

(3) The third, and most far-reaching, reaction to the theological argument against normalization calls into question the very theological premise on which the argument rests. When someone says, "What can we do? The Torah is clear on the subject!", what is being said amounts to a claim of infallibility and irrefutability for the text of the Torah. And that claim ultimately rests on the assumption that the words of Leviticus (and, of course, those of the other four books of the Pentateuch) express directly and completely the will of God. (Indeed, treating a text as infallible on any basis other than on such an assumption would surely count as a form of idolatry.) But that assumption (that the Torah is the direct and complete expression of God's will) is one that, for all its currency in parts of the Jewish world, is not accepted in our Conservative Jewish world. And it is not accepted for good scholarly and theological reasons. We should be clear that this is not an assertion that the Torah is not divine, or that it is merely human. Heschel famously wrote that "as a report about revelation, the bible itself is a *midrash*."¹⁵ We quote this phrase often enough, but perhaps don't sufficiently appreciate that its far-reaching implications both free up our religious thinking and tie us to traditional theological categories at the same time. It is, in other words, possible to (a) believe in God; (b) believe in revelation; (c) believe that it is meaningful to speak of a divine will for the world; and (d) to have faith in the idea that the Torah is our first (and thus, in an important sense, most sacred) expression of God's will in human language, and still insist that the sacred text of the Torah does not perfectly and infallibly express that will.¹⁶ Heschel also wrote that "...whatever hand wrote the Torah included the 'finger of God'.....". But "the question as to whether the Pentateuch was entirely written in forty years or in eighty years is a temporal question asked in the context of the problem of eternity."¹⁷

This is a view of the Torah that conforms to scholarly discoveries about its text, and at the same time presents to us a most compelling theological image of human-divine partnership. That is, the non-acceptance of biblical infallibility is not merely a negative verdict on the divine authorship of the Torah born of academic skepticism; it is a profound and inspiring positive message about the ways in which God and humans find each other on the stage of history onto which we have been placed. A large part of our understanding of the role of human beings in the generation and perfection of religious truth hinges on the

idea that God's will is not infallibly represented in the Torah, but only imperfectly, in a form that awaits the engagement and honest searching of religious communities that connect to one another, and to Sinai, throughout the ages, but do not simply duplicate one another. Was it for nothing that we have celebrated the groundbreaking scholarship of Yehezkel Kaufmann on the religion of Israel? Is it merely an intellectual game that we have played for a century now by calling such people as Mordecai Kaplan, Robert Gordis, Gerson Cohen, Abraham Joshua Heschel, Nahum Sarna, H.L. Ginsburg, Jacob Milgrom, and Yochanan Muffs our masters and teachers? Why do we study and get inspired by such teachings, and yet fear to teach them in turn to our congregations, preferring to present to them the simple – but misleading – formulation that the Torah is the word of God? And why would we even consider doing halakhah by appealing to an axiom of biblical inerrancy that undermines the very theology with which these revered teachers, and others, have gifted us?

I remember vividly discussions about this very theological issue that took place among the members of the commission that produced *Emet Ve-Emunah*. At one such session, it was suggested, to a fair amount of approval, that one of the ways in which we might approach the biblical text is to treat it "as if" it were divine. It was not my point of view, but I thought at the time that it was not an *unreasonable* position to be offered to congregations that still had no real alternative to the Hertz Humash commentary in their pews. With the right mental reservations, it would do little or no harm to speak and to preach as if God had actually spoken the Hebrew words of the fifth commandment, which calls upon us to honor our parents. But this "as if" approach is not always harmless, as we can now see. For what justification is there for using an "as if", or "virtual", theology to undergird the inerrancy of a prohibition (i.e. the one in Leviticus 18:22) that has a deep, irrevocable, and devastating effect on the lives of people who one day in their teens discover something about their sexual constitutions? It would be one thing to impose such a prohibition on the basis of a theology that we truly believed. But to negate a person's drive for love, companionship, and family life on the basis of "as if"? Who would want to answer to such a charge in some future, post-mortem tribunal?

No, the time has come for a movement that has finally published a Humash commentary that reflects the theology our masters have taught us to "come out of the closet".

VIII. AN ALTERNATIVE (ENHANCED)⁴² HALAKHIC METHOD

We seek a method that could retain the advantages of positivism for most cases, but avoid the relatively infrequent, yet vexing, failures of positivism to produce the legal results that our deepest intuitions and consciences guide us to. In doing so, we do well to keep in mind what was urged above (in section II): that Conservative Judaism has long since made a commitment to a theology that acknowledges that (1) the text of the Torah is not necessarily God's word, and thus not an infallible expression of God's will; (2) that human beings have a critical role in the generation and perfection of religious truth; and (3) that the fulfillment of God's will not only allows, but requires the engagement of religious communities. This means, of course, that halakhah will change, but that is hardly a complete characterization of what this theology entails. Positivists, after all, have never denied that halakhah changes. The deeper consequence of our theology, is that the Torah (and *a fortiori* subsequent expressions of religious law) is not a record of commanding utterances from God, but rather a record of the religious quests of a people, and of their understanding of how God's will commands them. The long-standing – and understandable – tendency to divide up religious literature into halakhah (law) and aggadah (narrative) has thus always been a mistake. The law is given cogency and support by the ongoing story of the community that seeks to live by the law. This is true no less for religious than for secular communities, and it is precisely what Robert Cover had in mind when he wrote that “for every constitution there is an epic”.⁴³ The ongoing, developing religious life of a community includes not only the work of its legalists, but also its experiences, its intuitions, and the ways in which its stories move it. This ongoing religious life must therefore have a role in the development of its norms, else the legal obligations of the community will become dangerously detached from its theological commitments. And when that happens, halakhah becomes

idiosyncratic, and less and less possible to defend even to ourselves.⁴⁴ So we would do well to speak of Halakhah, written with a capital “H”, when we wish to denote not only collections of rules and precedents, but rather a more expansive repertoire of legally relevant materials, which include the accretions over time of theological and moral underpinnings of the community of faith. And a vision of a Halakhic methodology would then be one that would include the more conventional halakhic methods, but would also appeal to aggadic (narrative) texts that have withstood the tests of time to become normative Jewish theology and ethics. The kinds of formative aggadic texts which I claim must be given legal standing will be exemplified later in this section.

⁴¹ Quindlen, Anna, “The Power of One”, in *The New York Times* (OpEd Page), April 28, 1993

⁴² I use the word “enhanced” here to underscore what was said above, in section IV of this paper: the need for an alternative approach to halakhah does not negate the validity of the positivist method for most normal purposes. Responsa should, and will, continue to be written in that mode. But for hard cases such as those of the people described in the previous section – and other cases to be described below – we need a way of “unsimplifying”, and thus enriching, the normal mode of operation in order to achieve a result that both reflects a deep fealty to the legal tradition and conforms to certain compelling and undeniable realities. Envisioning and describing that enhanced halakhic method is what this section is about.

⁴³ Cover, Robert, “Nomos and Narrative”, in *97 Harvard Law Review* 4 (1983)

⁴⁴ Cover put it in these words: “The intelligibility of normative behavior inheres in the communal character of the narratives that provide the context of that behavior. Any person who lived an entirely idiosyncratic normative life would be quite mad.” (*op. cit.*, pg. 10). Moshe Greenberg also wrote in a similar vein: “Only by making the larger context determine the construction of particular laws can the Torah be kept from dissolving in a welter of incoherent rulings, adding up to no intelligible pattern of goodness.” (Greenberg, Moshe, “Rabbinic Reflections on Defying Illegal Orders”, reprinted in Menachem Kellner, *Contemporary Jewish Ethics*, New York: Hebrew Publishing Company, 1978, pg. 216. See also Moshe Halbertal’s warning, cited above in Section III, that “if the study of Torah is an analytic explication of formal legal categories, however stimulating and brilliant it may be, in the end it will lead those students who are thirsting for inspiration to an empty trough.”

⁴⁵ Cover, Robert, *op. cit.*, pg. 47 (italics mine).

occasions. By that I mean that there have been several positions voted by us that I have thought were outside the parameters of halakhic legitimacy. For each of them (and, thank God, there were really very few) I “convinced” myself, probably after the fact, that it did not stretch the rubberband beyond the point at which it could snap back.

→ What is at stake here, for me, and I believe for the Committee on Jewish Law and Standards as a body, is whether the Law Committee can continue to be seen as an halakhic decision-making body. For all of the breadth I believe that there is for pluralism within halakhah, some decisions are outside those boundaries. If we make such a decision, we are no longer legitimate halakhists, we undermine our authority as the interpreters of God's will, and we render the Law Committee halakhically irrelevant.

I hope that I am not a fool. I believe that every member of the Law Committee could pen the final two sentences of the preceding paragraph! What is at stake in our debate on this subject is precisely this: Where are the boundaries of legitimate halakhic decision-making? For me, the wrong decision on this subject will demonstrate that we have drawn the line of legitimacy unacceptably, and have forfeited our legitimate halakhic authority.

We often affirm that our mission is to write the next chapter in the book of Jewish law, to be the next link in the unbroken chain. But, if we are to write that chapter, it must be recognizable as the continuation of the book, and not the beginning of a new one. It can be the continuation of the same book even if its decisions are sometimes radically different from those of the writers of the previous chapters, but it cannot be the next link in the unbroken chain if the method utilized to get to the conclusion would be unrecognizable to the writers of the preceding chapters, and especially if the method we use rejects the foundational premise of the authors of every preceding chapter.

In our current deliberation, the papers before the Committee which argue a position contrary to mine fall into three categories. The first category includes those papers which attempt to argue that we will continue to obey what the authors contend is biblical law, and will limit our permissive rulings to matters which are rabbinic in authority. Much of this paper has been devoted to an attempt to disprove the tenability of those arguments. I have long believed, and regularly articulated my conviction that there is nothing wrong with a *poseik* undertaking his study and research of a question before him with a predisposition to wanting to reach a specific conclusion. I have always affirmed, however, that *poskim* must be very cautious to make sure that their predisposition does not blind them to the improbability of their understandings of the relevant texts, or to the fact that they have ignored texts which cannot be responsibly ignored. I believe that several of the authors of the papers before us, whose motivation is absolutely pure, have fallen into this trap, i.e., so immediately recognizable as halakhically indefensible as to make acceptance of them laughable, at best.

The second category recognizes the weakness of the argument of the papers in the first category. The paper in this category, therefore, argues that the law is clear and דאורייתא. What we must do, in order to be loyal to recognized halakhic method, is to invoke the ultimate systemic right of *poskim* to be עוקר דבר מן התורה בקום ועשה. I would urge the authors of this paper to ponder carefully whether the Law Committee is sufficiently self-validating to warrant its taking such an action, the results of which will be irrevocable. I have made this argument on other occasions around the table of the CJLS, and I believe that it remains valid to insist that such a far-reaching action be taken only by such a body, and that the body's self-validating nature be based on more than its formal position of authority. But, in this instance, it is even more important that the authors remember that the law in question is in the category of גופי תורה, and that the right to be עוקר דבר מן התורה בקום ועשה regarding it does not really exist.⁸⁴ To do so, therefore, would be outside the parameters of halakhic legitimacy – even though the authors

⁸⁴ I would raise the same objection to the *teshuvah* which permitted a priest to marry a divorcee on the same systemic grounds. There, too, the author was attempting to reach the desired conclusion within the parameters of the system, but, I believe, ignored the fact that the right to be עוקר does not apply to גופי תורה.

were arguing as they did precisely in order to remain within those parameters, and without doing violence to the texts which are core to this discussion.⁸⁵

The approach of the third category was very straightforward, and for that I give the authors much credit. The authors did not try to "permit the impermissible" through the classical methods of the halakhic system. For these papers, whether stated openly or not, there is one crucial underlying premise, which alone allows for the argument to be made at all. That premise is that the Torah is "somehow" not entirely Divine, and, as such, not legally infallible. Thus, the verses in Leviticus have no absolute legal claim or hold on us, since it is clear to us that they cannot be expressing God's will, since the view they express is immoral.

Again, to the credit of the authors of the papers in this category, they recognize that this claim has no source in the classical halakhic literature, and that it would be impossible to quote even one poseik until our day who has offered such an argument and called it halakhic. Indeed, if we think back over our most radical decisions of the past, all were written utilizing the accepted methodology of classical decisors. It was precisely that methodology that was supposed to make even the most radical departures from precedent acceptable. Some of them were well done and others poorly done, in my opinion, but they did not go outside the boundaries of the halakhic decision-making process. To the best of my recollection, none of them was based on the claim that the Torah was not Divine or not legally infallible.⁸⁶

That, then, brings us to the following issue: Assuming that the type of biblical scholarship we have all been taught is correct, does that mean that the Torah is, in fact, not Divine and legally infallible? I believe that it does not mean that. The argument here is over the following issue: Is theology the dog which wags the tail called halakhah, or is halakhah the dog which wags the tail called theology? It cannot be both ways.

There can be no real doubt that normatively speaking the halakhic tradition is the given, and theology is required to fall into place behind it. Theology can, indeed, should, provide the narrative which makes the halakhic tradition intellectually persuasive and emotionally acceptable and satisfying, and that narrative can change as needed, and it need not be the same narrative for everyone. Narratives, after all, are aggadic, and thus, neither normative nor binding. That claim, incidentally, in no way diminishes their importance. Whatever narrative works is fine, so long as the narrative does not reverse which is the dog and which is the tail. In this enterprise we are again in a long chain: Sa'adia Ga'on did it, Yehuda ha-Levi did it, Maimonides did it, Samson Rafael Hirsch did it, David Zevi Hoffman did it, and Joseph Hertz did it. Our movement's thinkers and theologians are as competent to provide a modern and persuasive theology of halakhah as were the thinkers of the past. But, we, like they, cannot undo the foundational premise of the entire halakhic system – that the Torah is Divine and legally infallible. That requires finding the persuasive and convincing way to affirm the validity of critical scholarship without allowing that affirmation to undermine the foundational premise of the halakhic system. It may well necessitate evolving a theology in which the divinity of the text is not dependent upon direct verbal revelation, but also not undermined by a claim that the text is merely inspired by the Divine; a theology which will allow us to affirm all of the things that we have learned and been convinced by concerning the composition of the text of the Torah without denying that the final result is Divine and legally infallible.⁸⁷ What we cannot do if

we are to be the writers of the next chapter in the book of halakhah, however, is to make theology become the dog which wags the tail called halakhah, for that cannot be the next chapter of the same book. That would be the first chapter of a new book!