

PARSHAT MISHPATIM 5765

Years ago the father of a friend once remarked that he always watched football with the sound off because he lived in fear of hearing the voice of Howard Cosell. Imagine, then, how much greater the trepidation of the Israelites at Sinai listening to God's utterance of the Ten Commandments! There are myriad *midrashim* regarding the overwhelming power of the experience, the fear our ancestors felt in the presence of such Divine majesty. According to one rabbinic observation, because the people could not bear to hear God's own voice after the second commandment, Moses served as a communicator for the rest.

Such was the climax of last week's Torah reading -- a moment of theophany, an acme of spiritual intensity. This week, however, *Parshat Mishpatim* seems to inhabit an entirely different plane. Its subject matter includes laws concerning property damage and personal injury, monetary restitution and penalties for stolen property, laws regarding interest and rental agreements. Coming as it does after last week's intense reading, one in which the Ten Commandments are given amidst the flash of lightning, the rumble of thunder, the fire and smoke of revelation, today's reading appears prosaic, going from the intensity of feeling God's breath on the back of one's neck to discussions about borrowed donkeys and interest rates.

Yet the rabbis were quick to connect Sinai's grandeur with the mundane. Noting that the *Sedrah* begins with the statement, "ואלה המשפטים אשר תשים לפניהם"--*And these are the statutes you shall place before them*, Rabbi Yishmael comments in the *Mekhilta*, an important *midrashic* work on *Exodus*, "ואלה מוסיף על הראשונים, מה עליונים מסיני אף תחתונים מסיני"--the phrase 'And these' connects what follows with the previous text: just as the prior commandments are from Sinai, so, too, these teachings are of the Divine provenance and equal authority."

Reading through the text of *Parshat Mishpatim* one is struck by the seemingly secular character of much of the narrative; it represents a body of law we associate with the realm of civil government and its judiciary. It is important to remember that Judaism originally existed as a fully functional religious civilization; it possessed a gestalt that was utterly unaware of a dichotomy

between sacred and secular, between the temporal and the religious. But for reasons both theological and practical, history compelled our ancestors to redefine the contours of Jewish governance. And since the era of the rabbis we have lived comfortably with the notion of דינא דינא דמלכותא דינא -- “the Law of the Land is the Law,” to quote a talmudic principle, which holds that Jews must obey the civil laws of the state in which they live.

This Jewish belief dovetails well with the constitutional separation of church and state, that cornerstone of American democracy. The Virginia Act of 1785, a forerunner of the Constitution’s First Amendment, expresses the heart and soul of this critical doctrine: “. . .our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry. . .[moreover] to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill-tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own.”

These sentiments inspired by Thomas Jefferson speak to the danger of allowing specific religious views to co-opt the governance of the nation. Religiously committed American Jews have a responsibility to listen carefully to the claims espoused by other faith groups -- To what extent do the values of others resonate with the teachings of our Torah? What happens when Judaism differs with those who claim the exclusive mantle of “family values” and “morality”? When is religious input into the decision-making of government welcomed and when does it constitute a threat to religious liberty as envisioned by the Virginia Assembly more than two centuries ago?

We are all familiar with the arguments of the Catholic Church and the Protestant Christian right regarding the equation of abortion with murder. If the soul enters a child at the moment of conception, then, indeed, the termination of a pregnancy is tantamount to infanticide. For this reason, passage by Congress last year of the Unborn Victims of Violence Act as heralded by many on the Christian right as a triumph of family values. Yet we as Jews come with a somewhat different religious perspective. As the words of today’s Torah reading clearly indicate: וכי ינצו אנשים ונגפו אשה הרה ויצאו ילדיה ולא יהיה אסון, ענוש יענוש כאשר יש’ת עליו בעל האשה. . . אם

... אסון יהיה ונתתה נפש תחת נפש, עין תחת עין . . . -- When men fight, and one of them pushes a pregnant woman, and a miscarriage results, but no other damage ensues, the one responsible shall be fined . . . but if other damage ensues, the penalty shall be life for life, eye for eye. . . (*Exodus* 21:22-23).

Should violence toward a woman result in miscarriage, the perpetrator pays a fine; it is only when bodily harm occurs to the woman that the aggressor is himself bodily punished. As such, the Torah takes the viewpoint that a fetus is not a fully fledged human being. And while the text should not be construed as tacit consent for *carte blanche* abortion, it does point to a different perspective than that of the so-called “Moral Majority.” In Judaism there is no doctrine of “ensoulment at conception.” Indeed, there are multiple views expressed in rabbinic literature, as attested to in the eleventh chapter of the Tractate Sanhedrin: One sage, Ravina, does suggest that a child’s soul may enter *Olam Haba*, the World-to-Come, from the hour of its conception, yet his colleague, Rabbi Hiya, maintains that it is only from the time of birth; Rav Nahman bar Yitzhak opines that entry to *Olam Haba* is from the moment of circumcision, while Rabbi Shimon son of Yehuda Hanasi advances the view that it is only from the time a child speaks. Indeed, one disciple in the name of Rabbi Meir even offers the view that entry to the World-to-Come is possible only when a child is able to intelligibly respond “Amen” to a blessing! So much for the existence of Jewish dogma on the subject!

What is most striking about these dramatically different perspectives is that the talmudic narrative offers no comment on their diversity. It is not that the subject of ensoulment had little interest for the rabbis -- quite to the contrary. Nevertheless, they understood that their answers were conjectural at best. Since the moment of a soul’s entry into the body is God’s secret, their responses did not pretend to doctrinal arrogance, and had no binding legal force. *Halakah* concerned itself solely with practical matters, and in the spirit of the verses from *Exodus* which we read this week, ruled that abortion is permissible to save a mother’s life up until the moment that the greater portion of the baby has emerged from the birth canal.

Judaism can neither be pigeonholed as “pro-choice” or “pro-life.” It is neither because it is, in some sense, both. The term “pro-choice” is an ethically problematic one inasmuch as it assumes

that a decision to have an abortion is morally neutral, that to do away with an unwanted pregnancy should be acceptable in any and all circumstances. After all, if the fetus is not yet a person, abortion is no more ethically problematic than an appendectomy. Rabbi Michael Gold writes in his acclaimed work, *Does God Belong in the Bedroom*, “Judaism differs fundamentally from the pro-choice position in that it is unwilling to term abortion a non-event. According to Jewish law, although the *ubar* (fetus) may not be a full human being, neither is it merely chemicals or a limb of the mother’s body to discard if she desires.”

Yet if the term “pro-choice” is not reflective of the totality of Jewish teaching, neither is the phrase “pro-life.” Indeed, the term should be offensive to religiously committed Jews because of its implicit judgment that those who would support the legality of abortion under certain circumstances are “anti-life.” There is scarcely a more life-affirming religion than Judaism -- that its traditional teachings cannot be neatly contained within the partisan politics of “pro-lifers” says far more about their narrow vision than it does about the actuality of Jewish teaching.

In truth, Judaism has always believed that the well-being of the mother, a fully sentient and functional human being, takes precedence over the fetus. Without ever providing blanket consent for abortion, rabbis throughout the ages have sanctioned the termination of pregnancy in a variety of contexts, including not only the physical but also the psychological health of the mother as a determinant. Handled on an individual basis, various rabbis have permitted abortions in cases of incest or rape, or when confronted by the birth of a seriously deformed child or one afflicted with a dreadful disease such as Tay-Sachs -- precisely because of the pain and psychological anguish that a mother might experience. Thus, some fourteen years before *Roe v. Wade* -- one of the leading halakhists of the Conservative movement, Rabbi Isaac Klein concluded in 1959, that while abortion is morally wrong in many circumstances, it can be performed for therapeutic reasons of both a physical or mental nature. Arms of the Conservative Movement -- including the Rabbinical Assembly and United Synagogue have passed resolutions in recent years supporting the legality of abortion. On Sisterhood Shabbat, I would be remiss if I did not mention that Women’s League for Conservative Judaism has done the same, and is also a charter member of the Religious Coalition for Reproductive Choice.

The Jewish view on abortion may well be the sanest and most coherent of perspectives. Interestingly, it echoes the findings of many popular surveys. The majority of America's John and Jane Q. Public seem to support the availability of safe and legal abortion, at least under certain circumstances. Yet even if most Americans are not ready to term abortion homicide, they are by no means ready to dismiss it as a morally neutral act. The termination of a potential human life should never be approached in a cavalier fashion.

The notion that a soul enters the body at the moment of conception may well be a valid religious viewpoint, but it is hardly the only one. Given the absence of religious consensus on this matter, it would be well for Federal courts to settle for a scientific or common sense solution. Public welfare should transcend dissent in the religious sector, and while government should welcome input from various faith communities, such input is useful only when restrained by a sense of human fallibility. Without such humility, religion can be a dangerous force, indeed. As Abraham Lincoln noted in his Second Inaugural Address regarding North and South: "Both read the same Bible, and pray to the same God; and each invokes His aid against the other." Let us be wary of those who claim the exclusive right to Ultimate Truth!

At day's end, perhaps we Jews can help bridge the gap between pro-choice and pro-life by demonstrating that being pro-faith and pro-family can reach across the divide. Teaching the value of teenage abstinence, promoting contraception when abstinence fails, making adoption a more acceptable alternative by not stigmatizing those who give up their children for adoption, providing financial resources and greater encouragement to potential single mothers that might lead them to consider an alternative to abortion, all these are areas in which religious organizations and communities might provide far greater assistance than is currently the case. Let religion go to work precisely because the moral stakes are far too high to be entrusted to government. If we, in our faith-based communities, cannot effect a change in attitudes toward intimacy, the sanctity of human life, the need for restraint, and the ability to think beyond our selfish desires of the moment, then it is at best wishful thinking to assume that government can play the role of effective moral surrogate through acts of legislation.

As for that cornerstone of American society, the separation of church and state, Heaven help us if we eviscerate democracy's greatest good by turning our government into an ecclesiastical synod entrusted with the task of determining the moment of ensoulment. Justice Oliver Wendell Holmes once observed that, "a page of history is worth a volume of logic." Surely all the pages of history will show that morality works best from the bottom up, rather than the top down, from the seat of inner morality, rather than the seat of government.