Sh'ma

a journal of Jewish responsibility

3/60, NOVEMBER 2, 1973

The talmud and the tapes

Norman Lamm

Now that the highest court in the land is prepared to study the problem of President Nixon's refusal to surrender the famous tapes, it is timely to inquire what Jewish law has to say about this historic confrontation between the executive and the judiciary. Can any wisdom be gleaned from the Hebrew tradition, one of the main streams that feed into Western culture and civilization?

The *Mishnah,* (the Jewish legal code redacted by Rabbi Judah in Palestine during the early part of the third century) teaches that a king may not judge and may not be brought to trial; others may not testify against him and he may not be made to testify concerning others. The *Talmud* (the Babylonian commentary and extension of the *Mishnah*) limits this law to "Israelite Kings," i.e. those who were not of Davidic descent. Kings of the House of David, however, are subject to judgment and may be compelled to testify. The *Talmud* then concludes that fundamentally the law requires that the king should submit to judgment and testimony, but that an exception was made in the case of later Jewish Kings ("Israelite Kings") because of a historic incident.

In the first century of the common era Jannai was King, and the head of the Sanhedrin (supreme court) was the fearlessly independent Simeon ben Shetach. Now it happened that a servant of the King had been accused of committing murder. According to the law, the master had to be present during the trial of the slave. Jannai obeyed, and presented himself in court. But then Simeon informed Jannai that the law required the master to stand while the trial was in session. Aware of the sensitivities involved, Simeon hastened to assure the King that "you are not standing before us, but before Him who by His word created the world." Here Jannai drew the line and hurled a challenge at Simeon: "not when you say so, but only when your colleagues will tell me so." The shrewd monarch had made the right move. Simeon turned to his right, and his colleagues "buried their heads in the ground." He looked to his left, and his fellow judges did likewise. Defeated, Simeon was furious and called down the wrath of heaven upon his colleagues who, because of a combination of political calculations and cowardice, had subverted their eminent calling. The text closes with a legend-like flourish: the angel Gabriel came down, smote them on the ground, and they died.

The limits of power

What the *Talmudic* sages are teaching us is that in a healthy society the executive is not above the law. The Chief magistrate of the land must honor a summons to trial and must offer testimony upon the order of the courts. It is only when the judiciary itself is bankrupt and shows a failure of nerve in its confrontation with the executive head of the government that the "separation of powers" becomes complete and all interaction between the various branches ceases. With an overpowerful king and an apprehensive and politically motivated judiciary, better abdicate all jurisdiction over the king and attend to other pressing matters, lest the courts be completely destroyed or corrupted.

Scholars agree that the story of this confrontation is factual. Some historians, however, maintain that the actual story took place some thirty years later, with a different cast of characters. Making this change brings the *Talmudic* tale somewhat into conformity with the report by the historian Josephus. It is important to note the identity of the people involved in the Josephus story, because it adds another element of contemporary relevance. Instead of Simeon, Josephus talks of Sameas (Shemayah) as the head of the Sanhedrin. In place of Jannai, he writes of Hyrkan. And instead of an anonymous "slave" of the King, the accused is none less than Herod – later to become the detested King – brought up on charges of political assassination. Herod is likewise called *eved,* which in this case means not one who is technically a "slave," but an "advisor" of the King. The opinion of the ancient Jewish Court was, thus, that the King is responsible for the malfeasance of his advisors in the pursuit of their official duties!

Historical analogies should, of course, never be driven too far, and ancient law can at most provide illumination, rarely detailed prescriptions, for complex modern

political problems. Yet the sense of the Hebrew legal tradition is clear enough: no one, not even a King, is above the law, and if his advisors commit a crime he is responsible for them. And, as Judge Sirica reminded us in quoting Chief Justice Marshall in his landmark decision against President Jefferson, there is, after all, a difference between an American President and an English King. The argument applies *a fortiori* to our case: if a Davidic King, who was not democratically elected, must submit to the courts, how much more so an American president! (Interesting coincidence: Simeon ben Shetach and John Marshall were both related, respectively, to Jannai and Thomas Jefferson.)

For the good of all concerned

The *Talmud* is a continuation of the Biblical tradition. *Deuteronomy* commands the appointment of judges before the crowning of a king. "Judges" ruled in ancient Israel before the rise of the monarchy. This limitation on the political head of the government is not only for the good of the people, but for the good of the king himself: "Thus he will not act arrogantly toward his fellow countrymen or deviate from the commandments to the right or to the left, to the end that he and his decendants may reign long in the midst of Israel" (*Deut.* 17:20).

Will America learn in time what the Bible and the *Talmud* knew ages ago? If the President is wise, he will obey the Courts – if necessary yield the tapes, and "reign long." If he is not, the Congress will have to remind him "not [to] act arrogantly toward his fellow countrymen."

Women in a minyan: too little too late

Esther Ticktin

What struck me most forcibly in the report on the Rabbinical Assembly Law Committee's decision to count women in a *minyan* is the spectacle of twenty males sitting there and deciding the destiny of Jewish women in the life of the community. Were they not embarrassed to be in a position of judging whether their mothers, wives, female fellow scholars, future granddaughters were worthy of being counted along with the most ignorant, coarse and even criminal male Jew? Were they not embarassed about the fact that a male definition of women in purely sexual, functional and male-centered terms had for so long been considered binding by them?

A spectacle of condescension

Of course, Jewish spiritual and intellectual life has to be opened up to women. And of course, since men have a monopoly of it (at this point), it is they who have to open the doors and welcome women's full participation as equals. Of course, since in addition to prejudice, stereotype and entrenched interest in the status quo, there is also the obstacle of a male *Halakhah* to overcome, men have to be responsible for removing the very conditions that have kept women – no matter how qualified – from sitting on that committee.

But the whole procedure seemed so blatantly patronizing, so insensitive to the dignity of women, whose essential humanity was being weighed, and luckily found adequate by a majority, that *I*, as a Jew, was embarrassed. How, I wonder, could the learned Rabbis have allowed themselves to be interviewed and make the front page of the *New York Times*? What were they

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We print typos that do not obscrue the meaning.

Send business letters to: Box 567, Port Washington, N.Y. 11050. Sh'ma is published bi-weekly except June, July, and August by Sh'ma, Inc. Office of publication: 735 Port Washington Blvd., Port Washington, N.Y. 11050. Subscription $10.00 for 2 years in U.S.A. and Canada; $15.00 overseas. Institutional bulk (10 or more copies to one address) $2.50 each per year.

POSTMASTER: Please forward Form 3579 to Box 567, Port Washington, N.Y. 11050.

3/60, November 2, 1973