Dissent In Bible and Talmud†

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The inevitability of clashing opinions wherever good and evil are to be distinguished is a recurrent theme in Professor Kelsen's writings. Wenn die Geschichte der menschlichen Erkenntnis uns irgend etwas lehren kann, ist es die Vergeblichkeit des Versuches, auf rationalem Wege eine absolut gültige Norm gerechten Verhaltens zu finden, d.h. aber eine solche, die die Möglichkeit ausschliesst, auch das gegenteilige Verhalten für gerecht zu halten.1

I trust he will be interested in the following comments on the treatment of dissent in ancient Hebraic sources.

I

TERMINOLOGY

First, some linguistic remarks. English is lucky (or unlucky, depending on the way you look at it) in possessing two fairly unemotional verbs for taking another view, “to dissent” and “to disagree”—leaving to one side the more general “to differ.” Both were adopted in the Renaissance, about 500 years ago. At that time French had dissentir and désagréer (the latter the opposite of agréer, “to find gratus, welcome”), by now obsolete. Certainly neither “to dissent” nor “to disagree” is ever quite neutral: there is practically always an element of regret, anger or combativeness. Still, the central reference is to the holding otherwise.

Few languages are so well equipped. Greek, of course, has a

† The form of Professor Daube's classical citations is in accordance with A Manual of Style (1969), copyright by the University of Chicago Press.

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If the history of human insight has anything to teach us, it is the futility of the attempt to discover by a rational procedure an absolutely valid norm of just conduct, that is to say, a norm which excludes the possibility of regarding as just also the opposite conduct.

(Author's translation.)
A TRIBUTE TO HANS KELSEN

goodly choice: antidoxazo,² antidoxeo,³ diaphoneo,⁴ dichonoeo,⁵ dichophroneo,⁶ heterodoxeo,⁷ etc. There is also diapheromai, "to differ."⁸ In Latin we find dissentio and discrepo. But, say, in modern French and German one resorts to circumscriptions, frequently with a negative: n’être pas d’accord, n’être pas du même avis, nicht übereinstimmen, anders denken; though in French différer will often do, like “to differ” in English.

Old Testament verbs in this area, whether positive or negative, do not express a mere discrepancy; they all describe doings or attitudes accompanying or flowing from it. Here is a selection alphabetically arranged:⁹ hith’onen, “to complain,” za’aq or sā’aq, “to cry out,” nalon, “to murmur,” me’en, “to refuse,” ma‘as, “to reject,” maradh, “to revolt,” mara, “to be rebellious,” rabh, to strive,” ra’ be’enaw, “something is bad in one’s eyes.” Two negative phrases are lo ’abha, “to be unwilling,” lo’ shama‘, “not to listen.”

No doubt most parts of the Old Testament are such that one would not expect much calm, orderly debate. But quite a few instances are mentioned. Absalom, temporarily master of Jerusalem, was told by Ahithophel how to defeat David once and for all. He then asked Hushai to speak and was given the opposite advice.¹⁰ After Solomon’s death, Rehoboam, urged by the Israelites to relax the harshness of his father’s rule, first consulted with the old ministers who took one line, then with his young companions who took another.¹¹ Neither narrative contains “to dissent.” The Wisdom literature—Proverbs, Ecclesiastes—would surely have had scope for this verb had it existed.

As a matter of fact, it is Wisdom literature that employs shana, “to differ,” in at least not too remote a sense. In Proverbs we are warned: “Fear the Lord, my son, and the king, and do not mix with them that differ,” or in an equally possible rendering, “with them that make things different.”¹² Apparently deviant individuals or factions are contemplated. The verb recurs in the Book of Esther, though it is there de-

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2. Plato, Theaetetus 170D.
3. Diodorus Siculus 2.29b.
5. Diodorus Siculus 2.29b.
6. Plutarch, On Love 18; Moralia 763E.
8. Plato, Euthyphro 7b.
9. According to the initial letter of the root.
11. 1 Kings 12:6-11.
12. Proverbs 24:21. The text may, however, be corrupt: see the commentaries. "To mix" is a bad thing also in Proverbs 20:19: "Do not mix with him that flatters with his lips;" Psalms 106:35: "They mixed with the heathen and learned their works;" Ezra 9:2: "They have taken of their daughters for themselves and for their sons, and the holy seed mixed with the peoples of the land."
scriptive not of nonconformist persons but of their customs. Haman charged the Jews before the Persian king: "There is one people scattered among the peoples in all the provinces of thy kingdom and their laws differ from every people and the laws of the king they do not carry out." Talmudic Hebrew could, I suppose, have pressed shana into service for "to dissent," but it did not do so. In modern Hebrew the word does have this meaning, probably under the influence of English.

Talmudic vocabulary does include objective (relatively objective) verbs for being at variance; I need hardly observe that there is no dearth of passionate ones—we shall come across some below. (An early one is qabhal, "to cry out"—a bit reminiscent of Greek egkaleo.) Even now, however, none goes directly to the inner state like "to dissent": I wonder whether the latter, highly intellectualized type occurs anywhere outside Greek or Greek-inspired terminology. Mostly the basic significance is "to divide" or "to be divided."

Two prominent specimens are halaq and pelegh (Aramaic). Both are represented in the Old Testament—the former being rather common, the latter rare—but never with reference to a differing in opinion. By the beginning of the Talmudic era, however, (around New Testament times) halaq had acquired this sense. The Mishnah already uses the noun mahaloqeth as denoting "a dispute." In the Bible it had meant "a group," and it is hardly accidental that in the earlier Rabbinic texts the dispute is not between individual sages but between schools, such as Hillelites and Shammaites.

Pelegh appears only in the Amoraic period (after A.D. 200), though distinct adumbrations of this usage in the Targumin (the Aramaic translations of the Old Testament) should make us beware of too late a dating. The noun pelugta' signifies "a dispute"; and again,

14. E.g., hissa; see text accompanying notes 56-58 infra.
15. Pharisees and Sadducees "cry out" over one another in Mishnah Yadain 4.6ff.
16. Nearest to it are the following passages: For halaq, "Then were the people of Israel divided, half followed Tibni to make him king and half followed Omri" (1 Kings 16:21, Niphal); for pelegh, "And unto Eber were born two sons; the name of one was Peleg for in his days was the earth divided" (Genesis 10:25—1 Chronicles 1:19, Niphal of palagh), which presumably alludes to the tower of Babel (Genesis 11:1-9); "Destroy, O Lord, and divide their tongue" (Psalms 55:9, Piel. No need to emend; attempts to do so have not been convincing), presumably a request for confusion among the enemies; and "The kingdom shall be divided" (Daniel 2:41, Aramaic), in the sense that its two component elements will not properly cohere (cp. id. 2:43).
17. Qal and Niphal.
harking back as it does to Biblical *pelugha*, "group,"\(^{20}\) in the first place one between two parties. Another Amoraic noun is *palgu*, "one of several views,"\(^{21}\) an adjective *palgā*: Mar Judah was "dispute-seeking."\(^{22}\)

II

THREE CASES

I now present three cases, one from the Old Testament, one from the New and one from the Rabbis.

A. The Old Testament

In the *Book of Judges* we are told that after Gideon's victory over the Midianites, the people offered him hereditary rule. But he replied: "I will not rule over you, neither shall my son rule over you: the Lord shall rule over you."\(^{23}\) (Unlike Shakespeare's Caesar\(^{24}\) he did not, having refused, go into an epileptic fit.) For the author of 1 *Samuel* 8,\(^{25}\) this was the right attitude to take: Israel should live in a special relationship with God, directly under his sovereignty, with no earthly king intervening—just as according to *Leviticus*\(^{26}\) a Jew might not be enslaved for ever to a fellow-Jew or a resident alien, "for unto me (God) the children of Israel are slaves."\(^{27}\) Samuel therefore, was rightly displeased when the people asked for a king on the model of the neighbouring states. God, too, was displeased. "They have not rejected thee," he said to Samuel, "but me that I should not reign over them."\(^{28}\) Nevertheless he ordered Samuel to give in, but first he should impress on the malcontents what a king would do to them: "He will take your sons and they shall run before his chariots, and he will take your daughters for cooks and bakers, and he will take your fields and give them to his servants."\(^{29}\) Moreover, he should caution them that once the system they craved was set up, they could not get rid of it at will: "And ye shall cry out in that day because of your king and the Lord will not hear you."\(^{30}\) The people, however, were not to be put off and

\(^{20}\) Ezra 6:18; 2 Chronicles 35:5.

\(^{21}\) Palestinian Erubin 25c.

\(^{22}\) Babylonian Erubin 61b; Qiddushin 58a.

\(^{23}\) Judges 8:22-23.

\(^{24}\) W. Shakespeare, *Julius Caesar* act I, scene II (Casca's report).


\(^{26}\) Leviticus 25:39-55.

\(^{27}\) Id. 25:55.

\(^{28}\) 1 Samuel 8:7.

\(^{29}\) Id. 8:9-17.

\(^{30}\) Id. 8:18.
so “The Lord said to Samuel, Hearken unto their voice and make them a
king.”

Here, then, we have the people demanding a fundamental and, from the Bible's point of view, deplorable alteration in the form of government. Yet, after due warning, they are allowed to have it their way; and it is noteworthy that the warning refers not to the wickedness of their proposal—it is too evident that that would not move them—but to the dire material consequences. The institution coming about in this fashion is nothing less than the monarchy, to which allegiance is owed by every Jew and from which, in the end of days, the Saviour is supposed to arise.

There are in the situation, as depicted by the narrator, three elements which explain this way of dealing with the misguided request. First, the people's desire to be “like all the nations,” outrageous as it is, has an understandable practical basis: the new organization will mean more strength in the prevalent social and military conditions. “Our king shall go out before us and fight our battles,” they exclaim. Those chariots and officers that, as Samuel reminds them, are a costly and oppressive concomitant of a monarchy will also have their enormous uses.

Secondly, there is no revolt as, say, in the case of Korah. The plea for a change is submitted to the lawful leader, Samuel, by the lawful representatives of the people, “the elders of Israel.” In fact they indicate that were there a prospect of his being succeeded by one of his sons, that would have been good enough: alas, his sons are untrustworthy. The petitioners, that is, are prepared to abide by the decree of established authority: nothing the latter would not sanction is being arrogated.

Thirdly, Israel has proved again and again its incapacity of living up to the ideal standard. Their present conduct, God points out to Samuel, is entirely in line with their conduct in the past: “According to all the works which they have done since I brought them out of Egypt, wherewith they have forsaken me and served other gods, so do they also unto thee.” There comes a point where, in order to avoid the worst, the second-best must be accepted. The people are not up to

31. Id. 8:22.
32. Id. 8:5, 20.
33. Id. 8:20.
34. Numbers 16:1-35.
35. 1 Samuel 8:4.
36. Id. 8:3, 5. When Samuel followed his predecessor Eli, it was because the latter's sons were degenerate. Id. 2ff.
37. Id. 8:8.
freedom under God; a divinely ordained kingship, with all its blemishes, is preferable to total defection and chaos.

This facet of the case is of outstanding importance. For one thing, because of it, the monarchy furnished an exemplar for institutions the legal order recognizes by way of concession to human frailty or depravity. In Jesus's judgment, divorce fell into this category, admitted by Moses "for the hardness of your hearts." What is particularly relevant in the present context is the dialectic that resulted in regard to the confrontation of king and prophet. On the face of it, throughout the monarchy, for over four centuries, it was the prophets who voiced dissent. However, when we look deeper, this role might be attributed to the kings that dared oppose them. The prophets stood for the perfect order—not just a higher ethics or natural law, but that unique connection between God and Israel adverted to above; whereas the very office of king originated in a break-away, not to mention the shortcomings of individual holders. If nothing else, this intrinsic flaw in the monarchy rendered it forever accountable to the prophets, representing the genuine norm.

B. The New Testament

To go on to the Acts of the Apostles—when Peter and his fellow-apostles preached the risen Jesus at Jerusalem, the Sanhedrin, we learn, was particularly incensed since it was dominated by Sadducees, who denied bodily resurrection. Repeated warnings to desist were spurned: the apostles "obeyed God rather than men." The Sanhedrin now contemplated killing them. But its most respected Pharisaic member, Gamaliel the Elder, Paul's master, urged moderation. He adduced examples of pseudo-Saviours who, without any effort on the part of the Sanhedrin, after some initial success, had perished and their cause with them; and he ended, "Refrain from these men and let them alone: for if this counsel or work be of man, it will be overthrown, but if it be of God, ye cannot overthrow it, lest haply ye be found even to fight against God."

The apostles' insight that the will of God takes precedence over

38. Matthew 19:8; Mark 10:5. As for Paul, see D. Daube, Pauline Contributions to a Pluralistic Culture: Re-creation and Beyond, in 2 Jesus and Man's Hope 231 et seq. (Miller & Hadidian eds. 1971).
39. In my Messenger Lectures at Cornell, in October of 1971, on "Civil Disobedience in Antiquity," I shall devote a chapter to them.
41. Id. 4:19; 5:29.
42. Id. 22:3.
43. Id. 5:33-36.
any other is as old as the *Second Book of Moses.* The midwives, bidden by Pharaoh to destroy any newborn Hebrew male, "feared God and did not as the king commanded them." In the abstract, not a single Rabbi would have contested it, as is indeed clear from the formulation chosen by Peter and John: "Whether it be right in the sight of God to hearken unto you more than unto God, judge ye." In the concrete, if your opponent does what you consider damnable, inevitably you do not accept that he is following God.

What about Gamaliel's opinion? (I pass over the well-known riddle posed by his observations on the two pretenders Theudas and Judas of Galilee: I shall take it that the gist of his reasoning is faithfully preserved. Even if that is not so, obviously such reasoning must have met with a good deal of understanding in the first century A.D.—otherwise it would not figure.) His disciple Paul, it may be recalled, in inveighing against Jewish opponents of the Christian claim, deemed it an extenuating circumstance that, however wrong-headed, they were motivated by genuine "zeal of God." There is some affinity with the doctrine in modern criminology that a measure of leniency ought to be extended to offences not the result of a despicable disposition (*die nicht aus ehrloser Gesinnung entspringen).*

Gamaliel's point is different. The advent of the Messiah may open with a stage where the nature of the happenings is not yet made fully manifest; hence there is a degree of uncertainty regarding the Christian sect. It may well be the same Rabbi (and not his grandson, Gamaliel II) of whom the Talmud records that he detected adumbrations of Messianic blessings in everyday phenomena. That would chime with his bias against rashness and ruthlessness in *Acts.* His advice does not mean that, once a movement definitely proved apostate, harsh suppression would not be in order. As a matter of fact, it was when his grandson Gamaliel II was President of the Academy of Jabneh that an imprecation against Christians and other heretics became part of the daily Eighteen Benedictions. Nor does it necessarily mean total passivity in the face of what looks to be a threat. The Sanhedrin, impressed by his argument, set the apostles free, but not without first having

them flogged. It is not inconceivable that he agreed to this procedure. What it does mean is that you must refrain from irreversible steps, above all, bloodshed.

The basis for this approach is fully spelled out. Things may not immediately be recognizable for what they are. But, on the one hand, if truly evil, God will not allow them to last. That is why you can afford to wait. On the other hand, if what appears suspect should really be salvation, sent in this testing guise, its triumph is assured and severity against it would be futile, indeed impious. It has long been seen that the Mishnah offers something of a parallel: "Any dispute (division, mahaloqeth) that is in the name of Heaven shall end by standing up, but any dispute that is not in the name of Heaven shall not end by standing up. What is a dispute that is in the name of Heaven? That is the dispute of Hillel and Shammai. And that is not in the name of Heaven? That is the dispute of Korah."\footnote{Mishnah Aboth 5.17.}

It has even been suggested that Gamaliel is the author of this aphorism. At any rate, in one form or another, this kind of trust is widespread in Judaism, Christianity and even beyond. \textit{(History is on Our Side} is the title of a book by Joseph Needham, the present Master of my Cambridge College.\textit{)} Without it, most long-term communal enterprises would make little sense.

A word about Gamaliel's remark, "lest haply ye be found to be god-fighting," \textit{theomachoi}, adjective. Quite a few experts assume that it is an allusion to \textit{The Bacchae} by Euripides, where Dionysos is the god unavailingly resisted.\footnote{Euripides, \textit{The Bacchae}, lines 45, 325, 635, 1255.} Luke, author of \textit{Acts}, they claim, drew either directly on the play or on an intermediate source. But Gamaliel is more likely than Luke to have made use of \textit{The Bacchae}, and even he is unlikely in the extreme. The concept is not at all uncommon either in pagan writings or Jewish ones. Leaving aside the former—the LXX says of Antiochus Epiphanes that he is "fighting against God," verb, \textit{theomacheo}.\footnote{2 Maccabees 7:19.} Symmachus employs the adjective three times.\footnote{Always translating \textit{repha'im}, the correct rendering of which seems to be "the dead in the underworld." The passages are: \textit{Job} 26:5, "The god-fighting ones tremble"; \textit{Proverbs} 9:18, "He (the guest of foolishness or of a prostitute) knoweth not that the god-fighting ones are there"; \textit{id.} 21:16, "The man that wandereth out of the way of understanding shall remain in the congregation of the god-fighting".} Josephus knows the verb.\footnote{Contra Apionem 1.244, 263, quotation from Manetho: Amenophis did not attack the lepers, thinking it wrong to fight against God.} To drag in Euripides is perverse. It should be added—what does not seem to have been noticed—that a number of

50. \textit{Acts} 5:40.
51. \textit{Mishnah Aboth} 5.17.
53. 2 Maccabees 7:19.
54. Always translating \textit{repha'im}, the correct rendering of which seems to be "the dead in the underworld." The passages are: \textit{Job} 26:5, "The god-fighting ones tremble"; \textit{Proverbs} 9:18, "He (the guest of foolishness or of a prostitute) knoweth not that the god-fighting ones are there"; \textit{id.} 21:16, "The man that wandereth out of the way of understanding shall remain in the congregation of the god-fighting".
55. \textit{Contra Apionem} 1.244, 263, quotation from Manetho: Amenophis did not attack the lepers, thinking it wrong to fight against God.
Rabbinic utterances testify to the currency of the concept. One at least bears on the topic of this paper: R. Hisda, of the third century A.D., held that “he who contends (halaq) against his master is as one that contends against the Divine Presence.” In support he cites a statement from Numbers, that Dathan and Abiram “strove against Moses and Aaron in the company of Korah, when they strove against the Lord”: here, Hisda maintains, strife with one’s teacher is equated with strife against God. The Biblical word is hissa, which can be used to signify proper battles. Hisda, incidentally, had a prolonged falling-out with his teacher Huna.

C. The Rabbis

Lastly, my Rabbinic case. From the beginning of the Talmudic epoch (New Testament times), controversies as to the correct understanding of the law were to be decided by a majority of the sages. Scriptural sanction for this was gained by a highly artificial interpretation of a verse from Exodus, “Thou shalt not speak in a cause to bend after the many, to incline.” The exegetes made a separate injunction of the last few words: “After the many to incline.” Needless to say, the principle entailed enormous problems, theoretical and practical, necessitating all sorts of devices. One paragraph in the Mislınah lays down that the majority, to succeed, must be superior in wisdom. Some qualification!

The following incident dates from the middle of the second century A.D. A Gentile asked R. Joshua ben Karha why, despite the commandment “After the many to incline,” the Jews failed to go over to the religion of the pagans who greatly outnumbered them. Joshua refuted him by making him confess that his sons did not serve the same god as himself nor any one of them the same god as the other; indeed, their differences were such that they were apt to knock one another’s

56. Shekhina; Babylonian Sanhedrin 110a.
58. Psalms 60:2; LXX empyrizo (“to set on fire,” assuming a Hebrew hissith).
59. Babylonian Baba Metzla 33a; see W. BACHER, DIE AGADA DER BABYLONISCHEN AMORÆER 61 (1878).
60. Exodus 23:2. The text may not be quite intact.
61. Babylonian Baba Metzla 59b; Hullin 11a; Leviticus Rabba 4, second half, on Leviticus 4:1-2 (this will be discussed in detail presently). If the verse is a simple warning against injustice to please the multitude, in strictness “to incline” is superfluous. For the Rabbis, the Pentateuch could contain nothing superfluous. Hence the division into two injunctions, one “Thou shalt not speak in a cause to bend,” against corruption, and one “After the many to incline,” the majority principle.
62. A good deal that is found in modern literature is speculative. See D. Daube, One Against Ninety-nine, NIV HA-MIDRASHA 43 et seq. (Spring-Summer 1971).
63. Mislınah Eduyoth 1.5.
64. Leviticus Rabba 4, second half, on Leviticus 4:1-2.
brains out. Before exerting himself, the Rabbi concluded, to get the Jews to join him, he ought to get his sons to do so. It is the kind of repartee that is effective though, in reality, evasive. A striking array of phrases testifies to its popularity: physician, heal thyself; the pot calling the kettle black; he who sits in a glasshouse should not throw stones; look who’s talking; clear up your own mess first. When the Gentile had left, Joshua's disciples requested and obtained substantive satisfaction. He pointed out to them that the Bible, in speaking of Esau's tiny household, used the plural *nephashoth*, "souls," whereas Jacob's huge progeny at the time of his going to Egypt was described as *nepesh* in the singular, "soul." In English, we might think of "folk" and "folks." Esau's family consisted of some half dozen "folks," Jacob's of 70 "folk." This was the true answer to the question: Scripture itself conveyed that the worshippers of a host of idols were so many individuals while the worshippers of the one God formed one whole—an invincible majority.

One inference to be drawn from this tale concerns the status of the majority principle around A.D. 150. Ideally, it seems to have been felt, this principle ought to govern not only internal conflicts but also those between Judaism and the outside world. In neither of his two explanations did Joshua deny the general applicability of the Biblical provision. What he demonstrated was that even if it was applied the Jews would win. It was treated almost as a natural law.

A further notable detail emerges. That Gentiles were exercised by the separatism of the small Jewish nation we know from many sources, Jewish and non-Jewish. (Above I quoted Haman's denunciation, which is typical: "There is one people scattered, and their laws differ from every people." Accordingly, the figure of the questioner in the encounter causes no surprise. But the story also introduces Jews, indeed, extremely committed ones, worried by being bound to a religion which the bulk of mankind would have nothing to do with. The Rabbi's disciples did want the criticism met.

There is hardly an elite which does not now and then need a reinforcing of its conviction of election. Judaism by that time had a long tradition of dealing with this difficulty, which actually arose not only in relation to heathendom but also among rival groups within.

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66. *Esther* 3:8; see text accompanying note 13 *supra*.
67. I shall not dwell on the particular turn of his enquiry, in invoking a Biblical text.
68. Touchiness is another result of the continuous inner struggle with doubt. Which is not to deny the importance of external factors; repeated ill-treatment, for example, is bound to intensify this quality. The recent Jewish reaction to de Gaulle's use of the epithet *dominateur* provides an arresting illustration.
We may think, for example, of the Dead Sea sect. The Pharisees themselves whose heritage Joshua considered himself to be guarding had had experience with being a proud, aloof minority.

What I want in conclusion to draw attention to is that the very form of this episode reflects a severe division of men into those without, ignorant and hostile, and those within, the saved; I have labelled the form “Public Retort and Private Explanation.” It occurs in Rabbinic writings from the first century A.D. and also, not surprisingly, in the gospels. The main parts are: First, a question by an outsider, “Why do you not fall in with the majority?,” or in Mark, “Why eat thy disciples with unwashen hands?” Second, the reply on his own level, “Start by getting your house in order,” or in Mark a saying which to the populace at large must sound a piece of magical lore, “There is nothing from without a man that entering into him can defile him, but the things which come out of him those defile a man.” Third, removal of the outsider and request of the disciples for enlightenment. And fourth, the secret, the truth: Scripture’s message about “soul” and “souls,” or in Mark, “Whatsoever thing from without entereth into the man entereth not into his heart, but from within, out of the heart, proceed evil thoughts.”

This is the barest outline. There is far more to it, and indeed, the form can assume varied and quite sophisticated shapes. Moreover, to be thoroughly appreciated, it must be compared with other, related forms cultivated in that age. One might even think it worthwhile to investigate generally the literary forms and genres bred by dissent.

70. Mark 7:1-23.