

Moshe Zemer's *Halakhah Shefuyah*: An Israeli Vision of Reform and Halakhah

David Ellenson and Michael White

When the Hamburg Reform Temple was established in 1817, it became, in the words of Jakob Petuchowski, "the first congregation in the nineteenth century which was founded on a declared Reform basis."¹ A year later the Hamburg Temple was officially dedicated and in 1819 the first edition of the Hamburg Temple Prayerbook appeared. This *siddur* engendered considerable controversy, and contemporaneous champions of Orthodoxy savagely attacked it in *Eileh Divrei Habrit*, a collection of responsa compiled and edited by the Hamburg Rabbinical Court. The opinions contained within this volume marshaled talmudic and other halakhic sources against the innovations introduced by the Reformers into Jewish prayer.

M. J. Bresslau, an editor of the Hamburg Temple Prayerbook, responded to the Orthodox in a Hebrew volume, *Herev Nokemet Nekam Brit*, and contended that the authors of *Eileh Divrei Habrit* had misinterpreted some and ignored other classical rabbinical sources in making their case against the Hamburg Reformers' liturgy. Drawing upon earlier halakhic works (*Or Nogah* and *Nogah Hatzedek*) in defense of Reform, Bresslau did not confine his response to a critique of what he claimed was an Orthodox misuse of rabbinic literature. He also cited much rabbinic material to defend the deeds of the Hamburg Reformers. Nor was Bresslau alone among the Reformers in offering such a statement. David Caro, in his *Brit Emet* (1820), also condemned the Orthodox responsa as misinformed, and he too gathered together alternative halakhic sources to provide a traditional warrant for the deeds of the Reformers.²

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While historians and partisans continue to debate the merits of each side's arguments in the dispute, "what remains of abiding interest [in this affair]," as Petuchowski observed, "is the fact that the early Reformers should have felt the need to defend themselves in that particular arena, and with these particular weapons. Nothing demonstrates more clearly than this that the farthest thing from their mind was the formation of a new Jewish sect, let alone the founding of a new religion. The Judaism to which they wanted to bring reform was a Judaism based on Bible, Talmud and Codes; and it was by an appeal to these accepted bases of Jewish life that they sought to justify their place *within* Judaism."³

Gunther Plaut, commenting upon the same episode, analyzes it much as Petuchowski did and notes that the literature of the Reformers in this dispute "is couched in the same language which Orthodoxy had used." These initial proponents of Reform, Plaut asserts, "demanded that any change from the past be founded in genuine Jewish tradition." In so doing, these men, in Plaut's opinion, established a pattern for later generations of Reform leaders who "insisted that all of tradition was significant, that Reform had to grow organically from it, and that a renewal of Judaism could only come from a continuity of spiritual development."⁴

Of course, not all Reformers would affirm this sentiment. From Samuel Holdheim and David Einhorn in the nineteenth century to spokesmen such as Alvin Reines in the twentieth, the halakhic dimension of Jewish tradition has hardly been central to significant numbers of Reformers. Yet, for others—ranging from the Hamburg Temple Reformers of the 1820s to scholars such as Jacob Lauterbach, Samuel Cohon, Solomon Freehof, Walter Jacob, Eugene Borowitz, Petuchowski, and Plaut in the 1900s—the Halakhah comprises too central and idiomatic a dimension of the Jewish Tradition for Reform Judaism to ignore. Reform Judaism, in the view of these men, is to be "predicated on organic growth and development, that is, on evolution." A Reform that would abrogate the halakhic elements of the Tradition "stands for revolution and [a] radical break with the Jewish past."⁵ It would deny Reform Jews the continuity and wisdom this literature provides and would constitute an unwarranted break with the identity and community that have marked Jews and Judaism for millennia.

To be sure, these men have sought no communal mechanism to impose halakhic decisions upon the Reform Jewish world. Nor have they wished to supplant individual autonomy as a Reform principle.⁶ As Rabbi Freehof felicitously put it, "Guidance not governance" should be the role halakhic sources

play in Reform Jewish decision-making.⁷ In this sense, these proponents of a Reform Halakhah have surely departed from a traditional approach to Halakhah which would regard halakhic decisions issued by the rabbinate as normative and binding for the Jewish community. Nevertheless, they still maintain that Reform, if it is to be authentic, must confront and at least express itself in part in terms taken from the Halakhah.

In our day, no one has affirmed this approach to Reform with more integrity and tenacity than our colleague Rabbi Moshe Zemer of Tel Aviv. Zemer, currently *Av Bet Din* of the Israel Council of Progressive Rabbis and director of the Freehof Institute for Progressive Halakhah, recently published *Halakhah Shefuyah* (A Sane Halakhah) in Israel.⁸ *Halakhah Shefuyah* constitutes, in its own right, an important link in the chain of Liberal Halakhah, and it is deserving of assessment and respect as a collection of responsa issued by an informed and concerned Reform rabbi eager to apply the precedents and ethos of Jewish law to the problems of the age. At the same time, Zemer's book can neither be understood nor judged apart from the religious-political reality of the Jewish State within which Zemer operates. Zemer's topics are often determined by events on the Israeli scene. Particular attention is paid to a whole host of issues ranging from the State of Israel's relationship to its own non-Jewish minorities and the Palestinians to the status of women within the State. These issues, and others, are treated within the context of an Israeli political situation where Halakhah and State are frequently intertwined.

Halakhah Shefuyah is itself divided into eight sections and forty-two chapters that represent a distillation of thirty years of Zemer's scholarly and polemical writings on matters of Jewish faith and practice. It is a book reflecting Zemer's own commitment to the notion that Reform must speak in that most idiomatic of Jewish genres — the responsum — if Reform is to find its rightful place in the continuum of Jewish history. Consequently, Zemer's book and the efforts reflected in it must be viewed against the backdrop of his larger work in the area of Jewish law. This work has found its primary expression in the work of the Freehof Institute of Progressive Halakhah, which he and Rabbi Walter Jacob cofounded in 1988. In the publications issued by the Freehof Institute, Zemer, along with Jacob, has consistently argued that there exist progressive and pluralistic trends within normative Halakhah, and that these trends are consonant with the principles of Reform Judaism.

Jacob and Zemer contend that recognized *poskim*, from the tannaitic period to the present day, have always sought creative solutions within the halakhic system to all types of contempo-

rary problems. Their legal decisions often pushed the boundaries of Halakhah in directions heretofore unrecognized, and they often reversed previous decisions and offered innovative interpretations of biblical texts in order to provide humane solutions to the dilemmas faced in past eras. All this, they contend, stands in sharp contrast to Orthodoxy today. As Jacob asserts:

Orthodox Judaism has felt threatened and endangered for several generations. Therefore, it has been unwilling to make the kind of radical changes necessary for the times. It has overlooked the willingness and ability of the Tannaim, the Amoraim, the Geonim, the Rishonim, and the Aharonim to make changes. They always changed the outer forms in keeping with the inner spirit and adapted Judaism to radically different situations. Reform Judaism has followed this path, while traditional Judaism has lost its nerve. ⁹

Zemer himself echoes Jacob on this point and throughout *Halakhah Shefuyah* argues that the way the current Orthodox rabbinical establishment renders halakhic decisions is stultified and all too often based on the narrowest and most stringent interpretations of Jewish law available.¹⁰ He cites scores of stories in the Israeli press to make this point. His examples range from the rabbinate's failure to discover a solution to the plight of the *agunah* to the Chief Rabbinate's decision to have the body of a Christian exhumed from a Jewish cemetery, from an edict forbidding the conversion of a woman who is civilly married to a Jewish man to the Orthodox Rabbinate's refusal to act on behalf of a widow whose brother-in-law refuses to perform the ceremony of *halitzah* unless she gives him her apartment, and from *haredim* who throw stones at tourists in order to preserve the sanctity of the Sabbath to the inability of Israeli citizens, declared *mamzerim*, to marry because their parents' marriage is declared invalid after twenty years of matrimony.

Zemer points to these cases and others to demonstrate the stridency and cruelty that marks much current Orthodox halakhic adjudication in Israel. The Israeli Orthodox rabbinic establishment has frequently created these dilemmas, Zemer argues, because it has chosen to interpret Jewish law in the most oppressive manner possible. These men have too often transformed the Halakhah into a weapon that violates the very people whose lives it was designed to enhance and guide. Zemer excoriates the official rabbinate for this lack of sensitivity and decries its failure to employ the Halakhah as a humane resource for the solution of many of life's quandaries. Their decisions dishonor the Jewish legal process they are purported to cham-

pion and it is no wonder, in light of this, that Zemer contends that many Israelis feel that Halakhah is callous and unresponsive to their lives.¹¹

Halakhah Shefuyah seeks to reverse this trend in contemporary Jewish legal adjudication by reviving the creativity and humaneness evidenced and embodied in so much of the Jewish legal tradition. Zemer attempts to apply these qualities to a host of contemporary issues, and, as he and Jacob have argued elsewhere, contends that Halakhah, so viewed, is in accord with the tenets and ethos of Reform Judaism.¹² By demonstrating the evolutionary nature of the halakhic process and the ancients' willingness to make changes and reverse precedents in order to arrive at an appropriate solution to a current quandary, Zemer as well as Jacob asserts that Reform Jewish decision-making today is an authentic inheritor of the halakhic process.¹³

The first section of *Halakhah Shefuyah* advances Zemer's own views on the nature of Halakhah, and subsequent sections indicate how Zemer applies these views to specific matters of illegitimacy, marriage, conversion, and burial, as well as medical ethics, within Jewish law. In offering his halakhic rulings on these matters, Zemer—not unsurprisingly—frequently contrasts a liberal halakhic position to those put forth by Orthodox rabbinic spokesmen in Israel and he consistently demonstrates that the Halakhah possesses broader resources than his Orthodox Israeli peers generally suggest. Indeed, one of his goals, in most of his responsa, is to offer the Israeli public a distinct liberal halakhic perspective on each topic he addresses.

At the outset of his book, Zemer puts forth the thesis that Halakhah, as it has developed throughout the ages, has always been evolutionary and inherently ethical.¹⁴ He makes the case for a "sane Halakhah" by highlighting progressive and humane principles and rules within normative halakhic literature and contends that these rules and principles comprise the essential elements that inform and direct the entire halakhic system. Zemer points out that *Hazal* consistently "discovered" directives within the Halakhah that allowed them to circumvent rulings which offended their ethical sensibilities. He cites, for example, a story told of Hillel the Elder as illustrative of this halakhic tendency. The talmudic passage reads as follows:

Hillel the Elder used to interpret "common speech." For it has been taught: The men of Alexandria used to betroth their wives, and when they were about to take them for the huppah ceremony, strangers would come and tear them away. Thereupon the Sages wished to declare their children mamzerim. Said Hillel the Elder to them, "Bring me your mothers' ketubahs." When they brought

them, he found therein, "When thou art taken for the *huppah*, be thou my wife." And on the strength of this they did not declare their children *mamzerim* (Baba Metzia 104a). 15

Zemer selected this example because it demonstrates Hillel the Elder's willingness to change a halakhic ruling he deemed unjust. As Zemer explains it, the Halakhah, prior to Hillel's decision, held that a woman between the period of betrothal and *huppah* was considered an *eshet-ish*. This meant that the woman, after betrothal, was—in a legal sense—married to her husband. Should the relationship not be sanctified beneath the *huppah*, the woman still required a *get* in order to marry another man. If, during that period, she did not receive a divorce and conceived by a man other than her husband, she would be considered an adulteress and her children would be *mamzerim*, unable to marry another kosher Jew.¹⁶ In the talmudic case under discussion, the women were captured and raped. Consequently, the children born from these rapes would have been consigned a legal status as *mamzerim*. Hillel, wishing to spare these children from such a fate, on the basis of the principle of "common speech," interpreted the relevant clause from their *ketubot* — "When thou art taken for the *huppah*, be thou my wife"—to mean that a woman is not a wife until she enters the *huppah*. This view enabled Hillel to release the children from the stigma of *mamzerut* even though their mothers received no *get*.

Zemer's reading of this passage is not without its problems. After all, if the ethical sensibilities of *Hazal* were so well-honed, one could reasonably suppose that it would have been inconceivable for the rabbis to have ever even considered applying the category of *mamzerut* to these children. Furthermore, there is the morally disturbing recognition—at least to many moderns—that no attempt is made here to alleviate the status deprivation the women suffer as chattel in this incident. Nor is there any acknowledgment of the women's human plight. These points are not insignificant, and in light of Zemer's overarching argument about the nature of Halakhah as compassionate and humane, the text's silences on these points need to be addressed. Nevertheless, while they pose a challenge to his thesis, they do not obviate it. As the beginning of the passage suggests, the Halakhah *ab initio* was clear regarding the status of these children. They were *mamzerim*. Hillel, responding to the injustice inherent in this application of the *din*, found an exegetical way to enable these children to marry within the Jewish community.

Zemer's argument here concerning the ethically sensitive nature of Jewish law is reinforced by other citations. Represent-

ative of them is a passage Zemer brings from the Mishnah concerning the fate of women who might have been consigned to the category of *agunah*, but were not, due to the boldness and empathy of a great tannaitic authority. The *agunah*, in Jewish law, is literally a "chained woman." It refers to a woman whose marriage has been terminated de facto (e.g., her husband is missing in war or has abandoned her for another reason), but not de jure. As husbands alone possess the right to initiate divorce in Jewish law, the *agunah* is prohibited from remarrying because she is still technically married to her previous husband.

In M. Yebamot 16:7 a story is told concerning some men who were killed at Tel Arza. The Written Law promulgates the rule that testimony is considered legally valid only when at least two witnesses can testify to an incident or an event (Deut. 19:15). Furthermore, those witnesses, according to halakhic precedent, cannot include women, slaves, or maidservants.¹⁷ Despite these rules, the mishna reports that Rabban Gamliel the Elder married the widows of these men on the basis of testimony offered by one witness alone. These women were thus spared the fate of an *agunah*. In addition, a new rule was established, on the basis of this incident, to allow a widow to remarry in such cases on the strength of testimony delivered by only one witness, and the rabbis, in this same mishnaic passage, held that this testimony could be given by a slave, a woman, or a maidservant. For many of us with certain modernist liberal sensibilities, the entire mishna is not unproblematic. Nevertheless, Zemer's reading of the mishna does support his claim that it is well within the realm of halakhic adjudication for a decisor to alter a rule, or create a coherent exception to a rule, in order to render an ethical and humane remedy in an instance where the rabbi deems a particular halakhic rule or application unethical or inadequate to resolve a concrete situation. This suggests that a *posek* is empowered by the halakhic process itself to employ compassion, creativity, and logic, as well as his own moral intuitions, to extend the boundaries of Halakhah to discover unique and unprecedented solutions to contemporary problems.

Moreover, there are overarching principles, not simply isolated rules or stories within the tradition of Jewish law, that Zemer further cites to support his notion that the essential nature of the Halakhah is one of sanity and ethical sensitivity.¹⁸ There is, for example, *takanat hashavim*, a principle which allows a rabbinic authority to render a lenient ruling in order to encourage a "sinner" to repent. This is based on the assumption that a more stringent ruling might place insurmountable obstacles before the sinner and thereby discourage or prevent the individual's repentance altogether. Zemer quotes a passage from B. T. Gittin 55a as an illustration of this principle. The passage poses the fol-

lowing question: If a person steals a beam and builds a large home using this beam, must he destroy his home in order to return the beam to its rightful owner? Or may he make restitution of equal value? Shammai stated that the house must be destroyed and the original beam returned. Since the Torah, in Leviticus 5:20 states, "A thief must return the object he stole," Shammai reasoned that the thief must destroy the entire building if necessary in order to return the original beam to its rightful owner. Hillel, ruling more leniently, asserted that the thief was only required to supply a beam of similar value, and he did so on the basis of the principle of *takanat hashavim*.¹⁹

As Zemer notes, Hillel's ruling makes it possible for the thief to rehabilitate himself without being compelled to offer a remedy he would be unable to endure. It demonstrates, in Zemer's view, Hillel's realistic willingness to be flexible and sensitive to the needs, and the weaknesses, of humanity.²⁰ As Zemer notes, quoting Maimonides, Shammai's determination, grounded as it is in Scripture, is itself a *din Torah*, a toraitic law. Yet, Maimonides asserts that Hillel's ruling is authoritative.²¹ The principle of encouraging repentance, in this case taken from the Talmud, took precedence over a *din Torah*.

For Zemer, this example of the self-corrective nature of Halakhah is not an isolated one. There are numerous other such principles which are frequently cited by halakhic authorities. Foremost among them is the notion of "human dignity." The talmudic statement "Great is human dignity, that it overrides negative precepts found in the Torah" (B. Berachot 19b), clearly grants a *posek* broad discretionary powers in circumstances where the authority deems its application appropriate. Zemer notes that no less a personage than the *Rama*, Moses Isserles, employed this principle in deciding to officiate at a wedding that actually occurred on the Sabbath.²² The wedding was initially scheduled to take place on a Friday afternoon, at the eve of the Sabbath, when, suddenly, the groom refused to enter the *huppah* because the bride was an orphan without a dowry. Isserles implored the groom to fulfill his responsibilities and refrain from publicly humiliating the young woman by abandoning her over money. An hour and a half after the Sabbath had commenced, Isserles was finally able to convince the young man to marry the young woman. Isserles defended his decision by asserting, "(I)n order not to embarrass a respectable daughter of Israel, I rose and arranged the *Kiddushin* at the above-mentioned time."²³ In justifying his decision, Isserles argued, "One can feel for the separation of this couple and the shame that this woman would endure.... The authorization to be lenient causes no damage, and will enhance the joy of

Shabbat afterward. And, it will enable the groom to perform the mitzvah of atonement to God in peace."²⁴

This is another example of the flexibility certain *poskim* are willing to employ to achieve a compassionate and ethical result. Isserles was especially concerned about the welfare of this couple and the reputation of the bride. This concern took precedence over the proscriptions against his officiating at the wedding on Shabbat. And so, in accordance with the principle enunciated in the passage from Talmud Berachot, Isserles was moved to violate a negative rule from the Torah in order to preserve the human dignity of this young woman. Should a *posek* demonstrate a *halakhic* ruling, even a law derived from the Torah, to be unreasonable or inhumane, it may — as in this instance — be invalidated in light of a principle derived from the halakhic system, and this can be done in order to achieve a more rational and humane solution to a vexing human problem.

Given an Israeli context where the Orthodox rabbinate discourages such perceptions of Jewish law's elasticity, Zemer, in offering these explications of talmudic passages and halakhic rules and principles, demonstrates to both the world wide liberal Jewish community and the Israeli populace that there are ethical mechanisms operative within the Halakhah and that these mechanisms inform and direct the ethos and ever-evolving character of the Jewish legal system. The desire to avoid undo pain, the determination to preserve human dignity, and the realization that new circumstances unknown to previous generations require contemporary *poskim* in every generation to exercise flexibility and compassion in rendering halakhic decisions are the criteria for a "sane Halakhah." It is a Halakhah that is not concerned with the rules of the Tradition alone, or, as Zemer phrases it, with "the dry letter of the law." Rather, in the spirit of a theological anthropology, it seeks out the rules and principles of the Tradition so that it can address and guide "the human being qua human being and the Jew qua Jew."²⁵ In the end, Zemer argues quite persuasively that a "sane Halakhah" embodies and treasures a set of core values that have always been at the heart of Judaism in general and Reform in particular. Like his Reform ancestors in the Hamburg Temple dispute in the early 1800s, Zemer maintains that this approach alone will maintain liberal Jewish continuity with the past. In addition, he argues that a failure to interpret Halakhah in an "enlightened and progressive spirit" will cause still other Jews to regard Jewish law as cruel and will lead them to consign not only Halakhah, but Judaism itself, to the dustbin of irrelevance. *Halakhah Shefuyah* argues that the compassion, the ethical sensi-

bilities, and the creative energy inherent in the Halakhah must be resuscitated in our day for all Jews— liberal and Orthodox alike. It applies these features to a whole host of contemporary issues and problems in unique and bold, yet sensible, ways.

Our review-essay, by outlining the character of Zemer's approach to Halakhah, has sought to provide a foundation and context for understanding both the concerns that animate Zemer and the normative judgments at which he arrives throughout his book. The Israeli venue of *Halakhah Shefuyah* marks Zemer's book as unique in the annals of Reform Jewish legal literature. As such, it commands the attention of all who are interested in liberal Judaism and its development in Zion today. At the same time, Zemer's articulation of the principles which undergird the halakhic process as well as the substantive matters he takes up in *Halakhah Shefuyah* commend his book to readers within and beyond the liberal Jewish camp in Israel. *Halakhah Shefuyah* constitutes a noteworthy achievement. It serves as a "bridge between the ways of our Sages and the needs of the present."⁶ It is our hope that it will soon appear in English translation so that it will receive the broader readership it so richly deserves.

Notes

¹ Jakob J. Petuchowski, *Prayerbook Reform in Europe* (New York: World Union for Progressive Judaism, 1968), p. 49.

² For a summary of this controversy and its literature, see Petuchowski, *Prayerbook Reform in Europe*, pp. 49-54 and 84-98, as well as Michael Meyer, *Response to Modernity: A History of the Reform Movement in Judaism* (New York: Oxford University Press, 1988), pp. 53-61.

³ Petuchowski, *Prayerbook Reform in Europe*, p. 98.

⁴ Gunther Plaut, *The Rise of Reform Judaism* (New York: World Union for Progressive Judaism, 1963), pp. 37 and xviii-xix.

⁵ The wording here is taken from Petuchowski, "Abraham Geiger and Samuel Holdheim," *Leo Baeck Institute Yearbook* (1977), p. 159.

⁶ For a philosophical exposition and defense of the dialectical tension inherent in this stance, see two outstanding articles by Eugene Borowitz. The first is "The Autonomous Self and the Commanding Community," *Theological Studies* 45 (March 1984), while the second is entitled "The Autonomous Jewish Self," *Modern Judaism* 4:1 (February 1984). For a representative internal Reform critique of this posture, see Dan Cohn-Sherbok, "Law and Freedom in Reform Judaism" *CCAR Journal* (winter 1983), p. 90.

⁷ As cited in Meyer, *Response to Modernity*, p. 376.

⁸ Moshe Zemer, *Halakhah Shefuyah* (Tel Aviv: D'vir, 1993).

⁹ Walter Jacob, "The Source of Reform Halakhic Authority," in *Rabbinic Authority*, ed. Elliot Stevens (New York: CCAR Press, 1982), p. 36.

¹⁰ Zemer, *Halakhah Shefuyah*, p. 20.

¹¹ Ibid.

¹² Jacob and Zemer, *Dynamic Jewish Law*, (Pittsburgh: Rodeph Shalom Press, 1991), p. 6.

¹³ For Jacob's views, see his article, "The Source of Reform Halachic Authority," p. 36.

¹⁴ Zemer, *Halakhah Shefuyah*, p. 20.

¹⁵ As translated in *The Soncino Talmud*, (London: Soncino Press, 1935), *Seder Nezikim*, vol. 1, pp. 594-595.

¹⁶ Zemer, *Halakhah Shefuyah*, p. 21.

¹⁷ Ibid., p. 33.

¹⁸ In making this claim about the nature of Jewish law, Zemer is not alone. Leading Conservative rabbis such as Bradley Artson, Elliot Dorff, and Gordon Tucker describe the Halakhah in much the same terms that Zemer does. See their many pieces during the last decade in journals such as *Judaism*, *Conservative Judaism*, *Sh'ma*, and *The Jewish Spectator*.

¹⁹ Zemer, *Halakhah Shefuyah*, p. 23.

²⁰ Ibid., p. 22.

²¹ Ibid., Zemer quotes Rambam's *Hilchot Gezerah* 1:5.

²² Ibid., p. 30.

²³ Ibid, p. 29, quoting Freehof, *Treasury of Responsa*, (Philadelphia, 1962), p. 133.

²⁴ Ibid.

²⁵ Ibid., p. 42.

²⁶ Ibid., p. 320.

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