

Contemporary Halakhah

Jonathan Sacks

Halakhah is often thought of as a mechanical process in which Jewish tradition is brought to bear on a problem and yields a single unequivocal answer: permitted or forbidden, valid or invalid, pure or impure. If this were so, a *posek* (halakhic authority) would be distinguished by his technical mastery of the literature alone.

But this does grave injustice to the situation. Some problems brought to the court of halakhah are inherently complex, and the role of the *posek* is anything but mechanical. How is the question to be framed? Which sources are relevant to it, and which, though they seem to be relevant, in fact address a different situation? How is a balance to be struck between direct precedent and the surrounding universe of broad halakhic and aggadic principles? Should one confront the problem in isolation or in its human setting – in the context of the people, place and time concerned?

These are matters calling for judgement or what used to be called wisdom, and the great *posek* is distinguished precisely by this quality. It needs not only total familiarity with the halakhic tradition, but also an immersion in all aspects of Jewish spirituality, so that one's intuitive responses are immediately recognisable as *da'at Torah*. This is the picture Maimonides drew of the 'sage' (*Hilkhot De'ot* ch.1), and is something of what is meant by the term *gadol ha-dor* (great authority of a generation).

In this review we consider three problems recently discussed in the halakhic literature, all of which share the quality of situational complexity. In each case the widest resources of halakhah are brought to bear on questions which do not admit of a simple answer. As well as their intrinsic interest, they show the multi-levelled character of the halakhic process.

Women's Prayer Groups

The impact of the feminist movement on Jewish life has been the cause of major controversies in America in recent years. In a previous *L'Eylah* (vol. 2 no. 5) we reviewed the sensitive responsum of the late R. Moshe Feinstein on the Women's Liberation movement. That response, deeply affirmative of the dignity and status of women in Jewish life, nonetheless sounded a warning note against the politicisation of halakhah (*Iggrot Moshe*, O.Ch. 4:49). It is misconceived and even heretical, he stated, to exert public pressure to bring about changes in Jewish law. Torah, being eternal, is concerned with norms that apply to most cases at most times. It does not yield to local conditions or public opinion.

One current attempt by Orthodox women to secure greater self-expression within – as it seemed – the halakhah is the organisation of women's prayer groups. There are several in New York, usually meeting monthly. They do not claim to be *minyanim* in the formal sense of constituting a quorum, and they avoid prayers and blessings that require a *minyan*. Their membership is of impeccable Orthodoxy, and several of the groups were convened with the assent of their local Orthodox rabbis.

Nonetheless, in reply to a question by Rabbi Louis Bernstein, President of the Rabbinical Council of America, five teachers of the Rabbi Isaac Elchanan Theological Seminary (Yeshiva University) issued a responsum condemning such groups. The decision was amplified by one of its signatories, Rabbi Hershel Schachter, in an article in the periodical *Bet Yitzchak* (vol. 17, March 1985, pp. 118-134).

He begins by pointing out that since women do not constitute a *minyan* for the prayers that require it (Berakhot 45b, Sh. A. Orach Chayyim 55:1), by praying in their own group instead of with men in the synagogue they thereby miss participation in these prayers. This applies also to the reading of the Torah, of which the saying of *Borchu* – which requires a *minyan* – is an essential component.

At another level, there is the question of the impression such groups create. Although halakhically women's prayer

groups are gatherings of individuals, they create the misleading impression of being, or aspiring to be *minyanim*. Wittingly or otherwise, this is a distortion and should be avoided.

The very act – by women or men – of breaking away from the main synagogue to form a separate group conflicts with the principle of *be-rov am hadrat melekh* ('In the multitude of people is the King's glory', Proverbs 14:28). For this reason a number of authorities forbade the formation of break-away *minyanim* if there was space for them in the main synagogue (see *Magen Avraham* 154:23; *Responsa Ktav Sofer*, Ch.M. 39; *Responsa Meshiv Davar* 1:46).

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Turning to the more delicate and substantive part of his argument, R. Schachter raises the question: by what criteria are we to judge new customs? Halakhah is clearly not static, he says. "Not a day passes in which the Holy One, blessed be He, does not teach a new halakhah in the heavenly court" (Gen. Rabbah 49:2). However, particular care is needed for any innovation. Two criteria must be satisfied. First, its *content* must be appropriate – it must protect some Torah ordinance, or reflect some attested opinion. Second, its *motivation* must be unimpeachable: it must be *lishmiah* (i.e., without ulterior purposes).

The famous example is Rabban Gamliel's request to the sages: "Is there anyone among you who can formulate a blessing relating to the *minim* (the paragraph in the Amidah relating to the 'slanderers')?" Shmuel ha-Katan arose and composed it" (Berakhot 28b). As Rav Kook and Rav Soloveitchik point out, the question was not who was technically able to compose the prayer, but rather who could be sure of doing so without invidious intent, since it called for the downfall of heretics. Only Shmuel ha-Katan, whose guiding principle was, 'Do not rejoice when your enemy falls' (Avot 4:19), could be relied on to do so with complete purity of motive.

R. Schachter cites in this context the responsum of R. Jacob Sasportas (c. 1610-1698, *Responsa Ohel Yaakov* no. 70).

cited in *Gilyonei Maharsha* to Y.D. 246:8) in which he declares that "a good custom that has been established by a bad man should not be followed". (Sasportas was a fierce opponent of the Sabbatean movement). The pre-war European *poskim* made a point of not sanctioning any new custom without the most careful consultation with their colleagues and peers. R. Schachter reports that both the late R. Moshe Feinstein and – *levahdil ben chayyim lechayyim* – Rav Soloveitchik expressed their opposition to women's prayer groups. He implies that those rabbis who sanctioned the groups did not properly solicit the opinion of major authorities, and concludes that the motivation of the groups is questionable: innovation for its own sake, a desire for publicity, and perhaps even rebellion against tradition.

A number of authorities were opposed to changes in custom. As for a custom which relates to the congregational as opposed to individual conduct, R. Moshe Soloveitchik held that someone who broke with it was guilty of 'separating from the community' – a major offence which denies the transgressor a share in the world to come (Hilkhot Teshuvah 3:11). One authority (Responsa *Imre Yosher* 2:178) forbade changes in synagogue practice under the rubric of the verse, "All this is put in writing as the Lord has made me wise by His hand upon me" (I Chron. 28:19) – David's words to Solomon in instructing him in the building of the Temple. From this we learn that no changes are to be made to the Temple without Scriptural warrant (Sukkah 51b), and by extension there should be no changes in the synagogue. (The innovation, though, to which *Imre Yosher* was opposed – having the *chuppah* in the synagogue in front of the ark – is standard practice in most British Orthodox congregations).

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However, the heart of R. Schachter's opposition is the *provenance* of the women's groups – who they have been influenced by and what line of potential development they represent. They are a symptom, he says, of the Women's Liberation movement, a group he accuses of licentious intent (*peritzut*) by blurring the boundaries between the sexes. A practice which is licentious, even if not idolatrous, is forbidden under the heading of *chukkot ha-goy* (Rema, Y.D. 178:1).

All the more must one be careful not to imitate non-Jewish practice in prayer. Moses warns the Israelites not to say: "Now, how did these nations worship their gods? I would also like to try such practices" (Deut. 12:30; see Rambam *ad loc.*). This consideration lay behind R. Soloveitchik's ban on attending a synagogue with mixed seating, even if this was one's only chance to hear the *shofar* blown on Rosh Hashanah.

Non-Jewish influence has had its effect, argues R. Schachter, on the Conservative movement and from there it has passed to the Orthodox women's groups. If we legitimate this change today "it will be concluded that other changes may be made tomorrow" and Orthodoxy will be dragged down the slippery slope which has already caused such havoc in Conservative circles.

Ultimately his conclusion is that regardless of the permissibility of such groups – which he disputes – they must be forbidden *at this time* because of the wider associations they carry. There are well-known examples of practices which, innocuous in themselves, were forbidden because they came to be performed by non-Jews or by non-

Orthodox Jews. Halakhah recognises that the symbolic value of an act may change from age to age, and that what was permitted at one time may be forbidden at another for just this reason. At this moment, women's prayer groups carry an association (regardless of their intentions) with non-Jewish and non-Orthodox feminist movements, which are certainly hostile to traditional Jewish values and practice.

If the result is that the women involved forsake Orthodoxy altogether and join the Conservatives, then Rav Soloveitchik has already ruled that "in such a circumstance we are not responsible for them".

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The essay created an immediate storm which spilled over into *Sh'ma*, a lively bi-weekly representing all streams of American Jewish life, though hardly a forum for detailed halakhic argumentation. Much of the debate was *ad hominem* and intemperate. But Michael Chernick (*Sh'ma* 15/295, 17 May 1985) raised two points that were highly germane to the issue.

One was: what actually *were* the views of the two authorities on whom R. Schachter rested his case, R. Soloveitchik and the late R. Moshe Feinstein? Chernick quoted a responsum written in 1983 on R. Feinstein's stationery by his grandson R. Mordecai Tendler and apparently sanctioned by R. Feinstein. This ruled categorically against women constituting *minyanim*, but added that "pious women whose considerations are solely for the sake of Heaven and are without protest against God's Torah or Jewish custom, why would it be appropriate to prevent them from praying together? They could also read from the Torah, though they should be careful not to do so in a manner as to create the erroneous impression that this constitutes *keri'at ha-Torah*".

As for R. Soloveitchik, Chernick writes that "those most closely involved in creating the women's *tefillah* movement at the outset did so in consultation with the Rav. To the best of my knowledge from those people, the Rav was not enthusiastic, given his intense respect for *minhag avot* (ancestral custom) . . . but he did provide practical instruction and set the parameters for women's participation in *hakafot* (processions with the Torah scrolls), *keri'at ha-Torah* and *tefillah*."

These contentions were later qualified by Kenneth Auman (*Sh'ma* 15/299, 18 October 1985). There had been a subsequent letter by R. Feinstein's grandson in which he wrote: "My grandfather pragmatically feels that the possibility of a group of women or for that matter men existing in any one community which will fulfil the lengthy philosophical criteria mentioned in his printed *teshuvah* is extremely remote. Therefore, realistically speaking he does not commend or actually condone the establishment of women's prayer groups." And R. Soloveitchik had been cited by R. Moshe Meiselman (*Jewish Women in Jewish Law*, Ktav, p.197, n. 64) as also being against them. The matter remained obscure, and R. David Bleich (*Sh'ma* *ibid.*) gave a fair summary when he said that "no rabbinic authority of any stature has been willing to endorse this innovation . . . At best, the reaction is 'unenthusiastic'".

The second point made by Chernick was that some 20th century *poskim* had endorsed analogous changes in practice. The great example was R. Yechiel Weinberg (who had been cited by R. Schachter as resisting change). In one

responsum (*Seridei Esh* 3:93), directly relevant to the present debate, R. Weinberg considered the then new Bat Mitzvah celebrations. Rejecting the argument that they constituted a departure from established custom, he stated that times had undergone a profound change. Girls no longer grew up in an atmosphere filled with Torah and fear of Heaven. They were subject to secular influences which the Jewish world must counter. "We are now bound to focus all our energies on the education of girls".

The distinction hitherto made between the way boys and girls celebrated their adulthood "wounds the feeling of the adolescent girl since in other areas she has received the benefits of 'emancipation'." One may understand the emotional reaction of those who rejected any change in Jewish custom. But they too should understand the motives of those who sought to introduce the Bat Mitzvah celebration. "They are passionately concerned to strengthen the religious education of Jewish girls, who in the current climate are all the more in need of spiritual protection and moral encouragement when they reach the age of mitzvot."

R. Weinberg himself permitted the celebrations with certain provisos (as did R. Feinstein, *Iggrot Moshe*, O.Ch. I:104). But he added that even were they forbidden, the rule of 'Let Israel go their way: better that they sin unwittingly than deliberately' would apply (Betzah 30a; see Responsa *Rivash*, 158). That is, if a negative ruling would go unheeded, it should not be given. Rather one should use peaceable means to ensure that as far as possible the spirit of Torah prevails.

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It was left to R. David Bleich (*Sh'ma, ibid.*) to make the most judicious presentation of the case against separate women's prayer groups. The points he raises "may or may not rise to the order of halakhic prohibition but . . . certainly should inform the formulation of 'public policy' regarding this highly sensitive issue".

The groups "have introduced a hitherto unknown element of sexism into the realm of prayer". Whereas the prayer community – the *tzibbur* – is open to men and women, a women's prayer group is not open to men, both because men cannot fulfil their duties there and because they may not listen to a female prayer-leader (*kol islah*).

Although they may offer women a more intense *emotional* involvement, nonetheless "the fulfilment of a mitzvah in an optimal manner . . . is to be favoured over less optimal fulfilment accompanied by fervent religious experience".

The Torah readings without blessings, though technically permitted, should not be allowed. The permission is based on the fact that anyone may read from a Torah scroll for private study. But nowadays there is no reason to do so, since we have printed Chumashim available instead. The readings in the prayer groups "manifest a clear desire to establish a formal, innovative, liturgical ritual". Maimonides rules that Noahides (non-Jews bound by the seven Noahide commands) "are not permitted to create a religion and to make commandments for themselves" (*Hilkhot Melakhim* 10:9). R. Bleich explains that "permitting such individuals to generate novel rituals and religious practices would lead to confusion and misapprehension with regard to Divine law". The same certainly applies to Jews; and women's Torah readings "come dangerously close" to falling within this category.

His key argument is that by joining together for what must remain essentially private prayer, women miss out on the communal prayer of the synagogue service proper. Though they may not be obligated to pray with the congregation, they certainly lose by forsaking it. Prayer with a *tzibbur* has a unique quality. As Maimonides puts it: "The prayer of the community is always heard. Even if there are transgressors among them, the Holy One blessed be He does not disdain the prayer of the multitude" (*Hilkhot Tefillah* 8:1).

Baalei Teshuvah and their parents

Of the many ironies of contemporary Israel, few are stranger than the phenomenon of organisations of parents determined to rescue their children from Judaism.

Since 1967 there have been growing numbers of young Jews who, searching for their Jewish roots, have found their way to yeshivot. Often they come from assimilated or secularised backgrounds, unwittingly obeying Hanson's Law that the third generation tries to remember what the second generation tried to forget.

To return to tradition – to become a *baal teshuvah* – is a formidably difficult undertaking. It involves intensive study, the creation of a new lifestyle and a new identity. The protective environment of the yeshivah is probably the only place in which it can be done successfully. Inevitably there are psychological strains. The greatest is often the fact that the *baal teshuvah's* friends and family see him as he was, not as he is trying to be, and try to pull him back to what they see as normality (Michael G. Levin's story, *Journey to Tradition*, reviewed elsewhere in this L'Eylah, is a good illustration).

How does one relate to parents who may be Jewishly unobservant and opposed to the *teshuvah* process? There are practical problems: one can no longer eat what they eat. Being at home over Shabbat and Yom Tov creates a stream of questions. And there is the psychological problem: one is a child of one's parents, but one is also a child of Sinai and tradition. Many *baalei teshuvah* simply sever their family links. In turn, their parents feel abandoned and come to view the yeshivot as centres of Jewish cults, dividing families and preying on impressionable minds. Hence the parents' organisations that have been formed in recent years to combat the *teshuvah* movement.

The halakhic issues are not new, but the context is. R. Elchanan Shevach's review of the literature in the latest issue of *Techumin* (Vol.6, 1985, pp. 122-126) is a useful reminder of the halakhic perspectives to the dilemma.

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One point is clear: if parents order a child to do something forbidden by Jewish law, they are not to be obeyed. "Every person must respect his mother and father, and keep My sabbaths: I am the Lord your God" (Lev. 19:3). "Every person must respect" – perhaps I might think that one is obliged to obey even if one's father or mother requested that one violate a commandment. Therefore the Torah says, 'and keep My sabbaths' – you are all bound to honour Me" (*Sifra ad loc.*). Parent and child are both bound by the prior duty to obey God. Only within this framework does the duty to obey parents operate.

But what of a parent who habitually transgresses the law. Does he or she thereby forfeit the rights of a parent to

respect and honour? Here the question is not specific but general: it concerns the filial relationship as a whole, not a particular request. It forces on us the question of the very source of filial duty. Does halakhah recognise a moral bond between parent and child which is rooted in their biological relationship, as if to say: He may be wicked but he is your father? Or does it recognise a point at which the child may say: Being wicked, he is no longer my father?

The Talmud considers the problem. But its conclusions are not without difficulty. One passage rules: "A tanna of the school of R. Ishmael taught: For no offence may a son be appointed as an agent to smite or curse his father, except if the father is a *mesit* (one who incites people to worship idols)" (Sanhedrin 85b). The situation here is that the parent has been sentenced to punishment by the Bet. Din. May a son be made an agent of the court to execute the punishment? The answer is that he may not. Even though the parent has been adjudged a transgressor, the son is still residually bound by duties of honour and respect, and may therefore not perform an act that is disrespectful.

This suggests that the filial relationship is independent of the moral-religious standing of the parent. Even a 'wicked parent' still commands respect. But another source points in a different direction.

A Mishnah states: "If one has any kind of son, that son exempts his father's wife from levirate marriage, is liable to punishment for striking or cursing his father, and is deemed to be his son in every respect" (M. Yevamot 2:5). The Talmud explains that 'any kind of son' includes a *mamzer*. The phrase, 'is liable to punishment for striking or cursing his father', generates the following discussion: "But why? One should apply here the Scriptural text, 'Nor curse a ruler of thy people' (Ex. 22:27) – meaning, only when he practises the deeds of thy people. Rather it is as R. Pinchas said elsewhere in the name of R. Pappa: It refers to someone who has repented. So here it is a case of someone who has repented" (Yevamot 22b).

The tenor of this passage is that respect belongs to people – a ruler, a parent, or any Jew – only when they command respect: when they 'practise the deeds of thy people'. How then can a *mamzer* be bound to honour his father when his very birth testifies to a major sexual offence on his father's part? The Talmudic answer is that indeed the child is not, *unless* his father has repented. By implication, an unrepentant parent is not the object of respect or honour. This contradicts the other passage which implies that the 'wicked parent' is still to be respected.

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There were several ways of resolving the texts. Tosafot (Yevamot 22b, s.v. *ke-she-asah*) and Ran (*Chiddushim* to Sanhedrin 85a) took the second passage as definitive and interpreted the first as referring to a parent who had repented. Alfassi and R. Asher (to Yevamot *ad. loc.*) reconciled the two passages by pointing out that the first referred to *permissibility*, the second to *liability*. A child is not permitted to act disrespectfully even to a wicked parent, but he is liable to punishment only for disrespectful behaviour to a righteous or repentant parent. Maimonides goes further and rules that "A *mamzer* is obliged to honour and revere his father, though he is not punished for striking or cursing him unless he has repented. Even if his father is a wicked man and a transgressor, he must honour and revere him" (*Hilkhos Mamrim* 6:11).

For Tosafot and Ran, therefore, the wicked parent forfeits respect, but for Maimonides he still commands it. Both views make their appearance in the Shulchan Arukh. R. Joseph Karo rules: "A *mamzer* is obliged to honour and revere his father. Even if his father is a wicked man and a transgressor he must honour and revere him." But R. Moses Isserles adds: "And some say that one is not obliged to honour one's wicked father unless he repents" (*Yoreh Deah* 240:18).

Isserles – on the basis of his silence in the face of another ruling by Karo (241:4) – has been taken to hold a compromise position. One may not be obliged to *honour* a wicked parent, but one is nonetheless bound to refrain from more serious acts such as the 'striking' or 'cursing' mentioned in the earlier sources (*Shakh* to 240:18).

Taking Isserles' view as normative, the halakhah would require the child of a 'wicked' parent to strike a sensitive balance. He may be freed of the positive duty of honour but he is still bound not to cause pain. Drawing the line in particular cases calls for fine judgement, but the principle is a delicate response to a deep conflict of responsibilities.

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But this is not the end of the matter. We still need to ask who is 'wicked' in the terminology of halakhah. R. Avraham Karelitz (1878-1953), in a famous section of his *Chazon Ish*, cites sources which would view the modern secularist not as an apostate but as a *tinok she-nishbah*, a 'captive child' whose transgressions are a product of its environment (*Hilkhos Shechitah* 2:28).

In another section (*ibid.* 2:16) he suggests that certain harsh treatments prescribed by halakhah for apostates do not apply nowadays. There are times, he says, when Divine providence can be sensed by everyone. At such times the apostate is clearly seen to be a deviant whose punishment is necessary for the welfare of society. But there are times of Divine concealment, like now, when the punishment of apostates would not strengthen Judaism but, on the contrary, make it seem harsh and authoritarian. Under such circumstances, the approach to the wicked should not be through force but 'to draw them back with cords of love'.

On the basis of these sources, a child of non-observant parents would be bound to think through the total context of their beliefs and lifestyle. The onus is on the child to see not just the problems but also the potential of the relationship: it may be a route for his parents' own return to Torah. If so, he has a duty to sustain it.

R. Shevach concludes with two Biblical illustrations. Abraham, at the beginning of his spiritual journey, is called to leave his land, his birthplace and his father's house (Gen. 12:1). R. Chayyim Azulai (*Birkhei Yosef* to Y.D. 241:4) quotes the Midrash which discounts this as a model for others to imitate. 'The Holy One, blessed be He, assured him: I exempt you from honouring your parents, but I exempt no-one else' (Gen. Rabbah 39:7; see also *Bayit Chadash* to Y.D. 240).

In his *Shiyyurei Berakhah* (Y.D. 241:4) R. Azulai strengthens his case by referring to the Zohar's reading of Rachel's premature death. She was punished for the anguish she caused her father Laban by stealing his *teraphim* (Gen. 31:19), despite the fact that her intention was to prevent him worshipping idols.

Taken together, these sources are an excellent example of halakhah's reluctance to give one-sided answers to

complex issues of human relationships. The *baal teshuvah* faces a real dilemma: his parents stand in the way of his return to Judaism. Certainly he must not obey them if they wish him to do something he halakhically may not do. But he is still bound not to cause them pain by gross acts of insensitivity. He is bound to think through their own position and do what he can to draw them close. And he must reckon with an aggadic tradition which, rather than take Abraham or Rachel as models, saw the duties of a child as going deeper than surface issues of right and wrong.

Releasing terrorists in exchange for prisoners of war

In May 1985 the Israeli government released 1150 Arab terrorists in a controversial exchange for three Israeli prisoners of war who had been held by Ahmed Jibril's Popular Front for the Liberation of Palestine. Six hundred of the terrorists were allowed to return to the West Bank. The exchange was criticised inside Israel and abroad, as weakening Israel's stand against terror, and as providing a future threat to security. It was defended by the Defence Minister and the Chief of Staff, however, on the ground that every Israeli soldier must have complete confidence that the army and state stand solidly behind him.

Two recent volumes contain halakhic responses written at the time, one by R. Dr. I. Warhaftig (*Techumin* vol.6, pp. 305-308), the other by R. Chayyim David Halevi (*Asei Lekha Rav*, vol. 7, nos. 53-54). A third, by R. Shlomo Goren and published in *HaTsofeh*, was not available to this reviewer, but its main lines are clear from R. Halevi's responsum.

A Mishnah considers the question of whether one may yield to extortionate demands in order to release captives. It rules that "Captives should not be redeemed for more than their value, to prevent abuses (*mipnei tikkun ha-olam*)" (M. Gittin 4:6). Two alternative interpretations are given in the Gemara: one that the rule is to prevent an excessive burden on the community, the other that it is concerned with future consequences. Yielding on this occasion will create future hazard since the taking of captives will have proved profitable (Gittin 45a).

Maimonides takes the second reason as primary (*Hilkhot Mattenot Ani'im* 8:12). Accordingly, even if an individual wished to pay the extortionate demand, he would not be allowed to since his act creates a future danger for the entire community. What, though, if the captive's life is at stake? Here Tosafot argued the possibility that the rule might be waived (Gittin 58a, s.v. *kol*). But this view was not generally accepted (see *Pitchei Teshuvah*, Y.D. 252 note 4). Maimonides seems not to have held it, for he writes that a captive is presumed to be "in danger of his life" (*ibid.* 8:10) and yet still maintains that he is not to be ransomed if the demand is excessive. Logic supports him, for if our concern is with the future, captors who see that death-threats are successful will be encouraged to repeat them on subsequent occasions.

On this basis, R. Goren criticised the release of the 1150 terrorists as a clear breach of the rule against redeeming captives on disproportionate terms.

R. Warhaftig considers another aspect of the deal, one he admits to be marginal but worthy of attention. There is an issue of justice at stake. The Torah commands: "Do not take ransom for the life of a murderer" (Num. 35:31). Maimonides adds by way of elaboration: "The court is commanded not to take ransom from a murderer even were he to offer all the money in the world, and even if the *goel*

ha-dam (the relative of the victim) wishes to pardon him. For the life of the person sentenced to death is not in the hands (*kinyan*) of the *goel ha-dam* but of the Holy One, blessed be He . . . There is no offence to which the Torah takes such exception as that of murder, as it says (Num. 35:33), 'Do not pollute the land in which you live; it is blood which pollutes the land' " (*Hilkhot Rotseach* 1:4).

Does the prohibition apply nowadays? The *Sefer ha-Chinnukh* (412) confines it to the time of the Temple, but this may be simply because the Bet Din subsequently lacked the power of capital punishment. The death sentence is not currently applied in Israel, but it exists as an exceptional possibility, as in the case of Eichmann. R. Warhaftig hypothesises that had Israel extradited Eichmann to Germany to return for financial aid it might have been held to have transgressed the Biblical command. In any case, since imprisonment is nowadays a functional equivalent of capital punishment in securing public order, releasing prisoners in return for a ransom certainly offends against the spirit of the command, especially as many of the released terrorists were tried and convicted murderers.

Not only their release arouses disquiet. So too does the fact that many of the terrorists were allowed to return to their homes in the West Bank. Had the government at least insisted that they leave the country, exile would have been a not inappropriate punishment for murder: it was the punishment of Cain (Gen. 4:11); and see Rambam *ad loc.*). The Torah expresses particular repugnance at the prospect of unpunished shedders of blood walking freely on the sacred earth of Israel: it is a defilement of the land.

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In the light of these responses, the approach taken by R. Chayyim David Halevi is particularly interesting. He notes R. Goren's opposition to the Israeli deal on the basis of the ruling in Gittin. But he questions whether that ruling can be applied to the present case.

The Mishnah confronted a historical situation in which the danger lay in isolated groups of bandits taking captives to extract money. It did not confront the situation facing Israel: of Palestinians engaged in a protracted war, and motivated by national and political aspirations. A halakhah cannot be simplistically taken from one context and applied to another where different considerations apply.

This leads R. Halevi to a fundamental point. There are, he says, difficult questions "which have no clear, decisive halakhic resolution". We now need "halakhic innovation (*chiddush halakhti*) consistent with and in the spirit of the earlier halakhic sources".

As an example of innovation he cites a precedent immediately relevant to the question under review. The Mishnah, we remember, rules that one may not ransom captives for more than their value. But the Talmud elsewhere (Gittin 58a) relates that R. Joshua b. Hananiah once visited Rome and was told that a beautiful Jewish child was being held in prison. He went to the prison, asked the child a question, was struck by the wisdom of his answer, and said, 'I am sure that he will be a teacher in Israel. I swear that I will not budge from here without ransoming him whatever price may be demanded.' He paid an extortionate sum and secured the release of the child, who did indeed become one of Israel's great teachers: R. Ishmael b. Elisha.

The point is that R. Joshua ben Hanania's act – recorded without comment in the Talmud – conflicts with the clear

teaching of the Mishnah. One suggestion of Tosafot (Gittin 45a, s.v. *delo*; 58a, s.v. *kol*) is that an exception may be made in the case of a potential or actual great sage. Here we may pay more than their value. This view was taken up by subsequent halakhists and is codified in the Shulchan Arukh (Y.D. 252:4). R. Halevi reminds us that this law was an innovation created by the decision of R. Joshua b. Hanania.

This was "the power of Israel's early sages to innovate halakhot in response to events that occurred in the course of national life". Not only the early sages: innovation marked subsequent periods too. Radbaz (R. David ben Abi Zimra, 1479-1573) was asked the question, why was the ruling of the Mishnah on captives no longer adhered to? In his day, it seems, they were ransomed for more than their value. Radbaz replies (Responsa, 40) that the situation Jews confront differs from that of the Mishnah, for bandits nowadays do not differentiate between Jews and non-Jews. If non-Jews pay a high price to release captives, so may Jews, for they will not thereby fuel higher demands than are currently made. This being so, "Let Israel go their way, for they are compassionate people, the children of compassionate people." Again this is a halakhic innovation.

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Tosafot make the radical suggestion (Gittin 45a, *loc. cit.*) that the rule against redeeming captives for a high price does not apply "at the time of the destruction of the Temple". Whatever their reason, R. Halevi suggests that

we consider it in the light of the present. Israel's security and counter-terrorist measures have proved so successful that Palestinians have not succeeded in taking hostages within Israel's borders. The three whose release was secured were captured during the Lebanon war. The government's decision to release the 1150 terrorists will not exacerbate the situation precisely because it is under control. It therefore does not offend against the Mishnah's ruling, because the relevant facts are different.

R. Halevi does not propose a new ruling, but merely wishes to challenge R. Goren's view that it is self-evident that the government acted against the letter or spirit of Jewish law. And he asks us to consider this. Certainly, as R. Goren contends, the decision will have strengthened the position of the Arab terrorists. But it will also strengthen the morale of the Israeli defence forces. The knowledge that if a soldier is taken prisoner, the entire weight of the state will be directed at securing his release, will reinforce the commitment of the army. Had the deal not been made, had the three prisoners been left in Palestinian hands because the state considered the price of their release exorbitant, army morale would have been significantly damaged.

Army morale, Halevi argues, is surely a factor which the early sages would have included in their halakhic deliberations were they alive today. We lack their authority. But we should not be quick to assume that the government acted against halakhah. It may be, he concludes, that its decision precisely reflects the spirit of halakhah in the circumstances of the modern state.

