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Recommended Citation

10 Wash. U. Global Stud. L. Rev. 133 (2011)

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**SECOND ANNUAL HOLOCAUST
REMEMBRANCE LECTURE AT
WASHINGTON UNIVERSITY**

**JEWISH LAW FROM OUT OF THE DEPTHS:
TRAGIC CHOICES IN THE HOLOCAUST**

SAMUEL J. LEVINE*

I. INTRODUCTION

Thank you and good evening. It is an honor to deliver the second annual Holocaust Remembrance Lecture at Washington University. The topic I would like to explore this evening is the phenomenon of fidelity to Jewish law and morality amidst the horrors of the Holocaust. History records some of the remarkable efforts of Jewish communities and individuals who, in the face of unimaginable conditions, in ghettos and concentration camps, continued to turn to the teachings of Jewish law and ethics for lessons and guidance. The questions and answers that were presented—a portion of which have survived in written form—span all areas of life: from ritual and holiday observance, to commercial law, to domestic relations, to—literally—daily questions of life and death.

The title and substance of this lecture draw on the published responsa of Rabbi Ephraim Oshry: *Sh'eilos UTeshuvos MiMa'makim* (“Questions and Responses from Out of the Depths”).¹ Rabbi Oshry lived through the Nazi invasion and occupation of Lithuania, which included: the unspeakable violence and brutality perpetrated by the Nazis on the Jewish community during the invasion of Kovno in June 1941; the continuing murder, over the next month, of thousands of Jewish residents of Kovno—

* Professor of Law & Director of the Jewish Law Institute, Touro Law Center. I delivered these remarks on April 14, 2010, at the Second Annual Holocaust Remembrance Lecture at Washington University. I thank Washington University School of Law, the Student Bar Association, and the Jewish Law Society for their kind invitation, and I thank Rafi Moreen and Rabbi Hershey Novack for organizing the lecture and for their hospitality during my visit. I also thank the faculties at Pepperdine Law School and Touro Law Center for their encouragement. Finally, I thank Fraida Liba, Yehudah, Aryeh, Rachel, and Shira.

1. The responsa were published originally in Hebrew, as a five-volume series, and later in abridged form in English. See EPHRAIM OSHRY, *RESPONSA FROM THE HOLOCAUST* xii (Yehoshua Leiman trans., 1983). In addition, Rabbi Oshry's responsa are cited heavily in another English book dedicated to questions of Jewish law during the Holocaust. See generally IRVING J. ROSENBAUM, *THE HOLOCAUST AND HALAKHAH* (1976).

men, women, and children—who were seized and taken to the nearby “Seventh Fort”; the brutal transfer of the remaining Jewish community, completed in August 1941, to ghettos in Slobodka, a suburb of Kovno; the years of persecution, deprivation, and despair in the Kovno ghetto, including deportations of thousands of Jews to concentration camps; and finally, the liquidation of the ghetto by the Nazis in July 1944, as the Russian army was approaching, during which the Nazis sent thousands to concentration camps in Germany, and murdered and cremated many others within the ghetto.²

Rabbi Oshry witnessed and survived all of these events, including the liquidation of the ghetto, which he escaped by hiding in a bunker. Following the liberation of Lithuania by the Russian army in August 1944, Rabbi Oshry helped lead the efforts, in the aftermath of the death and destruction, to tend to the spiritual and physical needs of the survivors. Through all of these years, Rabbi Oshry served as a religious authority and spiritual guide for those who would approach him with the most pressing questions on the application of Jewish law. Following the Holocaust, Rabbi Oshry published five scholarly volumes collecting his responsa, addressing nearly every aspect of Jewish communal, personal, and religious life.³

I would like to focus on two of Rabbi Oshry’s responsa, which may be representative of the issues he faced over the years. The two responsa differ considerably in subject matter: one explores the scope and possible limits of the responsibility to take action to save a life; the other discusses the ritual of drinking four cups of wine at the Passover Seder. Yet both responsa provide documentary insight into the attitudes of those who, when confronted with the most difficult challenges, held firmly to their religious and ethical principles.

II. ENDANGERING ONE’S LIFE TO RESCUE ANOTHER

The first responsum relates more directly to the title of my lecture: “tragic choices.” Throughout the years of the Holocaust, Jewish communities and individuals were constantly confronted with the most urgent matters of life and death. The Nazis’ systematic methods of demonization, deportation, and extermination gave rise to countless choices and decisions, trying both the endurance and the sense of morality of those who struggled simply to survive.

2. See OSHRY, *supra* note 1, at xv–xxvii.

3. See *id.* at xii–xv.

Notably, in addition to the challenges of self-survival, important questions arose for those who were engaged in efforts to save the lives of others. In fact, these questions sometimes asked not whether there is a religious obligation to try to rescue those in peril, but rather, the extent to which individuals are permitted to put themselves in danger when engaged in efforts to save others.

Of course, this question begins from the premise that, as a threshold matter, Jewish law mandates the affirmative obligation to take action to preserve life. In the American legal system, absent exceptional circumstances, the criminal law generally does not impose a duty to undertake any efforts to save someone whose life is in peril. As a somewhat extreme hypothetical that I sometimes pose to my first-year criminal law students, a bystander who watches a person drowning, and does not lift a finger to help, faces no criminal penalty. While some courts have expressed their moral outrage at this failure to act,⁴ few jurisdictions impose even a civil duty to exert even a minimal effort in response to a danger to life.

Jewish law operates under a different premise. The Torah states in *Leviticus*: “Do not stand idly by the blood of your neighbor,”⁵ which is understood as imposing an obligation to act, and not to remain passive, when the life of another is in danger.⁶ In fact, Jewish law places such a high premium on the value of life that, with very few exceptions, the other laws of the Torah are suspended, to the extent necessary, to save a life. For example, if fasting on Yom Kippur would endanger a person’s life, that person would be not merely permitted, but would be obligated, to eat on Yom Kippur.⁷

4. *See, e.g.*, *People v. Beardsley*, 113 N.W. 1128, 1131 (Mich. 1907).

In the absence of such obligations, it is undoubtedly the moral duty of every person to extend to others assistance when in danger, * * * and, if such efforts should be omitted by any one when they could be made without imperiling his own life, he would by his conduct draw upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society.

Id. (quoting *United States v. Knowles*, 26 F. Cas. 800 (N.D. Cal. 1864) (No. 15,540)).

5. *Leviticus* 19:16.

6. *See Talmud Bavli, Sanhedrin* 73a.

7. *See, e.g.*, Samuel J. Levine, *The Yale L. Rosenberg Memorial Lecture: Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor’s Ethical Obligation to “Seek Justice” in a Comparative Analytical Framework*, 41 *HOUS. L. REV.* 1337, 1359 & n.67 (2004) (citing *Talmud Bavli, Yoma* 85a-b; MAIMONIDES, *MISHNE TORAH, Laws of Sabbath* 2; 2 ARYEH KAPLAN, *THE HANDBOOK OF JEWISH THOUGHT* 38–49 (Abraham Sutton ed., 1992); HERSHEL SCHACHTER, B’IKVEI HATZOAN 14–18 (1997); JOSEPH B. SOLOVEITCHIK, *HALAKHIC MAN* 34–35 (Lawrence Kaplan trans., 1983)); *see also* Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 *IND. L. REV.* 21, 57 n.151 (2003) (“[N]early every obligation in Jewish law is

At the same time, as a corollary to recognizing a duty to take action to save a life, Jewish law has to define the scope and possible limitations on the duty. Indeed, one of the justifications sometimes suggested for the American rule, which does not require such action, points to the difficulty in line-drawing that would be necessary to determine to whom the duty would apply, and under what circumstances.⁸

These questions, which raise difficult theoretical and philosophical issues, took on a vital and practical urgency during the Holocaust, when attempts to rescue others often put the life of the rescuer in possible—if not certain—danger. Rabbi Oshry confronted this issue in the context of early stages of the Nazi occupation of Kovno in June of 1941.⁹ Rabbi Oshry describes the dire circumstances under which, on a daily basis, the Nazis, with the assistance of local Lithuanians, seized a number of Jews who were taken to the “Seventh Fort,” where their fate was to be determined and many were murdered.¹⁰

During this time, Rabbi Avraham Grodzinsky, the dean of the yeshiva of Slobodka, asked Rabbi Oshry to seek the assistance of Rabbi Dovid Itzkowitz. Rabbi Itzkowitz, a leader in the rabbinic organization Agudas ha-Rabbanim, had contacts from before the war among the Lithuanian authorities who were now working with the Nazis in seizing and deporting Jews from Kovno. Perhaps Rabbi Itzkowitz should approach these authorities with a request to free some of those who had been seized. Such a response, it was suggested, would appear to be incumbent upon Rabbi Itzkowitz, mandated by the command not to stand idly by.

Rabbi Oshry recognized, however, that the situation they faced was different from a typical situation in which the Torah instructs a bystander to take action to save the life of a person who is in peril. In this case, were Rabbi Itzkowitz to approach the Lithuanian authorities in an effort to save those who had been captured, he might be placing himself in a similar danger; rather than acceding to his request, the Lithuanian authorities might instead decide to capture him as well. Perhaps Rabbi Itzkowitz

suspended to save a life.”); YITZCHAK ZEEV HA-LEVI SOLOVEITCHIK, CHIDUSHEI MARAN RI’Z HA-LEVI 12–13 (1998).

8. See Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About “Bad Samaritan” Laws*, 40 SANTA CLARA L. REV. 971, 986–87 (2000).

9. This section is based on Volume II, pages 7–15, of the five-volume series of Rabbi Oshry’s responsa, published in Hebrew in 1963. For English summaries of this responsum, see OSHRY, *supra* note 1, at 1–2 and ROSENBAUM, *supra* note 1, at 17–21.

10. Rabbi Oshry’s description of the role of the Lithuanian authorities and the local population is particularly telling and troubling. The same individuals who had lived for years alongside their Jewish neighbors, apparently on good terms, were now willingly assisting the Nazis in the brutal persecution and extermination of the Jews of Kovno. See OSHRY, *supra* note 1, at xv–xvii.

would not be required—or even permitted—to endanger his own life in an effort to save others.

In considering this issue, Rabbi Oshry looked to the Talmudic discussion of a case in which Jewish law does not require—or permit—violation of a law of the Torah to save a life: a case in which a person can save a life only through the taking of another innocent life. For example, the Talmud cites the scenario in which, at the threat of death, an individual is ordered to kill a third party. The Talmud concludes that, although, ordinarily, a person would be expected to violate nearly any of the laws of the Torah, as necessary, to save a life—including one’s own life—this rule does not extend to the commission of a homicide. In support of this conclusion, the Talmud poses a rhetorical and metaphorical question: “Who can say that your blood is ‘redder’ than that of the third party? Perhaps the blood of the third party is redder than yours.”¹¹ In short, Jewish law does not allow a person to value his or her own life over the life of another.

Based on the Talmudic logic, Rabbi Oshry argued that the duty under Jewish law to take action to save the life of another does not apply to situations in which the rescuer would be required to undertake a life-threatening risk. Inverting the Talmud’s rhetorical question, Rabbi Oshry asks, in turn: “Who is to say that a third party’s blood is redder than yours?” He reasoned that just as a person may not value his or her own life over that of another, a person may not value the life of another over one’s own. Under this analysis, the Torah’s command—“do not stand idly by”—applies only when it is possible to intervene without risking one’s own life. Thus, there should be no obligation for a person to enter into a life-threatening situation to save the life of another. Accordingly, Rabbi Oshry ruled, Rabbi Itzkowitz should not be required to request the release of those captured by the Lithuanian authorities, if doing so would thereby place his own life in danger.

In fact, taking this logic one step further, Rabbi Oshry raised the possibility that perhaps Rabbi Itzkowitz should be prohibited from approaching the authorities in an attempt to gain the release of others. After all, if he may not value the life of another over his own, therefore, it would seem, he may not place his own life in jeopardy while trying to save the lives of those who have been captured. Yet, Rabbi Oshry was reluctant to take his ruling this far. Based on various sources of Jewish law, he suggested that while a person need not—arguably should not—enter into a

11. See *Talmud Bavli, Sanhedrin 74a*.

situation of “certain danger” to save the life of another, perhaps a person is obligated to enter into a situation of “possible danger” to rescue someone who is in “certain danger.” In such a case, the Torah’s command not to “stand idly by” remains in force. Under this analysis, to the extent that the risk facing Rabbi Itzkowitz represented a possible danger rather than certain danger, he would indeed be obligated to approach the Lithuanian authorities in an effort to save those who had already been captured and whose lives were in certain danger.

Based on a comprehensive survey of leading Jewish legal authorities, from medieval through modern times, Rabbi Oshry concluded that under the prevailing view, Jewish law does not require a person to risk even possible danger to save the life of another. In such a scenario, the decision to refrain from action would not constitute “standing idly by.” At the same time, Rabbi Oshry cited the position among some legal authorities that, although there is no obligation to do so, it is deemed admirable to risk possible danger in an effort to save a life.

Therefore, Rabbi Oshry ruled that Rabbi Itzkowitz was not obligated to approach the Lithuanian authorities, because such a response would entail the possibility that Rabbi Itzkowitz himself would be captured and thus had the potential to endanger his own life. However, in light of the view that would commend such conduct, Rabbi Oshry also held that, should Rabbi Itzkowitz be moved to undertake such action at his own risk, it would not be proper to deter him from this heroic effort. In Rabbi Oshry’s perspective, in addition to the inherent value of saving the lives of others, such courage embodied a powerful rebuke to the evil and inhumanity perpetrated by the Nazis.

Ultimately, as Rabbi Oshry later recorded, Rabbi Itzkowitz bravely approached the Lithuanian authorities and, through his efforts, succeeded in gaining the freedom of a number of those who had been captured, while he was not harmed in the process. Tragically, however, Rabbi Oshry concludes his responsum with the report that Rabbi Itzkowitz was later a victim of Nazi extermination in a concentration camp.

This responsum is striking in a number of ways. First, the situation that was presented to Rabbi Oshry exemplifies tragic choices that confronted Jewish communities and individuals throughout the Holocaust. Second, in turn, the resolve by those who were confronted with these choices, remaining faithful to Jewish religious and ethical principles, exemplifies the insistence to maintain a moral compass amidst the most immoral conditions. Finally, the decision by Rabbi Oshry to allow, and by Rabbi Itzkowitz to undertake, a potentially perilous mission in an effort to save

others, represents a victory of hope and righteousness amidst a world of evil and despair.

Indeed, many of Rabbi Oshry's responsa reflect the tragic choices that confronted Jewish communities and individuals amidst the depths of the Holocaust. At the same time, by virtue of even having the strength to ask these questions, and to struggle to articulate moral and ethical responses, Rabbi Oshry and the Jewish community living in the Kovno ghetto repeatedly found a ray of hope amidst the constant and overwhelming despair. There can be few choices more tragic than deciding when and whether to try to save a life, and few responses offering more hope than Rabbi Itzkowitz's decision to risk his own life to successfully save others.

III. DRINKING THE FOUR CUPS OF WINE AT THE PASSOVER SEDER

In fact, when thinking about a title for this evening's lecture, as an alternative to "Tragic Choices in the Holocaust," I considered, instead, the title: "Despair and Hope in the Holocaust." Along those lines, I would like to briefly explore another of Rabbi Oshry's responsa, one that likewise involves a difficult decision—though perhaps not a "tragic choice"—as well as an underlying message of hope, addressing one of the ongoing challenges to the observance of religious rituals in the Kovno ghetto.¹²

Rabbi Oshry prefaces this responsum with a powerful description of the sense of determination among those in the Kovno ghetto to observe and preserve their spiritual life, as a form of resistance against the aims and actions of the Nazis. Indeed, as Rabbi Oshry poignantly reports, the Jews in the ghetto viewed the Nazis' attempts to undermine their spirit and morale as but a means toward the Nazis' larger intention, of rendering them more vulnerable to physical destruction and extermination. Thus, he recounts, the Jewish community in the ghetto felt a shared sense of responsibility to strengthen their spirit and their spiritual lives, to maintain their morale and their moral integrity, in part as a way of protecting their physical integrity as well.

Against this backdrop, Rabbi Oshry presents the dilemma of those who wished to conduct a Passover Seder, including one of the central rituals of the night: drinking four cups of wine, corresponding to the four different phrases the Torah cites in God's promise to free the nation from slavery in

12. This section is based on Volume III, pages 51–55, of the Hebrew version of Rabbi Oshry's responsa. For English summaries of this responsum, see OSHRY, *supra* note 1, at 67–68 and ROSENBAUM, *supra* note 1, at 103–05.

Egypt: “I will bring you out”; “I will save you”; “I will redeem you”; “I will take you.”¹³

Not surprisingly, it was impossible for the Jews in the ghetto to possess any wine, and so the question posed to Rabbi Oshry was whether another beverage could be substituted and used for the four cups, in fulfillment of the ritual obligation. In fact, as Rabbi Oshry notes, the deprivation in the ghetto was such that it was nearly impossible to possess any beverage that could even be contemplated as an acceptable substitute for wine at the Seder, with the possible exception of tea sweetened with saccharin, which, he points out, was itself available only to relatively few individuals. Under these circumstances, the precise question for Rabbi Oshry was rather narrow in scope: whether it is acceptable to substitute tea with saccharin, in place of wine, to fulfill the obligation to drink four cups at the Passover Seder.

Before addressing the question, however, Rabbi Oshry provided further context for the issue, citing various Talmudic and post-Talmudic sources that emphasize the importance of drinking four cups at the Passover Seder. Because the ritual serves to symbolize and publicize the miraculous nature of the events of the Exodus from Egypt, even a person who is destitute is required to make extraordinary efforts to obtain four cups of wine. Yet, as Rabbi Oshry laments, even the most extraordinary efforts would not have enabled the Jewish community in the ghetto to possess wine for the Seder. Instead, they were faced with the far more desperate challenge of determining whether, at best, they should drink four cups of tea as an alternative.

Thus, to answer the question posed to him, Rabbi Oshry looked to the area of Jewish law that classifies what kinds of beverages are suitable for ritual use when wine is unavailable. As a general rule, beverages that fall under the category of *chamar medina*—beverages that attain a certain degree of status in a given society—may be used for rituals such as the *havdala* service, which is conducted on Saturday night to mark the conclusion of the Sabbath. A number of Jewish legal authorities approved of beverages such as *kvass* or *borscht*, or a beverage known as *mehd*, which was made from honey, as suitable for *havdala*; likewise, these beverages would apparently be considered appropriate for the Seder. Yet, even these rulings did not resolve the issue for those in the Kovno ghetto, who did not have access to any of these beverages.

13. *Exodus* 6:6–7.

Instead, returning directly to the question of the status of tea for use in religious rituals, Rabbi Oshry cited a dispute among legal authorities as to whether sweetened tea is acceptable for the *havdala* service at the end of the Sabbath. As Rabbi Oshry explained, those authorities who allowed tea for *havdala* premised their decision on the categorization of tea as *chamar medina*: a beverage that has achieved a societal status sufficient to qualify for ritual use. Moreover, Rabbi Oshry noted, the standards for determining which beverages qualify for the Passover Seder are generally less stringent than those for the *havdala* ritual. Therefore, relying on the authorities who approved of sweetened tea for *havdala*, Rabbi Oshry concluded that drinking four cups of tea may likewise be substituted for drinking wine at the Seder.

Having resolved the legal and religious question, Rabbi Oshry closes this responsum with yet another message of hope, recounting the reaction to his ruling among his students. In an effort to spread a feeling of hope amidst the darkest hours of despair, they took upon themselves the task of distributing sweetened tea throughout the ghetto, for use at the Passover Seder. Rabbi Oshry notes that this sense of hope was particularly powerful in the context of the ritual of drinking the four cups at the Seder, which symbolizes and embodies the feeling of freedom and redemption that is experienced on the Seder night. Likewise, Rabbi Oshry declared, this ritual should serve as a means for lifting the spirits and bringing joy to the hearts of those who dwell in the darkness and death of the ghetto, in the hope that they too will soon experience freedom and redemption from those who seek their destruction.

IV. CONCLUSION

Taken together, these two responsa, perhaps representative of hundreds written by Rabbi Oshry, paint, in part, a powerful picture of a side of the Holocaust familiar to many of us: the constant fear and deprivation, the relentless death and destruction, perpetrated by the Nazis and those who were all too willing to assist them. Rabbi Oshry witnessed unspeakable acts of inhumanity, and he felt a strong sense of responsibility to provide a testimonial record of what he had endured.

Indeed, in his introduction to the abridged form of his responsa, which he published in English in 1983, Rabbi Oshry expressed his outraged incredulity at the existence of Holocaust denial, and he emphasized the need to help preserve the historical record. As he put it: "I want my fellow

Jews, and the rest of the world, to know, and never to forget, the bestiality unleashed by Hitler and his cohorts upon mankind”¹⁴

At the same time, Rabbi Oshry’s responsa reveal a side of the Holocaust that perhaps is not as well-known: an unwillingness on the part of Jewish victims of the Holocaust to succumb to the evils that were being perpetrated; a determination to respond forcefully to the most horrific forms of immorality by reaffirming their own commitment to Jewish law and ethics; and an abiding affirmation of hope amidst the height of despair.

It may thus be fitting to close with Rabbi Oshry’s own words. As he further reflected in the introduction to his responsa: “In a more positive vein, . . . [t]he inquiries on Jewish law and practice to which I had to respond were neither academic questions posed by scholars, nor scenarios proposed . . . [in] theoretical games of ‘What if . . .?’ They were made by ordinary Jews who . . . tenaciously upheld their obligation under the Divine Covenant: to observe to the best of their ability, even in the ghetto, the commandments of God’s Torah”¹⁵

14. OSHRY, *supra* note 1, at xiii.

15. *Id.*