

2003

The Openness of Talmud

Bruce Ledewitz

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

Bruce Ledewitz, *The Openness of Talmud*, 41 Duq. L. Rev. 353 (2003).

Available at: <https://dsc.duq.edu/dlr/vol41/iss2/5>

This Book Review is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

The Openness of Talmud

*Bruce Ledewitz**

The book, *The Jewish Political Tradition*,¹ represents an undertaking of monumental proportion. This first book is over 500 pages long and is presented as only volume I of a projected four volumes. The subject of this first volume is Authority, to be followed by volumes devoted to Membership, Community and Politics in History.

The book is sprawling in its scope. The editors, Michael Walzer, Menachem Lorberbaum and Noam J. Zohar, have assembled a vast array of short vignettes, mostly from classical Jewish sources. They then arranged these fragments according to ten headings and numerous subtopics. The editors also added short commentaries by well-known writers—people like Michael Sandel, Hilary Putnam, David Hartman, Suzanne Stone and Walzer himself. The result is not a unified investigation into the Jewish political tradition, nor could it have been.

An overall theme does emerge in the book, however, though that theme is not really the Jewish political tradition. Instead, the editors overwhelmingly emphasize the authority of the rabbinic tradition in Judaism—the Talmud, commentaries on the Talmud, medieval sources committed to the Talmudic tradition and a smattering of voices of 19th century reform. Spinoza makes an appearance, but there is nothing here of Marx, Levinas or Freud, let alone Sartre or Derrida. Walzer candidly acknowledges this editorial choice, claiming that the editors wanted voices that refer to one another in an unfolding tradition—"intertextuality"—informed by the shared experience of gentile rule.² This gives the book the feel of a unified point of view.

The topics and discussions reflect the editors' emphasis upon the rabbinic tradition. The book examines the issue of authority, beginning with authority of the Covenant; of reason versus revelation; of the Kings of Israel; of the Priests; of the Prophets; of the

* Bruce Ledewitz is a Professor of Law at Duquesne University School of Law. Professor Ledewitz' writings on Judaism can be found on the web at newamericanjudaism.com.

1. THE JEWISH POLITICAL TRADITION, VOLUME 1: AUTHORITY (Michael Walzer, Menachem Lorberbaum & Noam J. Zohar eds., 2000)

2. *Id.* at xxiii.

Rabbis; of the lay leadership in a Jewish community; of the Gentile State over its Jewish community; and of Jewish law in the modern State of Israel.

Despite these headings, almost the entire book is really about the authority of the rabbinic tradition to define the terms and conditions of Jewish life. So, being bound to the covenant means being bound to halacha — Jewish law defined by the rabbinic tradition. The authority of reason is the authority of rabbinic discussion. The authority of the King is interpreted by the rabbis. The prophet is subject to rabbinic interpretation. The rabbis decide upon the authority of the good men of the Town. And so forth.

There are some exceptions. There is discussion of the sources of morality and responsibility. But, basically this is a book about rabbinic law.

The emphasis on classic sources and concerns is not inadvertent. The editors aimed to accomplish three goals in this book: retrieval of classic Jewish sources, integration of them into a whole and criticism of them.³ They admirably seek these goals and accomplish them perhaps as well as could any one book. But, is this the Jewish political tradition?

The legitimacy of traditional halacha is a very important topic in Israel. The question Israelis face is whether a Jewish State can ignore this tradition and remain Jewish. And that question is part of a larger issue—whether a State that is Jewish can also consider itself democratic. This is the last topic the book addresses. But, this undeniably political issue is given short shrift. It does not become the starting point for an examination of political life generally.

The fundamental orientation of the book is more concerned with halacha and the ability of the Jewish legal system to adapt to modernity and to the existence of the State of Israel than with political life itself. The issues the editors treat mostly concern halachic development. While that may be an important religious question for Jews who feel the pull of tradition, and while in Israel it has become an important political issue, it is not essentially political matter.

How did a book about the political come to be this way? The question of Judaism's teaching concerning how a society is to be governed—that is, the traditional political question—is literally

3. *Id.* at xxiv.

posed in the book,⁴ but it is left unanswered or is treated obliquely and indirectly. The reason this question could not be addressed directly in the book is that there has been no Jewish political tradition in this sense since Jewish sovereignty ended in Israel with defeat of the Bar Kochba rebellion in 135 C.E. Since then, the Jewish people have lived under the sovereignty of others. Therefore, the only political question for Jews has been whether, and under what circumstances, a non-Jewish government exercises legitimate authority over its Jewish subjects.

The answer the rabbis gave generally to that question was that the prerogatives of a King are the same whether the King is Jewish or non-Jewish. In that answer, a great deal of arbitrary political power was accepted by the rabbis as rather inevitable. No doubt the failure of Jewish thinking to address the needs of the good society or the nascent notions of democracy and individual rights came about because of the assumption that protest and resistance were not serious options for Jews. The Jews were, by and large, unwelcome guests for 2000 years. This was not a situation conducive to political analysis.

Yet, a fundamental political orientation apart from halacha does appear in the book, though not acknowledged as such and scattered in several different places. The Jewish political tradition begins, as the authors show, with consent by the people as the foundation of God's covenantal authority. This issue arose in terms of the continuing binding character of Biblical law and later rabbinic law outside the state of Israel.

What could be called Jewish political thinking did not remain with the authority of God and God's representative in government. Once Israel rejected rule by God, that is, once Israel was tempted to be ruled by a King, a surprisingly uncompromising Jewish critique of all purely human authority emerged. Gideon refused to be King. The judges ruled in a temporary, limited way. Samuel attempted to avoid the creation of a full-scale dynasty. Solomon was a tyrant. The rest of the Kingly line was a disaster in many ways. The book shows this Jewish critique at work. Walzer actually writes about the failed attempt in the Talmud to incorporate monarchy within a constitutional structure,⁵ which is something of

4. *Id.* at 3. The questions the authors say they are addressing are "[h]ow is this people to be organized and led? Who will speak for God in its courts, assemblies, and schools? What structure of human authority is required by divine and textual authority?" *Id.*

5. *Id.* at 139.

an anachronistic way to look at the matter. For reasons alluded to above, Jews in exile could not develop a theory of limited government. So, Jewish political analysis of the State eventually ended or was deemphasized.

The place Judaism did consider the implications of human political power was not in the government of the State, but in the arrangements in the rabbinic academy itself. This theme is well-represented in the book's treatment of rabbinic authority and minority dissent. The best known Talmudic story of controversy and dissent is the Oven of Aknai. Many writers, including American law professors,⁶ have considered this story.⁷ In the book, the Oven of Aknai story occupies a central role. David Hartman, with whose Shalom Hartman Institute the editors are affiliated, wrote the commentary about Aknai. Hartman writes of the story as "in many ways a key to understanding the distinctive nature of Rabbinic Judaism."⁸

The editors know that Aknai is the place to look for a Jewish account of power. But, they fail to hear the radical critique in the story.

The Oven of Aknai story in the Talmud presents the rabbis as engaged in a dispute about an oven's ritual status—whether it is liable to ritual impurity.⁹ Rabbi Eliezer, considered to be the leading authority of his generation, regards the oven as not subject to impurity, and hence as clean, because its layers render it non-unified. The majority—indeed all the other sages—on the other hand, regard the cement coating as rendering the oven a single utensil, and thus subject to impurity. In and of itself the dispute

6. See e.g., Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 841 (1993); Daniel J.H. Greenwood, *Akhnai*, 1997 UTAH L. REV. 309 (1997); and Edmond Cahn, *Authority and Responsibility*, 51 COLUM. L. REV. 838, 838-39 (1951).

7. For other references see JULIUS STONE, *HUMAN LAW & HUMAN JUSTICE*, 27 n.89 (1965), and Izhak Englard, *Majority Decision vs Individual Truth: The Interpretation of the "Oven of Achnai," Aggadah*, 15 TRADITION 137 nos. 1-2 (1971).

8. WALZER, *et al.*, *supra* note 1, at 264.

9. The traditional, and most authoritative, English translation of the Babylonian Talmud is the Soncino Edition, published by the Soncino Press in London in 1935, translated under the editorship of Rabbi Dr. I. Epstein. The Oven of Aknai story can be found there at Baba Mezia 59a. I am most indebted to this translation, including its spelling of the name "Aknai." Nevertheless, I do not always adhere precisely to the Soncino translation or its punctuation and spelling. Occasionally I make my own judgments on these matters from the original text. My differences from the Soncino translation, however, are relatively minor and do not affect the thrust of the discussion here.

is over, as Edmund Cahn once called it, “a fine point in the interpretation of the law.”¹⁰

In the dispute about the purity of the oven, the sages and Eliezer at first argue from the Bible. The Talmud account does not tell us what these arguments for and against the oven’s purity were. They are just referred to as “arguments”. But the editors of the Talmud seem to favor Eliezer. The arguments by the sages are likened to “snakes”—a play on the word *Aknai* and a not-too-subtle reference to the behavior of the snake in Eden. Conversely, Eliezer is portrayed as making “all the proofs in the world” to no avail—the sages “did not accept them.”

Once Eliezer’s arguments fail to persuade, he ceases referring to the holy sources. Instead, he calls upon the natural and man-made world to testify on his behalf by altering the natural actions of a tree, a stream, and a wall. Eliezer says, “If [the law] agrees with me, let this carob tree prove it.” Thereupon the carob tree flies out of its place to a spot either a hundred or four hundred cubits away.

But the sages are unimpressed by such a demonstration. “No proof can be brought from a carob-tree,” they say.

Eliezer then calls upon another aspect of nature—a stream. “If [the law] agrees with me, let the stream of water prove it,” he says. Thereupon, the stream flows backward.

But again, the sages are unimpressed. “No proof can be brought from a stream of water,” they say.

Eliezer attempts one more proof of his position from the testimony of physical things. In a comical, yet fundamentally serious, demonstration, he calls upon the “walls of the academy” to prove him right about the oven. At that moment, the walls begin to topple. But Rabbi Joshua, one of the sages opposing Eliezer, rebukes the walls. He says, “When scholars are engaged in a dispute, what does it have to do with you?”

The walls at this point are in a dilemma. They stop falling out of respect for Rabbi Joshua, but remain bowed out of respect for Rabbi Eliezer.

Finally, Eliezer calls upon heaven itself to witness on his behalf. Thereupon a heavenly voice—literally “the daughter of the voice”—declares Eliezer’s interpretation of the law to be correct. The sages also reject this intervention because once the Torah was given at Sinai, the law evolves exclusively through human inter-

10. Cahn, *supra* note 6, at 838.

pretation—according to Rabbi Jeremiah, through majority rule. So, Rabbi Joshua rejects even the testimony of the voice of Heaven, with the famous phrase: “It is not in heaven.”

What was God’s reaction to the rejection of his intervention? Rabbi Nathan is portrayed as meeting the prophet Elijah—who walks the world in a number of Talmudic stories—and is told by Elijah that God laughed at the incident, laughed at being “defeated” by his children.

The story continues at this point in a darker vein. The sages were not content with carrying the day against Eliezer on just the point of law concerning the oven. They declare unclean “all” the objects upon which Eliezer had given his judgment of clean and then burn these objects. After the burning, the sages vote to excommunicate Eliezer.

As the sages feared, the excommunication of Eliezer sparks disorder in the natural world. Disasters of all sorts occur—including the destruction of a third of the olive, wheat and barley crops, which would have been a catastrophe indeed in that economy.

In the midst of these events, a huge wave threatens to swamp the boat of Rabban Gamliel, the head of the Academy. Gamliel addresses God directly, the same God who had been “defeated” by the sages. Gamliel says that the action against Eliezer was not taken out of ego, but to avoid factionalism—“so that strife may not multiply in Israel.” The sea then subsides.

All the same, Gamliel eventually is killed by heaven’s hand because of the treatment of Eliezer. Ima Shalom, who is both Gamliel’s sister and also Eliezer’s wife, continually distracts Eliezer from prayer after his excommunication, because of her fear of the possible consequences of Eliezer’s prayer. But one day she fails to prevent Eliezer’s from praying and Gamliel immediately dies. Thus, concludes the text, referring to an earlier Talmudic discussion, wounded feelings have the greatest access to heaven.

David Hartman endorses what might be called the mainstream interpretation of Aknai. For Hartman, Aknai represents the day Judaism became humanism, though he would no doubt reject that term. God’s “defeat” is a form of divine self-limitation, out of which man is enabled truly to become man. After Aknai, God’s active involvement in the world is more or less prohibited by the excision of miracle as a source of wisdom. From that time on, and until the advent of the Messiah, legal development would occupy the central role in Jewish thinking. Furthermore, even in this legal development, man is not to seek God’s “original intent,” but

to make sense of the law given a particular time and place. In this process of legal development, the needs of the group require the acceptance of majority rule in order to prevent strife. According to the editors, this account summarizes the Jewish intellectual world in light of, and symbolized by, Aknai.

This reading of Aknai parallels other assertions of rabbinic authority. The editors also present, for example, the rabbinic view that the rabbi is superior to the Prophet. Even if a messenger is sent by God, rabbinic interpretation cannot be supplanted.

There is obviously something crucial about Aknai in Jewish thinking. As the book demonstrates, the story has been taken as vindication of rabbinic rule, as opposed to any form of charismatic leadership, or indeed, any other form of leadership.

But in treating the Oven of Aknai story so positively, the editors entirely omit its darker implications. As Hartman implicitly acknowledges, the notion of man's taking responsibility for himself and excluding God does not lead to rabbinic rule. Instead, it carries the seed of secularism. The true heirs of the rabbis at Aknai are the thinkers of the Enlightenment. This is why Hartman is able to say, in likening secular zionists to the rabbis, that the secular zionists "opened up yet another dimension of Jewish life to the spirit of rabbinic confidence and initiative...."¹¹

What Hartman and the tradition the book celebrates fail to see is that this independence turns every "defeat" of God into a pinnacle of human achievement. Eventually, man will learn to "stand on his own two feet" everywhere and in every sense. Psychology will eliminate the need for prayer. Medicine and reproductive technology will triumph over death. Humanity will force the hand of history. This is why almost the entire book is, one way or another, a celebration of the human. On this reading, the Jewish political tradition has no place for God. This reading turns Aknai into a new rendition of the story of the tower of Babel, with man setting himself up as God's rival.

Of course, the literal heirs to the rabbis did not come to this conclusion. All of the current, major, movements in Judaism insist that halacha must in some sense be followed because it is God's will. They all oppose, to varying extents, the secularization of the world.

But as long as the Oven of Aknai story is read as Hartman reads it, this opposition is mere rabbinic self-interest. Halacha is

11. WALZER, *et al.*, *supra* note 1, at 268.

revealed at Aknai as a purely human artifact. Man is as free to jettison it as to jettison God's interpretation of it.

The question left unasked in the book is whether this interpretation of Aknai, and thus of Jewish thinking, is valid. The Oven of Aknai story does not unambiguously support Hartman's mainstream reading. The story is not a celebration of the triumph of man. The editors present the story of Aknai as ending with the rescue of Gamliel from the raging sea. The strong implication is that Gamliel, and hence, the rabbinic majority, was right to do what they did. But the story actually turns out differently. In just a few more lines, Gamliel is dead as divine retribution for the treatment meted out to Eliezer. So, the message of the wisdom of the sages at Aknai is certainly not free from doubt. Indeed, as a rejection of God, how different is the story of Aknai from the story of Samuel the editors tell? The people rejected God because they wanted a king. The rabbis reject God so they can rule.

Human authority without God is what is in question at Aknai. It turns out that such authority is badly liable to abuse. Majority rule is untrustworthy. The rabbis do not win over Eliezer, they simply have more votes. Reason is no safeguard either. Eliezer presents every argument in the world, while the rabbis opposing him argue "snake"-like. What happened at Aknai is more akin to political oppression than to the celebration of human leadership that the mainstream and the editors trumpet. At Aknai, the rabbis crush legitimate dissent in a pure display of power.

Aknai can indeed be read as central to Judaism's political understanding. But that understanding is that, without divine guidance, man is likely to oppress his fellow man.

Nevertheless, the political problem of division cannot simply be ignored. Gamliel was not insincere when he told God he feared strife. The rabbis had endured disastrous war against the Roman empire and plainly feared charismatic, popular leadership. The word of God is a powerful, ungovernable freedom that rulers always wish to cabin. Is there some way to deal with dissent and controversy other than to excommunicate it, as the rabbis did at Aknai?

The classic counter-response to the majority at Aknai is given in another Talmud story,¹² one also mentioned in the book.¹³ Rabbi Elazar ben Azaryah is portrayed as giving a sort of orientation to

12. Hagigah 3b.

13. *Id.* at xl - xli.

students at the academy. The words of the Torah, he says, direct us to life, are themselves unmovable and yet grow. They are expounded by the masters of assemblies—the masters of wisdom. These men sit and declare the law. Some say permitted; others say forbidden. Some say clean; others unclean. Some say fit; others disqualify. In such dissension, the student may well wonder, “how ... shall I learn Torah?”

Azaryah’s answer is nothing like that of the majority at Aknai. He does not say take a vote. He does not say assess the best reasoning. He does not say consult tradition.

Azaryah tells the students that all these disparate sayings are from One God. Make your ear like the hopper¹⁴ and get a perceptive heart to understand all these words. Azaryah’s words, unlike those of Gamliel and the rabbis at Aknai, lead to peace.

I can hear my own students asking, “But, what is the answer?” And yes, lawmaking requires some sort of closure. But, Talmud is not lawmaking. Truly, little in political life requires closure. As the editors note, the Talmud is much more free and open than Judaism later became. The Talmud is much less likely to end debate and always ready to explain minority positions.

Azaryah is as close as one comes to political wisdom in Judaism. Find the holy ones—the ones turned toward Heaven. Understand their wisdom. Live with contradiction. Avoid closure, as much as possible. This is freedom. When men and women come to fear freedom, as we so often do today, then politics becomes oppression.

14. “Hopper” means a funnel-shaped receptacle.

