

*THE UNFOLDING TRADITION: JEWISH LAW AFTER SINAI.* By Elliot N. Dorff. Aviv Press 2005. Pp. 566. \$19.95. ISBN: 0-916-21929-1.

Rabbi Elliot Dorff is a prolific and careful scholar. His writings show great respect for those with different views, views which he tries to present as fairly as possible. Yet he does not shrink from expressing his own opinions, which he supports by careful research and analysis. Rabbi Dorff is a leading expert on Jewish Law within the Conservative movement. This, his most recent book, shows the development of that movement's approaches to Jewish law since its founding more than a century ago.

Following a brief introduction to the nature of philosophy and a comparison of Jewish and American legal theories, the book sets out some of the classic Biblical rabbinic texts on the sources and authority of law. This chapter will be familiar to those who have read Dorff and Rosett's *A Living Tree: The Roots and Growth of Jewish Law*, but it is useful to have the texts here as several of the writings later in the book refer to some of these sources. The next four chapters of the book contain excerpts or articles by fifteen Conservative rabbis including Dorff, appearing more or less in chronological order. Each is preceded by a long introduction where Dorff places each individual in context. Dorff describes the main ideas of the selected reading and how it fits in the overall thought of the chosen writer. He then offers his own assessment of the weaknesses and strengths of each writer's viewpoints. The next chapter presents viewpoints from Orthodox and Reform thinkers, showing some of the similarities and differences between their views and Conservative ideology. The final chapter presents six examples of Conservative legal theory in practice.

The book is a sort of conversation between these rabbis. Not only do Dorff's introductions provide probing questions and commentary to each selection, but some of the selections are themselves directed at other theories already discussed, and the book includes open letters between Dorff and Eugene Borowitz, a Reform rabbi. The texts draw the reader into the conversations, and I found myself referring back to earlier passages to compare opinions. The conversations concern among other things the source of the *halakhah*, whether it is still authoritative, and how, when and by whom it can be changed.

The book shows a wide range of views within the Conservative movement about the authority of Jewish law. The earlier writers, Zacharias Frankel and Solomon Schechter, seemed not to have disagreed with the Orthodox belief that the Torah was revealed at Sinai. They championed the idea that the law has changed over time as the Jewish people, under the leadership of their rabbis, have adopted new practices and dropped some older ones. Other Conservative rabbis have rejected the idea of revelation at Sinai, believing instead that people wrote the Torah either under divine inspiration or to record their interactions with God or their search for Him. Further to the left, Mordecai Kaplan believed that Jewish law was not law at all, but only a set of religious folkways.

The more recent Conservative theorists have built on these earlier approaches and reflect current modes of thinking about law and the interpretation of texts. For example, Rabbi Edward Feld takes Kaplan's idea somewhat farther, and asserts that "Halakah of any kind, whether Reform or Orthodox, is no longer necessary in our community" and that "rejecting halakhah can be a religiously liberating process through which new criteria of meaning are established and one's ritual life made holy." (211) Feld advocates a traditional set of observances filled with religious meaning. One example he offers is lighting the Sabbath candles with a blessing after sunset when he or his guests run late. He recognizes that this is in violation of Jewish law but does it so that his guests "can fully participate in welcoming the Shabbat." (210)

I found Feld's practice intriguing. It is one that I expect many Jews would follow who enjoy the flavor of Jewish practice without the desire to be bound by its restrictions. Still, I wondered how he could justify saying the blessing, "Blessed are you, Lord our God, King of the Universe, who has sanctified us by your commandments and commanded us to kindle the Sabbath lights." If there is no *halakhah*, how can there be a commandment? Even if one drops any reference to being commanded from the blessing, what does it mean to bless God while lighting the Sabbath candles in violation of the Sabbath? Other than nostalgia, what leads one to adopt a ritual that is based on a legal tradition that one rejects? Moreover, if we are living in a post-*halakhic* age where the goal is to find religious meaning, should not each individual or group be able to define their own legitimate path? Would Feld approve of someone who finds such meaning by playing a round of golf with his close friends on a Saturday morning?

Although Feld does not go that far, another rabbi, Raymond Scheindlin, presumably would. For Rabbi Scheindlin, Judaism does not

have normative rules but only opportunities. He writes,

You may be able to take advantage of some Jewish ideas and practices but not of others. You may even find that none of it works for you. This would not make you a bad person or even a lost soul. I would not even feel sorry for you, or lament that you are missing something. (395)

Yet Scheindlin finds meaning in Jewish practice. He writes in a way that many may find meaningful,

This core of life is God. Consciousness of this core is spirituality. Ordering one's life to make one conscious of that in a regular way is religion. Judaism is one such religion—the one I happen to have been born into and that I have cultivated. (404)

One of the things that unites all of the Conservative approaches in this book is the commitment to studying texts in their historical context, which entails, among other things, understanding the social, political, and economic conditions that existed at the time a particular text was written. Indeed, it is sometimes claimed that the Orthodox reject such an approach and hold that both the written and oral law were given at Sinai such that the Bible and Talmud are “the exact word of God.”<sup>1</sup> Can one believe in revelation at Sinai and still accept the premise that rabbinic texts must be analyzed in their historic context? Some Orthodox rabbis have done so, as Dorff recognizes. (437, 443) This does not surprise me. When confronting a text that seems to make a peculiar assumption about human behavior or social institutions, it is natural to try to place the text in historical context. That this is not more common among Orthodox rabbis may be due to a felt need to make the argument as persuasive as possible. There are different styles of argument, and sometimes avoiding historical analysis may appear to be the most objective. Some Orthodox rabbis, especially among the ultra-Orthodox, assert that the *halakhah* never changes and that one can find the solution to all legal issues within the four corners of the rabbinic texts. Yet it is apparent that these rabbis are influenced by historical factors. For example, this seems to be the best explanation for how rabbis in the late-twentieth century have brought the Jewish law of medical malpractice into line with modern expectations of the responsibilities of medical professionals.<sup>2</sup>

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1. Elliot N. Dorff, *Conservative Judaism: Our Ancestors to Our Descendants* 116-117 (United Synagogue Am. 1977).

2. As late as the early 20<sup>th</sup> century, Jewish law required compensation for medical injuries only if they were intentionally caused; if injury was caused by inadvertence, then the physician was liable only in a court of Heaven. Rabbi Jehiel Michal Epstein, *Arukh Ha-Shulhan* 336:2

One unifying assumption among the Conservative theorists is that following the Enlightenment, Jewish laws governing civil obligations, such as torts and contracts, have not been legally binding.<sup>3</sup> Conservative Judaism has thereby restricted the scope of Jewish law to matters of ritual observance, dietary laws, and marital status. Orthodox thinkers would disagree with this limitation, holding that not only is Jewish law still applicable to civil matters but that recourse to non-Jewish courts is restricted.<sup>4</sup> Orthodox rabbinic tribunals try civil disputes and their decisions are enforceable in this country the same as any arbitration award. Moreover, the Jewish law codes require wrongdoers not only to compensate their victims but to make sincere efforts to reconcile with them.<sup>5</sup> By contrast, Dorff and others within the Conservative movement look to Jewish law to provide guidance on matters otherwise governed by civil law, but only to fulfill our duties to God<sup>6</sup> or because Jews “aspire to holiness.”<sup>7</sup>

In a selection of his own writing, Dorff argues strongly that Jewish law must be changed if it is not moral. (340) He also claims that in reaching a decision about Jewish law, rabbis must seek to determine the will of God by studying rabbinic precedents and weighing them with

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(1884-1907). By the latter part of the century, even ultra-Orthodox rabbis imposed full liability for medical injuries caused by malpractice, deeming them to be intentional injuries. Rabbi Shmuel Halevi Wosner, *Responsa Shevet Halevi* 4:151 (1981); Rabbi Isaac Jacob Weiss, *Minhat Yitzhak* 3:104-105 (1961) (injection with wrong medicine). See Steven Friedell, *Medical Malpractice in Jewish Law: Some Parallels to External Norms and Practices*, 6 Chi-Kent J. Intl. & Comp. L. 1 (2006) (available at [www.kentlaw.edu/jicl/spring2006.html](http://www.kentlaw.edu/jicl/spring2006.html)).

3. E.g. Elliot Dorff, *The Unfolding Tradition* 74, 202, 209 (Aviv 2005); Elliot Dorff & Arthur Rosett, *A Living Tree, The Roots and Growth of Jewish Law* 364 (SUNY 1988); Dorff, *Conservative Judaism*, *supra* n. 1, at 12, 60; Boaz Cohen, *The Shulhan Aruk as a Guide for Religious Practice Today*, in *Conservative Judaism and Jewish Law* 91 (Seymour Siegel ed., Rabbinical Assembly 1977); Elliot Dorff, *Judaism as a Religious Legal System*, 29 *Hastings L.J.* 1331, 1356-1357 (1978). But see *A Living Tree*, *supra* at 519 (noting the doctrine of the law of the kingdom is the law “was largely restricted in practice to the areas governing the relations between the government and the Jews, such as taxation and expropriation of property for governmental purposes . . .”).

4. J. David Bleich, *Litigation and Arbitration Before Non-Jews*, 34.3 *Tradition* 58 (2000). However, Bleich sees no halakhic difficulty with suing in tort where the recovery is limited to the insurance coverage. J. David Bleich, *Medical Malpractice and Jewish Law*, 39.1 *Tradition* 72, 73-74 (2005).

5. E.g. Shulhan Arukh, *Hoshen Mishpat* 422:1 (Hebrew).

6. Elliot N. Dorff & Elie Kaplan Spitz, *Computer Privacy and the Modern Workplace* 2 (2001) (available at [www.rabbinicalassembly.org/teshuvot/docs/19912000/dorffspitz\\_privacy.pdf](http://www.rabbinicalassembly.org/teshuvot/docs/19912000/dorffspitz_privacy.pdf)) (responsum adopted by the Committee on Jewish Law and Standards of the Conservative movement).

7. Elliot N. Dorff, *Family Violence*, in Kassel Abelson & David J. Fine, *Responsa 1991-2000 The Committee on Jewish Law and Standards of the Conservative Movement* 773, 775 (Rabbinical Assembly 2002).

contemporary circumstances (economics, demographics, etc.) and a host of other Jewish forms of expression (stories, theology, history, morals, etc.) to make a considered, wise, and clearly Jewish judgment . . . (332)

Combining these two ideas, Dorff concludes that the Conservative rabbis have “a deep commitment to make Jewish law articulate how a good and just God would have us act in our time and place.” (513) Dorff recognizes that one must not only exercise judgment in making these decisions, but that one must re-examine one’s decisions on an ongoing basis “for the certainties of yesterday are not necessarily the certainties of tomorrow . . .” (335) He says that rabbis sometimes have to be willing to stretch sources beyond their original meaning but ought to be open about what they are doing. (351) Dorff recognizes that sometimes rabbis and judges reach a result after analysis of the relevant data and sometimes begin with a desired result and find ways to justify it. (505-506)

Overall, I have sympathy with Dorff’s description of rabbinic decision-making. Although it might sound like a collection of clichés, it is supported by many Jewish sources and is probably about as accurate as one can be. I have some difficulty, however, with the goal of trying to discern God’s will. That must be understood in a special sense, for the Talmud’s story of Achnai’s oven indicates that even when God’s will in a particular case is manifest, the rabbis must follow their own interpretation.<sup>8</sup> The search for what a “good and just God” would want seems likely to amount only to a search for what is good and just. Dorff provides an interesting discussion of two responsa on miscarriage that illustrate this. Rabbi Amy Eilberg concluded in her responsum that couples suffering a miscarriage should be viewed as mourners. The Committee on Jewish Law and Standards refused to adopt this view, instead preferring the responsum of Rabbi Debra Reed Blank that the parents be considered ill, so that family and friends should pay attention to their suffering. According to Dorff, Rabbi Eilberg had made the better argument that parents following a miscarriage are grieving, not ill. (504) Yet he defends the Committee’s decision because of fear that if the Conservative movement regarded the death of a fetus the same as the death of a human being for purposes of mourning, it might undermine its

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8. B. Bava Metzia 59a-b, included in *The Unfolding Tradition* at 27-28. An even more astounding story in the Talmud makes it appear that even in the Heavenly tribunal, God is only entitled to 50% of the voting power and must convince at least one other participant for His will to be accepted. B. Bava Metzia 86a. However, God apparently has sole power to decide who has a place in the world to come. B. Sanhedrin 104b.

position on abortion, “[e]specially in the context of consistent attempts by Catholics and others to make abortion illegal in the United States . . .” (500-501) He concludes, “The Committee preferred deliberately to misinterpret a grieving couple’s emotional state rather than risk overturning the propriety of abortion when the mother’s physical or mental health required one.” (504) As Dorff recognizes, this sort of calculated decision-making sometimes occurs in American courts. It seems a bit of a stretch, however, to conclude that even if this was a prudent decision, it was God’s will that it be made.

Rabbi Dorff is to be congratulated for having put together a remarkable book, one that informs and enlightens on many levels. All who are interested in a critical assessment of the Conservative movement’s approaches to Jewish law and who wish to understand its origins and current diversity of opinion will do well to read it.

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