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BOOK REVIEW

AARON KIRSCHENBAUM ON EQUITY IN JEWISH LAW*

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Anyone who has taught Jewish law in an American law school has probably encountered a well-meaning colleague or student who has asked something like the following: "Why should I study Jewish law? Isn't it all just a lot of formalism and legalism? Other than as an historical oddity, what interest can it have?" For a long time people have had the misconception that Jewish law is overly formal, that it gives slavish obedience to the letter of the law, and that it is oblivious to practical consequences. This misconception can be fostered by reading excerpts from the Talmud that appear to discuss matters of intense personal pain and anguish in abstract legal terms.[1] The misconception of Jewish law is so ingrained in secular society that it is doubtful that the publication of any one book or article will remove it. But a start has to be made, and Professor Aaron Kirschenbaum's two recent books on Jewish law are a ready antidote for anyone who thinks Jewish law is only a set of formal rules.[2]

With Professor Kirschenbaum's books as the foundation and starting point of my discussion on equity in Jewish law, Part I of this review discusses how Jewish law used equity to govern particular cases. I suggest that the view of Jewish law

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1. *See* JUDITH PLASKOW, STANDING AGAIN AT SINAI: JUDAISM FROM A FEMINIST PERSPECTIVE 68-70 (1990).

2. AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW, HALAKHIC PERSPECTIVES IN LAW: FORMALISM AND FLEXIBILITY IN JEWISH CIVIL LAW, KTAV Publishing House, 1991, 324 pp. $35 [hereinafter KIRSCHENBAUM, HALAKHIC PERSPECTIVES]; AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW, BEYOND EQUITY: HALAKHIC ASPIRATIONISM IN JEWISH CIVIL LAW, KTAV Publishing House, 1991, 238 pp. $35 [hereinafter KIRSCHENBAUM, BEYOND EQUITY].

as formalistic is based in part on a confusion of the study of Jewish law as a religious discipline with the application of that law in actual cases. Part II discusses some implications that result from an understanding that Jewish law as it was practiced was a religious legal system with its own set of values. By comparing the differing goals and values of Jewish law with those of American law, I will demonstrate that Jewish legal rules are not likely to be acceptable to modern societies. Similarly I will discuss why the current Israeli method of incorporating only "mishpat ivri" (the non-religious aspects of Jewish law such as torts and contracts) into the Israeli legal system is fundamentally flawed. The effort to incorporate only secular aspects of Jewish law into the law of Israel is not likely to present an accurate application of Jewish law because such incorporation will take these rules out of context.

I. EQUITY IN JEWISH LAW

In his books, Professor Kirschenbaum marshals an impressive array of talmudic[3] and post-talmudic sources, codes, commentaries, responsa, and writings on philosophy, religion, and mysticism. If the only achievement of these two books were to present the reader with this array of fascinating texts it would be enough. But the books also present a variety of equitable methods used by the rabbis to do justice in individual cases. These methods included interpretation, compromise, a tailoring of justice to the individual case and to the individual litigants, and an aspiration to assume greater obligations than strict law would require.

Beginning with a description of equity in Greek philosophy and Roman and English law, Professor Kirschenbaum demonstrates that although Jewish law has no exact equivalent to the concept of equity found in these other systems, there are several parallels. The Jewish concepts of "yosher" (uprightness), "darkhei no'am" (ways of pleasantness), "lifnim mishurat hadin" (above and beyond the letter of the law),

3. The Talmud is defined as "[t]he collection of ancient Rabbinic writings consisting of the Mishnah and the Gemara, constituting the basis of religious authority for traditional Judaism." THE AMERICAN HERITAGE DICTIONARY 1313 (2d ed. 1973). Actually, there are two Talmuds. One was compiled in Babylonia—the Babylonian Talmud, and one was compiled in Palestine—the "Western" or "Jerusalem" Talmud. *See generally* ELLIOT N. DORFF & ARTHUR ROSETT, A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW 143-44 (1988); ADIN STEINSALTZ, THE ESSENTIAL TALMUD 40-63 (Chaya Galai trans., 1976).

"middat hassidut" (saintliness), and other related concepts combine to create for the judges and the community a culture of responsibility and care that goes beyond the requirements of strict law. Kirschenbaum's books show the development of these and related equitable concepts in Jewish law and demonstrate their use in legal materials from talmudic times until the present.

Professor Kirschenbaum answers the colleague or student who misunderstands the nature of Jewish law by making the distinction between the formalism of the study of Jewish law and its more equitable practice in actual cases. Kirschenbaum points out that the study of the Talmud can be highly abstract. The reality that it creates can be far removed from everyday life. Part of the joy of talmudic study (once one understands the Aramaic and Hebrew terms) is to find contradictions within the text and to resolve them, to probe a text for a variety of possible meanings, and to attempt to create a coherent structure that harmonizes as many points of view as possible. The activity can be highly abstract and formal. The Talmud requires one to deal with problems that no longer arise. For example, much of the Talmud deals with the ancient Temple, the animal sacrifices, and the priestly caste.[4] A student of the Talmud cannot avoid these religious concepts by attempting to study only non-religious law, such as the talmudic law of torts or crimes, because the religious concepts creep in at various points. Thus, one encounters questions about the tort liabilities associated with an animal that has been donated to the Temple,[5] procedure for trials involving the High Priest,[6] and a host of other matters that might illumine the general area under study. Indeed, the Talmud devotes attention to the study of problems that it assumes never or hardly ever arose. For instance, the tractate *Sanhedrin* devotes several pages to the rules applied to the rebellious son, who under biblical law is

4. For instance, one of the six orders of the Mishnah is called Kodashim. It concerns primarily the types of sacrifices that the priests offered in the Temple. These subjects are also discussed in many other places in the Talmud. For example, the beginning tractate of the Mishnah, which deals primarily with blessings, defines the time for reciting part of the evening service by reference to when priests who had been ritually unclean may begin to eat "terumah," food which possesses a degree of sanctity. *Berakhot* 1:1.

5. *E.g.*, BABYLONIAN TALMUD, *Baba Kamma* 37b, 53b [hereinafter B. TALMUD].

6. *E.g.*, B. TALMUD, *Sanhedrin* 18a; JERUSALEM TALMUD, *Sanhedrin* 2:1.

subject to the death penalty.[7] The discussion is purely abstract. No specific cases are mentioned. Indeed, the rabbis construed the definition of a rebellious son so narrowly that some of the talmudic rabbis thought there never was and never would be an actual case.[8] Why are these formalistic matters studied? The study of the Torah[9]—upon which the Talmud is based—is a religious activity, and like all religious activities, at least part of the reward is inherent in the activity itself.[10] In addition, the study of the Torah is a way of experiencing God's revelation. The Talmud states that a father who teaches his son the Talmud is regarded as if he had himself stood at Sinai.[11] Why? Because the revelation that began at Sinai continues and is made manifest whenever the Torah is studied. The study of the Torah is parallel to prayer, for both involve a communion with God.[12]

In contrast to the formalism of the study of Jewish law, Professor Kirschenbaum demonstrates that the resolution of an actual dispute is an equitable activity. It is not an abstract exercise in reasoning but a practical resolution of a problem. The goal is to reconcile the parties. According to talmudic law, lawyers ought to be excluded from the entire trial process.[13] This forces the parties to confront one another directly before a religious tribunal. The goal is not simply to unveil the truth at all costs, but to resolve the dispute in a manner that heals the wounds between the parties and within the community.[14] Jewish courts can proceed under the method of strict law or by the method of compromise if authorized by the parties. Compromise means that the court will impose a solution that differs from the requirements of strict law and will respond to

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7. B. TALMUD, *Sanhedrin* 68b-72a; *see Deuteronomy* 21:18-21.

8. B. TALMUD, *Sanhedrin* 71a.

9. "Torah" refers to the five books of Moses and also to the oral law which is reflected in part in the Mishnah, Talmud, and later sources.

10. As the Talmud recites in connection with the law of the rebellious son, "Why then was this law written?—That you may study it and receive reward." B. TALMUD, *Sanhedrin* 71a.

11. *See* B. TALMUD, *Berakoth* 21b.

12. The Talmud teaches that one ought to pray where one studies because after the destruction of the Temple, God is only found within four cubits of the Torah. B. TALMUD, *Berakoth* 8a.

13. *See* KIRSCHENBAUM, HALAKHIC PERSPECTIVES, *supra* note 2, at 139-40.

14. Maimonides, physician and codifier, drew the analogy between healing illness and resolving civil disputes. *Id.* at 284 (citing MAIMONIDES, GUIDE OF THE PERPLEXED 34 (S. Pines ed. & trans., Univ. of Chicago Press 1963)).

the "equities" and special features of the particular case.[15] Unlike the American system of trial, which considers the adversary system to be the best method for uncovering the truth, the Jewish system is more dubious about the ability of witnesses and fact finders to determine what actually happened. In addition, the Jewish system recognizes that the dispute over what happened may play only a small part in the complex relationship between the parties.

Jewish courts strongly encourage parties to authorize the court to impose a compromise. But even when the parties do not give that authorization, Jewish law gives the judge some discretion. When the law or facts are unclear, the rabbi is to follow his intuition and judgment to seek peace.[16] Even when the law and facts seem clear, the rabbi has considerable power to adjust the law to the subtleties of the facts before him.[17] These and other examples of equity in Jewish law are used by Professor Kirschenbaum to dispel the misconception that Jewish law is only a set of formal rules.

II. VALUES UNDERLYING JEWISH LAW AND THE IMPLICATIONS OF A RELIGIOUS LEGAL SYSTEM

A. *Comparing Jewish and American Law: Why Incorporating Jewish Law into the Law of a Modern State Is Difficult*

Professor Kirschenbaum's books discuss whether the values underlying Jewish law differ from those underlying a modern legal system. While there are many similarities in both systems, there are some fundamental differences in their outlook and goals as well. American law, for example, places a high value on individualism, free enterprise, and privacy. Jewish law, while not always opposed to these goals, has other aspirations that may cause conflict. Foremost among these goals is support for the study of the Torah and the maintenance of a religious community committed to mutual support through acts of loving kindness.[18]

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15. *Id.* at 137-49.

16. RESPONSA ROSH 107:6.

17. *See, e.g.*, KIRSCHENBAUM, HALAKHIC PERSPECTIVES, *supra* note 2, at 86-108 (coping with improper behavior by litigants); KIRSCHENBAUM, BEYOND EQUITY, *supra* note 2, at 56-57 (some rules are not to be taught in public); *id.* at 201 (whether a man is obligated to support children born of a civil intermarriage, which is invalid in the eyes of Jewish law, depends on the facts and circumstances of the case).

18. Simon the Just said, "Upon three things the world is based: upon the To-

The differences between the goals of the two systems surface in a variety of settings. Two areas mentioned by Kirschenbaum are monopolies and freedom of contract.[19] American law generally views monopolies as an undesirable restraint on trade, and generally favors the notion of freedom of contract, subject to the prevention of fraud or overreaching. By contrast, Jewish law generally favored the use of monopolies.[20] It also limited the ability of merchants to compete freely. Regulated monopolies were viewed both as a protection to the community and as an equitable means of ensuring a merchant's livelihood. For example, communities were authorized to fix prices for essential commodities.[21] In the field of contracts, Jewish law was willing to overturn a fairly negotiated contract if doing so would conform to the "ways of pleasantness" of the Torah. Thus, a renter could be compelled to give up his lease if the owner convinced the court that "his financial situation [was] such that he [was] compelled to sell his house and that the buyers [had] made the sale conditional on their immediate occupancy of the premises."[22]

From an American legal perspective, monopolies, limitations on competition, and limitations on freedom of contract impede economic growth and limit individual freedom. But from a Jewish law perspective, these restrictions were necessary to prevent harm to other members in the community. They were a natural outgrowth of the religious teachings that members of the community must help one another.

Another area where the differences between Jewish law and American law are striking is criminal law. No American court would try to dissuade an owner of stolen goods from accepting the return of the goods from a repenting thief. The

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rah, upon Divine service, and upon acts of loving kindness." MISHNAH, *Aboth* 1:2 (Herbert Danby trans., 1933). Some of the differences between Jewish law and American law are explored in Steven F. Friedell, *The "Different Voice" in Jewish Law: Some Parallels to a Feminist Jurisprudence*, 67 IND. L.J. 915 (1992).

19. KIRSCHENBAUM, HALAKHIC PERSPECTIVES, *supra* note 2, at 178-80.

20. *See, e.g.*, SHULHAN ARUKH, *Hoshen Mishpat* 156:5. But no monopoly could be had over the teaching of the Torah. *Id.* at 156:3.

21. *Id.* at 231:27.

22. KIRSCHENBAUM, HALAKHIC PERSPECTIVES, *supra* note 2, at 172. In the case referred to, Responsa Radbaz IV, 143, additional facts mitigate somewhat the seeming harshness of the rule. The lease was not for a fixed period, rent was being paid monthly, and the owner was facing the prospect of going to a Gentile prison after trial in a Gentile court for debts owing to his Gentile creditors. Imprisonment posed a risk of illness or death. The responsum makes no mention of any hardship to the renter.

thief's confession and sincere efforts to repent would at most be taken into account in reducing the sentence. But the Talmud teaches that the owner should refuse the return of the stolen goods.[23] Although later sources limited the reach of this talmudic rule, its existence suggests that Jewish law and American law have different priorities. Jewish law is a religious system that places a high value on atonement. The rabbis were concerned that thieves might be prevented from repenting if restitution meant the loss of all of their possessions.

Given these fundamental differences, it is no surprise that Jewish law and American law differ over the concept of unjust enrichment. As shown by Kirschenbaum, American law requires restitution from a defendant who has been unjustly enriched even if the enrichment caused no tangible loss to the plaintiff. By contrast, Jewish law requires no restitution in such cases.[24] For instance, Jewish law denies restitution to the owner of a vacant building if a squatter occupies the building without causing any tangible loss to the owner. In American law, the owner's loss of exclusive right to possession is regarded as a loss that entitles the owner to restitution.[25] The Jewish approach gives less respect to the individual's right to ownership and gives more weight to the obligation to help others in distress. Unjust enrichment is an open-ended concept. Not only is the concept of "enrichment" subject to debate, but the concept of "unjustness" calls on all the policies of the underlying legal system.[26] Kirschenbaum explores both the American and the Jewish law of unjust enrichment, highlighting these basic differences in outlook.

Because American and Jewish law have different values, caution must be used in comparing doctrines in the two legal systems that appear similar on the surface. A good example is a two-hundred-year-old case in Jewish law that invites parallels to modern economic theories. As discussed by Kirschenbaum, there was a dispute between brothers who owned different floors of a house. One brother wanted to open a bar on an upper story which he owned. The other brother protested that the bar would create disturbing noise below. A

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23. KIRSCHENBAUM, BEYOND EQUITY, *supra* note 2, at 81-83.

24. KIRSCHENBAUM, HALAKHIC PERSPECTIVES, *supra* note 2, at 231-52.

25. *See* 1 GEORGE E. PALMER, THE LAW OF RESTITUTION § 2.10 (1978).

26. *See* Jay M. Feinman, *The Law of Restitution*, 11 RUT.-CAM. L.J. 689, 696 (1980) (reviewing GEORGE E. PALMER, THE LAW OF RESTITUTION (1978)).

mishnah apparently gave the protesting brother a solid case; it allows neighbors to protest the opening of a shop but not the opening of a factory within a courtyard.[27] But one of the leading authorities of the day, Rabbi Moses Sofer-Schreiber, interpreted this passage to mean that the court must consider the cost of alternatives. Since a shop can normally be opened on the street at little cost, the neighbors of the courtyard may protest. But since a factory can normally be moved only at great cost, residents may not protest. In the case at hand, Rabbi Sofer found that the cost of renting new space for the bar or of trying to sell liquor on the street would be prohibitively expensive. If the owner from the upper story could be enjoined from opening a bar, then "nobody would ever be able to make a living."[28]

Kirschenbaum correctly reads Rabbi Sofer's responsum as showing that Jewish law refuses to resolve disputes by application of formal rules.[29] But one could read the case as foreshadowing the modern economic approach that all nuisance disputes ought to be resolved in the most cost-efficient way. Kirschenbaum avoids the temptation to do so, and I think such a reading would be inconsistent with other Jewish values. At stake for the owner of the upper story was the opportunity "to make a living," not the opportunity of making a fortune. A property owner can be forced to tolerate noise if the alternative is to put someone out of business. But all nuisance cases are not necessarily to be decided in favor of the most cost-efficient user. Judaism did not despise wealth; rather, the role of making money was subordinate to the study of the Torah. The real value of making a living was that it enabled one to study the Torah or, at least, to support others in their study of it.[30]

B. "Mishpat Ivri" Cannot Be Faithfully Incorporated into the Israeli Legal System

A number of consequences follow from recognizing that Jewish law differs not only in some incidental matters from a

27. MISHNAH, *Bava Batra* 2:3.

28. *Responsa Hatam Sofer*, H.M. 92.

29. KIRSCHENBAUM, HALAKHIC PERSPECTIVES, *supra* note 2, at 108-10.

30. *See* B. TALMUD, *Berakoth* 34b; *cf.* Yehoshua Liebermann, *The Coase Theorem in Jewish Law*, 10 J. LEGAL STUD. 293, 297 (1981) (the owner of a courtyard may not protest that there is too much noise from the voices of school children studying the Torah since the value of Jewish education is very high).

secular legal system, but also in its fundamental outlook, structure and purpose. One consequence is to recognize the limitations of the modern Israeli approach to the study of Jewish law known as "mishpat ivri." This modern Hebrew term was coined to connote those subjects of Jewish law that are relevant to the operation of a secular society.[31] There is nothing wrong with focusing on these matters, nor is it wrong to try to incorporate Jewish law into the legal framework of the State of Israel. But because the concept of "mishpat ivri" is foreign to Jewish law, the modern approach is unlikely to present an accurate picture of the subjects studied.

First of all, in order to understand many of the terms and concepts that are implicated in a study of torts, contracts, or criminal law, one has to see how those terms and concepts are used within religious settings. A modern student of Jewish law cannot avoid studying questions like the liability of animals that have been devoted to the sanctuary or the immunity of the High Priest. More importantly, one cannot paint an accurate picture of Jewish law by focusing on the abstract treatment of portions of the substantive law; one must see how that law was put into practice. Furthermore, the practice of Jewish law was intimately tied to the religious courts, the religious belief structures and practices of the communities, and the religious aspirations of the Jewish people.

For example, the prohibition of usury was seen in Jewish law as a religious problem, not merely a limitation on contract. As Kirschenbaum demonstrates, Jewish law viewed usury not as a violation of natural law but as a violation of the requirement of "hesed" or loving kindness that members of the community are expected to show one another.[32] A modern court cannot hope to apply the Jewish rules governing usury without understanding the underlying religious purposes.

Another instance is the Jewish law concept of "dinei shamayyim," or laws of heaven. Jewish tort law limited liability rather severely.[33] One of the escapes from this limited liability was that even though a defendant in some cases would be exempt under "dinei adam" or human law, he might be liable under the laws of heaven. As Kirschenbaum shows, the

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31. *See* "Mishpat Ivri," 12 ENCYCLOPAEDIA JUDAICA 109 (1972).

32. KIRSCHENBAUM, BEYOND EQUITY, *supra* note 2, at 25-44.

33. *See* Steven F. Friedell, *Some Observations on the Talmudic Law of Torts*, 15 RUTGERS L.J. 897, 902-08 (1984).

concept of liability under heavenly law could have tangible effects on earth. A rabbinic court might be able to coax a defendant into fulfilling his religious obligations and in some cases might be able to coerce him to do so. Thus, a recalcitrant party might be barred from qualifying as a witness,[34] and a plaintiff in such cases might be able to resort to self-help.[35]

How can these concepts be successfully incorporated into a modern judicial scheme? If a secular court borrows only the limited liability that is available under human law, it achieves only superficial success. If it allows the plaintiff to pursue self-help, it goes beyond the field of tort law and may well encourage breaches of the peace. If the court disqualifies the defendant from testifying in other cases, it may undermine the public policies underlying the law of evidence and may unduly hamper the administration of justice. Successful incorporation would require an integration of differing values and purposes, not merely the rules derived from them.

The field of conflict of laws has given us the concept of dépeçage, which is the resolution by a court of different issues in a case by resort to different legal systems.[36] It is doubtful that simple dépeçage would sufficiently mesh Jewish law with modern legal systems. When a court resorts to dépeçage it runs the risk of creating a hybrid result that would not be achieved by either legal system. More than that, the result might be antithetical to both legal systems. For example, Jewish law imposes strict liability on individuals for harms directly caused by their bodies.[37] It limits the effect of this liability by having no rule of respondeat superior,[38] by having no rule of joint and several liability,[39] and by measuring damages in ways that generally benefit the defendant.[40] If a secular court were to

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34. KIRSCHENBAUM, BEYOND EQUITY, *supra* note 2, at 158-59.

35. *Id.* at 151-57.

36. *See* EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 35 (2d ed. 1992).

37. SHULHAN ARUKH, *Hoshen Mishpat* 421:3 (liability for damage even in case of *force majeure*).

38. *See* Haim S. Hefetz, *Vicarious Liability in Jewish Law*, 6 DINÉ ISRAEL 49 (1975) (in Hebrew).

39. SHULHAN ARUKH, *Hoshen Mishpat* 410:37.

40. According to Jewish law there are five possible types of damages that can be owed in a case of personal injuries committed by a person: damage, pain, loss of time, medical care and humiliation. Damage is only owed in case of *force majeure*. *Id.* at 421:3. Damage was measured by comparing the loss of value based on the assumption that the plaintiff was a slave being sold in the market place. *Id.* at 420:15. Humiliation is due only in case of intent to cause humiliation. *Id.* at

incorporate the Jewish law of strict liability for certain torts and combine it with the secular doctrines of joint and several liability, respondeat superior, and liberal damage evaluation, the court would create a result that could not be reached by either legal system independently. Further, the result would also be antithetical to both legal systems. That is, the Jewish approach of strict liability limited to the individual defendant achieves a goal of localizing the blame on the individual whose activity caused the harm. It lightens the burden by measuring damages in a way that is generally favorable to the defendant. But if, in the name of Jewish law, the court were to punish an employer for an injury that his employee only partially created, it might be perverting the values of Jewish law. Similarly, a secular approach that requires a showing of negligence does so, in part, to encourage activity that may cause losses but is otherwise beneficial to the economy. However, the application of strict liability in such a circumstance may be antithetical to these goals. Thus, applying secular aspects of Jewish law in a modern legal system would distort the values of both Jewish law and the modern legal system.

Professor Kirschenbaum's contribution to the study of Jewish law has been immense, and we are fortunate that these two books are written in English by a scholar familiar with the classical and modern analogies. His books persuasively question the notion that Jewish law is all formalism. No fair reader can ever conclude that Jewish law is oblivious to the consequences of a decision or to the underlying purposes and policies. On the contrary, the books heighten our awareness that Jewish law has policies and purposes that are unique and that make the application of Jewish law in a modern legal system difficult.

421:1. Pain was the amount that a plaintiff would pay to avoid having to undergo the pain. *Id.* at 420:16.