

September 23, 1971

*Talmud Flatly Forbids Criminal Record
for Those Who Repented*

One who has been convicted of a crime suffers endlessly even after he has paid his fine or served his prison sentence. Anglo-American common law protects him somewhat when he has to take the stand in his own defense for the commission of a subsequent crime. His earlier criminal record is regarded as irrelevant testimony unless he seeks to offer proof of his own good character. But the law offers little or no protection in countless situations in which numerous young people presently find themselves.

Must a student of law, for example, who has been convicted of a misdemeanor or felony make that information available to the character committee when he seeks admission to the Bar? Ought public officials be subpoenaed to compensate for his failure to do so? If the student is asked whether he was ever charged with crime must he make reply even if the charge was dismissed or he was subsequently pardoned?

Resistance to the military draft in the United States as well as militant social action with subsequent arrests have made "criminals" of many of our country's ablest and most conscientious young men and women. To what extent will they continue to be victimized by the state's agencies? That they must cope with social ostracism and employers' prejudices is one thing. However, shall the state's machinery also be the instrument of their oppression?

Jewish law has something to say about this issue. One might have expected this from a great religious tradition that glorifies penitence.

If one has committed a crime or sin and truly atoned for it, the Talmud forbids us ever to make reference to it again. (*B.T. Kidushin* 40b and *Baba Mezia* 58b) This rule is applicable to

everyone and the state's law-enforcing agencies are not exempt from its observance.

Certainly, the penitent himself must not be subjected to the requirement that he himself disclose the information. According to Jewish law a person enjoys not only a privilege against self-incrimination but his confession, even if voluntarily made, is a nullity. And even if a third party has such information, he may not impart it if he knows that the applicant has atoned for his sinful or criminal behavior.

However, is the rule any different if there was no penitence but only the fulfillment of one's punishment? In the case of militant social activists or draft resisters there usually is no penitence. The persons involved are proud of what they did and would not hesitate to act similarly again. Yet, by Jewish law they too should not be subjected to the indignity of being compelled to reveal their past and others who have the information should also be barred from making it available. Why?

Because according to Jewish law he who has suffered the punishment for his sin or crime has sufficiently purged himself of his offense thereafter to be regarded as "y^o ur brother" (Mishna, Makot, 111:15). The strongest proof that he is deemed completely rehabilitated is that he is competent to testify and take oaths in a Jewish court of law (Maimonides, Mishneh Torah, Hilchot Edut, XII:3). If he has been guilty of a crime of violence it may also be necessary to establish that he is a penitent (*ibid.* 4). However, it is rare that any of the students who are presently in difficulty with state agencies that dispense licenses to practice law, medicine or accounting, have committed a crime of violence.

The most difficult question that one must resolve is the propriety of concealing embarrassing information or even lying under oath that one committed no offense - or that one was never charged with crime. The same problem frequently confronts third parties who are called upon to give affidavits with regard to the good character of applicants for state licenses. What shall they do when they know for a certainty that if they reveal what they know they will place in jeopardy the future of the person they want to help?

Jewish law regards oaths made under duress as nullities. The duress need not be threats of physical harm alone. It includes any

kind of unfair pressure that prompts the person making the oath secretly to resolve that he does not intend to be bound by it. Undoubtedly this is a very dangerous rule for a legal system to entertain. It will make a mockery of all oaths if mental reservations can vitiate them. However, Jewish law would rather risk this consequence and permit individuals to make what may be a truly ethical decision - not only to lie but also to swear falsely. Jews who have had abundant and intimate experience with all kinds of persecution would rather abuse the oath themselves than permit the use of the oath to extort property or information unconscionably.

Every important ethical decision usually involves the balancing of many considerations. One frequently makes the wrong choice and may have to pay the penalty for it. Yet Jewish ethics are not Kantian ethics and occasionally to lie is more promotive of justice than to tell the truth. One may even face punishment for the lie or the perjury but one must often be a martyr in ways other than permitting one's self to be killed. The right decision may be costly and even dangerous but to live ethically is often to live dangerously.