The Role of *Halakha* in Reconstructionist Decision Making

By Daniel Goldman Cedarbaum

Many Reconstructionists and other liberal Jews seem afraid of the term *halakha*, reacting as if it invokes some dark presence coming out of the past to crush them with its oppressive weight. They would be surprised to learn that Mordecai Kaplan wrote that "Jewish life [is] meaningless without Jewish law." They would be more surprised to learn that Kaplan made this statement not as the young rabbi of an Orthodox congregation, but relatively late in his career in one of his most thorough and systematic examinations of Jewish life in America, *The Future of the American Jew*.[1]

Kaplan's Advocacy of *Halakha*

Years earlier, one of the five planks of the platform of the proto-Reconstructionist organization that Kaplan founded in 1920, The Society for the Jewish Renascence, stated as follows:

> We accept the *halakha*, which is rooted in the Talmud, as the norm of Jewish life, availing ourselves, at the same time, of the method implicit therein to interpret and develop the body of Jewish Law in accordance with the actual conditions and spiritual needs of modern life.

A close reading of this plank reveals that what at first appears, from a Reconstructionist perspective, to be a remarkably conservative statement is in fact, from an Orthodox perspective, a remarkably subversive statement.

First, Kaplan diverges from the Orthodox approach by identifying as the foundational halakhic text the Talmud (more particularly the Gemarah) rather than the *Shulḥan Arukh* or the other medieval law codes. The differences in style, and often in substance as well, between

Daniel Goldman Cedarbaum, a lawyer in private practice, is a member of the Jewish Reconstructionist Congregation in Evanston, IL and is the secretary of the Board of the Jewish Reconstructionist Federation.

the law codes and the Talmud are well-known and dramatic. The law codes (as the term implies) generally consist of dry, impersonal recitations of legal rules. The halakhic portions of the Gemarah, on the other hand, generally consist of relatively free-wheeling discussions of legal issues, with particular views generally attributed to particular, named rabbis and with dissenting opinions often respectfully set forth. (This shift of emphasis from the law codes to the Talmud is one that I understand the Conservative movement to have adopted.)

Even more striking is the next part of Kaplan's statement. He claims for "ourselves" (and not just for traditionally recognized halakhic authorities) the right "to interpret and develop" Jewish law. He then goes on to recognize the changed "spiritual needs" of today's Jews, in addition to the changed "actual conditions" of today's Jewish communities, as a valid basis on which to make changes in Jewish law.

Fear of *Halakha*

The liberal Jewish fear of the term *halakha* is mixed with a type of awe, leaving many of us scared to touch Jewish law, much less wrestle with it. But by leaving *halakha* to the Orthodox and other "traditional" Jews, Reconstructionists in particular, and liberal Jews in general, have unintentionally promoted the perception that the Orthodox are the only "authentic" Jews. And I believe that we have collaborated in creating this impression, for I am willing to stand with Kaplan in asserting that any form of Judaism that does not recognize *halakha* as an essential component of the fabric of Jewish life is not authentic. (Even the Karaites are not an exception, although their version of *halakha* may be very different from the rabbinic version.) The value of individual autonomy has been elevated by liberal Jews to the point where it conflicts with the essentially communitarian nature of Judaism.

At the same time, I recognize that the traditional halakhic system is incapable of producing a code of conduct that is meaningful for, and acceptable to, the vast majority of contemporary Jews. And I am also willing to stand with Kaplan in asserting that non-Orthodox Jews have evaded and avoided the challenge of reconstructing *halakha*.

Even among the Orthodox, no one today would argue (other than as a pure statement of traditional faith divorced from historical reality) that Jewish law has not undergone tremendous evolution over the past 2,000 years or so, or that Jewish law has not shown remarkable variability as it has been adapted to the local conditions and needs of Jewish communities around the world. Indeed, in the preeminent academic treatise in the field, *Jewish Law: History, Sources, Principles* (Philadelphia, Pennsylvania: The Jewish Publication Society 1994), the renowned Israeli scholar and jurist Menachem Elon, himself an Orthodox Jew, celebrates

the enormous elasticity and adaptability of Jewish law across time and from place to place.

Halakha Evolves

The practice of treating *halakha* as an unchanging monolith that can speak independently of human voices is perhaps traceable to Maimonides, who wanted to create the perception that *halakha* was an impersonal, fixed and unamendable body of law even as he was making significant changes to it. And yet, as Ira Eisenstein and others have pointed out, Jews of all denominations often err by saying that the "*halakha* says thus-and-so" when we should instead say that "particular halakhic authorities said thus-and-so at particular times and in particular places." The real debate among Jews today should not be about whether Jewish law can change, but about who has the authority to make changes in Jewish law, and in what manner.

A related phenomenon is what I believe to be the pervasive misunderstanding by Reconstructionists of their own favorite aphorism about Jewish law, "The past has a vote but not a veto." Too many Reconstructionists read this as, "The *halakha* has a vote but not a veto," making it a sort of declaration of independence from what is perceived to be an ossified legal system.

A better reading of the aphorism might be "Past understandings of *halakha* have a vote but not a veto in our formulations of contemporary *halakha*," thereby reflecting our interpretation of the fundamental halakhic principle that legal rulings are to be made by contemporary judges (see chapter 17 of Deuteronomy).

We must move away from the liberal Jewish approach to *halakha* that typically has looked something like: "Here is the collection of fixed rules that we have received from traditional Judaism. Now we will decide (whether individually or, in some sense, communally) which of these rules to obey and which to disregard." Our approach to *halakha* should instead look something like: "Drawing on the wisdom that we have received from thousands of years of Jewish legal thinking, we, as a community, must construct for ourselves a set of rules that are at once rooted in our tradition and consonant with the actual conditions and spiritual needs of modern life. We must then commit ourselves to obeying those rules."

Is This a "Post-Halakhic" Age?

Many Reconstructionists, as well as other liberal Jews, like to say that we are living in a "post-halakhic" age. By this they generally mean that, like it or not, Jewish communities (at least outside of Israel) no longer possess the juridical sovereignty that once enabled them to impose sanctions for violations of legal rules, and that without such an ability to impose sanctions, Jewish law cannot function in any meaningful sense.

In a technical sense, this proposition (that I call the "post-halakhic thesis") seems self-evidently true; but on another important level, it seems false. In any case, the validity of the post-halakhic thesis is anything but self-evident to our Orthodox brothers and sisters, and to the leaders (at least) of the Conservative movement as well, for they sincerely believe that they are bound by *halakha*. The main problem, I believe, with the post-halakhic thesis is that it rests on an unnecessarily strong reading of the word "law," as I will attempt to illustrate with some non-abstract examples.

Practical Examples

For the past eight years, I have been a member of a trans-denominational Talmud study group, in which the primary teacher is an Orthodox rabbi and the majority of the other participants are Reconstructionists. The group meets at lunchtime, and many of its members typically eat lunch while they study.

Early on, the organizers of the group announced the rule that, while the lunch foods of the members need not be kosher-certified, they could not include meat or non-kosher seafood, and no member expressed a dissenting opinion at that time. Ever since, no one has brought a "forbidden" food for lunch.

And what would happen if someone brought shrimp salad? Someone else would remind that person of our eating policy, and most likely that person would immediately dispose of the offending food. In the unlikely event that the person for some reason insisted on eating the shrimp salad, he or she would be asked to leave the room. Repeated violations would result in the person's being told that he or she could no longer participate in the study group. In other words, sanctions can apply to violations of the "dietary law" of this small community. Failure to follow our rule subjects the offender, first, to shaming and, beyond that, to the possibility of expulsion from our community.

Sanctions and Freedom

These are precisely the two sanctions, I believe, that have historically been the most important and effective in securing obedience to *halakha*. What primarily differentiates the operation of these sanctions within my Talmud study group and within, say, the 18th century Kehillah of Vilna, are the sizes of the communities involved and the consequences of the sanctions to the wrongdoers. For example, expulsion from the Vilna Kehillah might well have resulted not just in social stigmatization, but in the loss of one's ability to make a living, at least in the absence of the extreme step of conversion to Christianity.

That my study group is a small, voluntary association and that the consequences of expulsion from it may not be objectively severe do not

alter the fact that expulsion, and shaming as well, are meaningful sanctions for the members. Membership in good standing in the study group confers real benefits on the member; otherwise, he or she would not choose to participate.

Moving to the level of a larger community, I have heard members of my synagogue say that they are not subject to any binding community obligations ("laws") that go beyond the rules of the American legal system or the norms of common courtesy. They might deny that the congregation even attempts to impose any rules of "Jewish law" on its members. But they are wrong. For example, the congregation has a formal policy against bringing non-kosher meat into its building. Although many of the members eat pork in restaurants and in their homes, my sense is that, once informed of the congregation's *kashrut* rules, none would even think about disobeying these rules in our building, even though the rules are in fact infringements on their freedom.

Perhaps more significantly, our congregation does not permit an interfaith marriage ceremony to take place within its building. Although quite a few of the members probably object to this policy, and some might work to change the policy through a vote of the board of directors or perhaps of the entire membership, I believe that all accept the current policy as a binding restriction on their behavior.

From Option To Obligation

Moving to yet another level, what happens if a member of my congregation whose parent has just died wants to recite *Kaddish*, in the presence of a *minyan*, in his or her home during the full *shiva* period? A synagogue community is, I believe, seriously deficient if a mourner has to worry about whether the community will make sure that such *minyanim* are present. The congregation should have in place a formal or informal structure for contacting members of the congregation and asking them to go to the house of mourning at the appropriate times. A member who receives a call to do so should regard such a call in much the same way that he or she would regard a summons for jury service, as a civic obligation that, in the absence of compelling extenuating circumstances, must be fulfilled and in that sense is not voluntary.

We are too squeamish about using the word "must" rather than the word "should" when we discuss these and similar issues within our communities. "Must" is appropriate, not because we believe that the obligation is literally ordained by God, but because it has its source in a democratically determined social contract, informed by our people's evolving understanding of how best to make Godliness manifest in the world. That should have the force of law for the community.

Some used to say that the defining slogan of Reconstructionism was

"Act kosher, think *treyf*." Less flippantly, some Reconstructionists used to say that they espoused "maximalist liberal Judaism" and that Reconstructionism is the only real "liberal alternative to Orthodoxy." But by ceding *halakha* to Orthodoxy, we have left these catch-phrases with no real content. Kaplan at one time proposed the creation of an international Sanhedrin, composed both of rabbis and of educated lay people from all denominational backgrounds, which would reconstruct *halakha* in an essentially democratic manner. That proposal (at least today) seems more like a messianic dream than a practical call to action.

Reconstructionist Responsa

More realistically, though, the process of reconstructing *halakha* could begin with the creation of a responsa commission, or similar body, of the national Reconstructionist movement, which could, on a case-by-case basis in response to questions from rabbis or lay members of Reconstructionist affiliates, issue pronouncements on various matters, both of ritual or ceremonial practice and of interpersonal conduct, that would make up, over time, our understanding of *halakha*. Such a commission would be made up both of rabbis and of educated lay people, and they would (at least indirectly) be democratically selected.

At some point in the future, when the commission had produced a significant body of written legal decisions, all affiliated Reconstructionist congregations and havurot might be asked formally to adopt the commission's body of work. Eventually, acceptance of this evolving *halakha* by a congregation or havurah might become one of the requirements for affiliation with the Jewish Reconstructionist Federation.

What the specific substance of such a reconstructed *halakha* might look like is, of course, beyond the scope of this article (indeed, is beyond the scope of anything but the communal process that would, over time, create it). However, in the interest of making my argument less abstract, I will offer a few thoughts about the direction that such a process might take.

Guiding Principles

First, it would likely involve an emphasis on the traditional distinction between those rules of Jewish law that pertain to obligations that are *beyn adam la'ḥavero* (between or among people) and those rules that pertain to obligations that are *beyn adam la'Makom* (between a person and God). The primary, though by no means exclusive, focus of this halakhic process would presumably be on the former category of rules, as they are the ones that directly affect the functioning of a community.

However, within the realm of ritual or ceremonial practice rules (generally assigned to the latter category), a distinction might well be drawn between those matters that are

nevertheless communal in nature (for example, the recitation of a blessing before eating a communal meal) and those matters that are truly private in nature (for example, the recitation of individual prayers upon waking).

Among the questions of communal ritual practice that could be answered for the entire Reconstructionist movement are whether the shofar should be blown when Rosh Hashanah coincides with Shabbat and whether the *regalim* festivals should retain *Yom Tov Sheni* (the additional days of observance mandated in traditional *halakha* for the Diaspora).

Other traditional halakhic categories or concepts could also play a fruitful role in this process. One important example is the traditional classification of actions along a spectrum that might include: *ḥayav* (forbidden actions that subject the transgressor to full sanctions); *pattur aval assur* (that we could interpret as actions to be avoided but for which there are only minor sanctions); *pattur mi'klum* (that we could interpret as actions that carry no sanctions, but from which it could nonetheless be beneficial to refrain); to *mutar* (fully permitted actions).

Thus, an individual's eating of pork in his or her home might be found to be *pattur mi'klum*, an individual's eating of pork in a restaurant (that is, in a public place) might be found to be *pattur aval assur* and an individual's serving pork to fellow congregants at a congregationally-sponsored dinner in his or her home might be found to be *ḥayav*.

As suggested above, the shirking of one's obligation to be the tenth person in a *shiva minyan* would presumably be *ḥayav* (result in full liability), as would failing to give *tzedakah* at some reasonable level. The extent of one's obligations, if any, to participate in worship services (when the presence of a *minyan* is not in doubt) is among the questions that are much more debatable.

Reviving the *Takanah*

Another example of something that could usefully be drawn from the traditional halakhic process is the recognition that changes in Jewish law are not always evolutionary and sometimes need to be discontinuous, for which we have available the traditional tool of the *takanah*. Basically, use of a *takanah* is appropriate when changes in social reality make a particular traditional halakhic rule run counter to a fundamental purpose of *halakha*, such as furthering *tikkun olam* (repair of the world) or *darkhei shalom* (promotion of peace).

Takanot appear frequently in the Mishnah, the most famous example of which being Hillel the Elder's ordaining that, for a certain category of loans, the obligation of repayment is not canceled by the Sabbatical Year, which in effect overturned the rule stated in Deuteronomy 15:2. (Calls for the revival of the *takanah* have recently been heard in the Conservative movement, and even in some Orthodox quarters.)[2]

The Private Realm

In formulating Reconstructionist *halakha*, giving attention even to matters of purely private ritual practice might be desirable, not for the purpose of regulating behavior but for the purpose of providing the individual with a communally-determined set of guidelines with regard to such practice. The operative term here would be "should"" or "ought," rather than "must." As Kaplan once wrote: "Ritual practices are the concern of every one who wants to be a Jew in the fullest sense of the term. However much or little either the observance, or the neglect, of these practices may affect our human relationships, they cannot be ignored. They can serve as a source of immediate good in the life of the individual. In their present state, they are either a nuisance, or an occasion for a sense of guilt."[3]

Standards of Observance

A knowledgeable and committed Reconstructionist once told me that he felt guilty about the fact that he rarely puts on *tefillin* in the morning, an act that for him apparently has little spiritual value. What I believe he was saying is that he wants to be an observant Jew (as he is, by traditional standards, in many areas of practice), and that his failure regularly to put on *tefillin* is undermining his ability to consider himself an observant Jew.

The underlying source of his problem, I think, is not his ritual behavior (or lack thereof) but the limited definition we currently have of "observant Jew."

In other words like many other non-Orthodox Jews, he is seeking a non-subjective yardstick against which to measure the adequacy of his ritual practice. He is quite familiar with the traditional yardstick, and, unfortunately, the liberal Jewish world has not provided him with any alternative objective measuring device. Creating such an alternative measuring device could be one of the goals of the Reconstructionist halakhic process.

A Reconstructionist responsa commission might well determine that the act of putting on *tefillin* is of little spiritual benefit to most Reconstructionist Jews, and that, because the practice (at least when done in private) does nothing to strengthen Jewish community, it should fall into the category of ritual practices that are (of course) permitted but that are not held out as normative.

Ritual And Ethical *Halakha*

Grappling with issues of even purely private ritual conduct in reconstructing *halakha* also has the advantage of helping to preserve the traditional concept of *halakha* as a seamless fabric. Over the past 2,000 years, only the architects of the Reform movement have attempted to draw sharp distinctions between ethical rules, on the one hand, and ceremonial or ritual rules, on the other hand, and at least some of the lead-

ers of the Reform movement have in the recent past confessed error in this regard.

The problem here is that once one takes the position that some of the rules that are part of a coherent legal framework are not worthy of respect, rationalizing disobedience of other rules becomes much easier. In other words, when a person has been taught that ignoring the dietary laws presents no problem, then such laws as, for example, assisting the communal poor may seem less like obligations and more like ethical suggestions.

Still, care must be taken to avoid confusing ritual practices in themselves with the ethical agendas with which the ritual practices are, or ought to be, associated (for example, saying a blessing before eating and having a renewed commitment to helping to feed the hungry). As Kaplan wrote: "Rituals can be abused by the tendency to assume that the performance of the symbolic rite is itself a virtuous act, whether it impels one to serve the ethical ideal it symbolizes or not." But, as Kaplan went on to say, "as with religion in general, so with its ritual aspect, it would be folly to dispense with it because of its possible abuse."[4]

Avoiding Insularity

Finally, in reconstructing *halakha*, we should be mindful of Kaplan's admonition that "Jewish law . . . [must] refrain from interfering with the freedom of economic and social intercourse with the non-Jewish elements of the population."[5] Kaplan saw that, at least in America, erecting artificial barriers between Jewish and non-Jewish communities could ultimately harm Judaism, and Jews.

There are three ways that such barriers could have negative consequences. First, by depriving Jews of the economic benefits and social pleasures of full interaction with their non-Jewish neighbors; second, by making the incorporation of the highest ideals of the American civilization into Jewish life more difficult; and, third, through a sort of cultural protectionism, weakening the products of Jewish creativity, including a reconstructed *halakha* itself, by insulating them from the rigors of competition in an open marketplace of ideas.

Return to Roots

In advocating the reconstruction of *halakha*, I am simply calling on our movement to return to some of its fundamental Kaplanian roots. For Kaplan, as for his ancestors, Judaism was at least as much a matter of the head as of the heart, and one could perform no more important religious service than fully using one's intellect to ascertain and advance divine purpose in the world. And for Kaplan, as for his ancestors, Jewish life without Jewish law was unthinkable. Kaplan empowered us; may we have the strength to carry on with his work.

1. Mordecai Kaplan, *The Future of the American Jew* (New York, Reconstructionist Press, 1948), 387-401.
2. See Michael Graetz, "Reviving *Takanah* in the Halakhic Process" reprinted as Appendix A in Naomi Graetz, *Silence Is Deadly: Judaism Confronts Wife-beating* (New Jersey, Jason Aronson, 1998).
3. Kaplan, *op. cit.*, 394.
4. Mordecai Kaplan, *Questions Jews Ask: Reconstructionist Answers* (New York, Reconstructionist Press, 1956), 227.
5. Kaplan, *Future of the American Jew, op. cit.*, 392.