Crime and punishment in Jewish law

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Part Two. Selected Reform Responsa

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Part Two

Selected Reform Responsa

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Professional Secrecy and an Illegal Act

Contemporary American Reform Responsa (New York, 1987), #4

Walter Jacob

QUESTION: A lawyer has discovered that a fellow attorney is providing a client with advice which will lead to an illegal act and the possibility of considerable financial loss. The lawyer asking the question has gained this information in a confidential relationship. Should he break that confidence and inform the client in question?

ANSWER: It is clear that privacy and information gained as part of a professional relationship can generally not be divulged (Lev. 19.16 *Yad* Hil. Deot 7), yet this prohibition is not absolute. For example, if knowledge of certain medical information might change a marriage, such information should be presented (Israel Kagan, *Hofetz Haym,* Hil. Rekhilut 9). The decision is based upon the principal of the "need to know." Such facts must not be given lightly or simply to complete existing information or for any personal gain. If such information would lead to the protection of lives or prevent personal injury and financial loss, it must be divulged in accordance with the Biblical injunction of Leviticus, "You shall not stand idly by the blood of your neighbor" (Lev. 19.16). If an individual's life is endangered, immediate action to remove that danger must be undertaken. This was also the interpretation provided for our verse by tradition (San. 73b; *Yad* Hil. Rotzeah 1.13 f, 15; 4.16; Hil. San. 2.4, 5, 12; *Shulhan Arukh, Hoshen Mishpat* 425.10, 426.1). Maimonides considered it necessary to move in this direction in cases of idolatry *(Yad* Hil. A. Z. 5.4) and rape *(Yad* Hil. Naarah 3.1). This would apply, however, only if the client's life is endangered; that is not the case here.

Maimonides and some others go further through the exegesis of another verse from Leviticus (19.14), "Thou shalt not place a

stumbling block before the blind." This would include reporting someone who provides incorrect advice which might lead to criminal acts or to a considerable financial loss (*Yad* Hil. Rotzeah 12.4; Jakob Breish, *Helkat Yaaqov* III 136; Elijah of Vilna, *Biur Hagra*, Yoreh Deah 295.2; Joshua Falk, *Peri Megadim*, Orah Hayim 443.5, 444.6). We must also ask about the status of attorneys in Jewish law. Generally, attorneys are not used in the traditional Jewish courts, although they have sometimes been appointed by the court (Ribash *Responsa* #235; Meir of Rothenburg *Responsa* #357). In other words, the litigants and the witnesses are present in person (M. Mak 1.9; *Yad* Hil. San. 21.8). Exceptions are only made when the individual involved is unavoidably absent or is too timid to defend himself (*Tos.* to Shev. 31a; *Tur Hoshen Mishpat* 123.16; also Bet Yosef).

When an attorney is appointed, the fiction is created that he acts entirely on his own behalf. He, therefore, has complete power of attorney for the defendant (B. K. 70a; *Yad* Hil. Sheluhin Veshutafin 3.7; *Shulkhan Arukh Hoshen Mishpat* 122-123; *Arukh Hashulhan Hoshen Mishpat* 124).

There was, in other words, a reluctance to use attorneys, but by the late Middle Ages, they have been admitted to court, especially if the parties involved were present and their reaction could be watched. Such attorneys are paid by a fee for their services (Rif, *Responsa* #157; Rashba, *Responsa* II #393, III #141, V #287, etc.).

An attorney, therefore, acts as an agent and the laws of the agency apply to him. There is a legal presumption that an agent properly performs the duties assigned to him (Git. 64a); any agent is considered to have been appointed by a client to benefit and not to harm him (Kid. 42b). In this instance, the attorney might be considered akin to both an agent and an expert. Experts who are paid for their advice are liable if their opinion proves to be wrong (B. K. 99bff; Simon ben Zemah of Duran, *Responsa* II, #174).

As the lawyer in question has not been ethical and has provided improper guidance to his client, it is the duty of the attorney to inform the Bar Association or other appropriate authorities of the misconduct which he suspects. This course of action should be followed in criminal and civil procedures.

Damages for a Physician's Error

Contemporary American Reform Responsa (New York, 1987), #75

Walter Jacob

QUESTION: An elderly woman suffering from a variety of ailments was mistakenly given an excessive dosage of a drug. This led to her serious rapid deterioration and hastened her death. The physician in question immediately admitted his error and did everything possible to rectify it. Is the family entitled to damages on moral and ethical grounds? Should this course be pursued to make the doctor more careful in the future? (M. M., Pittsburgh, Pennsylvania)

ANSWER: The Talmud dealt with the general problem of a physician's liability while healing the sick. The Talmud considered the task of healing a *mitzvah* and not interference with God's intentions [as He may have sent the disease] (B. K. 85a; *Bet Josef* to *Tur* Yoreh Deah 336). It was a person's duty to seek the best physician in case of illness (Shab. 32a). Furthermore, it was permitted to violate all shabbat and ritual laws to save a human life (Yoma 85b; *Shulhan Arukh* Orah Hayim 329.3). If the physician failed and the patient died, he is free from liability as long as the remedies were tried in good faith (*Tosefta* Git. 4.6). This *Tosefta* discussed other situations of inadvertent injury incurred while performing a *mitzvah*. As long as the injury is inadvertent, no liability is incurred. The traditional statements are very specific about the physician's responsibility and free him from general liability for unintentional harm. Without such assurance it would be impossible for a physician to practice (David Pardons J. Preuss, *Biblical and Talmudic Medicine*, p. 28). It is, of course, assumed that the physician has been trained and properly licensed (Nachmanides; *Torat Ha-adam* 12b; Simon ben Zemah of Duran, *Responsa*, Vol. 3; *Tur* Yoreh Deah 336; *Shulhan Arukh* Yoreh Deah 336; Eliezer Waldenberg, *Tzitz Eliezer*, Vol. 5, #23).

When, however, the physician has clearly made a mistake, then he is liable for the same damages as anyone engaged in other professional or commercial transactions (Tosefta 8. K. 9.11). The general laws of liability apply here. The surviving family is

entitled to damages on moral and ethical grounds and should pursue this course of action. The physician may well be willing to assume this obligation in keeping with tradition.

Suing the Rabbi

Questions and Reform Jewish Answers (New York, 1992), #235

Walter Jacob

QUESTION: A rabbi who does a considerable amount of counseling has asked whether it is necessary to purchase malpractice insurance. What, according to tradition, is the range of liability? (Walter Rosenthal, Trenton New Jersey)

ANSWER: We are going to look at this matter with the understanding that the rabbi in question is not a licensed therapist and so would do counseling as part of ordinary congregational responsibility and not in the special capacity of a therapist. Such cases would be akin to the responsibility of a physician which has been discussed previously (W. Jacob, *Contemporary American Reform Responsa* # 75).

This entire area has been treated thoroughly in American secular legal literature; it is the general desire of the courts to remain out of this area, as it is very difficult for them to establish the parameters of training and appropriate religious conduct for so many religious groups and sects (Funston, "Made out of Whole Cloth—A Constitutional Analysis of the Clergy Malpractice Concept," *Georgia Western Law Review*, Vol 10, pp. 507ff; McMenamin *The Jurist*, Vol 45, pp. 275ff etc).

We are not concerned with the judicial function of the rabbi and possible errors which might take place in the exercise of that function (*Shulhan Arukh Hoshen Mishpat* 25 and commentaries), but rather with the general area of responsibility through counseling.

The rabbi would be liable if there was gross neglect, for then he/she would be violating the Biblical statement "Do not place a stumbling block before the blind" (Lev 19.14). However, the later Talmudic development of the law of torts is rather confused; we have two concepts, *garmi* which includes those actions directly responsible for damage, and *gerama or* matters in which the action is indirect (*Encyclopedia Talmudit* Vol 6; Ramban *Dina Degarmi; Shulhan Arukh Hoshen Mishpat* 386). The general rule which we may abstract from the many cases cited in the literature is as follows: If the individual in question is an expert and the advice which is followed is based upon his expertise, then he would be liable. As for example, a coin appraiser who has been shown a coin and has declared it good, but subsequently it was discovered to be bad coinage. If he has been paid for his advice, then he is liable. If he has not been paid, then he is not liable. On the other hand, if he is not an absolute expert, but the individual who came stated that he was relying on this person's opinion alone, then he is also liable (*Yad* Hil. Shirut.5). We can see from this that the matters which are involved are: (a) The expert status; (b) the exchange of money for the advice and evaluation; (c) the agreement between the individuals that this person is the only one to be asked for advice.

In the case of counseling ordinarily done by rabbis, there is no exchange of funds. The rabbi makes no pretense to being an expert in the field. In addition to that, a rabbi would and should not permit himself/herself to be placed in a position of being the only person consulted, particularly in a difficult matter. It is our common practice to refer difficult matters onward and even in other counseling situations to provide only tentative advice. Furthermore, following the rabbinic advice is entirely voluntary. This is not like a business transaction in which the paths are much clearer; it involves a great many areas: (a) theological issues; (b) to what extent was the party being counseled completely forthcoming; (c) was there an opportunity to see other parties or to gather additional information about this matter, (d) the party seeking counseling remains completely independent and may accept or reject the advice. From a traditional point of view, therefore, there is little or no ground for a suit to be brought against a rabbi as the counseling situation leaves so many areas open.

Malpractice Suits Against Rabbis

Today's Reform Responsa (Cincinnati, 1990), #50

Solomon B. Freehof

QUESTION: The Church Mutual Insurance Company founded by Lutheran ministers in 1897 has recently begun to sell malpractice insurance to ministers. This is an innovation and is based upon reports that there have been suits for malpractice when the minister gave wrong advice in counseling. However, a careful study of the situation revealed that, at the very most, there were only two such suits in the country. So it has been charged that the whole situation must have been blown up in order to sell insurance. However, nowadays when people are, as one person interviewed described it, "sue crazy," and when malpractice suits have already multiplied against doctors, lawyers and accountants, this type of suit against ministers may indeed increase. Therefore the question now asked is: To what extent, on the basis of Jewish tradition, is a rabbi to be held liable for harm coming from wrong advice that he had given. The question is still theoretical and, it is hoped, may never become practical, but it is worth preliminary investigation from the point of view of tradition. (Asked by Rabbi Lawrence J. Goldmark, La Mirada, California.)

ANSWER: In one of the suits the minister's lawyer said that the suit is an anti-constitutional interference with the separation of church and state. This may well be argued on the ground that while lawyers and doctors may not practice unless they are licensed by the state, ministers are not licensed by the state, but are licensed by their denomination. The only authorization which the state gives to the minister is that if he is already accepted by the church as a minister, the state then gives him the right to officiate at marriage, for the laws governing marriage are state laws. Yet even in the case of marriage, in which the state has authority over the work of the minister, is it at all conceivable that the minister could justly be sued for malpractice when a marriage at which he had officiated turns into a tragic mismatch? When one sees what a flood of suits could start in this all-too-frequent situation, it is clear that the courts cannot permit such suits. However,

in all other activities of the minister except marriage, the state has no authority. Nevertheless, the minister does a great deal of counseling and in this activity, he often overlaps the work of the psychiatrist who *is* a professional, licensed by the state and subject in a suit to punishment by the state. Therefore, when the minister in his counseling does psychiatric work, it is there that there would be the chief ground for possible malpractice suits.

Therefore, our specific question here is: To what extent does Jewish tradition hold a rabbi liable for harm resulting from his counsel? Actually there is some sort of liability, due to the historic function of the rabbi as judge. If a rabbi is part of a court (a *bet din*) in the case of some financial dispute and gives a wrong decision, then, if this decision cannot be reversed when the harm due to the mistake has already been done, there are circumstances in which the judge (i.e., the rabbi) must make up for the damage from his own property (*Hoshen Mishpat* 25). Therefore we would say that if some Jewish businessman would bring a case before a *bet din* of rabbis and a wrong decision was given, there are indeed, in Jewish law, certain circumstances under which the rabbi is liable to make restitution. But, even so, the businessman would not need to institute a malpractice suit in the civil courts, since Jewish law under which the cam was heard already provides for the restitution. But actually this situation is rare. Few people bring their business disputes nowadays to a *bet din* and if they do, then, considering the long and detailed development of Jewish law, there is almost no likelihood of such liability being incurred by the rabbi-judge.

The only potential cases in which a modern malpractice suit is likely to occur is in the field of family or personal counseling. We must therefore ask: Is such counseling an inherent function of the rabbi? It must be understood at the outset that personal and family counseling is indeed an essential part of the work of the Christian ministry. At the very beginning of the Christian ministry, Jesus said to disciples: Feed my sheep. (John 21:16). Since that beginning, the guidance of each individual Christian was a central responsibility of the pastor, whose very title means "the shepherd." The church has a name for this individual counseling. It is an historic name for an historic function, *cura animarum* (the healing of the spirit). In the Lutheran Church the term used is *Seelensorge*. The Latin and German terms could be translated into the Greek as "psychiatry." The "healing of souls" is the essential task of the Christian minister. So if a Christian minister errs in his

counseling, one could well argue (in a suit) that he has made a professional error, as a doctor who gives the wrong medicine has made a professional error.

This personal guidance has never been an essential part of the rabbi's task. He was, as mentioned above, the judge, but primarily he was the teacher. People would, of course, come to him for advice, as they would to any other person whom they respected as intelligent. But giving the advice was not an essential or required part of his profession. He is a teacher, not a pastor, a shepherd of the flock.

Of course in recent years counseling as a practice has developed among our rabbis. This is understandable. Partly it is due to the influence of the Christian environment and partially because in these confused and troubled times people increasingly come to the rabbi for advice. But unlike the Christian minister, the rabbi is not required by his profession to give advice in every situation. He may, if it seems proper to him, refuse to interfere. For it must be understood that to the extent that rabbis follow the practice of Christian clergy and give psychiatric advice, they do run the risk of such malpractice suits.

This at least we can say in defense of the rabbi in such a suit. We share the Christian defense of the separation of church and state, but we also have the additional defense that such counseling is not a required part of the rabbinical profession and therefore, such mistakes cannot be ascribed to professional failure. It is not malpractice on our part, because counseling is not the required practice of the rabbinical profession. It is simply advice given by one person to another.

What we can learn from the threat of such suits for which this clerical insurance company is now selling insurance, is that we should be careful in our counseling not to infringe upon the work of a psychiatrist. We must always remember and always to remember that while we do practice counseling when necessary, this counseling is not an essential part of the traditional function of the rabbinate, and that we will not be neglectful of our rabbinical duty if in certain cases we say "This situation is not one in which I can be of help."

Confidential Information

Contemporary American Reform Responsa (New York), #5

Walter Jacob

QUESTION: A rabbi has been told by one of his congregants that she suffers from a rare disorder which may kill her prematurely. The congregant now intends to be married. The woman in question has stated clearly that she will commit suicide if the information is divulged to her fiancé. Is it the rabbi's duty to inform the groom or should the information given in a confidential manner be kept secret by the rabbi?

ANSWER: The biblical prohibition against "being a tale bearer" is quite precise (Lev. 19.16), even when the information is true and accurate *(Yad* Hil. Deot. 7.2). However, in this case this biblical citation is opposed by others in the same chapter of Leviticus, "You shall not place a stumbling block before the blind" (Lev. 19.14). In other words, one must prevent someone from committing a sin or placing themselves in a position of personal or financial loss *(Had* Hil. Rotzeah 12.4, 1.13). Nor should "one stand idly by the blood of your neighbor" (Lev. 19.16). This has been interpreted to indicate that one should do everything possible to protect life and property from injury directly or indirectly, including providing information *(Yad* Hil. Rotzeah 1.13 *Shulhan Arukh Hoshen Mishpat* 426.1).

Hafetz Hayim (Israel Meir Kagan) argued vigorously for disclosure in a case specifically like this one especially as this may be a major factor in the prospective marriage and lack of such information may endanger the stability of the marriage in the future. Furthermore, in this instance, we are dealing with a life-threatening situation and not a vague problem which need not be revealed *(Sefer Hafetz Hayim* Hil. Rehilut #9).

In analogous situations involving physicians, there is some difference of opinion whether a doctor should volunteer or can be compelled to provide such information, but that is only because it may be contrary to the Hippocratic Oath. Most authorities feel that physicians may be forced to testify (Eliezer Waldenberg, *Tzitz Eliezer,* 13 #81; Jacob Breish, *Helkat Ya-nkov 3,* 136). However, Barukh Rakover argues to the contrary and feels that a physician

is bound by the oath (*Noam*, Vol. 2). A rabbi, however, would be duty-bound to divulge the information he possesses.

In this specific instance, the rabbi must weigh the danger of the woman committing suicide against the problem of not providing adequate information to the fiancé. The quotation "do not stand idly by the blood of your neighbor" here weighs heavily on the side of the woman (Lev. 19.16). If the rabbi is convinced that her threat of suicide is real, he may *not* divulge the information.

Testimony Against a Family Member

American Reform Responsa (New York, 1983), #170

Walter Jacob

QUESTION: Does a prisoner in a federal correction institution have the right to refuse testimony in a case which involves his father and other members of the family? What is the attitude of Jewish law in this matter? (Rabbi Stanley J. Garfein, Tallahassee, Florida)

ANSWER: The principle that governs all cases of the laws of the land in which we live is, of course, "dina d' malkhuta ("The law of the land is the law"). This talmudic principle has been applied in all matters except those connected with Jewish family law (i.e., marriage and divorce), and even in that area the decision of the Napoleonic Sanhedrin of 1806 gave civil law priority over Jewish law. This principle has been attributed by the Talmud to Samuel of the third century (Git. 10b; B.K. 113a; Ned. 28a; B.B. 54b; *Shulhan Arukh, Hoshen Mishpat* 369.6). Of course, in the Middle Ages Jewish communities were often autonomous and used the Jewish legal systems to govern other communities. The question arose only when there was a conflict between a Jew and a non-Jew, or

when a Jew chose to take his case to a non-Jewish court, something that was decried by the Jewish authorities.

The earliest record of a Jew handing a Jewish criminal who had injured non-Jews to a gentile court came from the Gaonic period (700–1000 C.E.; J. Mueller, *Mafteah*, p. 182). The responsa literature contains numerous examples of Jews testifying in non-Jewish courts and doing so willingly when the law of the land demanded it.

The codes summarize various other considerations. Clearly, one may testify to save oneself if punishment is threatened; then one is *moser be-ones*, and should testify before a non Jewish court (*Tur, Hoshen Mishpat* 388; *Shulhan Arukh, Ch.M.* 388.8ff; *Yad, Hil.* Chovel 8.2).

Furthermore, if the withholding of testimony will harm the community, then handing such an individual over to the government, as well as testimony, is mandatory (Isserles to *Shulhan Arukh, Hoshen Mishpat* 388.11). Testimony in criminal cases is every witness' obligation (Lev. 5:1; B.K. 55b), while in civil cases a witness may wait until summoned (*Shulhan Arukh, Ch.M.* 28.1). A witness must possess personal knowledge of the events (Isserles to *Shulhan Arukh, Ch.M.* 19, 28.1).

In our instance, it seems that we are not dealing with a government demand for testimony—as that would certainly have to be met—but with a request to volunteer testimony. The decision then rests in the hands of the individual involved.

He may wish to be guided by the principles surrounding family witnesses in a purely Jewish court. Members of the immediate family are not eligible to act as witnesses and are disqualified. The tradition interpreted the statement of Deuteronomy 24:16 that parents should not be put to death for their children or children for their parents as a prohibition against parents testifying against children or children against parents (San. 27b; *Sifrei Deut.* 280). The Mishna expanded this list of disqualified relatives considerably so that it included father, brother, uncle, brother-in-law, stepfather, father-in-law, their sons, and sons-in-law (San. 3.4). Later the rule was extended still further to include nephews and first cousins (*Yad*, Hil. Edut 12.3; *Shulhan Arukh, Hoshen Mishpat* 33.2).

A husband was disqualified in cases involving his wife (*Yad*, Hil. Edut 13.6; *Shulhan Arukh, Hoshen Mishpat* 33.3). Testimony from the individuals listed above for or against the accused was

not permitted in court, and it did not matter whether these relatives retained any ties with the accused or not (*Yad*, Hil. Edut 13.6; *Shulhan Arukh, Hoshen Mishpat* 33.3).

Jewish tradition, therefore, very clearly eliminated all relatives from this kind of judicial involvement in contrast to other legal systems. The ancient Greek legal system had no qualms about the testimony of relatives (W. Smith, *A Dictionary of Greek and Roman Antiquities*, p. 626). In Rome, such testimony was not excluded, but it was given little weight. In English common law, relatives, except husband and wife, may testify against or for each other (H. Roscoe, *A Digest of the Law of Evidence*, pp. 112ff).

It is clear, therefore, that from the point of view of a Jewish court, such an individual should not testify against any member of his family, but he must testify (1) if a criminal act endangers the community, or (2) if the law of the land demands such testimony in accordance with the principle "*dina d'malkhuta dina*" this may restrain bitter family feelings which might arise from such circumstances (Gulak, *Hamishpat Ha-Ivri* IV.1).

Informing on Others in Criminal Activities

Contemporary American Reform Responsa #6 (New York, 1987)

Walter Jacob

QUESTION: A prisoner has asked whether he is, according to Jewish law, duty-bound to inform on others in criminal matters with which he is charged. This will probably be part of "plea bargaining." What is his duty according to our tradition? (Rabbi W. J. Leffler, Lexington, Kentucky)

ANSWER: Jewish tradition states that information which, if withheld, would harm individuals or the community, either

through criminal activity or considerable financial loss, must be presented. This is based on a Biblical statement (Lev. 19.16) as well as later authorities (*Yad* Hil. Rotzeah 1.13; *Shulhan Arukh Hoshen Mishpat* 426.1; Elijah of Vilna *Biur Hagra, Hoshen Mishpat* 425.20; Isserles to *Shulhan Arukh Hoshen Mishpat* 388.11). Furthermore, in a criminal case every witness is obligated to testify if he possesses personal knowledge of the events (Lev. 5.1; B. K. 55b; Isserles to *Shulhan Arukh Hoshen Mishpat* 28.1).

It is also clear that a person is obligated to testify before a Jewish or non-Jewish court in order to save himself from threatened punishment. Under such circumstances, one is *moser beones* (*Tur Hoshen Mishpat* 388; *Shulhan Arukh Hoshen Mishpat* 388.8ff; *Yad* Hil. Hovel 8.2). We should note that there is no problem of testifying before a non Jewish court. We have records of a Jewish community handing a Jewish criminal who had injured a non-Jew to a gentile court as early as the Gaonic Period (700-1000 C.E.; J. Mueller, *Mafteah*, p. 182).

It is quite clear, therefore, that Jewish law requires an individual to testify and that there is no reason to hesitate.

Electronic Eavesdropping and Jewish Law

Reform Responsa for Our Time (Cincinnati, 1977), #6

Solomon B. Freehof

QUESTION: May information obtained through electronic eavesdropping be used as evidence in Jewish law? (Asked by Rabbi Richard F. Steinbrink, Saint Louis, Missouri)

ANSWER: Jewish law is basically religious (canon) law, and therefore it is not surprising that many of its rules are widely different

from those governing secular legal systems. Thus, the Jewish laws governing the eligibility of witnesses and the admissibility of evidence are much more severely limited than those of secular legal systems. For example, a gentile is not eligible as a witness in a Jewish court (except in the special case of freeing a woman for remarriage when her husband has disappeared, *aguna*). Also, a child may not be a witness, nor a woman, nor a gambler, nor may any man testify in behalf of a near relative.

Since the laws of evidence in Jewish courts are so different from those governing secular courts, it would seem meaningless to draw any analogies between the two on any matter involving the rules governing witnesses or admissible evidence. Yet such a question *can* be meaningful if we go beyond the actual rules (or certain rules) of evidence and try to reach the ethical basis upon which they rest. In this deeper sense, the older (Jewish) system may give some moral guidance in some of the newer legal problems. This is surely the meaning of the question here. What really is asked is: According to the *ethical* standards underlying Jewish legal procedure, would it be deemed morally right to use a tape obtained by electronic eavesdropping as evidence in a secular court case?

Of course, it is obvious that classic Jewish law could not possibly know of the modern devices whereby voices recorded on a tape can be repeated in the hearing of the court, and used thus as testimony of guilt or of financial obligation. Furthermore, as has been stated, Jewish law as to testimony is extremely strict in defense of the innocent, or the possibly innocent, and thus reveals an especially high ethical standard. Then let us assume that the sound of the voice from the tape may be considered the same as the voice of a witness testifying. Would such a witness be accepted as competent in Jewish law even though the tape is not a living witness?

First as to criminal law, even if it were accepted as a witness (assuming that for the moment), it would not be *sufficient* testimony, because in Jewish criminal law there must be two witnesses together in the court at the same time, both testifying to having observed the same crime at the same time. So, along with the tape, there would have to be a living witness as the second witness, and he would have to testify that he has personal knowledge through his own senses of the same crime to which the tape attests. The tape alone could not be admissible because

we would not have here independent witnesses. If it were possible for a living witness to attest the alleged fact, it is not likely that there would also be need of surreptitious eavesdropping. But at all events, the tape, even if it *were* acceptable as a witness, is invalid in Jewish criminal law unless there is another witness who can testify of his own knowledge to the same facts at the same time.

With regard to civil law, disputes as to debts, etc., the two witnesses do not need to have observed the facts in dispute simultaneously. However, there are certain definite restrictions to testimony, other than those mentioned above, which are relevant to our question. The crucial fact in Jewish legal testimony is that the witnesses must hear the words of the judges and the judges' warnings against false testimony, and they must submit to cross-examination by the judges (this is *always* the rule in criminal cases, and in case of doubt also in civil cases). It is for this reason that the preponderant weight of Jewish law is against testimony in writing (i.e., by affidavit); see Rashi to *Gittin* 71a). The *Tur* (in *Hoshen Mishpat 28)* cites Rashi's opinion, but adds that Rabbenu Tam permitted written testimony. However the *Shulhan Arukh* (ibid.) upholds the general rule that only *oral* testimony is acceptable. It is because the witnesses must hear the warning of the judges and accept cross-examination that deaf-mutes are considered incompetent to serve as witnesses in a Jewish court (see *Hoshen Mishpat 35:* 1 1 and also the *Tur*; see also Maimonides in *Yad, Hil. Edut, IX. 9).* Such restrictions are all based upon the Talmud in *Gittin* 71a, where certain rights are assured to deaf-mutes with regard to marriage and divorce, but they may not testify against someone else, since Scripture in Deuteronomy 17:6 says that only "from the *mouth* of the witnesses" can a man be condemned. There are, by the way, certain alleviations to this rule; for example, a woman who is an *agunah* may be freed from her unhappy state through the testimony of a deaf-mute. But this is testimony to help her and is, of course, a special case. In general, the law in all the Codes based on this Talmudic passage is that a deaf-mute is not a competent witness because he cannot hear the warnings of the judges or be subjected effectively to cross-examination.

The moral basis of this restriction is clear enough. No man can be justly condemned unless the witnesses and their testimony can be carefully scrutinized and weighed. For similar reasons (that the witness must hear the judge and may be

cross-examined), only oral testimony (but not written testimony), according to most authorities, is admissible. This certainly applies to the admissibility of an electronic tape. At best it is written rather than oral testimony. At worst it is equivalent to a deaf-mute because it cannot be questioned and it cannot be warned. If a living witness cunningly concocts a false testimony, he can be questioned and perhaps trapped in his deceit. But if a tape is cleverly faked, the tape itself is like a deaf-mute and cannot be spoken to.

Therefore one may say that by the moral high standards of Jewish court testimony, a tape cannot be accepted as a witness or as testimony.

Addendum

I consulted Eugene B. Strassburger, a prominent lawyer, and asked him whether any of the objections to electronic eavesdropping in American law are based upon reasonings analogous to those in the Jewish legal tradition. He answered that he has not seen a case where objection was made on the grounds (mentioned in the responsum) that the tape could not be cross-examined. He mentioned, however, the right of the people to be secure in their houses (i.e., privacy). Then he continued as follows: "The Fifth Amendment to the Constitution provides: 'No person ... shall be compelled in any criminal case to be a witness against himself.' Electronic devices by which a defendant in a criminal case is heard to make a statement against himself violate this amendment."

There are, indeed, similar regulations in Jewish law defending the privacy of private premises. One may not make a window overlooking a neighbor's court. The neighbor can object on the basis of *hezek r'iah* ("the damage of looking"), i.e., invasion of privacy (*Hoshen Mishpat* 154:6 ff., Maimonides, *Yad, Hilchot Shehenim* VII).

But more significant in Jewish law is the prohibition against a man being compelled to incriminate himself. The Talmud, in *Yevamos* 25b, speaks of a man's relatives being ineligible as witnesses, and then says: "A man is considered to be his own relative and therefore may not declare himself to be evil, or criminal." See Rashi to the passage in which he says: "A man may confess to a debt, but he may not make any confession

against himself in criminal law." So, too, Maimonides in *Yad, Edus* XII, 2. In fact, Jewish law seems to be even stricter than general law in this matter. Not only may he not be compelled to incriminate himself, but he may not incriminate himself even of his own free will. He is simply ineligible as a witness (even if voluntarily) against himself. Certainly by the electronic tape he is, as Mr. Strassburger says, made to incriminate himself. This is against Jewish law, as it is against American law.

Disinterment for Legal Evidence

Contemporary American Reform Responsa (New York, 1987), #110

Walter Jacob

QUESTION: May the body of a young person who was murdered be disinterred after a number of years have passed? New evidence has arisen, and it is the contention of the attorney representing the husband of the person who was convicted of murder that this disinterment will provide additional clues about the real killer. (H. B., Massachusetts)

ANSWER: This sad inquiry actually contains three separate questions. First, we must ask about criminal procedures, especially in cases which might lead to the death penalty. How far can we go to obtain evidence? Secondly, we must turn to the general question of disinterment, and finally, to that of autopsy.

It is clear from the Mishnah (Makot, Sanhedrin) that every precaution was taken in the case of capital offenses. The accused was provided with all conceivable opportunities to prove his innocence, and all possible evidence had to be examined. He had to be specifically warned by two witnesses (M. Makot 9.6), etc. A court of twenty-three had to be used (M. San. 4.1). Akiba and others sought to eliminate the death sentence entirely (M. Makot

10.6), This Talmudic line of reasoning made it very difficult to execute anyone. The crime and sentence were publicly announced with a plea for evidence which might prove the accused's innocence. Furthermore, an elaborate communications system was arranged between the courtroom and the place of execution so that any new evidence, even at the last minute, could prevent the execution (M. San. 6.1 ff). As our case is a capital offense, the statements and the intent of tradition apply. These indicate that in order to save the life, or to prevent an error in judgment in a capital offense, every effort to gain evidence on behalf of the accused must be undertaken.

Now let us turn to exhumation. Disinterment is not undertaken lightly in Jewish tradition. The prohibition rests upon a talmudic incident in which disinterment was suggested in order to establish whether the deceased was a child or an adult, and thereby settle a quarrel over property rights. In that instance, it was disallowed (B. B. 155a), because Akiba felt that the dead should not be disturbed. But that was not a capital case. Disinterment has also been prohibited in almost all instances with the exception of the following: a) in order to re-inter in the land of Israel; b) in order to reinter in a family plot, especially if the deceased died away from the city in which he normally resided; and c) in those instances in which the grave was threatened by hostile individuals or by an unforeseen natural event *(Shulhan Arukh* Yoreh Deah 363.1ff).

Whenever burial has taken place in a coffin, rather than merely in shrouds, disinterment has been more readily acceptable as the dead are disturbed less. In our case we are not dealing with the usual cases of disinterment, but with a more serious reason. In view of the intensive search for evidence in all capital cases, disinterment should be permitted in this instance.

Each cemetery has its own regulations, and every effort should be made to abide by them. However, in this instance, as an individual's freedom is at stake, disinterment should be encouraged.

Autopsy has been thoroughly discussed by J. Z. Lauterbach (W. Jacob, *American Reform Responsa*, #82) and S. B. Freehof (*Reform Jewish Practice*, vol. 1, [Pittsburgh PA.], pp. 115ff). As this autopsy will be of immediate benefit in a criminal case, even the more hesitant traditional authorities would permit it.

Insanity in Criminal Cases

Contemporary American Reform Responsa (New York, 1987), #7

Walter Jacob

QUESTION: Are there rabbinic opinions on insanity as a defense in a criminal trial? What is the status of the insane in criminal matters? (A. Adelstone, Flushing, New York)

ANSWER: When the Mishnah and the discussed individuals of limited ability, they frequently used the phrase *heresh shoteh vegatan*—the deaf, the insane and the minor; insanity included any serious mental imbalance. No one in these categories may be punished for their offenses, and they are considered to have limited legal liability (M. Erub. 3.2; R. H. 3.8; Meg. 2.4; Hag. 1.1; Git. 2.5, 5.8; B. K. 4.4, 5.6, 6.4, 8.4, etc.). The later Jewish codes continue this classification. The insane are not considered responsible for injuries to others, though others who assault them are liable for the usual punishments (M. B. K. 8.4, 87a; *Yad* Hil. Hovel 24.20; *Shulhan Arukh Hoshen Mishpat* 424.8). However, if the individual has lucid moments, in other words, if insanity is temporary, then he is considered responsible *(Yad* Hil. Mekh. 29; *Shulhan Arukh Hoshen Mishpat* 235.23). If the rights or the estate of persons of unsound mind need to be defended, the court appoints an administrator *(epitropos)* who looks after their interests. They are not entitled to damages in cases of insult or defamation of character (B. K. 86b; *Yad* Hil. Hovel 3.4; *Shulhan Arukh Hoshen Mishpat* 300.27).

The status of the insane in rabbinic literature is, therefore, clear. The discussion of the insane in the later responsa deals almost exclusively with problems of engagement, marriage. divorce or inheritance. Two problems remain for our discussion. How is insanity defined by rabbinic literature? What is temporary lucidity?

The Talmud attempted to define the insane as one "who wanders alone at night and spends the night in the cemetery and tears his garments" (Hag. 3b). This definition was immediately challenged by authorities on the same page, and no resolution was achieved. Others defined insanity to include individuals

who were self-destructive or eccentric (Git. 78a; J. Ter. 40b). It was ultimately left to the judges to assess the situation and make a judgement according to the evidence in each case (*Yad* Hil. Edut. 9.9). In order to assure an appropriate decision, the judges were required to possess some knowledge of all the sciences, including medicine (*Yad* Hil. San. 2.1).

Those temporarily insane are not considered liable for acts performed during periods of insanity. However, during times of lucidity, they are liable and could also act as witnesses (*Tos.* Ter. 1.3; J. Ter. 40b; B. B. 128a; *Yad* Hil. Mekh. *29; Shulhan Arukh Hoshen Mishpat* 235.23). The court must decide whether an act has been committed in a period of insanity or lucidity. Furthermore, an individual so intoxicated as to be totally unaware of his actions is considered temporarily insane, and is treated accordingly by the court (Er. 75a; *Yad* Hil. Ishut 4.18). The cases cited in the responsa literature, however, deal with betrothal and marriage, not criminal acts.

Although some guidelines have been mentioned, they are vague and the decision of temporary insanity is left to the court. Individuals who are considered totally insane are not liable for any act which they may commit.

Unknown Defect in Building Material

Contemporary American Reform Responsa (New York, 1987), #11

Walter Jacob

QUESTION: Our sanctuary and social hall contain asbestos tiles in their ceilings. The congregation is planning on removing them. At the last board meeting a directive was passed instructing our legal committee to file proceedings against an asbestos manufacturer. Is it moral to bring a liability suit against a manufacturer

who was unaware of the potential health hazard of his product when it was installed? (Rabbi M. Levin, Kansas City, Missouri)

ANSWER: This entire matter is governed by a simple biblical statement, "When you sell property to your neighbor, or buy anything from your neighbor, you shall not wrong one another" (Lev. 25:14). This law has been further developed in the Talmud and later codes. Maimonides made the seller responsible for disclosure of any defect to the buyer (Hul. 94a; *Yad* Hil. Mekhirah 18.1; *Tur Shulhan Arukh Hoshen Mishpat* 227; *Shulhan Arukh Hoshen Mishpat* 227.6; *Sefer Hamitzvot* Lo Ta-aseh #250). There is disagreement over the possibility of waiving such liability. Maimonides felt it could not be waived *(Yad* Hil. Mekhirah 15.6). Asher ben Yehiel disagreed *(Tur Hoshen Mishpat* 232.7); the discussion on waiver of responsibility was continued in the later responsa.

Traditional texts discuss specific items in which defects have been discovered. One of the primary grounds for recovering the purchase price involves an item which may have a dual use and the buyer finds it not suitable for his purpose. This would be true of eggs, which may be eaten or hatched, seed which may be consumed or planted, an ox which may be used for plowing or slaughtered for food, etc. If the buyer did not inform the seller of his intended used then he has no recourse (B. B. 90a; *Yad* Hil. Mekhirah 16.2).

In these instances, and others like them, the seller had to provide a sum which made good on the defect, but the items purchased were not returned to him. However, if the defect was major and in a permanent item like a building, then the buyer generally had the right to return the building to the seller, though he might settle for payment of repair costs. For example, Asher ben Jehiel spoke of a building which had been severely damaged by vandals during the period of the sale. In that instance, the damage was repairable, and so the seller was responsible for payment of the repairs. However, if the damage had been more serious, and if the item could not have been restored to its original state, then the seller would have been forced to take it back (Asher b. Jehiel, *Responsa,* Section 96, #7; Joshua Falk to *Tur Hoshen Mishpat* 232.5; Joel Sirkes to *Tur Hoshen Mishpat* 232.4).

Each of these instances dealt with defects which were readily discernible and not latent as in the case of the asbestos. Furthermore, they dealt with defects which were discovered in a

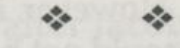
reasonable period of time, certainly before the item was heavily used. I have found no responsa which deal with a latent defect or cases in which damages and liability were claimed decades later.

The matter of damages is much more complex because it depends whether this situation is classified as *garmei* or *gerama*. *Garmei* implies liability and *gerama* does not. There is a considerable amount of discussion on these two terms without clear conclusions (B. K. 24b, 48b, 55b ff, 60a, 98b, 110a, 117b; B. B. 22b; *Tur Hoshen Mishpat* 232.21 and commentaries; *Shulhan Arukh Hoshen Mishpat* 232.20, 386.4 and commentaries). The general rule seems to be that the governing authorities impose damages when the public order makes it necessary or desirable. When the damages are indirect, can not be foreseen, and no public benefit is involved, then there is no liability (*Tur Hoshen Mishpat* 232.20; *Shulhan Arukh Hoshen Mishpat* 232.21). For a recent discussion of this, see Epstein, *Arukh Hashulhan Hoshen Mishpat*, Vol. 8, 386.1ff; M. Elon, Hamishpat Ha-Ivri, Vol. 1 (Jerusalem), pp. 173ff.

In each of the discussions cited above, the defect was found either immediately or after a reasonable length of time; it was apparent and not latent. That is not the case in the question which you asked.

We must, therefore, conclude that traditional Jewish law would not hold the seller responsible for defects of damages after a long period of time has elapsed, especially as the defect was latent and unknown to both buyer and seller at the time of the transaction.

The entire matter may also be considered under the general classification *dina d'malkhuta dina*, and as the courts of the United States have decided that the seller responsible in this matter and that it is for the public good, it would be permissible for the congregation on those grounds alone to bring a liability suit.



Freeing Hostages

Questions and Reform Jewish Answers (New York, 1992), #237

Walter Jacob

QUESTION: A man in my family has been taken as a hostage by bandits in South America. How far may the family and the community go in order to obtain his release? (Daniel Stern, New York, New York)

ANSWER: The discussion of hostages and their ransom is ancient; captivity as a hostage was considered a terrible fate. The talmudic discussion of a verse in Jeremiah came to this conclusion as captivity was the last of a list of horrors (Jer 15.2; B B 8a). The later tradition elaborated further, and Maimonides warned that numerous commandments were violated by anyone who ignored the plight of hostages or even slightly delayed their redemption (*Had* Hil. Matnot Aniyim 8.10; *Shulhan Arukh* Yoreh Deah 352). Among charitable obligations, the redemption of hostages was primary; it took precedence over feeding the poor or building a synagogue, and funds to be expended for this purpose could be moved from any other obligation (B B 8b). Even the sale of a Torah was permitted for the redemption of captives (*Seder Hahinukh* #613).

The primary obligation rested on the immediate family, yet the obligation was also communal. However, matters were slightly different if the redemption posed a danger to the community. So, for example, Meir of Rothenburg refused to allow himself to be redeemed as that would have impoverished the community and set a precedent for taking communal leaders hostage. He, therefore, died in captivity (H. Graetz, *Geschichte der Juden*, Vol.7 pp. 203 ff. 476 ff.).

The redemption of a hostage is a major *mitzvah;* all the members of the family and their friends should participate in it. In this instance, the community may also be appropriately involved. Your description indicates that the man was taken hostage by bandits; this act does not have broader political implications as, for example, the taking of hostages by the Palestinian Liberation Front. Such efforts at blackmail of Western govern-

ments or Israel must be resisted and rejected. There the community may be hurt by ransom efforts, and that is akin to the problem which Meir of Rothenburg faced. Here, however, everything within reason should be done by the family and the community to obtain the release of the hostage.

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Jewish Lawyers and Terrorists

Questions and Reform Jewish Answers (New York, 1992), #238

Walter Jacob

QUESTION: According to Jewish tradition, is a Jewish lawyer obliged to defend Arab terrorists who attempt to kill Jews in Israel if the lawyer is designated to defend them? Is a Jewish lawyer obliged to defend terrorists who attempt to kill people in general if the lawyer is designated to defend them? Is a Jewish lawyer obliged to defend a member of the American Nazi Party when the lawyer knows that the goal of the American Nazi Party is detrimental to the Jewish people? (Rabbi Jack Segal, Houston Texas)

ANSWER: We should begin by making it clear that the current system of appointing a lawyer or the hiring of a lawyer to defend appears late in our tradition. Although a person might have engaged someone to speak for him, this was usually not an individual who made his livelihood as an attorney. A representative akin to the modern attorney was used if the individual could not appear personally due to illness or distance or if one of the parties felt inadequate to the test of presenting a case. Most cases proceeded without an attorney. The traditional Jewish court procedure saw judges engaged in interrogation and so they did much of what attorneys do in the American courts. Various responsa mentioned attorneys and dealt with problems associ-

ated with them but not with our problem (Jacob ben Judah Weil *Responsa;* Meir of Rothenburg *Responsa;* Isaac ben Sheshet *Responsa* #235; Moses Isserles *Responsa* and others).

Although there is nothing like a court-appointed attorney in the traditional system of Jewish law, nevertheless, the tradition may provide some guidance for Jewish attorneys in the United States and in the State of Israel in which the courts function differently. In these systems, an accused individual engages an attorney or has an attorney appointed. What is the duty of a Jewish attorney under those circumstances?

In order to answer this question, we must ask ourselves about the purpose of a trial. Our concern is justice and that was expressed by the Bible, which demanded close cross examination of the witnesses (Deut 13.15), as the accused was perceived innocent until proven guilty. The accused must be present during the examination of each of the witnesses who are testifying against her or him *(Yad Hil.* Edut 4.1). Furthermore, the defendant must be personally warned by those who saw the crime or by someone else (San 30a; Git 33b; Kid 26b and Codes). The examination must concentrate on precise facts and not wander afield (San 32b; *Yad* Hil. Edut 18.2; 22:1 ff; *Shulhan Arukh Hoshen Mishpat* 15.3; *Responsa Rivash #266).*

There are strict rules against self-incrimination and no evidence of that kind is permissible (Ex 23.1; San 9b; Yeb 25; San 6.2; 18.6 and commentaries). The defendant may plead on her or his own behalf in front of the court before the court begins its deliberations (M San 5.4), but is not permitted to say anything which might prejudice the court against him or her (San 9.4). If the defendant is not capable of speaking for himself, then a judge may do so for him (San 29a). If the matter involves a death sentence, then the court remains in session until the individual has been executed so that if any new evidence appears, the execution may be halted (M San 6.1; San 43a and *Yad* Hil. San 13.1 95).

This is merely a sample of judicial safeguards against injustice. It demonstrates the great care given to the defense of the accused and the efforts made on his behalf by the ancient system of courts. Lawyers or other representatives have not been involved, but the spirit of the law demands that we seek justice. We, in many modern lands, do so through an adversarial procedure.

The spirit of traditional legislation would indicate that lawyers in our system must participate in this effort to seek justice. This

would apply to war criminals, terrorists, or others who may be tried in the United States or in the State of Israel. Jewish attorneys should consider themselves within the framework of tradition if they are appointed to such tasks or wish to volunteer for them. No one can, of course, be forced into such a position against their will. Attorneys help to assure that justice is done and that the accused has a reasonable opportunity to defend herself/himself within the framework of our judicial system. "Justice, justice, shall you pursue" (Deut 16.20) or "in righteousness shall you judge your neighbor" (Lev 19.15) will continue to be our guide.

Punishment of Minors

Contemporary American Reform Responsa (New York, 1987), #3

Walter Jacob

QUESTION: What is the status of the minor in Jewish law regarding punishment for serious offenses? (S. Levin, Pittsburgh, Pennsylvania)

ANSWER: It is clear from a wide variety of statements that the father is completely responsible for the acts of his minor children. So minors would not be punished no matter what their crime, but the father would face whatever monetary penalty is appropriate (M. K. 8.4; Yeb. 99b; Hag. 2b; Git. 23a; B. M. 10b; *Tur* and *Shulhan Arukh Hoshen Mishpat* 182.1, 348.81, 235.19).

In a similar vein, the father is compensated for any injury to his minor children, including any humiliation sustained by them (B. K. 86b). The value lost was figured as if they could still be sold into slavery, as was possible in an earlier period (B. K. 97b).

In the case of the seduction of minor females, the fine went to the father (Deut. 22.28). If the culprit married her, he paid no fine (Ex. 20.15). In case of rape, he had to pay a fine, marry her and

could never divorce her (Deut. 22.28). The Talmud increased the fine and included psychological damage (Ket. 29a).

Individuals above the age of maturity (12 for girls and 13 for boys) are considered responsible and may be punished as adults, but no capital punishment is permitted until the age of twenty (*Yad* Hil. Genevah 1.10).

If damage to property occurs due to the action of a minor, liability is incurred only if proper precautions have been taken by the owner (B. K. 29a, 55bff; *Tur* and *Shulhan Arukh Hoshen Mishpat* 421).

Memorializing a Known Criminal

Contemporary American Reform Responsa (New York, 1987), #146

Walter Jacob

QUESTION: A man has approached the synagogue with the wish to provide a fund. Through it he would like to remember his deceased brother, who died in prison as a convicted felon. Is it permissible to place a plaque bearing this name or to name a fund after him? (F. S., Chicago, Illinois)

ANSWER: The entire matter of memorial plaques has a dual history. On one hand, we have wished from the talmudic time onward to encourage gifts, yet we have tried to discourage boasts about such donations. The medieval Spanish scholar Solomon ben Adret (*Responsa* #582) stated that it would be appropriate to list the name of the donor for two reasons and the *Shulhan* Arukh (Yoreh Deah 249.13) agreed: a) in order to recall the specific wishes of the donor so that the funds would not be diverted to another use; and b) to encourage other donors through the good example of that individual.

The question of donations from people of doubtful reputation or those having a criminal record has also arisen a number of times. It was always felt that such gifts should be accepted, especially as it is a *mitzvah* to support a synagogue and it would be a sin to hinder its performance. There were objections to temple sacrifices by criminals, but these objections were not transferred to the synagogue (*Toldot Adam V'Havah*, Havah 23.1: Shulhan Arukh Orah Hayim 152.31 and commentaries). However, there was an equally strong feeling that individuals of dubious reputation should not be honored; *marit ayin* and the honor of the synagogue are involved here.

It is, therefore, clear that although there is a strong tradition for memorializing the deceased through plaques, we should not mention a convicted felon by name. We might affix a plaque which read, "Given by in memory of his dear brother," without the specific name. We should not go further than this.

Garnisheeing Wages

Contemporary Reform Responsa (Cincinnati, 1974), #57

Solomon B. Freehof

QUESTION: If the court orders the wages due to an employee to be garnisheed, and the employer is Jewish, has the employer the moral and religious duty to resist the court order, since the Bible prohibits withholding the wages of an employee? (Asked by Rabbi Joshua 0. Haberman, Washington, D.C.)

ANSWER: The Bible is specific in prohibiting the withholding of wages due to an employee (see Leviticus 19:13 and Deuteronomy 24:16). If, for example, the employee is a day-by-day laborer, he must be paid on the very day that his work is finished. This law is developed in full detail in the Talmud in *Baba Metzia* from 110b to

112b; and based upon the Talmud, the law is discussed fully by Maimonides in his *Yad*, in the laws of "hiring" *(S'hiros)*, Chapter 11. Then it is dealt with in the *Tur*, *Hoshen Mishpat* #339 and the same reference in the *Shulhan Arukh.*

There are certain circumstances under which even the strict Jewish law does not deem it a sin to withhold wages. According to some opinions, it is no sin to do so in the case of agricultural labor (evidently because the farmer himself gets his money only after the harvest. See the *Tur.*) Also, if the workingman knows beforehand that his employer has no money except on market-days, the employer is not liable for delay of payment till the market-day. Finally, the employer is never liable if the employee does not demand his wages. This is clearly stated in *Baba Metzia* 112a and in the *Tur* and in the *Shulhan Arukh* 339:10.

So it may well happen that the employee, whose wages are garnisheed by the law, may well appreciate the fact that his employer cannot violate the court order; and knowing that fact, he does not make the futile gesture of demanding his wages. Thus if he does not demand it (for whatever reason), the employer has committed no sin under Jewish law if he withholds the wages.

As to the moral principle involved, that may depend upon what sort of debt, for which the wages are being garnisheed. In the Commonwealth of Pennsylvania, for example, we have no garnisheeing of wages, except for the support of children and a wife (also for income tax). If it is to support children and wife, how could it be considered unethical for the employer to help in their support in this regard?

There is another ethical consideration involved. The sin denounced in Scripture actually involves two sins: a) the workman is deprived of what he has justly earned, and b) the employer dishonestly keeps (permanently or for a time) money belonging to the worker. But in the case of the garnisheeing of the wages to pay a debt (to a third party), while it is true that the workman is deprived of his just due, the employer at least does not have the use of the money withheld. It goes to satisfy the debt designated in the writ.

But actually the whole question is theoretical. The garnisheeing of the wages comes to the employer as a court order which he cannot fail to obey without legal penalty. The fact that he is compelled to obey the court order has special relevance in Jewish law. In all matters of civil law (such as these) the principle

of *dina d'malkhuta dina* applies, "The law of the land is the law." In such cases it is the duty (the *Jewish* duty) of the employer to obey the law. This principle of *dina d'malkhuta dina* does not apply in ritual or spiritual matters. A decree to violate Jewish law in such matters should be resisted even to martyrdom. But the decrees of a secular court in *civil* matters are laws which (by Jewish law) we are bound to obey. Therefore the employer has no moral or *religious* right to pay the man his wages.

Muggers and Money on Sabbath

Reform Responsa for Our Time (Cincinnati, 1977), #6

Solomon B. Freehof

QUESTION: An elderly Orthodox Jew, walking home from the synagogue on the Sabbath, was, of course, carrying no money. A hold-up man accosted him and, because the old man had no money to give him, shot and killed him. It was suggested that elderly Orthodox Jews, living in high-risk areas, should carry a token bill with them, say a ten-dollar bill, to hand over to the hold-up man and thus save their lives. Is there a liberal Jewish attitude applicable to this opinion? (Asked by Rabbi Reeve Brenner, Hebrew Center of Westchester, Tuckahoe, New York)

ANSWER: Non-Orthodox Jews do not hesitate to carry money on the Sabbath. Therefore there is no need for "a liberal Jewish posture" in this matter. The only type of permission to carry money that would be convincing to an Orthodox man would be that which is based firmly on Orthodox law. Let us, therefore, consider the strict halakhah on the question as to whether a man may carry money on the Sabbath if that act is likely to save his life in case he is held up.

First of all, there is no question that the carrying of money is forbidden on the Sabbath. (See Maimonides, *Yad, Shabbat 25:6*

and *Orah Hayyim* 301:33.) The reason for the prohibition is not directly biblical but is based upon the rabbinical concept of *muktsa*. There are numerous types of *muktsa*. The one that applies here is the *muktsa* prohibition to handle such objects as are normally used to perform the type of work which is prohibited on the Sabbath. Since, therefore, it is prohibited to do business on the Sabbath, and money is considered to be specifically "set aside" *(muktsa)* as an instrument for doing business, money may not be handled or carried on the Sabbath.

However, it is to be noted that in this very matter of carrying money on the Sabbath, there are some grounds for leniency. Isserles, in his note to the law in the *Shulhan Arukh (Orah Hayyim* 301:33), says: "Many permit the carrying of money on the Sabbath if one is afraid that if he leaves the money in his lodging, his money will be stolen." There are some discussions in the commentators as to whether the money should be sewn in the garments or carried loose. But be that as it may, Isserles says: *Nohagin l'hokel*: ("It is customary to be lenient in this matter.").

Now, our problem here is primarily how to persuade the pious old man to carry the money for his safety's sake. One could well argue with him as follows: Since it is permitted to carry the money in order to save the money from being stolen, should it not be permitted to carry the money to save one's life from danger from injury or death? Of course, this is, in a way, the reverse of what Isserles permits. He permits the money to be carried on the Sabbath in order that it *not* be stolen, and we here would permit it to be carried on the Sabbath in order that it could be stolen. However, as we have said, danger to health or even life is more important than safeguarding the money.

Further discussion of this problem should also consider the laws of healing the sick on the Sabbath. If a person is dangerously sick, all Sabbath laws must be set aside completely. This applies not only to the secondary Sabbath laws like *muktsa*, the carrying of money, but also the strict biblical laws, such as lighting fires, etc. *(Yad, Shabbat* 2:1 and *Orah Hayyim* 328, 329). Furthermore, this violating of the Sabbath for the sick must not be done surreptitiously but openly by adults and men of standing *(Orah Hayyim* 328:12 based on *Yoma* 84b).

Yet actually there are provisions in the law much more relevant to our question than the fact that money may be carried to save it, or that a dangerously sick person may be saved by means

which are in violation of Sabbath laws. The important and the direct law in this case is the law of *pikuah nefesh,* direct danger to life from accident, fire, violence. The law, as stated in the Talmud *(Yoma* 84b), and as codified in the *Shulhan Arukh* 329:1, 2, is clear and forthright. It is as follows: "All danger to life sets aside the Sabbath, and whoever is most active [in violating the Sabbath to save life], he is most praiseworthy." Mugging is clearly a source of danger to life, and if a life can be saved by carrying money, which is based only on the laws of *muktsa,* then certainly one is to be praised who can save a life by this violation.

Of course, it can be argued that we do not know whether the man might be mugged at all, or if mugged, whether or not the mugger would kill him. However, the law is also clear that when there is such danger of violence to life, we do not stop to count the probabilities. Thus, for example, if a wall falls, and if we think that someone is buried under it, but we really do not *know* whether or not a person is there under the ruins, though we suspect that he may be, or we do not know whether he is already dead or perhaps still alive, we must simply take for granted that there is danger of accidental death, and we dig into the ruined heap on the Sabbath *(Orah Hayyim 329:2).* This mugging situation is so frequent, especially in certain neighborhoods, that we may not stop to count the probabilities. We *assume* that the danger is present; and just as we are in duty bound to violate the Sabbath to save an endangered life, so the endangered person is equally in duty bound to save his own.

Maimonides, in his discussion of saving life on the Sabbath, cites the verse in Leviticus 18:5: "My statutes and ordinances which a man should do and live by" *(Yad, Shabbat* 2:3). To this he adds the talmudic amplification: "live by but not die by." This amplification of the biblical verse is derived from the Talmud *(Yoma* 85b) where, in the discussion of saving a man from danger, one scholar says: "Violate one Sabbath in his behalf that he may live to observe many Sabbaths." Clearly, then, it is a man's duty to save the lives of others regardless of whether the action involves violating the Sabbath. In fact, the law is that if we see a man attacked on the Sabbath, we may even prepare or use weapons to defend him, even if such actions are forbidden on the Sabbath *(Yad, Hil. Shabbat 2:24).* Obviously, too, just as a man is in duty bound to violate the Sabbath in order to save others, so a man is clearly in duty bound to save himself if he can. If, for

example, a wall fell upon a person, we must, as mentioned above, remove the debris on the Sabbath to save him; so too, certainly, if the man is only half-covered by the debris and has the strength to struggle, he is in duty bound to remove rocks and stones and dirt (on the Sabbath) in order to save himself.

The old man and those like him are actually in duty bound to violate the Sabbath (by carrying money) or even to carry some repellent, such as mace or the like, if this is likely to save him, as the Talmud says, "to observe many Sabbaths."

Collecting Synagogue Pledges through the Civil Courts

Recent Reform Responsa (Cincinnati, 1963), #44

Solomon B. Freehof

QUESTION: One of our congregations has used legal processes in collecting delinquent building pledges. Summonses have been issued to defaulting members, placing liens upon their property. Are there any precedents for this action? (From Rabbi Solomon K. Kaplan, Union of American Hebrew Congregations, Philadelphia, Pennsylvania)

ANSWER: The very fact that the question is asked reveals a feeling that it is wrong to bring Jewish religious disputes to the secular courts. Of course, it does happen in modern times that such matters have occasionally been brought to the courts in the United States, as, for example, disputes in Orthodox synagogues on the question of mixed seating, or questions of disinterment from Orthodox cemeteries. Nevertheless, whenever such lawsuits do come up, there is a general feeling in the Jewish community that the disputes should never have been brought to the courts—that to have done so was a *hillul ha-shem.*

This strong feeling against such actions is the product of a long tradition in Jewish law. The Talmud (b. Gittin 88b) denounces the resort to gentile courts. The *Takkanot* of the various medieval Jewish communities forbade Jews to resort to gentile courts. This tradition is recorded in vigorous language in the *Shulhan Arukh, Hoshen Mishpat* 26:1: "Whoever brings his case before the gentile courts is a wicked man, whose action amounts to blasphemy and violence against the Law of Moses, our teacher."

Of course that does not mean that Jews in the past never had recourse to the civil courts. There were circumstances when there was no other way to obtain their rights. If, for example, a debtor was influential and stubborn and refused to be sued in the Jewish courts, he could be sued in the civil courts (usually with the creditor getting express permission from the Jewish authorities). (*Hoshen Mishpat* 26: 2, 4, Isserles.) This procedure, as a last resort, is valid because gentile courts may (according to Jewish law) deal with matters of business debts. This limited validity is acknowledged by Jewish law because the "children of Noah" are understood to have been commanded to maintain courts dealing with civil law *(dinei mommonot).* (Cf. b. Gittin 9a-b.)

If the building pledges discussed in our question are to be considered merely as notes of debt, then, if there is no other way to collect them, it would be permissible to bring them to the civil courts for collection. But surely they are not precisely of the same nature as a business debt. They are rather what the law calls *sh'-tar matana,* a document of gift (*Hoshen Mishpat* 68:1). Jewish documents of gift cannot legally (in the eyes of Jewish law) be dealt with by the non-Jewish courts (*Hoshen Mishpat* 68:1).

In Jewish law itself, such pledges as certificates of gift are valid, legal documents. If, for example, Jewish law still had the executive authority which it possessed in past centuries, these pledges could be collected by force. The building pledges are equivalent to charity gifts, in general, and are deemed collectible even if the maker of the pledge changes his mind. The law is that the members of the Jewish community may compel each other to give charity *(kofin,* Yoreh Deah 256: 5).

To give *zedakah is* considered an inescapable religious obligation *(chova)* which even the poor must fulfill (Yoreh Deah 248:1). In fact, a promise made to give *zedakah* has the sacred status of a religious vow *(neder,* Yoreh Deah 257: 3) and, therefore, must be fulfilled without delay.

This serious concern with the legal validity of Jewish charity pledges is exclusively a matter of Jewish law. Non-Jewish law can have no relevance to it, unless we say that the pledges are also to be considered analogous to the taxes and imposts which the medieval community imposed upon its members *(missim v'arnunios)*. These, too, were collectible by compulsion. In fact, with regard to taxes and imposts, there are indications that occasionally, in some localities, the power of the civil government was called in to enforce payment. This resort to the "secular arm" seems to have been confined to Italy. Joseph Colon (Italy, fifteenth century) says (*Responsa* #17) that he sees nothing wrong in asking aid from the government in collecting the taxes imposed by the Jewish community upon its members. In fact, he adds, this has been the custom of many (Italian) communities.

Yet, after all, these taxes were to be paid over to the government, and the Jewish community would be endangered if they were not forthcoming It was understandable, then, that the Italian communities might, in desperation, call for secular aid in collecting them. But even in the case of taxes, there seems to be no evidence that the resort to government help was made by Jewish communities in other countries. Certainly this practice is not recorded in the general Codes.

The taxes and imposts were by their nature secular and civil. But a gift to the community for the building of a synagogue was a religious gift which was to remain within the Jewish community. Gentile authorities could not and would not be used to enforce an intra-community religious duty. There is only one exception to this, namely, the situation mentioned in the Mishnah (M. Gittin 9:8) in the case of a man ordered by the Jewish court to give his wife a divorce. If he refused this, gentiles might be asked to compel him to obey the mandate of the Jewish court. But even in that case the divorce is not a fully valid divorce (cf. *Tur* and *Perisha*, ad loc.).

Within the Jewish community, and in Jewish law, a pledge to the building of the synagogue is valid and enforceable. The same phrase used in the case of charity gifts is used for synagogue building gifts, namely: "The members of the community may compel each other ..." *(kofin zeh es zeh, Orah Hayyim* 150: 1). To enforce payment, the older communities used the power of excommunication *(herem)*.

When the Russian government forbade the Jewish communities to employ the *herem*, then the phrase "to compel," used

here in the *Shulhan Arukh*, seemed to reveal a violation of government decree. Therefore, in the *Shulchan Arukh* printed in Vilna, at the word "compel" there is an asterisk pointing to a footnote which reads, "by means of the government." This, of course, did not mean that the Jewish communities ever called on the Russian government to enforce this religious obligation. The footnote was added either by the censor, or else was added to disarm the censor, and to say that the community would not use the forbidden instrument of the *herem*.

It is clear, then, that, except for the time when Italian communities called for government aid in collecting taxes, the Jewish communities did not call upon secular courts to help them collect charitable or religious pledges. Jewish law considered that secular law could not validly deal with charitable pledges. And, in general, resort to gentile courts was held to be a sin.

The action of the congregation referred to, therefore, is contrary both to the letter and the spirit of Jewish legal tradition.

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Synagogue Contribution from a Criminal

Current Reform Responsa (Cincinnati, 1969), #14

Solomon B. Freehof

QUESTION: A man known or reputed to be a gangster wishes to make a contribution to the Temple. Should his gift be accepted? The question may also arise as to whether a plaque be put up in appreciation of his gift as is done with other generous donors. (From M.A.K.)

ANSWER: There is considerable discussion in the legal literature which relates to the question raised here. The chain of halakhic reasoning begins with the verse (in Deuteronomy 23:19): "Thou

shalt not bring the hire of a harlot or the price of a dog into the house of the Lord thy God for any vow; for both these are an abomination ...." Aaron of Barcelona, in his *Safer ha-Chinuch,* explains the reason for the prohibition as follows: If a lamb is brought to the altar in the fulfillment of a vow, its purpose is to purify the heart, but if one brings a lamb which had been given as the hire of a harlot, it would bring back lascivious memories of the sin.

The law is carried over to the Mishnah *(Temura, VI, 2)* and thence to the Talmud *(Temura* 29a If., *Baba Kama* 65b). In the Talmud the application of the law is generally restricted. There are opinions given, that the word "harlot" used in the verse applies only to sexual relations with a married woman (which could not be legitimized by marriage). Other opinions say that only the object itself (e.g., the lamb) may not be given. But if the object is changed (if it be converted into money) or if corn be given to the harlot and the corn is converted into flour, or olives into oil, then these converted objects are no longer unfit and may be brought to the Temple in payment of a vow. So Maimonides records this as the Law *(Hilchoth Issurei Mizbeach, IV,* 14): "Only the object itself (i.e., the payment in its original form) is prohibited to be brought to the altar." The "hire of a harlot," etc., is the only "dirty money" mentioned in Scripture as prohibited as Temple gifts, and even these are restricted to the "hire" in its original form.

But there is a further and more important question involved here. The law as given in Bible and Talmud applies only to the Temple in Jerusalem and the altar, etc. Can it be legitimately extended to apply also to the synagogue?

There is considerable doubt about the justification of thus transferring and extending the old Temple restriction to the synagogue. The doubt is clearly expressed by the *Magen Avraham* (to *Orah Hayyim* 153:21). He says that the law refers only to the Temple, and that no classic decisor has extended it to apply to the synagogue except Jacob Well. (I could not find the passage he refers to in the *Responsa* of Jacob Weil.) Therefore the *Magen Avraham* decides that (since there is doubt whether the prohibition really applies to the synagogue at all) all questions on the matter should be decided *l'kula,* i.e., permissively.

Magen Avraham's comment is in reference to the note of Moses Isserles (ad loc.) who does apply the law to the synagogue, and says that no sacred synagogue object or *Sefer Torah* can come from "the hire of a harlot." But he adds that money (if the gift is con-

verted into money) may be used. As a matter of fact, the application of the Temple law to the synagogue was made before Isserles (i.e., before the sixteenth century) by Rabbenu Yeruchem (of Provence, fourteenth century). In his *Toldoth Adam V'Chava* (Section *Chavah*, Path 23, part 1), he says that "the hire," etc., may not be used for a *Sefer Torah* or for synagogue lights, etc. But he also says (in reference to Temple times) that if a man gave money and she bought an animal, it would be permitted on the altar (because she did not give the object that she received).

So as far as the law is concerned, it is clear that as long as the man you refer to does not give the actual money (coins or gift) which changed hands in the criminal transaction, it is not prohibited by the halakhah.

However, our present concern is not restricted to the letter of the law, even though it does have weight with us. We are concerned also with the moral effect upon the community if we accept such a gift. This is a delicate matter and must be carefully weighed. In my judgment you *should* accept the gift, because it is his obligation (a *mitzvah*) to support the synagogue and we have no right to prevent a sinner from performing a righteous act. For example, it is a *mitzvah* incumbent upon a *Cohen* to bless the people (in the *duchan*). But suppose a *Cohen* has committed a grievous sin, should we allow him to bless the people? To which Maimonides says *(Hilchoth Tefilla XV*, 6) that he must perform the *mitzvah*. He says: "We may not tell a man to add to his sin by neglecting a *mitzvah*."

So it is in this case. He, as a Jew, has the duty to support the synagogue according to his means. We have no right to prevent him from doing his duty.

But as to putting up a plaque honoring him, that should not be done. Of course, in general, Jewish tradition favors recording and publicizing the names of donors in order to encourage other donors and also in order to prevent a specific gift-object being used or melted down for another purpose. (See Isserles, *Yoreh Yeah* 249:13, and the whole discussion in *Recent Reform Responsa*, p. 203) Nevertheless, the putting up of a plaque would also be honoring him as a person, and such a man is not one whom the synagogue "delighteth to honor."

Yet even in this case, something constructive can be done. If he wishes to honor his parents or some other close relative, a plaque can be put up in their name and his name included as the

donor. In this case, besides giving a gift to the synagogue, he is honoring his parents, which makes it a double *mitzvah.*

To sum up, the money itself is changed from its original form and all authorities agree that it is acceptable. As for the donor, it is his duty to support the Temple according to his means and we have no right to prevent him from doing his duty. As for a plaque, he should not be so honored in his own right, but if he wishes to have a plaque put up in memory of a close relative, such a plaque should be put up, and his name mentioned on it as the donor.

A Criminal as a Member of the Congregation

Questions and Reform Jewish Answers (New York, 1992), #41

Walter Jacob

QUESTION: A member of our congregation was (several years ago) convicted of brutally murdering his wife by repeatedly stabbing and drowning her in a bathtub in the presence of one of his children. He is serving a lengthy prison term and shows no remorse as he claims to have acted in self-defense. His children live with members of the congregation and attend our religious school. The man is still listed on the congregations membership roster. May we expel him from membership? (Los Altos California)

ANSWER: We must ask ourselves about the purpose of expulsion from a congregation, which is the equivalent of the *herem* or *nidui* in past ages. At times, the *herem* was invoked to protect the congregation or to indicate that certain kinds of action were considered reprehensible and would not be condoned by the community. This power was invoked for criminal acts, various types

of dubious financial transactions, rebellion against the existing religious or governmental authorities both Jewish and gentile, or any person whose deeds seriously threatened the community. On other occasions the *herem* or *nidui* was used as a way of punishing an offender and forcing that individual to repent and return to the community. Maimonides listed the twenty-four possible causes for imposing various forms of the ban; they were casually mentioned in the *Talmud* (Ber 19a; *Yad* Hil. Talmud Torah 4.14; *Shulhan Arukh* Yoreh Deah 334.43). We should also note that in the last century the *herem* was used in unsuccessful attempts to quell liberal tendencies in various European communities. In other words, this was part of the struggle between Orthodoxy and Reform.

The various forms of exclusion, *nidui* and *herem*, were imposed for limited periods and seldom permanently. Furthermore, the bans remained in force only as long as the individual did not change his/her ways. The bans meant social and religious ostracism so no one could associate with the individual on a social basis or in business relationships. The individual could not be counted as part of the *minyan* or as part of *mezuman*, and his children were not circumcised or married *(Shulhan Arukh* Yoreh Deah 334.10 and Isserles). For most purposes he was treated as a non-Jew *(Shaarei Tzedeq 4.5)*. He or she was also excluded from all congregational honors and privileges. As the punishment was so severe, some rabbis abstained from using it while others sought to limit its range (Solomon ben Aderet *Responsa V #238*, etc.). The *herem* did not necessarily preclude attendance at services or worshiping with the congregation although it often did. The authorities always hoped that the individual under the ban would repent, and this was considered as possible to the very end of life. Even convicted unrepentant murderers, who were executed, were buried in the Jewish cemetery albeit in a separate corner; they were considered a part of the community. Burial itself was considered an act of possible repentance; it was mandated in order to show proper respect for the human body *(Semahot* II; San 47a; *Yat* Hil. Avel 1.10; *Tur* Yoreh Deah *334; Shulhan Arukh* Yoreh Deah *333.3)*. Apostates, who were frequently a thorn in the side of the Jewish community, were also still considered part of the community; they were permitted to be buried in Jewish cemeteries for two reasons: a) In order to spare the feelings of the surviving Jewish family mem-

bers; and b) if they died suddenly, on the assumption that they had actually repented just before their death.

Clearly the community does not need to distance itself from this murderer in order to demonstrate abhorrence of his crime. We might, therefore, exclude this individual from membership in order to punish him, but it is doubtful whether this would be an effective tool. We might rather say that given the conditions of modern Jewish life in which a large percentage of individuals remains unaffiliated, we should encourage the affiliation of all Jews with the hope that those who are criminals or on the borderline of legality may be moved toward an ethical and moral life. We would make an exception only for individuals who represent a clear danger to the Jewish community (like Messianic Jews, certain political offenders, etc.). This particular individual can, of course, not attend synagogue services but the fact that he continues to be informed of congregational activities and receives the regular mailings may prompt him in a positive direction.

As an individual who is a criminal and has been convicted, he should be denied all special rights and privileges. He can not claim any of the honors or privileges normally accorded to a member of the congregation *(Shulhan Arukh* Orah Hayim 153.21 and commentaries; *Toldot Adam Vehavah 23.1).* This would include those privileges normally associated with his status as a father, he may, for example, be excluded from participation in any rites or services connected with his children. His name need not appear in the published directory of the congregation. As we normally exclude members who may be somewhat in arrears in dues payment, we may certainly exclude a member who has committed a serious offense.

This individual should be retained as a member of the congregation with the hope that he will ultimately repent and change his attitude. He may, however, be excluded from all privileges and honors normally due to members of the congregation.

An Unworthy Man Called to Torah

Current Reform Responsa (Cincinnati, 1969), #167

Solomon B. Freehof

QUESTION: At the regular Sabbath service, it is the custom of the congregation to call up two men to recite the blessings over the Torah reading. One Sabbath morning after the service, an officer of the congregation protested the fact that a certain man had been called up to the Torah that day. He said that the man (who was a lawyer) did not have a good reputation in his professional career. Is it justified to debar a man from being called up to the Torah because his character is open to question? Or is his reputation or character irrelevant to his being called to perform this religious function? (Prom C.G.B., Pittsburgh, Pennsylvania)

ANSWER: The question asked is of considerable importance because the answer given to it might well be applied to various other religious functions for which people are called up to the *bima*. The subject has been discussed sporadically in the literature. Simon ben Zemach Duran (fourteenth–fifteenth century, *Tashbetz* II:261) was asked whether unmarried youths may be prohibited from reading the *Torah*, either because the honor of the *Torah* requires only mature married adults to be called or because an unmarried youth could not remain clean-minded. He answered that according to the law, a young man is permitted to be called up to the *Torah*, and adds that even sinners are not forbidden to be called to the *Torah*; but, nevertheless, if the congregation, in order to make "a fence against evil," desires to forbid certain groups to come up, the congregation is always permitted to do.

Duran is cited in a recent volume of responsa, *Mispar HaSofer*, by Isaac Zvi Sofer (Jerusalem, 1961, Responsum 5) not with regard to the calling up of young unmarried men, but with regard to the more characteristically modern question as to whether a public violator of the Sabbath may be called up to the *Torah*. Sofer follows the decision of Duran, namely, that whatever be the actual rights of the individual in this matter, the congre-

gation has, always, the right as a congregation to make decisions excluding sinners from being called up. He adds that many Hungarian congregations have long made such decisions as a "fence against evildoers."

The difficulties involved in this question are reflected in the very wording of the dispute as it was presented to Simon ben Zemach Duran. Some of the disputants considered that what was involved was *kevodei ha-Torah,* the honor due to the Torah, and therefore the dignity of the service. Other disputants insisted that to come up to the Torah reading was an obligation, a *mitzvah,* and therefore we have no right to keep a man from his religious duty.

The fact is that the legal literature never clearly defines the true status of this function. For example, is being called up to the Torah to be deemed as a religious duty, incumbent upon every Jew, just as praying three times a day is a duty? If it is a duty, then it would not be possible to debar a man from it, and thus prevent him from performing a *mitzvah.* Maimonides says *(Hilchot Tefilla, XV,* 6) in a somewhat analogous situation, speaking of a priest who had sinned: "We do not tell a man to add to his sin by neglecting a *mitzvah."*

But being called up to the Torah may not be a *mitzvah* at all. It may be a *right* that any Jew can claim and, therefore, could protest if he were not called up to the Torah after a long time. There is no doubt that many pious Jews consider this a right which they can demand, and object if they are not called up. The Talmud *(Berachos* 55a) says that if a man is given a Torah to read and does not read it, his life will be shortened. Therefore it is believed by some that to refuse to go up to the Torah shortens one's life (see *Yesodei Yeshurun* II, 201). A Yemenite, some time ago in Israel, sued the officers of his congregation on the ground that they were prejudiced against him and had not called him up to the Torah for a long time. He was suing for what he called his rights as a Jew. Certainly many Jews have that feeling, whether it is so in the law. Then again, it may be neither a duty on a man's part which he must fulfill, nor a right which he may demand, but a privilege which the congregation confers. In that case, the congregation can bestow that privilege upon whomever it deems worthy and withhold it from whomever it judges unworthy.

Since this basic definition of what the status of the ceremony is (duty, right, or privilege) has not been clarified in the law, the probabilities are that the status is vague and that it has the nature

of all three of these possible classifications. It is necessary, therefore, to see to what extent it partakes of each.

Is it a duty, a *mitzvah*, incumbent upon every Jew, to be called up to the Torah? When a boy who is to be bar mitzvah is called up to the Torah, his father is required to recite the blessing *(barukh sh'petorani)*. Now, clearly in this case, this is a religious duty incumbent upon the father. How could we possibly prevent him from performing this *mitzvah*, even if he were a notorious sinner? Yet, even in this case, it is to be observed that it is doubtful whether the blessing is really required. The requirement is found in a note by Isserles in *Orah Hayyim 225:1*, and even he is uncertain about it and, therefore, suggests that in reciting the blessing, the father should leave out God's name (a practice which is followed in the case of all blessings of dubious validity, so that God's name be not recited in vain). If, then, it is not, broadly speaking, a duty to go up to the Torah, is it a right which a Jew can claim? To some extent this may be so. Certainly a priest can count it as his right to be called up to the Torah first. The law frequently discusses who should be called up to the Torah, after the priest and the Levite have been called up for the first two portions: a bridegroom in the week of his marriage has precedence over a bar mitzvah; next, a father whose child is circumcised that week; then a mourner, on his *yahrzeit*. Are all these rights which a man can demand? The most that can be said is that they have become customary rights. The law does not make them firm rights, but a man can well be aggrieved if he is denied them. If, for example, someone gives a large sum of money for the privilege of being called up, the old congregations would certainly call him up, and no one of the categories above would feel that they had a right to dispute.

Certainly the calling up partakes, also, of the nature of a privilege because the congregation often calls up a man in order to honor him. It will call up the rabbi for the third portion, which is the first to which a non-priest or non-Levite can be called up. That honor is certainly involved in the Torah reading is clear from the statement in b. *Megilla* 23a, where it is said that while women may be called up as one of the seven on the Sabbath, we do not call up women because of "the dignity of the congregation" *(mipne kovodei ha-tzibur)*. Thus the dignity and the propriety of the situation involved is a significant consideration.

It is possible to decide the matter more closely than merely upon the vague fact that being called up to the Torah partakes

somewhat of the nature of all three, a duty, a right, or a privilege. Ephraim Margolies, the famous scholar of Brody (1762–1828), wrote a book dealing specifically with the questions involved in the reading of the Torah (*Sha'arei Ephraim*, many editions). In Section 1, paragraph 32, he discusses who should not be called up to the Torah. Most of this discussion is based chiefly upon two passages in the *Shulhan Arukh* which provide some material analogous to our problem. One in *Orah Hayyim* 128 deals with sinful priests and their rights to go up to bb# the people; and the other in *Yoreh Deah*, 334 (also *Orah Hayyim* 55:11) speaks of a man who has been put under ban, as to whether he may be included in the *minyan*, etc.

The implications of these two laws and their bearing on our question about calling an unworthy man up to the Torah have been rather fully explored in an interesting responsa sequence. It is found in *Shetei Helehem* (331) by Moses Hagiz, a Palestinian rabbi who lived in Leghorn and Amsterdam (1671–1750).

The incident which evoked this series of responsa throws some light on the social conditions of the time. In one of the Sephardic congregations, a man embezzled the money of the *chazan* and ran away with the *chazan's* wife. The guilty couple fled to Spain, but terrified by the Inquisition, they came to London. Meantime, the *chazan*, in poverty and anguish, died. The culprit in London was told by the *Chacham* to make a public confession of guilt. This he did in the synagogue, in the presence of the congregation. Thereafter he was frequently called up to the Torah. One Yom Kippur, the brother of the dead *chazan* was in London and saw this man holding the Torah at *Kol Nidre*. He bitterly protested. He said that this man had not returned the embezzled money or made any attempt to do so; his repentance is, therefore, insincere, and such a scoundrel should not be called up to the Torah.

Although this was a quarrel within the Sephardic community, many Ashkenazic scholars were consulted, as well as the rabbis of Mantua, etc., and among the Ashkenazim were the famous scholars, Jacob Reischer of Metz (*Shevut Jacob*) and Jacob Emden of Altona. Between them, they dealt with the implications of the references to the sinful priest in *Orah Hayyim* and the excommunicated man in *Yoreh Deah*. Most of the opinions were to the effect that since the man had made no attempt to restore what he had stolen, his repentance is incomplete and, therefore,

he should not be called up to the Torah. This would indicate the feeling, at least on the part of most of the scholars, that a non-repentant sinner should not be called up to the Torah. This opinion is generally based on the *Orah Hayyim* statement that if a priest has committed certain crucial sins, such as marrying a divorced woman, wilfully defiling himself by contact with the dead, then if he is not repentant, he not permitted to bless the people. Two of the scholars, one anonymous and the other Jacob Emden, say that this is a bad analogy. A priest, if he repents, may bless the people because blessing the people is a *mitzvah*, a commandment imposed upon him ("Thus shall ye bless," Numbers 6:23). Thus it is clear in the minds of these scholars that being called up to the Torah is *not* a commandment before which we may not put obstacles.

As for the analogy with the law in *Yoreh Deah*, that a man who is under ban may not be counted to the *minyan*, Jacob Emden says that the law clearly states that only the man who has been officially put under ban is debarred. As long as a sinner has not been put officially under ban, he may still be counted to the *minyan*. This sinner in London has not been put under ban officially. Therefore he may still be counted to the *minyan*.

Jacob Emden then adds that being called up to the Torah is less important than being counted to the *minyan*. Women and children, although they may not be counted to the *minyan*, may, nevertheless (according to the Talmud, *Megilla* 23a) be called up to the Torah. So it is conceivable that this wicked man in London could be excluded from the *minyan* and yet be called up to the Torah. But Jacob Emden says that since he was not put under ban, and since, anyhow, being called up to the Torah is not as strict a matter as being counted to a *minyan*, then it might be a kindness to let him be called to the Torah. This might help him towards righteousness. Besides, he adds, we "must not close the door in the face of the would-be repentant." In fact, Ephraim Margolies in his handbook says that if it is not definitely proved that a man is a sinner, we ought to allow him to be called up.

Ephraim Margolies goes into specific details about who should not be called up. A man who is known to have taken bribes should not be called up to the passage dealing with justice and laws; and a man whose wife neglects the mikvah, etc., should not be called up to the passage which deals with these matters. On fast days, a man who is not fasting is not called up to the

Torah (*Shaare Ephraim* I, 17). The commentator, Shaarei Rahamim (Sabbetai Lifschitz) bases an explanation of these selective restrictions upon the *P'ri Megadim* (Joseph Teomim) to *Orah Hayyim* 141, end of paragraph 8, in which he indicates that such a man would be bearing false witness to the passage being read. But in spite of these selective restrictions, where there would be a shocking contrast between the reading from Scripture and the character of the man called up, Margolies concludes that, in the spirit of Jacob Emden: "If we call him up and some indignant worshiper scolds him, the embarrassment may lead the sinner to full repentance." The commentator Shaarei Rahamim to this passage in Margolies adds another leniency as follows: Although it is not permissible to call a blind man to the Torah, nevertheless we do call up blind people and illiterates because they do not read the Torah and we rely upon the reading by the official reader. Thus, he continues, we can call up sinners who should not be permitted to read the Torah themselves because nowadays we count on the reading by the official reader. (See also Jehiel Weinberg in *Seridei Esh*, II, as to Sabbath violators called to the Torah.)

We may therefore conclude as follows: While it is not clear in the law whether being called up is a duty, a right, or a privilege, the ceremony clearly partakes of each of these. A man of dubious reputation should not be called up for certain specific passages, where his character contradicts the reading. Nor, of course, should a notoriously evil man, such as the one mentioned by Moses Hagiz, be allowed to shame the congregation by being called up to the Torah. But in general, in less heinous offenses, as long as the man has not been excluded or ostracized by the community, we should not "shut the door in his face." We should always consider the honor of the congregation, yet be lenient and avoid complete exclusion.