BOOK REVIEW

COLLABORATION WITH TYRANNY IN RABBINIC LAW. By David Daube.[1] London: Oxford University Press, 1965. Pp. 104. $2.40.

JEWISH LAW IN THE DIASPORA: CONFRONTATION AND ACCOMMODATION. By Leo Landman.[2] New York: Shulsinger Bros. Inc., 1968. Pp. 223. $6.00.

THE IMPERATIVE OF RELIGIOUS LAW

First "the Nuremberg Trials" syndrome and now the Vietnam War, together with other causes, have brought to the fore of the American consciousness the problem of what the moral limitations may be upon the legitimacy and potency of state law. It is a striking irony of modern history that in this situation men and groups of currently "progressive" views, *i.e.*, such as assert the ultimate primacy of ethical commitments, generally tend to lack authorities, both institutional and ideological, on which to rely for their protestations, because it was almost exclusively they who, in modern times, insisted on the secularization and relativization of society and values. Thus we see the curious and pathetic spectacle of an increasing number of young people, raised in a "liberal" cultural environment which prided itself in its alienation from religion and absolute morality, face the government with the claim that they must be exempt from at least some of its laws "on religious (and/or moral) grounds."[3]

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2. Professor of Rabbinics, Dropsie College for Hebrew and Cognate Learning.

3. For a good view of the confusing diversity that prevails among American legal thinkers, *see* Freeman, *Moral Preemption*, 17 HAST. L.J. 425-71 (1966). The frightening disarray on this question which prevails in international law is excellently analyzed in Lewy, *Superior Orders, Nuclear Warfare, and the Dictates of Conscience: The Dilemma of Military Obedience in the Atomic Age*, 55 AM. POL. SCI. REV. 3 (1961). And the jurisprudential brouhaha can be illustrated by the opposition of Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) and his German tradition of Radbruch, Max Weber, Kelsen, and Lask vs. R. HARE, THE LAWFUL GOVERNMENT, PHILOSOPHY, POLITICS, AND SOCIETY 157-72 and Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). Also Hart does not deny that there is a "minimum content of natural law." H. HART, THE CONCEPT OF LAW 184-95 (1961). Indeed, despite all the talk of "legal positivism," this is also true of Kelsen. The latter, too, stipulates a rational, natural "*Grundnorm*" as "minimally necessary natural law" to justify the idea of social contract and to provide a last resort for freedom and morality. H. KELSEN, DIE PHILOSOPHISCHEN GRUNDLAGEN DER NATURRECHTSLEHRE UND DES RECHTS POSITIVISMUS 67 (1928); *Do Noachites Have to Believe in Revelation? (A Passage in Dispute between Maimonides, Spinoza, Mendelosohn and Herman Cohen) A Contribution to a Jewish*

This circumstance alone should suffice to induce us to take another look at the relationship between positive law and ethics, and, certainly, the state and religion most prominently claim to be spokesmen for these two values.

There are at least two additional reasons why men of the law would be well advised to look at these two books: 1) Americans almost invariably discuss the relationship between "state and church" from the perspective of the state; here they have a chance to study it from the perspective of at least one religion; 2) in Western culture the entire problem is almost always discussed in a limitedly Christian context, and even when, rarely, Jewish considerations are adduced (by non-Jews as much as by Jews) they turn out to be the political and social concerns of modernized, acculturated Jews rather than the authentic and authoritative legal sources of Judaism itself. These two books help greatly in remedying this condition.

Landman's book has the advantages and disadvantages of having started out as a Ph.D. dissertation, that is, it is a dry and rather unimaginative compilation and historical ordering of a large body of useful facts. It revolves around the fundamental legal dictum laid down by the Babylonian Talmudic authority Samuel early in the third century that "the law of the kingdom (i.e. the highest civil authority) is (also religiously binding) law."[4] This principle has never ceased to be authoritative and operative for Jews. However, without the religious qualifications attached to it either from the outset or in the course of time, it could (as has been attempted a few times and as the author rightly warns) lead to self-dissolution of religious law and its ethical values by the wholesale and unlimited assimilation of all state laws. In fact, Samuel's dictum has always been applicable only to civil law, primarily tax and real estate questions, to which, later, commercial law

View of Natural Law, 52 JEWISH Q. REV. (1962) and 53 JEWISH Q. REV. 60-63 (1963). The issue seems to be two-fold: 1) Hart thinks that it is practically more useful to subsume also fundamentally evil enactments under the concept "law" while others would disagree; 2) he derives his "minimum natural law" from empirical nature (*cf.* his references to Hobbes and Hume, LANDMAN at 254), whereas some regard such a procedure as rationalistic reductionism, which in this connection, for one, turns out to be not so much self-fulfilling as self-defeating; for Hart does not deny that certain positive laws should be disobeyed. H. HART, THE CONCEPT OF LAW 203-07 (1961). But it has become greatly more difficult, if not impossible, to determine what both the rationale and the instances of such morally justified disobedience are. For a wild extrapolation of Hart's "minimum natural law" to extraterrestrial creatures, *cf.* R. PUCCETTI, PERSONS—A STUDY OF POSSIBLE MORAL AGENTS IN THE UNIVERSE 107-15 (1968).

4. The sources and details can also be conveniently found in 7 TALMUDIC ENCYCLOPEDIA (Hebrew), cols. 295-308 (1956), though not historically analyzed as in LANDMAN.

and contract came to be added. Even in this area the relevant laws had to be "laws of the kingdom," not "laws of the king" or "fiats of the kingdom,"—i.e. they had to be universally directed at all subjects, based on established legal tradition, and for the common welfare; otherwise they were "royal robbery" and could, if possible, be properly evaded.

Perhaps the historically and jurisprudentially most interesting implication of Landman's study—for which the author supplies a good deal of information but which he does not himself really explicate, because of an apparent lack of a penchant for conceptualization—is precisely the ironic historical tragedy of which we spoke at the outset: that "liberalism" proved to be ultimately suicidal. Samuel's dictum was laid down in Babylonia, where the Jews lived in a foreign country the legitimacy of whose government they accepted.[5] In the contemporary Palestinian Talmud, on the other hand, and in Palestinian Jewry neither Samuel's principle nor its concept arises, clearly because there the Jews regarded the country as their own and the occupying Roman or other government as illegitimate. The Palestinian tradition, with its extreme waryness of civil government, was perpetuated in earlier mediaeval North-European Jewry which regarded itself as surrounded by an immoral society. Thus the Franco-German 12th-century Rabbi Samuel ben Meir stipulated a social contract theory of legitimate government and law under which conquest could not be a source of legitimate sovereignty.[6] In more enlightened Spain, on the other hand, where, under Moslem reign, a lot of cultural and political crossacculturation took place, the Babylonian tradition was carried forward to the point where even

5. Although Landman does not like the historical explanation (LANDMAN at 19-22), his refutation of it is unconvincing, and B. Bamberger's point, 54 CENTRAL CONFERENCE OF AMERICAN RABBIS YEARBOOK, INDIVIDUAL RIGHTS AND THE DEMANDS OF THE STATE: THE POSITION OF CLASSICAL JUDAISM 9 (1944), especially his assimilation of Samuel's Persian patriotism to his anti-messianism, is quite persuasive. Bamberger's view is strenghtened, at length, in 2 J. NEUSNER, A HISTORY OF THE JEWS IN BABYLONIA (1966). Bamberger's view of the matter fits the thesis here advanced.

6. Landman wrongly thinks that social contract theory of government is a thesis about history (157), whereas in fact it is a normative, heuristic idea. 1 THE POLITICAL WRITINGS OF J.J. ROSSEAU, *Je cherche le droit et la raison et ne dispute pas des faits*, 462 (C.E. Vaughan ed. 1915); 6 KANTS WERKE 380 (E. Cassirer ed. 1912). The contract is "by no means to be necessarily assumed to be a fact—it is a mere idea of reason, which has, however, its undoubted (practical) reality . . . ." E. CASSIRER, ROSSEAU, KANT, GOETHE (1945); W. HAENSEL, KANTS LEHRE VOM WIDERSTANDSRECHT, Kant-Studien No. 60, 46-53 (1926); Schwartz, *The Right of Resistance*, 74 ETHICS 126 (1964).

appointment of rabbis was ceded to the civil power. This tradition then also entered Northern-European Jewry a little later when increasing civil despotism made it quite necessary for survival to accept brute might as right. And with 19th-century Jewish emancipation, in Napoleon's "Sanhedrin," under German-Jewish and American assimilation, the Babylonian-Spanish tendency to submit to civil government made further tremendous headway. The ultimate tragico-ironic result of this development was seen in one way when German Jews were confronted with Nazi laws whose legitimacy they had in principle trouble disputing and which intended their death and is seen in another way when present-day young American Jews, together with other Americans, vainly seek grounds for ethical objections to the Vietnam War and the draft.

The conclusion that such an over-all analysis would seem to constrain is that the self-assertion of regligious law and the strictest limitation of state law are again called for under modern conditions. Recent decisions of U.S. courts, especially rulings of the Supreme Court concerning conscientious objections (though couched more in individualistic and moralistic terms), also come to this effect.[7] Landman himself, however, is much too much the product of the unfortunate development which we have described to commit himself unambiguously to such a conclusion. He preaches a good deal of "patriotism"[8] and had to write a separate article in which to come to grips with the Vietnam War problematic.[9]

Therewith we arrive at the single fundamental and decisive limitation on the principle that "the law of the land is the law" which has never been disputed in all of Jewish history—that with respect to three sins, idolatry, sexual immorality, and shedding of human blood, "one must let oneself be killed rather than forced to commit" them.[10] Landman

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7. *Cf.* United States v. Seeger, 380 U.S. 163 (1965).

> The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a power higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

Girouard v. United States, 328 U.S. 61, 68 (1946).

8. LANDMAN at 21.

9. L. Landman, *Law and Conscience: The Jewish View*, 18 JUDAISM 17 (Winter 1969). Here he rightly anchors conscientious objection in principle to Jewish law. *Id.* at 25-29. Nevertheless, (sad to say to someone committed to the over-arching supremacy of ethico-religious law) he leaves "the facts" of the Vietnam War open. *Id.* at 29.

10. BABYLONIAN TALMUD, FRACTATE SANHEDRIN 74a.

does not deal with this at all. It is, on the other hand, the entire subject of Daube's study. The latter is in every way a different kind of book: the distinguished Regius Professor of Civil Law in the University of Oxford, Fellow of All Souls College, and erudite historian of comparative law, read the book as the Riddle Memorial Lectures at the University of Newcastle on Tyne. He writes literately, wittily, humanely, and though his is overtly an exercise in the reconstruction of the history of legal texts and concepts and he carefully abstains from moralizing about them, he clearly knows full well what the real issue is, and no intelligent reader can in turn fail to grasp it.

There is no need here to rehearse the details or the history of Daube's scholarly and perceptive investigation. Suffice it to summarize the result: under the fundamental ethico-legal principle just quoted the earliest stratum of Talmudic law (*i.e.* continuously valid Jewish law) prescribed that an individual man was not to be surrendered to civil authority for execution, even if this refusal entailed the death of the entire community, unless he was specifically named rather than anonymously chosen at random, and even this exception was not acceptable under "the rule for the truly pious;" after the devastating persecutions under Emperor Hadrian (c. 130 C.E.), for the sake of the survival of the community, this prohibition was relaxed inasmuch as individuals who were "legally deserving of the death penalty" anyway were excepted. "Legally deserving of the death penalty" turns out to be metaphoric. As Daube shows, a civil condemnation to death could not be meant literally, since (a) it would defeat the entire purpose of the Jewish law in question, and (b) Samuel's principle "was never taken *au pied de la lettre*."[11] Jewish law itself, on the other hand, had by that time *de facto* abolished capital punishment. With the experience of the Nazi Holocaust and other modern practices of using hostages in mind, Daube is not, however, ready to let it ride at that: "The doctrine here combated is perhaps not yet so old and rooted that it must count as Halakhah, as the valid law on the matter. Alternatively, if it is too late to drop it, it should be subjected to very restrictive interpretation."[12]

11. D. DAUBE, COLLABORATION WITH TYRANNY IN RABBINIC LAW 43-44 (1965).

12. D. DAUBE, THE DEFENSE OF SUPERIOR ORDERS IN ROMAN LAW 23 (1956). Daube can find additional support in the authoritative sources for his view. For example, whereas the original Mishniac source only prohibits the surrender of a man if death awaits him, the Jerusalemite commentary *ad locum* adds:

Even as one is not allowed to surrender a man unto death so also is one not allowed to

Collaboration with Tyranny in Rabbinic Law is actually the Jewish counterpart to Daube's earlier and equally civilized *The Defence of Superior Orders in Roman Law (Inaugural Lecture before the University of Oxford)*, Oxford 1956. With the Eichman Trial and now My Lai before our eyes, it is supremely important to note the decisive difference between the Biblically inspired ethos discussed hitherto and, on the other hand, the basic posture of the Greco-Roman mind and Occidental ethics and law under the latter's influence. Daube shows that there is a clear line from Aristotle who held that the slave who murders on his master's order is not guilty,[13] through Cicero's "metastatis," *i.e.* an act under outside compulsion is regarded as not, in any way, appertaining to the agent, to the Justinian *Digest*: "[h]e is without blame . . . who is under the necessity of obeying."[14] Daube concludes that in mediaeval times "Judeo-Christian concerns had to humanize this" and says "[t]hat in an epoch of increasing regimentation the problem is as urgent as ever no one will deny."[15]

In view of all this evidence it is, the reviewer believes, correct to speak of a dichotomy between the Biblical posture and the Greco-Occidental one.[16] Even in the Christian world-view, strong forces issuing from the latter are at work. The Protestant theologian Reinhold Niebuhr, who, with his "neo-realism," has decisively influenced such political thinkers and activists as Hans Morgenthau and Arthur Schlesinger Jr., has taught that concrete political action must be a "prudent" adjudication between the absolute morality of the Sermon on the Mount and the "proximate," realistic judgments in a real world in the state of sinfulness.[17] This enabled his disciples, like Paul

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surrender him unto other punishments, for (it is known that) once a man falls into the hands of pagans these will never act compassionately toward him.

Even further, although it had originally been conceded that a woman might be surrendered for immoral sexual purposes if, and only if, (a) she had been specifically named and (b) she was really known to be a prostitute anyway, the Rashba (13th century) prohibits even this on the ground that such a woman might, just at that time, be considering (!) mending her ways.

13. M. OSTWALD, (Aristotles) NICOMACHEAN ETHICS, book 5 129-30, 133-36 (1962).

14. It must be added in fairness that Stoic views, *e.g.* Seneca, took a different position. *Cf.* E. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 166 (1928) (and sources cited).

15. D. DAUBE, THE DEFENSE OF SUPERIOR ORDERS IN ROMAN LAW 24 (1956).

16. G. Lewy, *Superior Orders, Nuclear Warfare, and the Dictates of Conscience: The Dilemma of Military Obedience in the Atomic Age*, 55 AM. POL. SCI. REV. 3, 5 (1961). The material shows conclusively that also the Western democratic countries provided even verbally for disobedience of immoral superior orders only as a ploy to enable them to put the Nazi war-criminals on trial.

17. *Cf.* 1966 NATIONAL INTER-RELIGIOUS CONFERENCE FOR PEACE, THE RELIGIOUS SEARCH FOR PEACE.

Ramsey,[18] to develop a theory of "the just war," at least as causistic as Roman-Catholic canon-law,[19] which, in effect, makes it virtually impossible ever to protest in the name of religious ethics against any state law. And even Ramsey is regarded by some as too moralistic. For example, Joseph L. Allen of the Perkins School of Theology, Southern Methodist University, asks:

> "What if one must choose between the right to immunity of a handful of persons, on the one hand, and the destruction of countless millions of people, with all of whom we are in covenant under God, on the other? How morally justified would one be in saying that although, tragically, he unintentionally allowed the deaths of millions upon millions as collateral damage, at least he did not commit murder by direct and intentional attacks upon the innocent? In such an extreme case it is not as clear what one should do as Ramsey may assume."[20]

Clearly there is need to revive the Judaic ethos also in the Christian world. The counter-question to Allen's is the Talmudic: "Is your blood redder than his?"[21] Or in our language: a man, or any number of men, must know when to be ready to die rather than commit murder, regardless of any arithmetic calculations to which human life is not susceptible.

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18. *See, e.g.*, P. RAMSEY, THE JUST WAR; FORCE AND POLITICAL RESPONSIBILITY (1968); *cf.* N.Y. Times, Nov. 2, 1969, § 7, at 10, col. 3.

19. Wells, *How Much Can 'The Just War' Justify?*, 46(23) J. PHILOSOPHY 819 (1969).

20. 12(12) WORLDVIEW 16 (1969).

21. BABYLONIAN TALMUD. TRACTATE PASSOVER 25a.

22. D. DAUBE, COLLABORATION WITH TYRANNY IN RABBINIC LAW 27 (1965).

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