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Source: *Journal of Law and Religion*, Vol. 5, No. 1 (1987), pp. 65-74

Published by: Cambridge University Press

Stable URL: <http://www.jstor.org/stable/1051017>

Accessed: 27-06-2016 01:05 UTC

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Journal of Law and Religion

OBLIGATION: A JEWISH JURISPRUDENCE OF THE SOCIAL ORDER*

*Robert M. Cover***

I. FUNDAMENTAL WORDS

Every legal culture has its fundamental words. When we define our subject this weekend as human rights, we also locate ourselves in a normative universe at a particular place. The word “rights” is a highly evocative one for those of us who have grown up in the post-enlightenment secular society of the West. Even those among us who have been graced with a deep and abiding religious background can hardly have escaped the evocations that the terminology of “rights” carries. Indeed, we try in this conference, to take a little credit here and there for the lustre which the edifice of rights reflects, perhaps suggesting now and again that the fine reflection owes something to some ultimate source of the light.

Judaism is, itself, a legal culture of great antiquity. It has hardly led a wholly autonomous existence these past three millennia. Yet, I suppose it can lay as much claim as any of the other great legal cultures to have an integrity to its basic categories. When I am asked to reflect upon Judaism and human rights, therefore, the first thought that comes to mind is that the categories are wrong. I do not mean, of course, that basic ideas of human dignity and worth are not powerfully expressed in the Jewish legal and literary traditions. Rather, I mean that because it is a legal tradition Judaism has its own categories for expressing through law the worth and dignity of each human being. And the categories are not closely analogous to “human rights.” The principal word in Jewish law, which occupies a place equivalent in evocative force to the American legal system’s “rights”, is the word “mitzvah” which literally means commandment but has a general meaning closer to “incumbent obligation.”

Before I begin an analysis of the differing implications of these two rather different key words, I should like to put the two words in a context—the contexts of their respective myths. For both of us these words are connected to fundamental stories and receive their force from those stories as much as from the denotative meaning of the

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words themselves. The story behind the term "rights" is the story of social contract. The myth postulates free and independent if highly vulnerable beings who voluntarily trade a portion of their autonomy for a measure of collective security. The myth makes the collective arrangement the product of individual choice and thus secondary to the individual. "Rights" are the fundamental category because it is the normative category which most nearly approximates that which is the source of the legitimacy of everything else. Rights are traded for collective security. But some rights are retained and, in some theories, some rights are inalienable. In any event the first and fundamental unit is the individual and "rights" locate him as an individual separate and apart from every other individual.

I must stress that I do not mean to suggest that all or even most theories that are founded upon rights are "individualistic" or "atomistic." Nor would I suggest for a moment that with a starting point of "rights" and social contract one must get to a certain end. Hobbes as well as Locke is part of this tradition. And, of course, so is Rousseau. Collective solutions as well as individualistic ones are possible but, it is the case that even the collective solutions are solutions which arrive at their destination by way of a theory which derives the authority of the collective from the individual. It is necessarily a theory which posits that that which was "given up" and therefore, at least implicitly, that which is desired, is a perfect freedom with all the alienated rights returned and the contradictions resolved.

The basic word of Judaism is obligation or *mitzvah*. It, too, is intrinsically bound up in a myth—the myth of Sinai. Just as the myth of social contract is essentially a myth of autonomy, so the myth of Sinai is essentially a myth of heteronomy. Sinai is a collective—indeed, a corporate—experience. The experience at Sinai is not chosen. The event gives forth the words which are commandments. In all Rabbinic and post Rabbinic embellishment upon the Biblical account of Sinai this event is the Code for all Law. All law was given at Sinai and therefore all law is related back to the ultimate heteronomous event in which we were chosen-passive voice.

Now, just as the social contract theories generated Hobbes and others who bore a monstrous and powerful collective engine from the myth of individualism, so the Sinaitic myth has given rise to counter myths and accounts which stress human autonomy. Indeed, the Rabbinic accounts of law-making autonomy are very powerful indeed, though they all conclude by suggesting that everything, even the questions yet to be asked by the brilliant students of the future and the

answers to those questions—everything was given at Sinai. And, of course, therefore, all is, was, and has been commanded—and we are obligated to this command.

What have these stories to do with the ways in which the law languages of these respective legal cultures are spoken? Social movements in the United States organize around rights. When there is some urgently felt need to change the law or keep it in one way or another a “Rights” movement is started. Civil rights, the right to life, welfare rights, etc. The premium that is to be put upon an entitlement is so coded. When we “take rights seriously” we understand them to be trumps in the legal game. In Jewish law, an entitlement without an obligation is a sad, almost pathetic thing. There were, in ancient Rabbinic Judaism, many obligations from which a blind person was excused. One of the great Rabbis of the fourth century, Rabbi Joseph, who was blind, asked the great question of his colleagues: Is it greater to do the commandments out of love when one is not obligated to do them or is it greater to do the commandments out of obligation? He had at first assumed that to voluntarily comply with the commandments though not obligated to do so entailed a greater merit. But his colleagues held that to do the commandments out of obligation—more correctly, to do them as obligated,—was the act which entailed greater merit. He then offered a feast for the Scholars if any could demonstrate that the great figure, Rabbi Judah’s position that the blind were not obligated to do the commandments was erroneous.

Indeed, to be one who acts out of obligation is the closest thing there is to a Jewish definition of completion as a person within the community. A child does not become emancipated or “free” when he or she reaches maturity. Nor does she/he become *sui juris*. No, the child becomes bar or bat mitzvah, literally one who is of the obligations. Traditionally, the parent at that time says a blessing. Blessed is He that has exonerated me from the punishment of this child. The primary legal distinction between Jew and non-Jew is that the non-Jew is only obligated to the 7 Noachide commandments. Where women have been denied by traditional Judaism an equal participation in ritual, the reasoning of the traditional legist has been that women are not obligated in the same way as are men with respect to those ritual matters (public prayer). It is almost a sure sign of a nontraditional background for someone to argue that women in Judaism should have the right to be counted in the prayer quorum, to lead prayer services or be called to the Torah. Traditionalists who do argue for women’s

participation (and there are some who do), do so not on the basis of the rights. They argue rather that the law, properly understood, does or ought to impose on women the obligation of public prayer, of study of Torah, etc. For the logic of Jewish Law is such that once the obligation is understood as falling upon women, or whomever, then there is no question of "right" of participation. Indeed, the public role is a responsibility.

THE USES OF RIGHTS AND OBLIGATIONS

The Jewish legal system has evolved for the past 1900 years without a state and largely without much in the way of coercive powers to be exercised upon the adherents of the faith. I do not mean to idealize the situation. The Jewish communities over the millennia have wielded power. Communal sanctions of banning and shunning have been regularly and occasionally cruelly imposed on individuals or groups. Less frequently, but frequently enough, Jewish communities granted quasi-autonomy by gentile rulers, have used the power of the gentile state to discipline dissidents and deviants. Nonetheless, there remains a difference between wielding a power which draws on but also depends on pre-existing social solidarity, and, wielding one which depends on violence. There is also a difference between controlling the violence that is wielded autonomously and being dependent upon a potentially hostile power for that force. The Jewish legal apparatus had not had the autonomous use of violence at its disposal for two millennia which are, indeed, for all practical purposes the period in which Jewish Law as we know it came to be.

In a situation in which there is no centralized power and little in the way of coercive violence, it is critical that the mythic center of the Law reinforce the bonds of solidarity. Common, mutual, reciprocal obligation is necessary. The myth of divine commandment creates that web. It must also be pointed out that through most of the past two millennia there has been no well defined hierarchy of law articulating voices in Judaism. There have been times when great figures have lamented the cacophony of laws, and have understood it to be a condition imposed upon us for our sins. But another strain has almost rejoiced in the plethora of laws and have drawn strength from the traditional solution given by the Talmud to the question of whether the School of Hillel or the School of Shammai was truly correct. "Both are the words of the Living God." The acceptance of the idea that the single great mythic event of lawgiving can issue in appar-

ently inconsistent precepts and understandings but that the apparent inconsistency can, itself, be the product of two correct readings of a larger understanding—that way of looking at the normative world—was immensely useful to a people doomed to live without an hierarchically determined authoritative voice. It was a myth that created legitimacy for a radically diffuse and coordinate system of authority. But while it created room for the diffusion of authority it did not have a place for individualism. One might have independent and divergent understandings of the obligations imposed by God through his chosen people, but one could not have a world view which denied the obligations.

The jurisprudence of rights, on the other hand, has gained ascendance in the Western world together with the rise of the national state with its almost unique mastery of violence over extensive territories. Certainly, it may be argued, it has been essential to counterbalance the development of the state with a myth which a) establishes the State as legitimate only in so far as it can be derived from the autonomous creatures who trade in their rights for security—i.e., one must tell a story about the States's utility or service to us, and b) potentially justifies individual and communal resistance to the Behemoth. It may be true as Bentham so aptly pointed out that natural rights may be used either apologetically or in revolutionary fashion, and there is nothing in the concept powerful enough analytically to constrain which use it shall be put to. Nevertheless, it is the case that natural right apologies are of a sort that in their articulation they limit the most far-reaching claims of the State, and the revolutionary ideology that can be generated is also of a sort which is particularly effective in countering organic statist claims.

Thus, there is a sense in which the ideology of rights has been a useful counter to the centrifugal forces of the western nation state while the ideology of mitzvot or obligation has been equally useful as a counter to the centripetal forces that have beset Judaism over the centuries. But, in a sense, this kind of speculation is beside the point. The primary function of basic words is not to be found in so simple a functional explanation. We must look to the internal organization of normative thought not to the external political results in the first instance.

III. THE NATURE OF THE JURISPRUDENCE OF MITZVOT

The leading Maimonides scholar of this generation, Professor

Isadore Twersky, has attributed to Maimonides' philosophy of law a thorough-going teleological understanding of the mitzvoth. Maimonides is generally thought of as being at the rationalist end of the spectrum of Jewish thinkers, so perhaps this attribution is natural. In any event, the position of Twersky is that Maimonides understood the rationale for the obligations of mitzvoth not only in terms of the bases for each of the commandments understood alone, but more important as a system with a systemic telos as well. In particular, Maimonides system contrasts the normative world of mitzvoth with the world of vanity—hebel. It seems that Maimonides, in this respect, as in so many others has hit the mark. A world centered upon obligation is not, really cannot be, an empty or vain world. Rights, as an organizing principle, are indifferent to the vanity of varying ends. But mitzvoths because they so strongly bind and locate the individual must make a strong claim for the substantive content of that which they dictate. The system, if it's content be vain, can hardly claim to be a system. The rights system is indifferent to ends and in its indifference can claim systemic coherence without making any strong claims about the fullness or vanity of the ends it permits.

Maimonide's claim is more specific than the above. In the Epistle to Yemen he writes:

If he could only fathom the inner intent of the law, he would realize that the essence of the true divine religion lies in the deeper meaning of its positive and negative precepts [mitzvoth], every one of which will aid man in his striving after perfection, and remove every impediment to the attainment of excellence.

It is difficult in the light of such a claim to apply certain familiar categories of jurisprudence such as the distinction between a morality of duty and one of aspiration. It is certainly true that Judaism like every other normative system recognizes degrees of attainment in moral or legal excellence. However, the mitzvoth generally do not distinguish between precepts of duty and those of aspiration. And, indeed, the element of aspiration comes into the picture in part as a natural growth from the discipline of the duty imposed upon all. In any event, purpose and divine purpose are located in the basic word.

IV. THE NATURAL DOMAINS OF RIGHTS AND MITZVOTH

There are certain kinds of problems which a jurisprudence of mitzvoth manages to solve rather naturally. There are others which present conceptual difficulties of the first order. Similarly, a jurisprudence of rights naturally solves certain problems while stumbling over

others. It seems interesting to me that these dissimilarities have not been much explored. The claim I am making is not a very strong one. It is not, I will stress, that particular problems cannot be solved, in one system or the other—only that the solution entails a sort of rhetorical or philosophical strain.

The jurisprudence of rights has proved singularly weak in providing for the material guarantees of life and dignity flowing from the community to the individual. While we may talk of the right to medical care, the right to subsistence, the right to an education, we are constantly met by the realization that such rhetorical tropes are empty in a way that the right to freedom of expression or the right to due process are not. When the issue is restraint upon power it is intelligible to simply state the principle of restraint. Of course, whether the restraint will be effective depends on many things not least of which is the good faith of those restrained. However, the intelligibility of the principle remains because it is always clear who is being addressed—whoever it is that acts to threaten the right in question. However, the “right to an education” is not even an intelligible principle unless we know to whom it is addressed. Taken alone it only speaks to a need. A distributional premise is missing which can only be supplied through a principle of “obligation.”

In a system of mitzvoth this problem does not arise. Jewish law is very firm in its guarantee of an education. Something approaching universal male schooling was pursued perhaps two millennia ago. In any event, it is clear that throughout the middle ages it was the obligation of families and communities to provide schooling to all male children. I do not mean to imply that this principle was not often honored in the breach. But it was a principle and a clear one. And it did give rise to a system of schooling unrivaled in its time for educational opportunity. Yet, it is striking that the Jewish legal materials never speak of the right or entitlement of the child to an education. Rather, they speak of the obligation incumbent upon various providers to make the education available. It is a mitzvah for a father to educate his son, or grandson. It is a mitzvah for a teacher under certain circumstances to teach even without remuneration. It is a mitzvah for the community to make certain provisions for education and its institutions. It is a mitzvah for householders to board poor scholars and support them, etc.

Now, of course, in the United States with its rhetoric of rights, we too have statutes and provisions which allocate the responsibilities, fiscal and administrative, for the provision of education to children.

As I said at the outset, we are comparing rhetorics not results. What is the case, however, is that these provisions concerning school districts and property taxes carry very little in the way of rhetorical freight. They do not move us or provide slogans or organizing ideologies. The provisions exist because if we are to carry on certain functions we need them. They neither move nor dignify in themselves. If we want to leap forward providing a kind or degree of education heretofore unprovided, we usually gravitate to the rhetoric of rights-declaring a campaign for the rights of the retarded to special education. "For every child has a right to an education." Then, the evocative force of the rights rhetoric having done its work we leave to the technicians the allocation of fiscal responsibility. If past experience is any indication, there will be a series of attempts to foist the responsibility off on someone else.

In a jurisprudence of mitzvot the loaded, evocative edge is at the assignment of responsibility. It is to the parent paying tuition, the householder paying his assessment, that the Law speaks eloquently and persuasively. It is for him/her that the myth resonates. This is true for all welfare functions and for ritual ones as well.

There are procedural issues as well in which the rhetorical edge of mitzvot as opposed to rights seems to make a difference. Consider for example the problem of the dress of litigants before a tribunal. In *Estelle v. Williams* the Supreme Court held that defendant had a right to appear at his trial (a jury trial) dressed in civilian garb of his choice rather than the convict garb in which he had spent the past days in jail. But, the Court concluded, in the absence of timely objection by counsel the right was deemed waived or not exercised. Now contrast Maimonides' treatment of a very similar though not identical issue:

1. A positive commandment enjoins upon the judge the duty to judge righteously . . .
2. If one of the parties to a suit is well clad and the other ill clad, the judge should say to the former, "either dress him like yourself before the trial is held or dress like him, then the trial will take place." (MT., Laws of Sanhedrin, c.21.)

It is, of course, the case that the rights centered system of jurisprudence does frequently place affirmative obligations upon a judge to see to the protection of the "rights" of the parties. In that sense the kind of obligation evoked in Maimonides' Code is not completely strange. Moreover, the ethics of certain roles like the roles of judges or even lawyers, do carry with them an evocative capacity associated with obligation and responsibility. Nevertheless, it is the case that even with

respect to these areas we tend to have a system which is almost uniquely dependent upon parties and their representatives asserting their "fairness rights" rather than judges fulfilling their fairness obligations.

If there is a comparative rhetorical advantage to mitzvoth in the realm of communal entitlements, there is, it seems to me, a corresponding comparative rhetorical advantage to rights in the area of political participation. The myth of social contract is a myth of co-equal autonomous, voluntary acts. It is a myth which posits participation because the legitimacy of what is generated depends upon the moral force of participation. The argument, for example, for the equal participation of women in political affairs or for their legal equality is very straightforward under a rights jurisprudence, once the parties to the argument accept the moral or biological equality of the sexes. However, in a jurisprudence of mitzvoth one must first create an argument for equality of obligation and only as a result of that come to equality of participation. The fact is that there might be important reasons which justify distinctions in obligations (e.g., the capacity to bear children) which nonetheless do not in any straightforward way mitigate against complete equality of participation. The rights rhetoric goes to the nub of this matter because it is keyed to the projection of personality among indifferent or hostile others. The reality of such indifference, hostility or oppression is what the rhetoric of responsibility obscures. At its best it obscures it by, in fact, removing or mitigating the causes. At its worst it is the ideological mask of familiar oppressions.

V. CONCLUSIONS

The struggle for universal human dignity and equality still proceeds on many levels all over the world. There is no question that we can use as many good myths in that struggle as we can find. Sinai and social contract both have their place. Yet, as I scan my own—our own—privileged position in the world social order and the national social order, as I attend the spiritual and material blessings of my life and the rather obvious connection that some of these have with the suffering of others—it seems to me that the rhetoric of obligation speaks more sharply to me than that of rights. Of course, I believe that every child has a right to decent education and shelter, food and medical care; of course, I believe that refugees from political oppression have a right to a haven in a free land; of course, I believe that

every person has a right to work in dignity and for a decent wage. I do believe and affirm the social contract that grounds those rights. But more to the point I also believe that I am commanded—that we are obligated—to realize those rights.