TRUTH AND WISDOM: AN ORTHODOX APPROACH

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Since the beginnings of modern times, the relationship between the Written and Oral Law has formed one of the crucial foci of both Jewish historical research and ideological discussion. Offering a plethora of interesting illustrations culled from the Talmud, the writer sets forth the thesis that the relationship is to be seen as a constant antiphony between divine, universal truth, beyond the accidents of time and the exigencics of circumstance, and its growing, modulated application to the stubborn uniqueness of life's actualities. The Talmud, the author maintains, by the exercise of reason turns the divine truth of revelation into wisdom and thus rends it life-directing and life-enhancing.

^Jotwithstanding popular opinion to - *• ' the contrary, Orthodox Judaism does not give its adherents unequivocal answers to the basic questions of life. Nor does it even prescribe for every situation in which the Jew may find himself. While it does have religious, philosophical and ethical imperatives, these are often antithetical in character and man is rarely spared the onus of deliberate choice and decision. It is important to point this out for the benefit of those who are already committed to the Law as well as for those who are about to embrace it.

Judaism affords no escape from the awareness of reality or the exercise of reason. Indeed, the divinely revealed must be true—in the absolute sense—and what is absolutely true can be an anchor for emotional and intellectual security. But the divinely revealed is limited in word and scope. Life, on the other hand, is complicated, nuanced and calls for cautious application of divinely revealed norms to an endless diversity of situations. To make this application the Jew must constantly muster all of the resources of heart and mind available. And for this he has his Oral Law and the sea of the Talmud. Most appropriately has it been said that while truth is to be found in the Decalogue, the Talmud has wisdom. The former is absolute; the latter is qualified, antithetical, even unsure of itself.

As simple an imperative as "Thou shalt not steal" cannot be treated as an absolute. Is man's right to the ownership of things divinely protected? When can his neighbors, or his fellow-citizens, invade the right and subject ownership to the requirements of the public weal? What is the nature of the higher good, or how many *yd* its beneficiaries, that in its name the public—a state or a community—may expropriate an individual? The Talmud suggests that the prohibition against the theft of things may not even be part of the Decalogue—the theft of things is too unimportant an evil to be given equal status with prohibitions against murder, incest and adultery. The Oral Law, therefore, regards the com-

mandment as directed against kidnapping. As murder and incest and adultery are crimes involving personality, not property, so must the prohibition against stealing involve humans, not things.

Is the prohibition against murder, however, any more absolute than the one against theft? Apparently, judicial punishment, even when capital, is not murder. Is killing in self-defense murder? And what of the killing of one's enemies in war, or after their conquest? As murder must be defined, so must adultery and incest. Even the mandate to tell the truth may have exceptions, and certainly envy—though generally reprehensible—is often encouraged when it stimulates rivalry in righteous and scholarly living.

Thus, even the revealed truth of the Decalogue becomes qualified and nuanced in life and the simplest revelation provides none of the absolutism that so many moderns associate with Orthodoxy. Man retains a creative role in the very process of applying revelation itself. He cannot altogether abdicate the autonomy of his reason. Nor can he, in Judaism, altogether delegate this responsibility, to others. Even his choice of an authority is ultimately an act that calls for deliberation and decision.

However, if with regard to the commands of the Decalogue, there remains an area for interpretation, then *a fortiori* with regard to the remainder of the Law, one can anticipate an uncertainty or ambiguity. Many texts of the Pentateuch—in the narratives and in the codes—invite a multiplicity of exegeses. Saadiah Gaon argued that the lack of clarity is deliberate, for thereby God stimulated understanding by man on many different levels—literal, mystical, allusive. This diversity in interpretation could also help to make diverse the application of Torah to many different situations. Revelation's importance is then due as much to the process it initiated and continues to mold as to its fixity. Indeed, its poles are many, even antithetical, and the Jew must learn to live by the light of these many suns. Simple and stark truth he may never achieve, but at least wisdom is within his reach. This wisdom is contained in the Oral Law, which helps us cope with the ambiguity and lacunae of revelation. And Moses, who taught the Law to all Israel, could not evade his own part in the process. That is why tradition must regard him as the lawgiver of both that which is written and that which is oral.

II

One of the most elementary functions of reason when applied to revealed materials is classification. In revelation itself there is no classification—there are only particulars upon which an inductive operation must be predicated. Without classification, an evolving body of law becomes incapable of transmission to succeeding generations. Moreover, in the very process of classifying the rules, new insights are born and the creative role of man is seen again. An isolated, revealed truth, becomes part of an organized body of wisdom.

Thus, for example, the Oral Law, as based on revelation, could not subscribe to the distinction which most modern states make between civil and criminal law. According to Torah, all conduct is either proper or improper, righteous or sinful. Consequently Halakhic analysis was not troubled, as modern legal philosophy is, with the problem of defining a crime, as differentiated from a tort. The Jew either did or did not do what God had sanctioned. If he did

what God sanctioned, he could not be summoned before the court. If he did what God had not sanctioned, or failed to do what God had ordained, then how could one regard his act of omission or commission as culpable only from a civil point of view and not from a criminal one? Judaism's classification, therefore, was exclusively functional. It focused attention on the ternedy which the court could grant. And the classification of cases was predicated on whether the court could grant a monetary award or a corporal punishment: flogging, imprisonment or execution. The nature of the court's judgment determined the qualifications and number of judges, the nature of the proof required, and the immunities of the persons against whom claims were asserted. That which was intended to be done to the defendant was definitive. If only his assets were to be reached, then the Law was less concerned about the possibility of error. Greater caution had to be exercised when it was his limb or his life that was in jeopardy. The state, however, played no more and no less of a role in the one case than in the other.

Thus, a court of three sat in a suit which involved the payment of money, and a court of at least twenty-three when his life was at stake. In the latter type of case the judges invariably had to be duly ordained masters of the Law; in the former type, the requirement was not so rigid. Decisions were arrived at by a majority vote, but for an execution more than a simple majority was necessary.

In cases involving only money, self-admissions were countenanced to a limited extent; in cases involving corporal punishment, confessions were utterly disregarded—they were absolute nullities. Furthermore, proof normally required two competent eye-witnesses; some circumstantial evidence wras valid in cases involving money. In cases involving corporal punishment no circumstantial evidence whatever was considered. Even the thoroughness with which the court interrogated the witnesses differed in both types of cases, for the interrogation of witnesses was by the court, not by attorneys. Some judges in capital cases played their role as cross-examiners so devastatingly that they virtually abolished capital punishment altogether—for this the Halakhah became famous. The judicial procedure of Judaism clearly manifests how much higher was the evaluation placed on life and limb than that placed on property.

With regard to the competency of witnesses there were also different standards. Some persons might be competent to testify in a lawsuit involving only money but not for a trial involving corporal punishment. Moreover, in the latler typeof case it was necessary that the testimony be of such a character that the witnesses might not only be impeached generally but also be subject to the special form of impeachment as a result of which they could become liable because of their perjury to the same punishment that they sought to mete out to the accused.

It was because the classification of the Oral Law concentrated on the difference between property and life that the eighth commandment of the Decalogue was interpreted as involving kidnapping. The Rabbis understood that all of the last five commandments of the Decalogue involved a hierarchy of values pertaining to human personality—the integrity of one's life (the prohibition against murder); the integrity of one's family (the prohibition against adultery); the integrity of one's freedom

(the prohibition against kidnapping); the integrity of reputation (the prohibition against bearing false witness); and immunity from being begrudged in what one has (the prohibition against coveting). The prohibition against stealing property is found in Leviticus and it involved no corporal punishment—at most, the return of the theft with double or quadruple or quintuple damages (which excess was a fine).

The preoccupation of the Law with the nature of the court's judgment resulted in many an anomaly. Thus, for example, a tort which was substantial enough to warrant a judgment in the amount of one cent or more, was tried by less rigorous rules than a tort which was so inconsequential that it involved damages of less than a cent. Because in the latter case, the court could award no money but could order the flogging of the defendant, the more stringent rules applicable to cases involving corporal punishment had to be followed.

On no issue, however, is the contrast so great as with respect to the measure of responsibility. When a money judgment is involved the defendant is usually held accountable without regard to his fault, for no legal system was ever committed more extensively to the theory of strict liability than the Halakhah. The only situations in which the defendants might not be liable for the immediate consequences of their acts were either when they were minors or incompetents, or when the acts were not theirs —when their bodies were used by others. Otherwise, they would be liable for torts committed even in their sleep. If the defendant, however, was to suffer corporal punishment, then his act must not only have been wilful but he must also have been forewarned in advance by two competent witnesses that if he proceeded with the act, he would suffer the punish* ment that is involved, and he must nonetheless have defiantly committed the act. Ignorance of the Law in such case is not only regarded as a defense but the witnesses who bring the crime to the attention of the court bear the burden of proof that they themselves apprised the defendant of the law involved. Needless to say, this was the w[T]ay in which all corporal punishment was abolished—for who but an insane person would commit an unlawful act in the presence of two competent witnesses who were forewarning him and preparing to testify against him! Furthermore, how could any of the laws against adultery and incest be enforced when the very act of coitus that constituted the offense had to be performed in the presence of two warning witnesses. It was thus that most of the laws which called for corporal punishment became exclusively hortatory. They constituted moral norms for social and educational purposes. Undoubtedly, the leniency of the Law increased the incidence of behavior that was frowned upon by the Law. The Talmud records this argument. When the incidence was too high, emergency measures had to taken. One such instance is recorded with regard to the practice of witchcraft and necromancy which the Pentateuch had forbidden. Moreover, a court of twenty-three, it would appear, had a reserved power to get rid of evil-doers, and if someone offended too brazenly, they could resort to a ruthless form of punishment with torture, to accomplish the result. However, there is no recorded case where this was done. The power remained a reserved power of the judiciary.

Moreover, the greater concern of the Law for human personality, rather than

property, prompted the rabbis to develop the law of stealing, that what was uppermost in their minds was the reform of the thief and not the return of the theft. Owners who sought to reclaim their property were frowned upon for thereby they deterred thieves from confessing their sin and doing penitence. Those owners, on the other hand, who waived their rights, helped to rehabilitate anti-social beings into honest men. How different the situation today when the criminal law and the threat of prosecution become the principal means whereby stolen goods are recovered, and in exchange for restitution, the offender is releasedl

It can hardly be claimed that any modern state, including Israel, could base its criminal law on the Halakhah. Indeed, few if any rabbis in almost two thousand years have thought that the Halakhic system could be restored in its entirety in any period other than the messianic era. Nonetheless, Jews studied the rules as part of Torah and hoped thereby to learn more about God, Who is the Source of their Law, and some of their ethical insights might very well receive more attention in all legal systerns of today.

Ill

The second major function of reason in the Oral Law is to resolve ambiguities in the revealed truths. No ambiguity in the Pentateuch, for example, has attracted more attention in Christian and Jewish history than the *lex talionis—"an* eye for an eye and a tooth for a tooth." Christian scholarship has generally assumed that the Pentateuch required the physical removal of the limb of the person who thus offended against another. The Talmudic rule—that the tort be compensated for with money—was considered a later development. Modern scholarship has exposed the error of this assumption. Some scholars have even demonstrated that the payment of money for the tort antedates the *lex talionis* in the development of some legal systems. Others maintain that the two rules are to be found in force at the same time. Perhaps either the offender or his victim had a choice of remedy. Certainly, Talmudic sources indicate that both remedies were known among Jews and were regarded as normative by one group or another. And the least that could be said about the revealed rule is that it was ambiguous. It remained for the Oral Law to resolve the ambiguity by reason, as well as tradition.

"An eye for an eye" might mean that an eye is to be removed for an eye even as the phrase "a life for a life" means precisely that when it is used in connection with the crime of murder. There the phrase is understood as requiring a life to be taken to atone for a homicide. However, "an eye for an eye" might also mean that a monetary equivalent shall be paid, as the phrase "a life for a life" used in Leviticus in connection with the killing of another's cattle, whereupon it is unequivocal that the tortfeasor pays the value of what has been destroyed, and does not forfeit his own life or the life of his cattle. Furthermore, in Exodus, only a few verses before the so-called *lex talionis,* there is a rule calling for the payment of medical expenses and loss of earnings in the event of bodily harm imposed upon another, which contradicts the phrase "a bruise for a bruise" a few verses thereafter. In Numbers it appears that the punishment for murder cannot be compounded with money but other torts may be thus compounded.

The ambiguity prompted the rabbis

of the Talmudic era and a preponderance of medieval commentators to articulate what is in essence the difference between the simple, stark truth of revelation and the qualified, nuanced wisdom of its application. He who takes another's eye merits the loss of his own. Measure for measure is the principle of divine, absolute justice. But no human tribunal can administer measure for measure. What executioner can remove the eye of an offender with absolute assurance that he will not kill and thus do more damage than he was authorized to do! Or how can one achieve exact equivalence when eyes are not all of the same size or vigor! God may articulate in revelation what is absolutely just but only He could administer it. Judges on earth can only permit themselves a limited retribution—full payment for every manner of loss sustained—in ultimate earning capacity, in pain, embarrassment and healing costs, and also loss resulting from one's unemployment during recovery from the tort inflicted.

The *lex talionis,* however, is not the only instance in which punishments are revealed vindictively only to indicate the extreme displeasure of God with the persons offending while, in fact, human tribunals are incompetent to administer the penalties prescribed, and can only mete out less severe ones. The simple, stark, truths of revelation are absolute norms in God's justice but mortal man must be content to leave it to God to bring the full measure of His wrath to bear upon the sinner. A human court shall only punish mildly. In this category are to be found scores of commandments with regard to whose violation Scripture says either "He shall die" or "That soul shall be cut off from his people," and the rabbis said that only God will decide how and when. The most that they would do in such cases is to decree lashes against the offender, provided that all the technical prerequisites for any form of corporal punishment had been fulfilled. This applied to many of the prohibitions against incest—particularly those involving collateral consanguinity rather than forbears or descendants—and most of the commandments pertaining to ritual observance.

The dialectic of the Oral Law involved two sets of antithetical norms. On the one hand there were God's exacting standards of justice and the unquestioning obedience* He was entitled to receive from the people whom He had taken out of Egypt that they might be His people and receive His Law. On the other hand there were God's compassion and love and His mandate that man be equally merciful. Where the revealed command appeared harsh or vindictive—primarily because the Jews were less likely to obey unless the Torah used fervent exhortation or vituperation —the Oral Law veered in the direction of mitigation. Thus, the provisions for the complete extermination of all the seven nations of Canaan, as well as Amalek, were understood as binding only if these pagans refused to make peace with Jews and fulfill the Noahide code, without which they could hardly be deemed safe to live with. Similarly, the almost inhuman commands of Deuteronomy wnth regard to the wayward son and the idolatrous city were so understood by the Oral Law that they were virtually nothing but exhortations, with at least one rabbi contending that the laws were never actually applied and another rabbi claiming to have had hearsay knowledge of the application of the Law. To such an extent had the laws become purely academic that no one is reported ever to have beheld an actual trial!

On the other hand, a provocateur for paganism—who thereby endangers Israel's covenant with God—was not regarded by the Oral Law as adequately condemned by the revealed word. His crime is so heinous that he is not entitled to the privileges and immunities of other offenders in capital cases. Moreover, if the Torah did not adequately punish the usurer the Oral Law added to his grief, and according to one rabbi, he forfeits the principal of, as well as the interest on, his loan. Again, revealed laws are qualified and nuanced in the dialectic of the Oral Law.

In no instance does the ambiguity of the revealed word beg for resolution more than in connection with the problem of individual versus collective responsibility. Repeatedly the Torah ascribes guilt to the group for the sins of the few at the same time that it ordains that "a man shall die for his own sin." The prophets wrestled with the problem and no less so did the Oral Law. For the prophets the problem was theological—for the rabbis, legal. And since theologians do not have to arrive at conclusions while jurists must pronounce verdicts, we find both groups accentuating antithetical views. In Jewish philosophy and ethics it was the principle of collective responsibility that was of paramount importance. The righteous suffer for the sins of their generation and all Jews are mutually responsible for each other. In Jewish jurisprudence, on the other hand, the principle of individual responsibility was carried to such an extreme that an accessory before the fact was not liable to punishment. Only he who does the actual killing or stealing bears the brunt of the law. In his commission of the crime, he has no partners and he cannot look forward to even that modicum of comfort that others who cooperated with him—before or after—will share his plight before the bar of justice.

In life it is a fact that the good suffer because of the bad, and the innocent are placed in jeopardy because of the guilty. The Torah recognizes this truth. It is, however, also given to individual men to choose between good and evil. This is a fact of the moral life and the Torah states it unequivocally. That because of those who choose evil, the righteous are denied their reward, remains a problem of theodicy for philosophers and theologians. However, man cannot claim a right to do evil and rely upon the argument that God Himself breaches His own covenant when He denies them their due. Human justice can only reckon with individual responsibility and act accordingly. On the level of absolute truth there is dilemma, contradiction, paradox. On the level of life and experience, there must be decision.

IV

The third major function of reason in the Oral Law is to fill the lacunae in the revealed word. In Numbers, for example, the Jewish law of inheritance is set forth. A decedent's estate, it is said, passes to his children, and if he has no children, to his brothers. The Oral Law ordains, however, that the father has a prior right to that of the brothers. The revealed word is silent with regard to the father. It is reasonable that the father's right should be antecedent to that of the brothers since the latter inherit only by the virtue of the common ancestor whose claim ought therefore be superior to theirs. Yet why the omission in the revealed word? Because, it is argued, for a father to inherit a child is a tragedy and the Torah preferred in

such a case to leave a lacuna and let reason fill the gap.

Many phrases and words of Scripture are also illusions to practices or things whose character is known only through the Oral Law, such as the manner of slaughtering cattle, the nature of the fair fruit used on the Sukkoth festival, the composition of phylacteries. However, there were significant sections of the Law with regard to which there were only the most meager references in the Biblical texts, while it must have been anticipated that there would be a high incidence of litigation involving them. Of these none is more exciting than the field of contracts—the enforcibility of a promise made by one person to another. Here, too, the Oral Law compensated for the lacuna, deriving from a few verses a multitude of insights that reveal the tradition's unrelenting concern for equity, the dignity of human speech, the need of the economically disenfranchised, and other values which are of paramount importance in a system of jurisprudence that is theocentric and not rooted only in history, economics, and power.

The Bible did ordain that a man should fulfill "what comes forth from his lips." At least one entire tractate of the Talmud deals with vows and, as one medieval commentator suggested, the goal of its study should be the dignification and sanctification of speech. It is of interest that the sages associated this goal with marital harmony, so important was guarded speech to the cultivation of a proper relationship between husband and wife. But apart from the moral and social implications of all kinds of intemperate talk and broken promises, did persons aggrieved have any basis on which to sue? Since "talk is cheap," when may persons have reason to believe that a legally binding promise was made in tlieir behalf so that they may enforce its fulfillment?

It would be too much for any legal order to insist upon the performance of every promise. Friends may agree to take a walk or play a game of golf and disappoint each other with impunity. Men also make exaggerated statements as to what they intend to do for others. They offend against ethics but it would be too much to set legal machinery in motion to enforce every foolish utterance of mortals. Needless to say, if there has been reliance upon a promise earnestly made, and injury follows a breach of the promise, the promisor should make good the loss. Jewish law concurs. But what of a promise to make a gift which few legal systems ever enforce? Should not such promises be a matter of "honor," with only social, not legal, sanctions to protect them?

Students of jurisprudence know how all legal systems wrestled with this problem.The Romans and Continentals came forth with a doctrine of *causa,* and the Anglo-Americans with a doctrine of *consideration,* two symbols to indicate that the parties to a contract intended to consummate an agreement of which the law should take cognizance. At least two interesting problems emerged in England and America. Pledges to charity were not enforcible since these were gratuitous gifts. Moreover, persons who did not themselves participate in the agreement could not complain that the promises were not performed since they were not principals.

The Oral Law of Judaism generally assumes that only deeds, not words, could create legal rights in others, and thus "nude" promises were a nullity. A formal act accompanied by words, such as a transfer of title to property with a formal possessary act, would be effective.

Nonetheless, with words alone one could obligate one's self to give charity. With regard to the poor, and with regard to the Temple, one could not pretend that one was merely jesting. The maxim was, "A verbal declaration in God's behalf was the equivalent of delivery," and the beneficiaries of the promises could themselves recover the gifts even though the words may have been uttered to another. Curiously enough, another type of promise enjoyed the same privileged status —promises of dowry. A marriage was too significant an event to permit of any kind of idle speech.

Another interesting exception was the unexecuted commitment of a person in acute illness. In most legal systems the trend is to impose additional formalities in such cases, as in the case of wills, in order to make certain that there is no undue advantage taken of the plight of the donor or testator. The fears of the Oral Law were quite to the contrary. Unless the patient could really be assured that his desires were being effectuated, he might die sooner as a result of the distress of frustration. In his condition, greater laxity prevailed and the value of saving human life yielded to the value of certainty in legal transactions. Again, the simple truth of revelation evoked in life a pattern of regulation that was complex and nuanced.

And what is true of revelation is true of all profound religious experience. The mystic's awareness of God induces certainty, perhaps salvation. But continuing to live with a constant awareness of God does not necessarily involve certainty. Nor does it relieve one of all perplexity and doubt. TheTeligious experience is only the beginning of wisdom. Its maturation and fulfillment require the Law, which in Judaism is endless—as endless as the sea. Indeed, the Talmud is a sea. It may have shores but it has no termini.