a woman's heirs shall be limited to her family—her father and her brothers. Early Roman law subscribed to this view. A son was the agnate of his father and not of his mother and the right of succession was limited to agnates. Here, as in so many other instances, Anglo-American law followed the pattern of Jewish law and the same law of succession that applies to a man's estate applies to a woman's estate. One Rabbi did hold that in a mother's estate all children should share equally—sons and daughters alike.[17] His view did not prevail. The first-born son was denied any right of primogeniture in his mother's estate. This will be discussed more fully in a subsequent section. But what emerges from the Talmudic discussion is that the unity and solidarity of the conjugal family unit was to be protected. What property both parents acquired would pass to heirs virtually the same way. The mother's tribal affiliation was to vanish. Even when she inherited from her parents of another tribe, her gains became a part of the new family unit which she had helped to form. We have come to take this for granted in modern western society, but this is part of the Jewish heritage—and not that of the Romans.

V

A husband inherits his wife, although she does not inherit him. Her very substantial rights against his estate derive from her Ketubah—or more accurately from the law pertaining to marriage rather than the law of inheritance. If her husband predeceased her she took from the estate all the property she had acquired by gift or inheritance during the marriage and

[18] **Num. 36:8 and B. BB. ma תנו רבנן "וכל בת יורשת נחלה ממטות בני ישראל" היאך בת יורשת שני מטות אלא זו שאביה משבט אחד ואמה משבט אחר ומתו וירשתן.**

[17] **B. BB. ma ר' יוסי בר' יהודה ור"א בר' יוסי אמרו משום רבי זכריה בן הקצב אחד הבן ואחד הבת שוין בנכסי האם.**

all the property which constituted her dowry as appraised at the time of the wedding and stipulated in the Ketubah (plus some appreciation in value). Until her remarriage she also received a domicile and maintenance both of which were charged against the estate. But she was never an heir.

The husband, on the other hand, was her heir. The Bible does not mention this at all. And the Talmudic discussion on the subject[18] indicates how hard put the rabbis were to justify this legislation by reference to Biblical texts. Their interpretation of the cited passages is both strained and unconvincing. That is why some sages later held that the rule is wholly rabbinic and not Biblical.[19] Indeed, in Roman law there was no inheritance whatever of spouses from each other.

Why were the rabbis so determined to establish the rights of the husband to inherit his wife and even give it the force of a Biblical ordinance ? Would such a rule not deter the wife's father, for example, from making gifts which would ultimately pass to a son-in-law? And was it fair to give the husband a right which was not reciprocated—since the wife never inherited from him ?

The rabbis were not oblivious of these considerations. However, one must visualize how much healthier it is for a marital relationship that the husband be generous with his wife and be spared continuing concern that what he gives her may not revert to him if she predeceases him. The rabbinic legislation (to which, as already noted, many rabbis even sought to give the status of a Biblical enactment) was designed to promote a more relaxed and expansive attitude on the part of husbands in making assets available to their wives without the strain of a careful accounting as to what is his and what is hers. In the final analysis—he would get everything back if she did not survive him. And as for that which her father wanted to make available to her as a dowry, he could

[18] *Ibid.* **mb.**

[19] **Maimonides, mt, Nahaiot,** 1:8 **והבעל יורש את כל נכסי אשתו מדברי סופרים and Meiri, B.B. 112a.**

rest assured—because of an implied term of every Ketuba—that it would first go to her children and not to her husband.

In the hope that in the relationship of husband and wife, there would be joint use and enjoyment of the family property the rabbis also ruled that neither husband nor wife could ever acquire presumptive rights of ownership (Hazakah) because of their use of the assets in togetherness.[20]

Imagine how domestic tranquility would be adversely affected if husbands and wives had to be continuously on guard lest their spouses hold on to property for too long a time and thereby acquire a title belonging to the other!

Furthermore, if the parties did not approve of the rabbinic rule they could stipulate in advance of the marriage, or during the coverture, that they do not want the rule to apply.[21] Even though the Biblical laws of inheritance were ever applicable—and never subject to change by a testator—this rigid limitation did not apply to the husband's right to inherit. He could waive it.

Moreover, the husband's right to inherit applied only to such property as the wife had reduced to possession at the time of her death. It did not apply to expectancies or choses in action.

In addition it must be noted that if the husband predeceased his wife, not only did he lose his right to her estate but his heirs too would not succeed to it. His children might, if they were also her children. But her estate reverted to her heirs, not his, according to the exact same rules applicable to his estate: first, her issue; then her father, and then her father's heirs. Indeed, if the mother had children who predeceased her, her estate did not pass to the children's father and his family, but rather to her family—to her father and his issue, her brothers, sisters, nephews, or nieces. In the language of the Talmud, a son in the grave inherits his father to transmit to

[20] B. BB. 42a. לא לאיש חזקה בנכסי אשתו ולא לאשה חזקה בנכסי בעלה.

[21] B. Ket. 83a כתב לה דין ודברים אין לי בנכסיך ובפירותיהן ובפירי פירותיהן בחייך ובמותך אינו אוכל פירות בחייה ואם מתה אינו יורשה.

his heirs (his father's family) but a mother's son does not inherit his mother in his grave to transmit to his heirs because that would mean that his father's family would take.[22] Instead it reverted to his mother's family.

VI

One of the most important differences between the Roman law of succession and Talmudic law—and here too Anglo-American common law adopted the Jewish position—pertains to the doctrine of universal succession. According to Roman law the heir or heirs succeeded to the estate of the deceased as his complete replacement and were responsible for all the assets and liabilities as if the deceased were alive.[23] If more than one heir took, then the assets and liabilities were shared in the proportion that they took. And it mattered not that the assets may not have been adequate to pay the liabilities. The heir or heirs paid the difference out of their own property. Because it would have been improvident for the heir or heirs to incur such a responsibility, or risk it when they did not know how solvent the deceased was, Roman law later invented sundry devices by which heirs might protect themselves. However, for religious reasons it was thought that the heir or heirs should enter as if into the very shoes of the deceased as extensions or prolongations of his legal personality. It were as if this was the deceased's way of continuing to live.

Despite the fact that Jewish law was so much more religio-centered than Roman law this doctrine of universal succession was never a part of Jewish law. Heirs were responsible for the debts of the deceased only in the measure that they acquired assets.[24] When their father's reputation was at stake—as in the case of a theft—the heirs were urged to redeem their father's reputation and make restitution even if

[22] **B. BB. 11$_4$h אף אשה את בנה אין הבן יורש את אמו בקבר להנחיל לאחין מן האב.**

[23] **Salkowski, supra, p. 768.**

[21] **B. BK. mb הגוזל ומאכיל את בניו והניח לפניהם פטורין מלשלם ואם היה דבר שיש בו אחריות חייבין לשלם.**

the estate's assets were inadequate for the purpose.[25] But this was moral exhortation—not strict law, nor even equity. With regard to debts that involved no moral turpitude, the obligation of heirs was not only limited to the assets but the court pleaded for them all available defenses and made the plantiff bear the burden of proof.[2'5]

One can very readily see in this major difference between the two legal systems a reflection of another important difference. With regard to the law of agency it took Roman law many years to develop the notion that an agent is the representative of his principal and not an extension of his person. For that reason, Roman law regarded the heir as a substitute for the deceased—the visible manifestation of the prolongation of the deceased's life beyond the grave. Jewish law, on the other hand, maintained very early that an agent is only a representative and not an extension of the person of the principal. Thus, for example, an agent was competent to testify with regard to the terms and fulfillment of the agency. He was not regarded as identical with the principal so that he would be disqualified as a witness as one who was a party to the action.[27]

It might be that Jewish law developed so advanced a notion of agency precisely because of its religious roots. In connection with the work of the priests in the temple the Talmud ponders whether the priests are God's agents or the people's agents. The conclusion is that they are God's agents.[28] Especially would this be so when they bless the people or make available forgiveness for sin. Yet if they are God's agents, how can one possibly regard them as substitutes for God? This was unthinkable in Judaism. The most that they could be is representatives with no identification of their personalities with that of God. And thus agency generally

[25] *ibid.* **94b הניח להם אביהם פרה וטלית וכל דבר המסדים חייבץ להחזיר מפני כבוד אביהם.**

[26] 13.1313. 41a **הבא משום ירושה אינו צריך טענה.**

[27] **B. Kid. 43a. והלכתא שליח נעשה עד**

[28] 13**. Ned. 35b הני כהני שלוחי דידן הוו או שלוחי דשמיא**

came to mean that. Heirs too were representatives and no more in connection with the estates of the deceased. They paid the debts of the deceased out of the deceased's assets and the remainder they took as heirs.

VII

The early insistence of the Rabbis that the distribution of the estate shall be in accordance with God's will—and not the deceased's—led to some anomalies. This is usually the case in a theocentric legal system. It is by respecting the anomaly and fulfilling it that we prove that we are obeying God rather than a rational or natural impulse. We yield to the divine mandate. In this way we reaffirm that all worldly goods are His and not man's.

One such anomaly was the subject of controversy between Pharisees and Sadducees. If a son predeceased his father, but was survived by a daughter, she took the estate ahead of the father's surviving daughter.[29]

From the point of view of the descendent it would appear to be absurd that his son's daughter shall take his assets and not his own daughter. But the pattern of succession was fixed and unalterable. Sons and their issue came first; daughters took only when there were no sons.

The Sadducees felt that the two groups of women should share the estate—the deceased's daughters and grand-daughters (by a son). This seemed reasonable. But the Biblical mandate was unequivocal. The Pharisees made a holiday of the day when they prevailed in their debate with the Sadducees.[30]

The emphasis in Jewish law on God's ultimate ownership of all property—so that man deals with property as God willed it and not as man sees fit—can be gleaned from still another

[29] **B. BB. 115b אמר רב אמר רב הונא אמר רב כל האומר תירש בת עם בת הבן אפילו נשיא שבישראל אין שומעין לו שאינן אלא מעשה צדוקין.**

[30] **Megiiiat Taanit and b.** *ibid.* **תבנא אב(=בעשרין וארבעה ביה לדיננא.**

anomaly. Jewish law (lid not approve of escheat whereby the king or state takes all property for which there are no heirs. The king or state enjoyed no special status in this connection. Indeed, it is inconceivable according to Jewish law that a Jew shall have no heirs. He can always trace heirs back as far as the patriarchs, Abraham, Isaac and Jacob. But what of a convert to Judaism? If he weds and has children, he too has heirs. But if he should die before acquiring heirs, his forbears cannot be traced back to the patriarch Jacob and his non-Jewish kin are no longer his relatives by Jewish law since his adoption of the faith constitutes a rebirth and he is regarded as a spiritual son of the patriarch Abraham. In such circumstances one would have expected that his estate might escheat to the king or state. But it did not. It was regarded as ownerless and anyone could seize it as one could any other ownerless property.[31]

The Bible does not specifically mention this but one elusive passage leads to the conclusion. It deals with a thief who had stolen from a convert and then compounded his theft by taking an oath to the convert denying the theft. If the theft were from a person other than a convert the thief would make restitution with some additional penalty and he would also bring an offering to the temple to atone for his perjury. However, if the offense was committed against a convert who is now dead without heirs there is no one to whom he can make restitution. Having compounded his original crime of theft with perjury, he must bring the offering to atone but the offering without restitution does not bring forgiveness. He therefore, makes restitution to the priests who succeed to the convert's rights. Yet since it is only when perjury too is involved that the priests take, it appears that otherwise the thief could keep what he had stolen because the estate of the convert is regarded as ownerless when the convert dies. Thus we deduce that whatever a convert had when he died can be seized by anyone at all. Neither the state nor the

[31] **Maimonides, MT, Zekhiyah,** 1**:6.**

priests are the heirs. This is another illustration of theocentric law stripping the state of power. God is the Sovereign over property, and not the state. The state too must yield to God's will.

Even as Jewish law placed so much emphasis on God's ultimate ownership of all the earth, so that heirs in essence took from Him and not from the deceased, so did Jewish law seek to impress heirs with their sense of debt not only to immediate forebears but also to all their people, past and])resent, without whom they would have had no sense of Jewish identification, no awareness of their history, and no opportunity to enjoy God's bounty as Jews. It is virtually impossible for a legal system to incorporate this kind of mood in rules of law. But the study of the Jewish law of inheritance was to induce it.

This is the philosophy underlying a most difficult Talmudic passage in which the sages essay to become historians and ponder a purely historical question: When Joshua divided the land of Israel among his people who conquered it, how did he make the division ? Equal it was, but was it distributed among those who were the conquerors or rather among those who were emancipated from bondage in Egypt ? On its face this question would appear to be most academic. Only two people who left Egypt were alive when Joshua made the distribution. What then is the point of the query? It becomes clear that what is meant is whether those who received portions of the land from Joshua took equal portions as conquerors, or rather whether the land was assigned theoretically, in equal portions, to those who were emancipated from Egypt, while those who actually took the land, received portions as heirs of those who had been slaves? The almost unanimous conelusion was—and it matters not what actually happened or how material it was in Talmudic times—that Joshua made the division taking into account both the present conquerors and the rights of those who were in Egypt to a share in the land. The details of the computation would have baffled a computer

but what emerges is the ethic of Judaism: Whoever took a portion of the land of Israel in Joshua's time did so not only as a conqueror or settler, but also as an heir of those to whom the promise of the Promised Land had been made. They took not only in their own right but as the heirs of those who suffered the bondage in Egypt and the trials and tribulations of the exodus.[32]

So relevant is this mood to our own day. Does the land and state of Israel belong only to those who in 1948 and subsequent wars made possible its restoration or does it belong to all who identified with the ebb and flow of Jewish fortunes in the past ? Does it belong to Klal Yisrael—the collectivity of Israel—past and present ? The unavoidable conclusion of the Talmud is that the latter is the proper attitude. That mood cannot be incorporated into many rules of law but at least the state of Israel has incorporated it into one—"The Law of Return". The land, and citizenship, in the state are available to every Jew who identifies with his people and wants to share their destiny in the new republic.

Thus while it is God's will that makes an inheritance available to an heir when the land of Israel is involved, the heir takes not simply as a son or daughter of a deceased, but as the heir of generations that came before, with whose fate and destiny he must identify. His economic gain is the bounty of history, as well as God's gift.

VIII

In a patriarchal system the eldest son usually succeeds to the status and rights of the deceased head of the family or clan. Far less frequently does one find the youngest son enjoying this privilege. The Bible too gave recognition to the special status of the first-born but denied him the right to take the entire estate. He would get more than the others

[32] B. BB. 117a-b **דתניא ר' יאשיה אומר ליוצאי מצרים נתחלקה הארץ ר' יונתן אומר לבאי הארץ נתחלקה הארץ ... רבי שמעון בן אלעזר אומר ... לאלו ולאלו נתחלקה הארץ.**

but not all. This Biblical limitation on an almost universal practice may have inspired the sages of the Talmud to add many other limitations which they discussed at length. Indeed it appears that as time passed the legal development was continuously in the direction of limitation.

The institution of primogeniture has much to commend it. One head of family succeeds one head of family. He keeps the property intact; creditors can easily identify the one person who is accountable for debts of the deceased; the king can look to one heir to fulfill military or tax obligations—all in all, the problem of succession is simplified. In addition, the first-born is the family's religious functionary. However, the younger children are certainly disadvantaged; democracy within the family is hardly achieved as the eldest virtually becomes the family's dictator; and untold damage is done to the personality development of all the constituents of a tightly knit family unit all of whom are dependent on the largesse of one eldest son. Moreover, the religious functions are better performed for a community or nation rather than for each family by itself. In that way religion makes for greater social and national solidarity.

Perhaps the Talmudic sages were right in implicitly assuming in their dialectic that the Bible frowned upon the almost omnipresent institution of primogeniture and gave it only token recognition, as the Torah so often does when it wants to abolish a social pattern. It proceeds not by social revolution but by a slow process of limitation and regulation. This also happened with the institution of human slavery until it was virtually abolished. Perhaps—as Philo says—the first-born was to be given more than his brothers because the father owed him a debt of gratitude—in the final analysis it was he who made the father a father. Yet the narratives in the book of Genesis reveal how much grief resulted from the deeply entrenched preference for the first-born—the rivalry between Ishmael and Isaac, Esau and Jacob, Reuben and Joseph. The Midrash also dwells upon these rivalries and one

wonders whether the famous psychoanalyst Alfred Adler did not rely heavily on this background for many of his theories. But whatever the reason, the Talmud progressively reduced the right of the first-born.

First it gave the most restricted interpretation it could to the Biblical phrase "a double portion". Did that mean two thirds of the estate in every case, or two portions of the estate after it is divided by the total number of sons, plus one ? The latter interpretation was upheld.[33]

Second he received this double portion only with respect to such property as the deceased had reduced to possession at the time of his death.[34] They denied his special privilege with respect to expectancies, debts, and even that appreciation in the value of the property after the death of the deceased which required no effort on anyone's part. If the buds on the trees became fruit, that natural gain was not an asset with regard to which the first-born could claim a double portion. Indeed, in cases cited in the Talmud the most innocuous act by the first-born—such as his making an equal distribution of the produce of a field among his brothers and himself—might constitute a waiver of his right to a double portion in that field.[35]

And that was not all. He must be the first-born of his father beyond the shadow of a doubt and he must have survived his father.[36] He must have been born naturally and not by Caesarean surgery.[37] If his older brother died immediately after birth he lost his special privilege.[38] Nor does he

[33] **B. BB. 122a-b ת״ר לתת לו פי שנים פי שנים כאחד• אתה אומר פי שנים כאחד או אינו אלא פי שנים בכל הנכסים ... אין עליך לדון כלשון האחרון אלא כלשון הראשון**
See It. Gordis, "The Ethical Dimension in the Halakhah," *Conservative Judaism,* **Vol. XXVI, No. 3, Spring 1972, pp. 71-72.**

[34] **B. Bekh. 51b הבבור נוטל פי שנים בנכסי האב ... ואינו נוטל בשבח ולא בראוי כבמוחזק.**

[35] **13. bb. 126a אמר רב אסי בכור שנטל חלק כפשוט ויתר**

[36] ***ibid.* 127a אמר רבא תניא כוותיה דר׳ אמי ... בכור ולא ספק.**

[37] **b. Bekh. 47b יוצא דופן והבא אחריו שניהן אינן בכור לא לנחלה ולא לכהן**

[38] **Maimonides, mt, Nahaiot,** 11**:10 בן תשעה שהוציא רוב ראשו חי הבא אחריו אינו בכור.**

have it if he was bom after his father died.[39] His twin brother born minutes after him is an equal heir in such a case because as a foetus he does not acquire special privileges although generally in Jewish law a foetus does inherit the father who predeceased him.

The Rabbis' strict construction also limited the right of the first-born to the father's estate—it did not apply to the mother's estate.[40] What rationalization can one discover other than that the institution was frowned upon and while one does not blithely ignore a Biblical provision, one seeks to fathom its direction and the Biblical direction was understood by the sages to be restrictive, not expansive.

Nonetheless the Rabbis refused to apply their restrictive approach to the bastard and deny the first-born who was a bastard his special privilege. This was a masterpiece of equity at work! [41]

A recent decision by the United States Supreme Court adversely affected the rights of illegitimate children to inherit from their natural fathers. Perhaps from the point of view of constitutional law the decision was a proper one. However, the position of Jewish law stands in bold contrast to that of Anglo-American common-law and even statutory provisions which sought to correct the harshness of earlier rules.

First it must be noted that according to Jewish law a child born out of wedlock is not illegitimate.[42] Only a child born of

[39] **B. BB. 142b אמר מ ר ברי ה דרב יוסף משמיה דרב א בכו ר ש נולד לאחר מיתת אביו אינו נוטל פי שנים ... והלכתא ככל הני לישני דאמר מר בריה דרב יוסף משמיה דרבא.**

[40] **B. Bekh. 51b הבכור נוטל פי שנים בנכסי האב ואינו נוטל פי שנים בנכסי האם.**

[41] **B. Yeb. 22b מי שיש לו ב ן . . . מכל מקום לאתרי מאי אמר רב יהודה לאתרי ממזר**

Sifre on Deut. 2:15 ועדי ין ל א ארבה את הערי ות שחיי בין עליה ן כ רת בידי שמים ת״ל שנו אה שנו אה ריבה את הערי ות שחייב ין עלי הן כרת בידי שמים.

Maimonides, mt, Nahaiot, 11**:13 היה הבכור ממזר נוטל פי שדם שנאמר כי את הבכור בן השנואה יכיר.**

B. Epstein, *Torah Temimah,* **on Deut. 21:15, n. 107.**

[42] **B. Kid. 66b וכל מי שאין לה עליו קידושין אבל יש לה על אחרים קידושין הולד ממזר ואיזה זה הבא על אחת מכל העריות שבתורה.**

an adulterous or incestuous relationship has any stigma attached to it. This limitation by itself almost completely eliminates the incidence of illegitimacy. If the offspring of unwed Jewish mothers suffer no legal disabilities then they are already spared the indignity which the common law accorded the progeny of the unwed mothers subject to its jurisdiction. Furthermore, when the status of illegitimacy attaches only to children born of an adulterous or incestuous relationship, the difficulty of proof is an almost insuperable impediment to bastardy. How does one prove whose sperm caused the pregnancy ? The presumptions are always in favor of the innocent infant.

According to common-law the child born out of wedlock was not only illegitimate but was also regarded as the "child of no one". He was not entitled to any of the rights and duties existent between parents and legitimate children. By statutes subsequently enacted the bastard was made the heir of the mother if the mother left no will. However, when she left a will and bequeathed property to her "children", it was not universally assumed that her intention was to include the illegitimate child. Most courts were sympathetic enough to so hold. Yet fewer courts were inclined to permit an illegitimate child to share in benefits recovered in an action for causing the death of the parent responsible for its support. They interpreted relevant statutes much more strictly. Perhaps it was prejudice against the mulatto child that made American courts so cruel.

Jewish law starts with the assumption that everything must be done to ameliorate the lot of even the relatively few illegitimate children that there could possibly be. This attitude was the prevailing one throughout Jewish history including the period when the late Isaac Halevi Herzog was Chief Rabbi of Israel. When illegitimacy was due to an unequivocally proved adulterous relationship the rabbis were even bold enough to annul the earlier marriage of the mother so that her child by the second mate would be legitimate. They retroactively made the mother an unmarried woman.

However, as to the right of the "Mamzer"—the unequivocal bastard—to inherit both father and mother there was never any doubt. And if the child was the father's first-born he even had the right of primogeniture. The Bible, it would appear, had limited his competency to marry. And the rabbis saw no reason for worsening his status by economic privation. If his parents sinned, why should his suffering be aggravated ? On the other hand, from Biblical sources they derived his right to inherit.

Thus we read in Maimonides' code: (Mishneh Torah: Hilchot Nahalot, 1:7).

> "All who are related (even) as a result of the commission of a sin inherit as do the legitimate. How? If a man had a son who was illegitimate or a brother who was illegitimate they are like other sons and the other brothers insofar as inheritance is concerned".

And in the second chapter (see 13) he adds that if the first-born is illegitimate he, nonetheless, takes a double portion for the Pentateuch denied the father the right to])refer one child to another even if the child whom the father wants to disadvantage is one of whose conception God had disapproved.

To this very liberal interpretation at least one of Maimonides' commentators raised an objection. He claimed that it has no source in Talmudic literature. However, Rabbi Boruch Epstein in his "Torah Tmimah" (Deuteronomy XXI :11. 107) found the source in the Tannaitic Sifre.

IX

As already noted, it appears that one of the aims of the Biblical and Talmudic law of succession was to eliminate any uncertainty with regard to the succession at the very moment of the death of the decedent. Professor Moshe Zilberg, in his book "This Is The Way of Talmud", makes the point that Talmudic law generally sought to minimize the incidence of

litigation and even make unnecessary resort to "doctors of the law" for the resolution of Halachic questions. The rules were to be formulated with such precision that their application was comparatively easy even for the layman. Especially was this true of the rules pertaining to inheritance. And one maxim makes this abundantly clear.

Certain heirs always took to the exclusion of doubtful heirs. If a man was survived by a son and a hermaphrodite the son took as sole heir because the sex of the hermaphrodite was doubtful (Baba Batra 140b). Similarly, if a father and his son perish in a common disaster, the father's estate goes to those coming after the son according to the law of succession since they certainly survived the father. If the son had issue, they would receive a share as heirs of their father's father but the son himself received nothing that would be subject to claims of his creditors or even his widow. They would have to collect their claims from assets that he personally had at the time of his death. In either of the aforementioned cases the court would accept conclusive proof that the hermaphro-(lite was a male or that the father predeceased the son. But as long as there was doubt, heirs who were certain heirs enjoyed priority.

In at least two cases that the Talmud cites, the rule protected the interests of women. If a widow and her son die together, her family takes her estate. If she had died first, then the estate would have passed to her son's heirs and thus to his father's family. Similarly, if a father and his married daughter perish in a common disaster (and the father had no sons), it is her husband who loses. If her father were deemed to have died first, the estate would have passed to the daughter and from her to her husband. But if it is deemed that she died first then her issue, who are the issue of her father, take directly from him.

The rule that heirs who are certain enjoy priority over those who are doubtful thus promoted not only the value of certainty but protected estates from being alienated to kin

that are more remote from the circle of affection and sense of beholdenness of the decedent.

The quest for the immediate and certain vesting of the inheritance in the appropriate heirs might have precipitated the disinheritance of the posthumous child because the delay in his birth means that in the interval between the death of the decedent and the birth of his youngest child it will not be known how many will share the estate. Perhaps to encourage the first-born to proceed diligently with the administration of the estate and the conservation of the assets, it was decided that his share shall not be diminished by the birth of the j:)0sthumous child. However, the posthumous child of a son among sons, or of a daughter when there are no sons, was also assured his or her share with those in his or her class. And because the right of the first-born was fixed as of the date of the father's death, he did not enjoy the right of primogeniture with respect to the shares of brothers who died without issue before the division of the estate. These shares were divided equally among all the brothers.

X

Though the Bible envisioned only intestate succession, and the Talmud sought to safeguard the Biblical pattern with repeated affirmations that the Biblical mandates are unalterable, the last two thousand years yielded a tremendous amount of legal creativity to make possible last wills and testaments and a greater control by their authors of the disposition of their estates after their death. Of course this development was an aggrandizement of the notion of private property and a partial negation of the Biblical conception that all property is the Lord's with the right in mortals to enjoy and control it during their lifetime and to surrender control when they breathe their last. What the Rabbis did in the last two thousand years is indeed proof of the fact that Jewish law is by no means rigid. It has always been amended, and resistance to change to-day is due to the intransigence of

those who are presently the oracles of the law and not the fault of the Halacha itself.

While a full discussion of the legal development in the last two thousand years is far beyond the scope of this essay, a few observations are relevant. Most of the changes—wrought by judicial interpretation, legislation, and the creation of new legal devices, such as revocable gifts to take effect a moment prior to death—were not made to give a property owner more power than the Bible had allowed him. Often this was an indirect result of the legal development. What was sought principally, however, was a correction of the shortcomings of the Biblical pattern—especially in connection with women's rights to share in the estate.

Fathers wanted their wed and unwed daughters to share with their sons in greater measure than the Bible had ordained. Husbands also wanted to provide for their wives even more abundantly than the Ketubah did. By the same token, there was a concerted effort to reduce the rights of husbands to inherit their wives—and this was due to the desire of the wives' fathers to give more to their daughters and yet not lose too much if the marriages did not endure long because of the early death of the women.

Fathers also wanted to make their children more attentive to their mothers by making them dependent upon her during her widowhood, and yet guaranteeing that there would be a remainder for them.

Much of the motivation for Rabbinic creativity in the law of testamentary succession was noble. The certainty of the patterns of intestate succession was sacrificed; testators were accorded more economic power, and the incidence of litigation increased. However, among the devotees of the law there persisted the desire to fulfill some of the Biblical patterns and thus perform the Mitzvah of "Yerushah De'Oraitah" (Inheritance according to the Torah's mandate). In this way one would ever be conscious that one ought to dispose of one's earthly possessions as God had willed it.