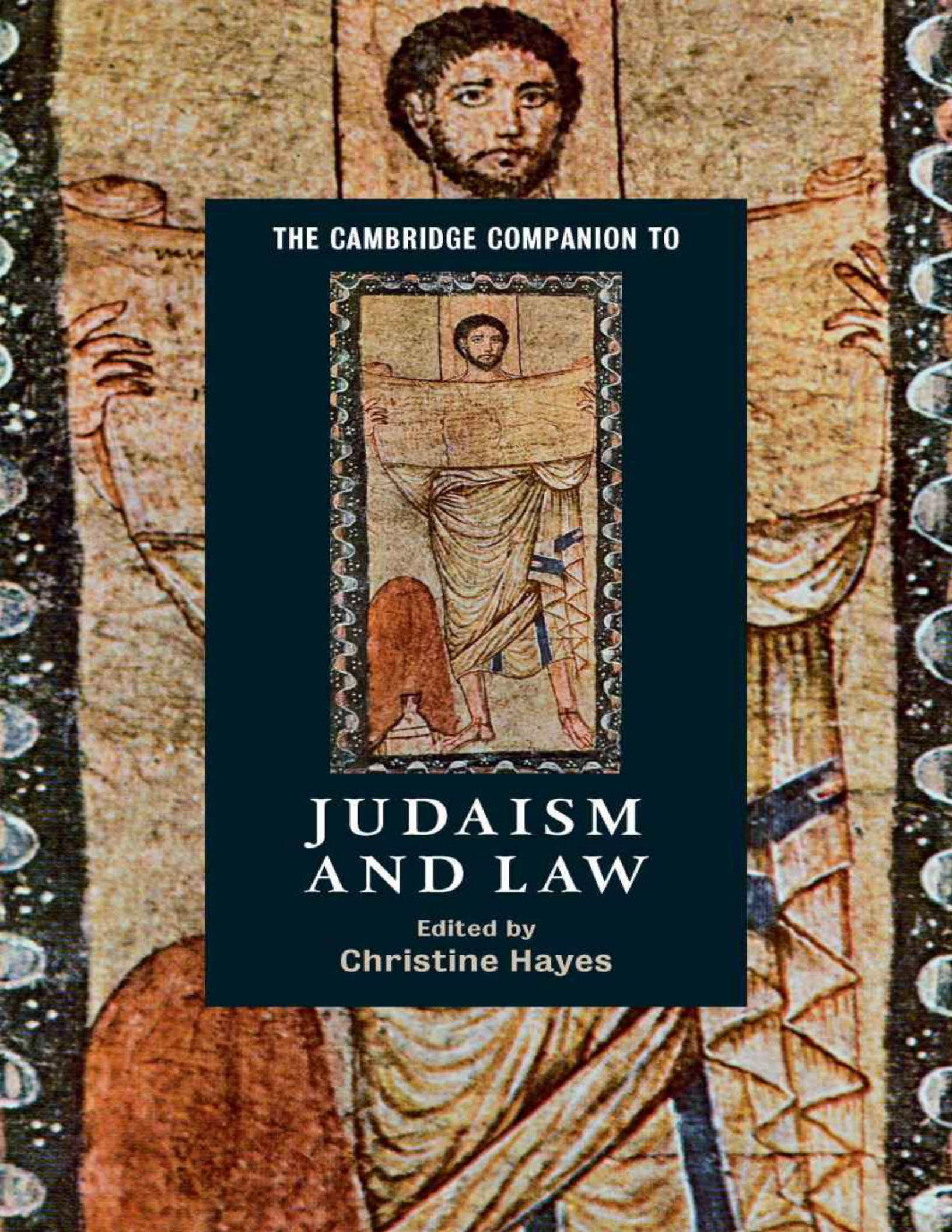

THE CAMBRIDGE COMPANION TO

JUDAISM AND LAW

Edited by

Christine Hayes

THE CAMBRIDGE COMPANION TO JUDAISM AND LAW

The Cambridge Companion to Judaism and Law explores the Jewish conception of law as an essential component of the divine–human relationship from biblical to modern times, as well as resistance to this conception. It also traces the political, social, intellectual, and cultural circumstances that spawned competing Jewish approaches to its own "divine" law and the "non-divine" law of others, including that of the modern secular state of Israel.

Written by an international team of distinguished scholars, the volume's fourteen chapters examine common themes outlined in the Introduction. Part I focuses on the emergence and development of law as an essential element of religious expression in biblical Israel and classical Judaism through the medieval period. Part II considers the ramifications for the law arising from political emancipation and the invention of Judaism as a "religion" in the modern period. Part III traces the historical and ideological processes leading to the current configuration of religion and state in modern Israel, and analyzes specific conflicts between religious law and state law.

Christine Hayes is the Weis Professor of Religious Studies in Classical Judaica at Yale University. A specialist in talmudic-midrashic studies, her published works include *Between the Babylonian and Palestinian Talmuds* (1997, winner of a Salo Baron prize), *Gentile Impurities and Jewish Identities: Intermarriage and Conversion from the Bible to the Talmud* (2002, National Jewish Book Award finalist), *The Emergence of Judaism* (2010), *Introduction to the Bible* (2012), and *What's Divine about Divine Law? Early Perspectives* (2015 National Jewish Book Award in Scholarship; 2016 PROSE award in Theology and Religious Studies from the American Publishers Association). She is an elected member of the American Academy of Jewish Research and Vice President for Program of the Association for Jewish Studies.

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Acknowledgments

In crafting the original plan for this volume, I envisaged a series of chapters ranging from biblical antiquity to the modern state of Israel, united by a common exploration of the concept of law as a vehicle for the divine-human relationship in Judaism, and of challenges to that concept arising from within Judaism and from various political and socio-historical realities. Hoping for a sustained and thorough-going narrative incorporating conceptual and historical approaches, I charted the precise terrain to be convered in each chapter. To my delight, it was not difficult to identify contributors who shared my enthusiasm for the project, and I couldn't be more pleased with the result: a stunning, collaborative effort by eminent scholars working with common purpose across a spectrum of disciplines, areas of specialty, and time periods to produce a cohesive and tightly interconnected volume that is greater than the sum of its parts.

I owe special thanks to the patient team at Cambridge University Press who allowed this project to take as long as it needed to take. I benefited from the kind attention and able assistance of a succession of editors and editorial assistants including Laura Morris, Beatrice Rehl, Alexandra Poreda and Isabella Vitti. I was fortunate to have the gloriously detail-oriented Jacqueline French as copy-editor. The logistics of publication were handled by Christina Sarigiannidou and Hannah Hiscock, with Ross Stewart carrying the project over the finish line.

It is wonderfully fitting that this volume on *Judaism and Law* reached completion on the eve of Simhat Torah – a holiday dedicated to joyful celebration in the Torah.

Christine Hayes

October 23, 2016

Introduction: Can We Even Speak of "Judaism *and* Law"?

Christine Hayes

We begin with a caveat. The formulation "Judaism and Law" rests upon an assumption derived from and congenial to the western Christian tradition but somewhat alien to the Jewish tradition. The assumption, articulated in a parallel Cambridge University Press volume on Christianity and law, is that "law and religion are distinct spheres and sciences of human life … that exist in dialectical interaction, constantly crossing-over and cross-fertilizing each other."[1] On this view, it is possible to explore how "legal and religious ideas and institutions, methods and mechanisms, beliefs and believers influence each other – for better and for worse, in the past, present and future."[2] And indeed, a guiding question for the volume *Christianity and Law* was the following: "what impact has Christianity had on law?" (law being understood here as western law in all its rich complexity, as an independent entity distinct from Christianity).

One might suppose that a volume on *Judaism and Law* could follow the same basic format – exploring Judaism's impact on law on the assumption that law and religion are distinct spheres that interact dialectically. However, the guiding assumption and questions that so fruitfully structure the volume on *Christianity and Law* raise immediate difficulties in the Jewish context. Christianity originated in a rejection of the Mosaic Law as antithetical to a life lived in the spirit. As is well known, this original alienation of the faith from law proved to be unsustainable, and in due course Christianity found it necessary to negotiate the bounds and claims of normativity. Nevertheless, even as Christianity made room for and in turn influenced the development of western legal traditions, law was never an *essential* or *constitutive* element of Christian religious expression. Law was a distinct sphere of human endeavor despite its many points of intersection with the new faith.

In contrast to the antinomian gesture at Christianity's inception, Judaism's origins are represented as thoroughly nomian. As David Novak writes: "While today many

regard law and religion as separate spheres and sciences of life, Judaism has long regarded these phenomena as overlapping, if not virtually identical … [By the Middle Ages, a]ll law was assumed to be derived from the will of God, whether immediately experienced in revelation, or transmitted via continuous tradition, or discerned by public discursive reasoning. And religion, being the human relationship with God, was assumed to consist of accepting, understanding, applying, and obeying God's commandments."[3] Law was long viewed as an essential and constitutive element of Jewish religious expression. Thus, the assumption that religion and law are distinct spheres that interact dialectically is unwarranted in the Jewish context. In premodern Judaism we find not simply a system of religious law but an exhaustive *nomos* of comprehensive scope retrojected to the very moment of the tradition's origin (the covenant at Sinai) and believed to express the will of a single divine being – in short, a divine law.

The idea of divine law – the notion that the norms that guide human action lay some claim to divinity – is found in both classical (Greco-Roman) thought and in the Hebraic (biblical) tradition. However, to the extent that the two traditions conceive of the divine in radically different ways, their notions of divine law diverge. In Stoic thought, for example, the divine is not distinct from nature; therefore, divine law is a metaphor for natural law – an *unwritten* law (as opposed to written legislation) based on and perceived in the rational order of the universe. By contrast, biblical law is divine because it is believed to emanate from and reflect the will of a personal god who is the master of history. In the biblical tradition, divine law – for the first time in history – is actual *written* legislation; among other things it contains a mass of specific and detailed pronouncements, rules, prohibitions and teachings attributed to the direct authorship of a divine being.

The Hebrew Bible places law and justice within the context of a relationship between the ethnos Israel and a personal deity, YHWH. Because of the utter centrality of divine law to the biblical and premodern Jewish conception of the divine–human relationship, it is difficult to speak of "Judaism" and "law" as distinct entities such that their interaction can be identified and traced. Arguably, at least in its classical rabbinic formulation extending through the premodern period, Judaism *was* law – though in a vastly expanded sense that is not fully captured by western definitions and theories of law (natural, positivist, or historical). For centuries, the foundational principles of

Judaism might just as easily have been understood to be the foundational principles of Jewish law. That the one god, through his covenant, has placed normative demands upon his people in order that they might achieve justice and aspire to holiness is at one and the same time a religious principle and a legal principle. Insofar as law may be seen as constitutive of the Jewish conception of the divine–human relationship – a condition that obtained in the literary manifestations of the tradition in the premodern period – it is not possible to speak of law *and* Judaism since law *is* Judaism.

In the modern period, the idea that law is constitutive of the divine–human relationship was challenged by intellectual and political changes that swept Europe, and Judaism came to be seen by some as a "religion" in terms that enable a consideration of its relationship to law as a distinct entity. The characterization of Judaism as a "religion" parallel to Christianity was not universally endorsed, however, and countertrends developed in European and American Jewish thought. In the twentieth century, the tension between competing visions of Judaism and Jewish identity (variously emphasizing moral, halakhic, ethnic, or cultural elements) and the relation of Judaism to law – both Jewish and western – found expression in debates over the role of church and state in modern-day Israel.

Reformulating the Question

In light of the foregoing, this volume on Judaism and law addresses the following topics. First, on the assumption that for much of its history, Judaism has been identified with law, the volume will explore ways in which the tradition has conceived and theorized its divine law. How did Jewish writers, rabbis, philosophers, and thinkers understand (1) the nature, scope, character, and purpose of the normative demands that Israel's god has placed upon the community; (2) the roles of the divine lawgiver and the divine law's human mediators; (3) the possibility of continuing revelation; (4) the possibility of and mechanisms for legal growth and development; (5) the relationship of Written Torah and Oral Torah, of biblical law and rabbinic law (or *halakhah*)? The volume also investigates the extent to which Judaism has, throughout its history, spawned *antinomian* challenges to the idea of law as the primary medium of the divine–human relationship. Thus, the volume gives some attention to the major sites of *resistance* to the nomian character of Jewish religious experience (for example, Pauline Christianity, mysticism, Sabbateanism, Ḥasidism, Reform Judaism) and the effect such movements have had on the development and character of the tradition.

Second, the volume explores Judaism's conception of and interaction with secular systems of law. The vision of divine law at the heart of biblical Israel and later Judaism does not include a system of secular law for YHWH's people. Nevertheless, deprived of political sovereignty since late antiquity, Jews have historically found themselves subjected to a variety of "foreign" legal systems. How have Jews – governed by divinely authored norms – negotiated the claims of the "secular" or non-native legal systems in which they have found themselves? How have they theorized the existence of those legal systems and how have they justified submission to them?

Third, the volume revisits the *status quaestionis* in the wake of the European Enlightenment on the one hand and political emancipation on the other. Doctrines of the separation of church and state and definitions of "religious traditions" as systems of belief began to penetrate Jewish life already in the seventeenth century. By the eighteenth century, some Jewish thinkers adopted the increasingly popular characterization of Judaism as a "religious faith," restricting or de-emphasizing its normative element. This approach facilitated the process of emancipation and the acquisition of citizenship in

European nation-states even as it opened the door to an internal critique of Jewish law. For many, it was now possible to conceive of Judaism as a "religion" distinct from law – whether Jewish or non-Jewish. Jewish voices were added to the larger European discussion of the competing and coinciding claims of religion and law, the role of religion in the state and public sphere, and the state's interest in controlling religion. At the same time, traditional views of law as central to if not constitutive of Jewish religious expression persisted in some circles, challenging Enlightenment conceptions of religion, law, and the relationship of the one to the other.

Fourth, the volume addresses the special case of Israel. The legal system of the secular Jewish state established in Palestine in 1948 drew primarily from mandatory law, Ottoman law, English common law and equity – and to only a limited extent, Jewish law. Ironically, the legal system of the Jewish state came to be counted among those "secular" legal systems with which Jews still governed by the provisions of the divine law must negotiate. This volume asks: How is the authority of the Israeli legal system theorized and justified by those who espouse a primary allegiance to the *halakhah*? How are familiar problems of church and state negotiated in modern Israel? What can be learned from the confrontation and interpenetration of the Jewish religious tradition and *halakhah* on the one hand and the legal system and institutions of secular Israeli society on the other?

The volume proceeds on two methodological fronts – conceptual and historical. Conceptual analyses deal with the Jewish notion of divine law – its nature, reach, guiding principles, authority, mechanisms for growth and change, relationship to other legal systems, and so on – with special attention to conceptual shifts that occurred over the course of time. However, the status and position of Jews for much of their history as a subject people or a people with limited autonomy had a decisive influence not only on the Jewish conception of law but on the extent to which the normative ideals of the literary and religious elite were realized in the quotidian life of Jewish society. Thus, conceptual analysis is combined with a historical approach that weighs the impact of political, social, and cultural circumstances on the Jewish understanding and implementation of its divine law. Particular attention is paid to Judaism's relationship with the legal systems of other peoples – whether divine or secular – including the secular legal system of the Jewish state of Israel.

This volume differs from classic introductions to Jewish law.[4] It does not provide a history of Jewish law or an exposition of its sources and principles. Rather, this volume examines the very concept of law as a central religious concept expressive of the divine–human relationship as well as challenges to that idea. These challenges arise from within Judaism and from social and historical realities that include Jewish interaction with and/or subjugation to other legal systems that are, from a Jewish perspective, non-divine. The volume considers how political and socio-historical reality shaped Jewish conceptions of its own "divine" law and Jewish perceptions of the "non-divine" law of others and, in the case of Israel, of a secular Jewish state.

The fourteen chapters, written by distinguished scholars with specific expertise in the subject, are divided into three parts arranged in historical sequence, as described below.

Part I: Law as Constitutive of Biblical and Premodern Jewish Religious Expression

The chapters in Part I focus on (a) the emergence and development of the idea of law as an essential and constitutive element of the divine–human relationship in biblical Israel and classical Judaism through the medieval period; (b) the extent to which law was, *in historical terms*, an essential and constitutive element of Jewish religious expression in this period; (c) alternative conceptions of the divine–human relationship and responses to these alternatives, and (d) approaches to both the idea of, and actual encounter with, secular law. These chapters combine conceptual analysis with a consideration of the socio-economic, political, and cultural factors that shaped notions of divine law from biblical to medieval times and influenced its implementation. The conceptual analyses and historical investigations in these chapters produce results that coincide with, contradict, or simply complicate one another. Where possible, an explanation for the slippage between rhetoric and reality will be attempted.

In Chapter 1, "Law in Biblical Israel," Chaya Halberstam explores law in ancient Israel as both a historical juridical practice and a literary discursive practice. She considers Israel's *historical* "law in practice" as it related to other social spheres (the familial and political) and argues that law in ancient Israel was not an autonomous and professionalized field but a cultural mode that imbued all facets of life, reflecting distinctive elements of ancient Israelite society, its conception of the divine and of divine justice. She then turns to an in-depth examination of law as *literary* practice in ancient Israel, highlighting the profound interconnections between law and a wide range of other discursive practices. She shows that in the Hebrew Bible, legal writing is not easily isolated from the literary genres of narrative, covenantal history, prophetic oracle, and wisdom which together comprise the *torah* ("teachings") of the God of Israel. Halberstam concludes that law "suffuses the language of the Hebrew Bible, and mediates the relationship between Israel and their God."

The distinction between literary sources and the documentary evidence for law-in-practice informs Seth Schwartz's discussion of "Law in Jewish Society in the Second Temple Period" (Chapter 2). Schwartz argues that literary sources (such as Sirach, the Dead Sea Scrolls) reveal the attitudes of an elite (a "high clerisy") that fetishized the

Torah but had little interest in applying its laws beyond the Temple or, in the case of the Dead Sea Scrolls, to a sectarian community. Despite extensive rumination on the character and nature of divine law, Philo provides little detail about a legal system (civil law, laws of marriage, divorce, inheritance, and so on), and Josephus only hints at Jewish law as a lived system outside the Temple and areas of priestly concern. There appears to have been no formal and rationalized approach to deriving prescriptive details from Scripture as a schematic written code in this period. By contrast, Schwartz argues, papyri and documents allow some insight into the quotidian legal reality of non-elites and some tentative reconstruction of the workings of Jewish law. While the documentary evidence is ambiguous and spare, it seems reasonable to suppose a body of practice in Jewish society of Judea in the latter part of the Second Temple period. But as Schwartz notes, it is likely not until the first century CE that the law of the land in Judea was Jewish in the strong sense of being self-consciously relatable to the law of the normative code (Scripture). Paradoxically, some documents evince an awareness of a biblical law only to then circumvent or ignore it, and in general Jews didn't hesitate to use non-Jewish legal documents and courts. Schwartz describes the development of strongly localized versions of general Hellenistic Near Eastern legal norms and instruments, a Judaized civil law that after the destruction in 70 CE would be appropriated by rabbis as Torah binding on all Jews.

The first seven centuries of the Common Era were a period of intensive legal creativity in the wake of the destruction of the Temple in 70 CE. In Chapter 3, "Law in Classical Rabbinic Judaism," Christine Hayes traces the expansion of Jewish law by the rabbis of the talmudic period (first to seventh centuries CE) – a period in which normativity, central to the biblical understanding of the divine–human relationship, becomes constitutive of that relationship. The chapter explores the ideology of Torah that lies at the heart of classical rabbinic Judaism, beginning with the role of law as both tool and telos in the rabbinic reconstruction of Judaism after 70 CE, and the shift in the perception of Scripture from a collection of descriptive legal teachings to a prescriptive legal code and source of law. This shift threatened to dissolve the vital link between law and narrative described in Chapter 1, as rabbinic readers sought to extract and organize the legal teachings from the biblical text. Hayes considers the conceptual categories and textual practices that emerged as a result of the prescriptive understanding of the nature

of Scripture, including the designation of and differentiation between law and narrative (*halakhah* and *aggadah*) and the development of various strategies for renarrativizing the law: the introduction in rabbinic legal literature of anecdotes and exempla, the presentation of normative materials in a dialogical format, the creation of ritual narratives, and the ethical interpretation of defunct laws. Hayes explores the tension between pluralism and normativity, between attribution and anonymity, and considers the implications of this tension for the rabbinic conception of divine law. In a final section, Hayes examines rabbinic divine law discourse set against competing divine law discourses in late antiquity and argues that the rabbis distinguished themselves from other Jewish groups in antiquity by constructing a conception of divine law that defied the main contours of Greco-Roman divine law thinking.

The eclecticism and adaptation that characterized both ancient Jewish law-in-practice (as described in Chapter 2) and rabbinic law (as described in Chapter 3) stand in stark contrast to a rhetoric of legal distinctiveness, if not isolationism, that appears in biblical, Second Temple and rabbinic sources. In Chapter 4, "Approaches to Foreign Law in Biblical Israel and Classical Judaism through the Medieval Period," Beth Berkowitz describes the process by which the biblical injunction against adopting the abominable practices of the Amorites (Lev 18:3, "You shall not walk in their ways") became a general prohibition against following or even imitating the laws of other peoples. Tracing the principle from its biblical origins through its Second Temple, rabbinic, and medieval elaborations and modifications, Berkowitz shows how the principle enabled Jews to theorize the existence, status, and authority of non-Jewish and/or non-divine legal systems. Because it was used to classify a wide range of practices, laws, and customs as either divinely sanctioned or prohibited, as either Jewish or non-Jewish, the principle reinforced the extent to which Jewish law would be seen as an integral part of Jewish identity. The centrality of Jewish law to Jewish identity was taken up in medieval Jewish thought and in the modern period would pose unique challenges, as some Jews sought to forge Jewish identities divorced from adherence to traditional conceptions of Jewish law.

In the medieval period, Jewish communities in Islamic lands and Christian lands were exposed to new intellectual stimuli and interfaith polemics which gave rise to new conceptions of the nature, purpose, and authority of divine law. With the revival of classical learning in the Islamic world, Sephardic scholars and philosophers, such as

Maimonides, Albo, and Abrabanel, constructed political theories that engaged and reformulated Judaic conceptions of the Law of Moses. The development of a scholastic legal tradition in both Sephardic and Ashkenazic centers resulted in the production of independent legal works – commentaries, responsa, and codes – that were not devoid of theoretical treatments of the Law. In addition, the medieval period saw the development of other modes of religious expression, such as philosophy, mysticism, and pietism, offering alternative visions of the value of law as a medium of divine revelation and of the nature and purpose of God's normative demands for Israel.

In Chapter 5, "Law in Medieval Judaism," Zev Harvey reviews medieval Jewish reflections on law in general and the Law of Moses in particular, beginning with the tenth-century rabbi and philosopher Saadia Gaon and concluding with the fifteenth-century philosopher-statesman Don Isaac Abrabanel. As Harvey demonstrates, some medieval Jewish thinkers drew on classical natural law traditions to configure the law of Moses as an order conducive to virtue and happiness, some drew on classical political theory to configure the law as the constitution of the Jewish nation despite the nation's lack of political autonomy, while still others combined natural law and positive law traditions in original ways. Some were informed by mystical tenets and emphasized the inner secrets and deeper mystical meaning of the commandments, some pointed to defects in the Law relative to aspects of foreign law, while others worked to bring coherence to the reality of the Jews' subjection to foreign legal systems through elaborations of the principle of *dina de-malkhuta dina* (the law of the land is law).

Part II: Enlightenment, Emancipation, and the Invention of Jewish "Religion"

Enlightenment political thought understood the basic political bond to exist between the state and the individual rather than the state and collective entities – a view that made possible the political emancipation of non-Christians. But the acquisition of rights as citizens in modern European states had far-reaching social and religious consequences for European Jews. As Jews were assimilated into secular European society and availed themselves of civil law, fewer matters were brought to traditional rabbinic courts. However, as Verena Kasper-Marienberg shows in Chapter 6, "From Enlightenment to Emancipation," the authority of the religious courts was already in flux on the eve of emancipation. The nature and extent of the dissolution of jurisdictional boundaries – which accelerated in the nineteenth century as subjugation to religious authority became a matter of choice – was a function of the legal framework that Jews encountered in their various places of residence. Focusing on the experience of the Jewish community of Frankfurt am Main with reference to more general trends in neighbouring regions, Kasper-Marienberg demonstrates that the engagement of Jews with non-Jewish law and jurisdiction (not always to override but sometimes to ratify or even coerce communal norms) was deeply connected to the amount of autonomy secured by the community in the premodern period. In general, the dissolution of jurisdictional boundaries, coupled with Jewish recourse to non-Jewish civil and customary law, provides a fascinating counterpoint to the tradition's preoccupation with the biblical prohibition against "walking in their ways" (see Chapter 5).

The acquisition of individual citizenship rights took place against the backdrop of an enlightenment differentiation between the political and the religious. In line with recent work on the invention of religion,[5] the remaining chapters in Part II consider the ramifications of the invention of Judaism as a "religion" in the Lockean sense of speculative faith of a personal and non-political nature. Locke and other European intellectuals confined religion to the private sphere in order to create a public sphere characterized by civil discourse, reason, tolerance, and harmony. Confining religion to the disembodied and speculative realm of faith was a critical step in the differentiation of church and government in western political thought and in the political emancipation of

non-Christians. However, the differentiation of the religious and the political raised critical questions in connection with Judaism that reverberate to the present: insofar as Law is a central and defining element of traditional Judaism, is Jewish identity primarily political rather than religious or even ethnic? If so, does observance of the Mosaic Law constitute for Jews a political allegiance that is competitive, or even incompatible, with allegiance to the secular state? And if religion is defined as speculative faith, or a universal and rational morality, are the bodily religious practices of Judaism purely "ceremonial" behaviors devoid of spiritual meaning and acceptable only to the extent that they do not impinge upon civic life?

In 1670, Baruch Spinoza published his *Theological-Political Treatise*, in which he argued that the Hebrew Bible contained social, political, and moral legislation of human origin, aimed at the political stability of the ancient Israelite state. In Chapter 7, "Enlightenment Conceptions of Judaism and Law," Eliyahu Stern explores the response of philosopher Moses Mendelssohn to Spinoza's political reinterpretation of the Mosaic Law and to Enlightenment conceptions of religion that minimized or dismissed law as a conduit of the divine. Hoping to facilitate Jewish entrance into civil society, the Enlightenment thinker Mendelssohn accepted the differentiation of religion and politics, church and state, but unlike Spinoza, he championed Judaism rather than Christianity as the religion of reason par excellence, a move that conceded the designation of particularistic Jewish laws and observances as ceremonial obligations only.

As a reaction to both oppressive conditions and to the legalism of rabbinic Judaism, and spurred on by the ideals of the European Enlightenment and the desire for emancipation, various forms and degrees of Jewish antinomianism arose in the premodern period. Extreme versions of Jewish antinomianism inspired by the teachings of mysticism included the aberrations of Shabbatai Tevi, a messianic figure who engaged in halakhic violations referred to as holy sins in order to achieve purification through transgression, and Jacob Frank, the self-proclaimed reincarnation of King David and Shabbatai Tevi who also committed a range of sins, including conversion to Christianity. By contrast, and in an attempt to overcome the bi-focal dichotomy of Jewish religiosity in the early modern period, new movements developed affirmative approaches to *halakhah* that cultivated a spiritual dimension and the experience of God's presence. In Chapter 8, "Rethinking *Halakhah* in Modern Eastern Europe: Mysticism,

Antinomianism, Positivism," Menachem Lorberbaum explores the paradigms of halakhic Judaism that emerge in the eighteenth century from attempts to navigate the fraught relationship between praxis and consciousness, between action and intention, between *halakhah* and spirituality. He focuses on two competing visions of the role of *halakhah* in Jewish religiosity: the spiritualistic orientation of Ḥasidism on the one hand and the positivistic orientation of R. Ḥayyim of Volozhin on the other. According to Ḥasidism's theology of presence, normative practice does not exhaust all avenues for cultivating the sacred. By contrast, for R. Ḥayyim of Volozhin, the *halakhah* stands as the sole and exhaustive mediator of the divine.

Hostility to the dominant role of Law in Judaism, and counter-reactions to this hostility continued into the nineteenth century. In Chapter 9, "Antinomianism and Its Responses in the Nineteenth Century," David Ellenson charts the rise of the major modern Jewish movements beginning with Reform Judaism's rejection of the centrality and authority of *halakhah* and emphasis on universal morality as the core of authentic Judaism, Modern Orthodoxy's assertion of the eternal validity of the *halakhah*, and the Positive-Historical (i.e., Conservative) movement's characterization of *halakhah* as subject to historical variation. The chapter examines the distinctive views of each movement on a range of questions such as (1) whether law is essential to and constitutive of the divine–human encounter in Judaism; (2) whether and how Jewish law and ritual observance can and should be modified or discarded; (3) the relation of Judaism to the secular state; (4) how the prohibition against "walking in their ways" is to be realized in a period of emancipation and acculturation.

The antinomian–nomian debate, fueled by the Enlightenment critique of Judaism as a particularistic legalism rather than a universal religious faith, continued to animate Jewish thought in the twentieth century, as discussed by Yonatan Y. Brafman in Chapter 10, "New Developments in Modern Jewish Thought: From Theology to Law and Back Again." Brafman begins by sketching Hermann Cohen's philosophical-theological response to Immanuel Kant's critique of Judaism, and the ensuing debate over *halakhah* and revelation conducted by Franz Rosenzweig and Martin Buber. Brafman shows that despite their many differences, these three German-Jewish philosophers were united in their desire to demonstrate Judaism's compatibility with reason, autonomy, and morality. Reacting to these liberal German-Jewish philosophers, Orthodox Jewish thinkers in the

mid-twentieth century – Joseph Soloveitchik in the United States and Yeshayahu Leibowitz in Israel – developed philosophical accounts of the centrality of Jewish law in Judaism, its self-sufficiency and political implications. At the same time, the *halakhah* began to come under fire anew as feminist thinkers raised questions about its ability to promote the flourishing of all Jews – women as well as men. Brafman explores the late twentieth and twenty-first-century tradition of Jewish feminist theological and legal reflection, focusing on the thought of Judith Plaskow, who presents a radical critique of the theological foundations of Jewish law; Rachel Adler, who employs legal theory in an effort to reshape and reclaim *halakhah* as a communal praxis responsive to evolving goods and values; and Tamar Ross, who asserts the viability of a feminist *halakhah* that retains the transcendent grounds of its authority.

Part III: Judaism and the Secular Jewish State

The role of Judaism in the "secular" Jewish state has been a source of ongoing controversy. The 1948 Proclamation of Independence declared that the new state would "uphold the full social and political equality of all its citizens, without distinction of religion, race or sex; (and would) guarantee freedom of religion, conscience, education and culture." Yet the incorporation of religious authorities into certain state institutions, the state's recognition of only Orthodox rites of conversion, marriage, divorce, and burial, and the subjection of citizens to religious rulings they do not personally approve stand in tension with the proclamation's guarantee of freedom of religion. The chapters in Part III review the historical and ideological processes leading to the current configuration of religion and state in Israel and examine central areas of contemporary conflict.

In Chapter 11, "Judaism and Jewish Law in Pre-State Palestine," Amihai Radzyner describes the status of Judaism and Jewish law in Palestine under Ottoman rule (the "millet system" whereby religious communities established religious councils that handled issues of personal status for their own members) before exploring the effects of two revolutionary developments that occurred under the British Mandate (1917–1948): the secularization of Jewish law and the establishment of rabbinical courts that operate under the aegis of state law to determine matters of marriage, divorce, burial, adoption, and conversion for even non-religious Jews on the basis of Jewish law (*halakhah*). The secularization of Jewish law and state sanctioning of rabbinical courts created the unprecedented situation of a commitment to Jewish law that lacked grounding in religious conviction. This new and entirely cultural-national or legal-civil commitment to Jewish law was allied with the development of *Mishpat Ivri* (Hebrew law, as distinct from traditional *halakhah* or Jewish law), a secular system of law rooted in prior tradition but adapted to the needs of a modern state. Radzyner notes the links between *Mishpat Ivri* and the ideals of Zionism – a nationalist movement founded by secular Jews who envisioned a strict division of religion and state in the Jewish homeland – and documents the pre-state clash between religious jurists who favored the revival of traditional and divinely authorized Jewish law on the one hand, and secularists who favored a legal system distinguished from morality and resembling the legal systems of other nations on

the other. At the heart of this debate over the role of Judaism and Jewish law in the *yishuv* and in the future Jewish state lay fundamental debates over the very nature of Judaism and Jewish identity in the modern world.

The establishment of the state of Israel in 1948 saw ongoing tensions between those who advocated for a strict separation of religion and state, those who sought to increase the role of *halakhah*, and religious authorities who opposed the existence of the secular state altogether. According to the "status quo" agreement, laws pertaining to marriage, adoption, and succession remained under the control of the Orthodox Chief Rabbinate (other matters being handled by a mix of Islamic law, Ottoman law, mandatory ordinances, English common law and equity) even as many of these same rabbis disapproved of the secular state. Religious authorities were incorporated into the state through the Ministry of Religion and its departments of Jewish, Christian, Muslim, and Druze affairs. Government institutions adopted public observance of elements of Jewish law, such as Sabbath regulations and dietary laws. In 1953, the Rabbinical Courts Jurisdiction Law placed all Jewish citizens and residents of the state of Israel under the jurisdiction of the rabbinic courts in personal status cases and in 1980, the Foundations of Law Act declared that judges must resolve gaps in the law not on the basis of English common law and equity but on the basis of the "principles of freedom, justice, equity and peace of the heritage of Israel." The tensions arising from the adoption of religious laws as laws of the state in a situation of diverse religious commitment among the citizenry is addressed by Arye Edrei in Chapter 12, "Judaism, Jewish Law, and the Jewish State in Israel." Edrei explores the legal status of Jewish law in Israeli courts and the halakhic status of Israeli law in rabbinical courts, the use of the legislative process to provide religious services or to fortify and increase religious practices, and anomalies arising from the enforcement of religious norms on nationalist grounds. He further considers efforts by later proponents of the *Mishpat Ivri* movement to expand the reach of *halakhah* beyond personal status matters to inform other areas of the legal system, as well as countervailing efforts by members of the High Court of Justice to maintain the independence of the law and the judges from the interpretive methods, values, and norms of traditional religious law.

Competing conceptions of what it is for a state to be Jewish and the implication of these conceptions for religion and religious law have been a central part of Israeli political

debate since the state's inception. A halakhic state was not the vision of the Zionists or the state's founders who strove for a separation of religion and state even as they sought to create a national culture based on the Jewish heritage and values; yet for some, a Jewish state must be a halakhic state because the national and religious components of Judaism cannot be torn asunder and a secular Jewish state is a contradiction in terms. Certainly, Israeli law does not declare Judaism to be the state religion, and in that sense Israel is a multi-religious state. At the same time, traditional religious Jewish elements have been introduced into public life. However, determining what is a religious symbol and what is a national/ethnic/cultural symbol is not always a simple matter. In Chapter 13, "What Does It Mean for a State to Be Jewish?" Daphne Barak-Erez considers material, religious, and cultural understandings of the Jewishness of the state. Focusing on the latter, she describes the challenges that attend the use of originally religious norms to nourish Jewish culture and identity: the alienation of non-Jewish citizens on the one hand, and secular Jewish citizens on the other. Barak-Erez presents case studies that document the shifting significance of religious elements of Israeli culture and a declining willingness by Israelis to grant national significance to cultural elements of religious origin. For example, pig-related legislation was originally adopted by the secular legal system less because of the religious prohibition of pork than because of the cultural sensitivities of many Jews. However, as the historical memory and cultural significance of this legislation fades, it is increasingly viewed as a reflection of narrow religious interests, raising the ire of secular Israelis.

The debates between secular and religious forces in the state of Israel and the tension between universal civil law and communal religious law are most severe in regard to certain human rights – such as freedom of religion and women's rights. As regards freedom of religion, despite significant protections of religious rights in Israel, the coercive enforcement of religious norms challenges the state's commitment to principles of freedom of conscience. This issue was addressed by High Court rulings in the 1990s that enhanced civil rights in matters of religious practice – the basic laws on Human Dignity and Liberty and on Freedom of Occupation, though the subsequent passage of an amendment to the latter in order to appease religious groups in the Knesset reversed some of these gains. As regards women's rights, the coercive enforcement of religious norms challenges the state's commitment to the equal rights of all citizens regardless of

gender. For this reason, gender has been one critical site of conflict in Israeli Courts between religious and secular forces, beginning with *Shakdiel* v. *The Minister of Religious Affairs* in 1988 (which defended the status of female members of public religious bodies). In Chapter 14, "Fault Lines," Patricia J. Woods examines the role of the women's movement in the battle over jurisdiction of personal status questions in the Israeli courts. She argues that the women's movement's recourse to litigation in the High Court was symptomatic of a growing movement away from legislation and toward litigation as a strategy for social and political change. Focusing on the women's movement as a case study, Woods addresses larger theoretical issues of the independence of the judiciary and the High Court's exercise of the right of judicial review. She shows how the symbiotic relationship of the women's movement and the High Court in the latter part of the twentieth century stemmed from overlapping interests in the desire for a strong court and an ideology of natural law that could challenge and constrain the jurisdiction of the rabbinical court.

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[1] Witte and Alexander (eds.), *Christianity and Law*, p. 3.

[2] ***Ibid.***, p. 5.

[3] Novak, "Law and Religion in Judaism," p. 33.

[4] See, for example, Hecht *et al.* (eds.), *An Introduction*, or M. Elon's magisterial *Jewish Law*.

[5] See, for example, Peterson and Walhof (eds.), *The Invention of Religion*.

Part I

◈

Law as Constitutive of Biblical and Premodern Jewish Religious Expression

1

Law in Biblical Israel

Chaya Halberstam

There are two main precursors to Jewish law: one historical, and one literary. Historically, the clans, tribes, villages, cities, and eventually monarchies of Israel had law-in-practice for centuries, much of which was unwritten and can only be at best speculatively reconstructed by scholars today. On the literary side, some laws, stories about legal practice, and legal modes of address are preserved in writing in the Hebrew Bible – though the relationship between these writings and actual legal practice is extremely difficult to determine and may in fact be nonexistent.

What can be said, then, about law in biblical Israel that spans both a history of ancient juridical practice of which we have little record and a record of legal discourse that may bear little relation to historical practice? Perhaps only a negative conclusion, albeit a significant one may be reached: that law does not seem to have been a highly developed, autonomous field, or a "system" in any real sense of the word. Rather, law in practice in ancient Israel appears to have been continuous with other social practices, an extension of familial or political duties. Moreover, law in writing, from its inception, appears to have been non-systematic and non-comprehensive; as preserved formally in the Hebrew Bible, rather than being more fully systematized, it was rather more fully embedded among an array of other discourses, such as the human–divine covenantal history, the poetry of the prophets, or the heightened emotional rhetoric of Deuteronomy.

This chapter will first present an overview of legal practice in ancient Israel, showing, through a case study of homicide and blood feud, that far from being an autonomous, circumscribed field, law was rather a rule-bound pursuit of remedy for injury intimately tied to family and clan networks, as well as political or state institutions. Based on the limited evidence we have, we may also be able to hypothesize that legal practice in ancient Israel was open to improvisation, compromise and private negotiation.

We will then turn to legal writing, surveying some best guesses about how and why law may have originally been committed to writing, before finally turning toward its placement within the wider framework of the Torah as well as the Hebrew Bible as a whole. We will look at both how written law is embedded in other discourses, such as narrative, political treatise, and emotional exhortation; and, on the other hand, how legal discourse permeates the prophetic oracle as it is seen to mediate and support both the divine–human relationship and interpersonal relationships in ancient Israel. We may observe, therefore, that law in ancient Israel, rather than a professionalized field of practice, was instead a cultural mode that imbued all facets of life, from the individual quest for wisdom to the communal pursuit of social harmony. Law, then, cannot be studied in isolation; as Steven Fraade has written about early Jewish law and narrative: "it is not just a question of how accompanying laws and narratives frame, justify, and authorize one another, but how their two modes of discourse interpenetrate one another, to the extent that we can speak of the normative force of narrative and the narrativity of law."[1] To get a full picture of law in ancient Israel, we must look at an entire normative universe.

Legal Practice in Ancient Israel

The question of whether decentralized, premodern societies had "law" or simply "norms" or "customs" has not yet been fully settled among legal theorists, legal sociologists, or legal anthropologists. For our purposes, we may define law rather broadly, following the lead of legal theorist Lon Fuller: "law is the enterprise of subjecting human conduct to the governance of rules."[2] Seen through this wide lens, it is probable, then, that ancient Israelite societies had some measure of a "legal enterprise": that elders, heads of households, priests, officials, and monarchs were tasked to ensure harmony among families and communities by resolving disputes and intervening when traditional rules were violated. Though they were not expected to adhere strictly to a code of law, there was, most likely, a body of tradition that provided the bases for social justice – and just decision making – that persisted throughout the generations within ancient Israel.[3]

Rather than providing a comprehensive code of legislation or legal precedent, the oral tradition was likely a broad one, consisting of law, narrative, song, advice, and prophecy; yet it also seems clear that law and legal prescription lay at the heart of this tradition.[4] These teachings formed the groundwork for some Israelites to become broadly well educated and would have allowed them, if called upon, to approach the task of ascertaining the right methods for settling disputes that would lead to justice, while also identifying a wrong path that would lead to discord.

What we find, then, in ancient Israel, is not a separate class of jurists or judges, but rather "lay" leadership in clans and villages who could help smooth over and navigate disputes, as well as a (very limited) number of educated, literate professionals[5] who would also be expected to adjudicate claims, if the need arose. As Jonathan Burnside notes, "[m]onarchs, Levites, priests, and non-priests are all involved in adjudication (Deut 17:8–13). This reflects the fusion of law and religion in biblical Israel. Nor is there any distinction, at least in the early period, between administration and adjudication … in early Israel."[6] The non-priests, or "lay leadership," involved in adjudication are often understood to be the *paterfamilias* within Israelite clans, or the elders of several families who presided at the town gate.[7] Farther up the (informal) judicial hierarchy, then, we would expect to find the priests, levites, and other officials adjudicating cases. Indeed, the only legal document outside the Bible recovered from ancient Israel, the Yavne Yam

Inscription, is a petition to a military officer, underscoring that adjudication was simply another administrative duty expected of local officials.[8] The prototype for this kind of professional, then – and the highest court of appeal (though one not always necessarily available to a petitioner) – would be the king. According to Moshe Weinfeld, we see that the duty of the king was aligned with promoting justice, not only by settling disputes and restoring order but also by proactively liberating the oppressed and moving society in the direction of social equality.[9] The king would be seen not merely as exhibiting his own unique wisdom, but also in fact as imitating or even channeling the justice of God. King Solomon, for example, is shown to receive his wisdom from YHWH: "[All Israel] stood in awe of the king, because they perceived that the wisdom of God was in him" (1 Kings 3:28).[10] It would therefore follow that divine wisdom and justice could inhere in any official acting as judge who, having been chosen, ideally, because they were the *right people*,[11] and educated appropriately, would act wisely and justly in accordance with the spirit of the justice of God.[12] Moreover, as Bernard Jackson points out, much of the Israelite legal tradition was geared toward self-actualization; there is clear guidance for resolving disputes, in many cases, that would allow for private settlement without the need for official or formal intervention.[13] The sense of divine justice could inspire all who might seek it.[14] And, indeed, the possibility of divine intervention via oracle remained open as a mode of decision making for disputes in which evidence was not sufficient.[15]

Oral teachings were at certain opportune times in Israelite history committed to writing; as such, they were understood to stand as a reference copy for teachings that continued to be transmitted orally.[16] It is likely that written text – a rare commodity in the ancient world which could only be produced by trained scribes in elite circles – took on an aura of the sacred. As David Carr points out, the idea of divine writing is in fact itself thematized in the Hebrew Bible.[17] These written tablets were then understood to stand as a "witness" (Deut 31:19[18]), lest the teachings be forgotten. The traditional, oral, legal instructions of ancient Israel, then, were seen as reiterations of a sacred, auratic, written copy. The idea of law as "divine" was therefore understood in a minimal, but twofold, sense: the pursuit of justice required the imitation of uniquely divine attributes of justice and was ultimately guaranteed through divine oracular assistance. Furthermore, the teachings themselves, as they were written down, attained a divine aura, which the

writing process itself in many ways conferred upon it. These laws would eventually be tied to the prophetic tradition, with Moses as the prophet par excellence,[19] and would make their way, via multiple revisions, into Exodus (the "Covenant Code," Exod 20:19–23:33) and Deuteronomy (chiefly 12–26).

Again, these laws would have been taught as part of a standard, "popular" education in ancient Israel, rather than as part of specialized legal training.[20] As Deuteronomy's own introduction to its laws advocates:

> Recite them to your children and talk about them when you are at home and when you are away, when you lie down and when you rise. Bind them as a sign on your hand, fix them as an emblem on your forehead, and write them on the doorposts of your house and on your gates.
>
> (Deut 6:7–9)

The question that arises, then, is where the original legal tradition came from. Were the laws and instruction devised from the outset as a purely theoretical, didactic enterprise? Or can they be connected in any way to ancient Israelite legal practice? Some scholars have argued that the nature of these laws, both in the Hebrew Bible and the corresponding law collections found elsewhere in the ancient Near East, are entirely theoretical: educational texts that convey ideals of justice, far from pragmatic instruction, and certainly not reflective of social practice. Anne Fitzpatrick-McKinley, for example, advocates understanding biblical law as akin to *dhama*, "a series of moral rules backed up by nothing other than their own moral authority,"[21] designed as a theoretical exercise for educational curriculum rather than emerging from real experience. Bruce Wells, however, compares Israelite law, as preserved in the Hebrew Bible, with records of actual legal practice from the ancient Near East[22] and argues that this position is too extreme.[23] There is too much overlap between the practice of law in the areas surrounding ancient Israel for it to be merely coincidental. He shows that similarities exist between legal issues that arise, legal reasoning, and legal remedies in some of the biblical laws from ancient Israel and documents of legal practice in the ancient Near East. He concludes:

> the evidence tends to favor those views that allow for some level of connection between the provisions in the codes and real-life law: views A ([biblical law functions as] authoritative law), B ([they represent] competing sets of authoritative law), and D ([they are] legally descriptive treatises). It tends to disfavor those views that sever the connection between the codes and legal practice: views C ([biblical law codes are] theoretical treatises) and E ([they are] nonlegal treatises).[24]

There is much room for debate among these options that Wells delineates; he writes that he "prefer[s] view D (legally descriptive treatises) as an explanation for much of the material in the [biblical] codes" because of "the connections with ancient Near Eastern practice … and because there is no clear evidence that any of the biblical or cuneiform codes were used by trial courts as the basis for verdicts."[25] Nevertheless, he readily admits that "a single view is insufficient to explain all the material in the pentateuchal laws"[26] and that while some laws strongly appear to reflect actual practice, others most likely "reflect the idiosyncratic ideals of a particular code's authors."[27]

There is, in the end, a vexed relationship between actual Israelite legal practice and the oral, written, and eventually codified legal, instructional tradition of ancient Israel, but there is a relationship nonetheless. We might therefore imagine that little care was taken to expressly separate legal precedent from authoritative legislation, or from wise advice, or from religious exhortation. The practice of law in ancient Israel was ideally to combine all of the above: to channel the wisdom and justice of YHWH, to conform to precedent or tradition as much as possible, and to promote a moral vision that would lead to harmony within Israelite families, clans, and communities.[28]

Blood Feud: Ancient Israel's Tradition and Practice

An example of legal practice that is corroborated by a variety of sources, Israelite homicide law may be examined as a complex nexus of private negotiation, procedural guidelines, cultic requirements, and official state intervention. According to Pamela Barmash, rather than a "paroxysm of rage," blood feud ought best be understood as "a legal mechanism that both assures the redress of wrongs and controls the violence to a level tolerable in a community … [I]t is local in nature, and … rule-bound."[29] She goes on to describe blood-feud in ancient Israel as follows:

> The victim's family undertook the initiative in punishing a homicide, but there were qualifications. Only the slayer was subject to action, not anyone else, whether having a connection to him or not. Apparently only a specific member of the victim's family, *go'el hadam* [the "blood avenger"], had the right to kill the slayer with impunity. The cities of refuge acted as a check on the right of [the blood avenger] to kill the slayer with impunity. He could not kill a slayer while the slayer was within the city of refuge (Num. 35:12; Deut. 19:5; Josh. 20:5). Second, once the slayer had entered the city of refuge, he was subject to trial to determine whether it was an intentional or accidental homicide (Num. 35:24; Deut. 19:12). This decision limited the ability of [the blood avenger] to effect vengeance because if the slayer was judged to be an accidental killer, he was permitted to stay in the city of refuge safe from the avenger. Only if the slayer was determined to be an intentional killer was he handed over to the avenger for execution. Indeed, biblical texts manifest anxiety over the possibility that [the blood avenger] might kill an accidental killer because he could kill any slayer with impunity outside the city of refuge (Deut. 19:6).[30]

Within this legal mechanism to remedy homicide, then, are a variety of styles of jurisprudence. We see the "customary law" of Israelite clan life, which relied on immediate but limited vengeance for the victim's family. Identification of the killer is not presented as an issue; we might presume that in small communities, the identity of the killer was most often known to all and not the vexed issue it is in murder mysteries today.[31] We may also note the presence of "cities of refuge," which may have been connected to a local shrine or altar[32] and provide a kind of divine protection for the

slayer who is believed to have killed without intent. These "cities of refuge" (or the altar itself, as described in Exod 21:13–14) reveal how religious or cultic institutions might function legally in some respects. The trial, then, is apparently *only* required for a slayer who has fled to a city of refuge, and therefore more "official" oversight in respect of the sanctions for homicide – identifying the killer's intent and motivations, the murder weapon used (bare hands or iron tool, for example[33]), the history (or lack thereof) of enmity between the killer and the victim – is reserved for only certain cases, but it is available nonetheless. Barmash clarifies that the trial is conducted normally by local officials or elders; the monarchy and/or the central sanctuary do not intervene other than in truly exceptional circumstances.[34] Thus, the procedure for blood feud appears to be both informal and rule bound; privately negotiated and navigated, but with the possibility that central authorities can be petitioned or invoked if a case warrants it.

As for the sanctions attached to homicide, the biblical law collections specify repeatedly that the penalty must be death. Nevertheless, it is likely that much like their neighbors throughout Mesopotamia,[35] ancient Israelite legal *practice* provided an option of accepting compensation for the homicide instead of putting the killer to death.[36] Israelite teachings, especially those in the priestly sources, do not agree. The explicit exhortation in Numbers not to accept ransom for the life of the killer (Num 35:31) shows the conflict, here, between what may very well be a cultic stipulation and a common practice of accepting compensation to restore harmony in the community. Why, in this case, would religious authorities so strongly attempt to influence a functioning legal practice? According to Barmash, there may have been a concern about ritual purity: Israelite religious culture may have insisted that only the blood of the killer was able to cleanse the pollution caused by spilling the blood of the innocent.[37] Or, from a different perspective, Moshe Greenberg contends that Israelite religion forbade compensation because human life was deemed sacred:

> The idea that life may be measured in terms of money or other property, and *a fortiori* the idea that persons may be evaluated as equivalences of other persons, is excluded. Compensation of any kind is ruled out. The guilt of the murderer is infinite because the murdered life is invaluable; the kinsmen of the slain man are not

> competent to say when he has been paid for. An absolute wrong has been committed, a sin against God which is not subject to human discussion.[38]

To Greenberg, this view dovetails with the Israelite notion that law was divine, and that God was its author. Murder is therefore not a crime against another person, but a transgression against God himself.

Regardless, it is clear that the talionic requirement of the death penalty for murderers in Israelite tradition stands at odds with the practice of neighboring cultures,[39] and perhaps of Israel itself. We see here a cultural/religious ideal that conflicts with legal practice and perhaps exerts pressure on it, but does not necessarily define it. Legal practice was thus continuous with other parts of Israelite culture, such as cultic observances or familial custom, but it was not wholly controlled or defined by either.

Law in Script: Legal Discourse in the Hebrew Bible

As many of ancient Israel's disparate writings would make their way into the current version of the Hebrew Bible, they would certainly have undergone much revision, restructuring, and reframing. Laws originating from royal spheres would be combined with a priestly tradition and laws or regulations that were more specifically tied with Israel's cult. In the process of combining these traditions, scribes (most likely tied to the priesthood) also combined them with narratives of early Israel and myths of primeval history, and they also collected and revised prophetic oracles as well.[40] It is highly likely that this combination and revision or re-inscribing of Israel's teachings occurred in order to obtain authorization by the Persian Empire, which may have lent certain symbolic importance to the Torah as "the law of … God and the law of the king" (Ezra 7:26). However, since it was unlikely that the book itself was actually used as a code of law,[41] the continuities between the legal collections, narrative traditions, and exhortations of the prophets are all the more pronounced. Together, they comprised the *teachings* of the God of Israel. Law is embedded in narrative and wisdom discourses; oracle, exhortation, song, and story are infused with legal language.

The Biblical Law Collections and Other Literary Discourses

There are three significant law collections in the Hebrew Bible: The Covenant Code, most likely the earliest, and possibly a revision or adaptation of the Code of Hammurabi.[42] Second, the Deuteronomic Code, which likely dates from the Neo-Assyrian period (seventh-century Judah), most likely grew out of a revision and transformation of the Covenant Code.[43] Finally, the Priestly Code, which includes the later Holiness Code, was likely compiled during the Babylonian exile, even while parts of the priestly teachings certainly pre-dated the exile as a specialized work circulating exclusively in priestly circles in both oral and written forms, as similar literature did in other ancient cultures.[44] What is perhaps surprising about Israel's written tradition is that the final editors did not do away with earlier material that had already been revised or updated, but rather preserved it, thus presenting multiple renderings of any given topic, including Israelite law.[45] Therefore, even as Israelite oral and written traditions are heavily edited so that they comprise one continuous story, their anthological character remains; the teaching of Israel, and its God, hardly speak with one voice.[46]

The combined law collections are placed by the biblical redactors as the climax of a story of liberation, revelation, and the forging of a divine–human relationship. Many scholars have noted the inextricability of biblical law and the structure of covenant, which together appear closely modeled on ancient Near Eastern treaties.[47] The narrative of the covenant is a powerful one: Israel's early ancestral narratives and its history of enslavement in Egypt, along with the miraculous protection that YHWH has given these proto-Israelites, become a type of salvation history; they point, teleologically, to the theophany at Sinai, an event which for Israel gains its significance through lawgiving. Here, we find a mutual (if lopsided, in terms of power and status) agreement depicted between YHWH and the Israelites: if Israel obeys the laws and is loyal to YHWH, YHWH bestows gifts and blessings upon them. If, on the other hand, Israel is disloyal to the treaty and does not obey the laws, YHWH removes his protection and carries out curses upon Israel. The relationship between Israel and God is thus depicted as formalized, mutually, in conditional, covenantal language.[48] The laws, then, do not abruptly interrupt the chronology of Israel's history, but are naturally placed within a narrative of covenant making; the laws attain their authority not only because of the

divine voice that utters them, but through the Israelites' consent.[49] The whole record of Israelite history becomes a narrative frame around a formal, legal center. Israel's early history is understood as a covenantal pre-history through YHWH's promises of blessing; YHWH's liberation of Israel from oppression then culminates in the forging of the covenant itself; a golden age of harmony and Israelite ascendancy follows from the covenant, but Israelite contentment and self-satisfaction also lead to breach of the covenant; Israel's decline is seen in terms of estrangement from YHWH; suffering is perceived as sanction, as after which Israel will eventually return to the covenant and its blessings.

At the same time, law within Israel's Torah is not incidental to the covenant, as some might contend.[50] For a long time, biblical scholars who had a distaste for law or legalism invoked the notion of covenant to give the law true theological meaning. As Jon D. Levenson writes, "The … appreciation of covenant has redeemed law for biblical theology for covenant gives law a place within a structure of faith …"[51] This view persists, though it has become somewhat less ideologically grounded.[52] However, rather than asserting that "covenant subsumes law,"[53] we might recognize that while law is embedded in covenant it is also fully present in elaborate detail at the center of the Pentateuch – a frustrating distraction to a reader primarily invested in the narrative progression of Israel's story. Rather than focus primarily on *either* covenant *or* law, Bernard Levinson suggests that biblical scholars arrive at "a theory of revelation derived *equally* from narrative and law."[54]

One might conclude that the framework of covenant successfully weds a mythic, legendary, and historical narrative to legal prescriptions, suggesting that narrative, history, and even creation itself are yoked to a demand for justice and obedience. Moreover, it suggests that Israel's laws are not arbitrary, but are rather the culmination of the divine plan for the universe, and specifically for YHWH's people. However, it is important to note that these inferences are not stated outright in the Pentateuch, nor are the narrative and law in the Hebrew Bible woven together seamlessly; there is no thorough justification of the laws in terms of divine oversight or nature that one finds among later writers and commentators. Legal collections in the Hebrew Bible still appear haphazardly

organized and only at certain moments do they tie themselves directly to Israelite narrative history.

Given that Israelite law collections are embedded within a narrative of Israel's history and a story of covenant making, it becomes clear that the division of the Pentateuch into "legal" and "narrative" sections with a broad brush is largely unsustainable.[55] Biblical law for the most part does not read like modern legalese, which is often composed of neutral, impartial, and precise language stripped of any emotional impact, narrative tension, or persuasive rhetoric. Biblical law is primarily casuistic: if–then clauses which are each mini hypothetical narratives, posing a tense protasis and concluding with an appropriate, and often satisfying, resolution.[56] Assnat Bartor describes them in narratological terms:

> The outstanding poetic accomplishment that is reflected in the casuistic laws is the production of mimetic texts – imitating reality – within a rigid pattern with fixed linguistic elements. The description of events and characters in the casuistic laws in a realistic, vivid manner – albeit not rich in details – leaves the reader with an intense impression of reality … The ability to "hear" the characters' words gives the events dramatic color.[57]

The "vivid" and "dramatic" reality of the casuistic laws can be seen, for example, in the law concerning a poor man's garment. It reads:

> If you take your neighbor's cloak in pawn, you shall restore it before the sun goes down; for it may be your neighbor's only clothing to use as cover; in what else shall that person sleep? And if your neighbor cries out to me, I will listen, for I am compassionate.
>
> (Exod 22:26–27)

Bartor analyzes this passage in terms of vivid imagery and literary point of view. She reveals the attention to word choice and narrative detail as she observes the use of "'personal' language, which describes so vividly and palpably the poor person's distress to such an extent that the reader can feel the night chill on his coverless body."[58] She also shows that the lawgiver's perspective shifts to the point of view of the poor man

himself and his "personal position," such that "[t]he rhetorical question 'in what else shall he sleep?' reflects the scene of a dialogue between the poor person and the lender."[59] The law, then, far from a simple imperative or regulation, is a dramatic confrontation between two different social viewpoints.

For Bartor, then, this narratologically rich casuistic law intends not simply to command, but "is aimed at persuading, at 'leading' the lender to the recognition" of the poor man's perspective. A rhetoric of persuasion is actually woven into the Pentateuch as a whole.[60] We can perhaps locate it most clearly in biblical law in the appearance of these so-called motive clauses attached to various biblical stipulations, which appear far more frequently in biblical law than in their ancient Near Eastern counterparts.[61] As such, they may point to a particular interest among ancient Israelite scribes in interweaving legal regulations with other discourses that support them.[62] These motive clauses function in several different ways. Some motive clauses, as James Watts observes, "create links between the lists of laws and the stories of the Pentateuch,"[63] grounding the laws directly in Israel's personal history and experience,[64] or in universal stories such as creation.[65] The motive clauses also function to tie observance of the laws to the emotions of readers (or hearers); several laws, for example, endeavor to activate empathy in order to engender adherence. Bartor sees this precise motivation in the legal stipulation about lending quoted above: "it evokes the effect of solidarity and empathy toward the poor person, promoting an empathetic identification on the part of the reader."[66] Thomas Kazen, writing about emotions in the Hebrew Bible, sees empathy functioning in many of the motive clauses throughout the legal collections, even those that appear, at first, to be based solely on the threat of divine punishment. Commenting on the law in Exodus that warns that in response to abusing widows and orphans, YHWH will "kill you with the sword, and your wives will become widows and your children orphans" (Exod 22:24), Kazen writes:

> Despite the harshness, the effect is an appeal to the recipients' experience … The threat seeks an *affective response* to the imagined fate of one's own family and, in extension, to the fate of those who are presently struck by such unfortunate circumstances. This is not an appeal to a cognitive understanding or cool reason

> alone, but again we might suggest an empathic arousal by *mediated association* …[67]

Ultimately, biblical laws are themselves dramatic and emotive; they are linked to the larger myths and narratives in Israel's memory, and they are scripturally embedded within a written narrative of Israel's origins as a nation.

The lines between law and narrative break down even further in stories about the aetiologies of particular laws, which proliferate in the Pentateuch – some with more focus on the legal conclusion, and some in which the legal conclusion appears to be an afterthought. Compare, for example, the story of the blasphemer in Leviticus to the quasi-mystical tale of Jacob's encounter with YHWH in Genesis. In Leviticus, we read:

> A man whose mother was an Israelite and whose father was an Egyptian came out among the people of Israel; and the Israelite woman's son and a certain Israelite began fighting in the camp. The Israelite woman's son blasphemed the Name in a curse. And they brought him to Moses – now his mother's name was Shelomith, daughter of Dibri, of the tribe of Dan – and they put him in custody, until the decision of YHWH should be made clear to them. YHWH said to Moses, saying: Take the blasphemer outside the camp; and let all who were within hearing lay their hands on his head, and let the whole *congregation* stone him. And speak to the people of Israel, saying: Anyone who curses God shall bear the sin. One who blasphemes the name of YHWH shall be put to death; the whole congregation shall stone the blasphemer. Aliens as well as citizens, when they blaspheme the Name, shall be put to death. Anyone who kills a human being shall be put to death. Anyone who kills an animal shall make restitution for it, life for life. Anyone who maims another shall suffer the same injury in return: fracture for fracture, eye for eye, tooth for tooth; the injury inflicted is the injury to be suffered. One who kills an animal shall make restitution for it; but one who kills a human being shall be put to death. You shall have one law for the alien and for the citizen: for I am YHWH your God. Moses spoke thus to the people of Israel; and they took the blasphemer outside the camp, and stoned him to death. The people of Israel did as YHWH had commanded Moses.
>
> (Lev 24:10–23)

This passage is undoubtedly a *story*: it is about specific individuals, complete with proper names, and it both begins and ends in a particular setting. Nevertheless, the oracular pronouncement, generalizable, universal, and indeed formulaic (the law of *talion*, phrased as it is, appears in every biblical law collection as well as many extra-biblical law collections), forms the heart of the narrative. The universal, normative force of this particular mini-narrative is overtly signaled in YHWH's speech; instructions are given to Moses as to how to deal with this particular blasphemer, but then it continues: "And speak to the people of Israel, saying: *Anyone* who curses God shall bear the sin." Is this passage narrative or law? Commentators have argued for each,[68] but it might make sense to recognize that law and narrative, as written genres, are far more intertwined than conventional thinking suggests.

If the law of *talion* in Leviticus appears to have little more than a flimsy narrative framework supporting it, the story of Jacob's encounter with YHWH at the river Jabbok is one of the most powerful narratives in the Hebrew Bible. Nevertheless, it ends on a kind of anti-climax, a legal coda that Robert Alter designates a "concluding etiological notice." The story reads:

> Jacob was left alone; and a man wrestled with him until daybreak. When the man saw that he did not prevail against Jacob, he struck him on the hip socket; and Jacob's hip was put out of joint as he wrestled with him. Then he said, "Let me go, for the day is breaking." But Jacob said, "I will not let you go, unless you bless me." So he said to him, "What is your name?" And he said, "Jacob." Then the man said, "You shall no longer be called Jacob, but Israel, for you have striven with God and with humans, and have prevailed." Then Jacob asked him, "Please tell me your name." But he said, "Why is it that you ask my name?" And there he blessed him. So Jacob called the place Peniel, saying, "For I have seen God face to face, and yet my life is preserved." The sun rose upon him as he passed Penuel, limping because of his hip. Therefore to this day the Israelites do not eat the thigh muscle that is on the hip socket, because he struck Jacob on the hip socket at the thigh muscle.

Alter refers to this story as having a "folkloric character" and depicting Jacob's "dark night of the soul" in a "haunting episode." Stephen Geller sees the story as a "true myth"[69] that possesses unreconcilable tensions and "pregnant ambiguity."[70] But could

this incident not similarly be read as legal precedent, or a legal origin story, much like the story about the blasphemer? To be sure, the final comment about not eating the thigh muscle appears in the indicative rather than imperative; nevertheless, although the custom of refraining from eating the thigh muscle does not appear elsewhere in the Hebrew Bible,[71] this story concludes with enough universalized normativity to justify the practice in later Jewish law.[72] As much as the biblical legal collections are inflected with narrative, the powerful, mythic, biblical narratives are injected with normative ends.[73]

Legal Discourse in the Prophets

Much as narratives in the Pentateuch can feature legal themes and universalizable imperatives, the prophetic books often rely upon legal language to attain ethical and normative weight. While the prophets never call upon the authority of a legal code or a particular commandment,[74] the imaginative universe they call forth is undoubtedly normative. For the prophets, justice is paramount: it is the cornerstone of the divinely ordered cosmos, and a definitive element in God's relationship with humanity and the natural world. When human beings fail to act justly, then natural or divine justice takes effect: sanctions are imposed, and transgressors, often collectively, pay for their wrongdoing by retributive suffering, whether through the hands of other humans, such as invading armies, or natural afflictions and disasters. In the end, the scales of justice are always rebalanced. Taken as a whole, then, the prophetic universe operates according to a kind of legal logic: basic rules of just order must be followed, and corrective punishment occurs when they are flouted.

Adding to this overall structure, interspersed throughout the prophetic books, are specific structural models, allusions, vocabulary, and literary tropes that are drawn from the legal world. Prophets draw upon both substantive law, as well as the structure of legal procedure, in order to emphasize the importance of social and interpersonal justice which they see being violated, and, perhaps to a lesser extent, the relationship between Israel and her God. Some of the most prominent of these will be outlined below: the talionic principle, the "*rib*" (lawsuit) pattern, the juridical parable, and, finally reference to specific laws in the Israelite tradition – including the Decalogue as a whole.

Talion

Patrick Miller, in his book *Sin and Judgment in the Prophets*, outlines the recurrence of a pattern of correspondence between the crimes of which Israel is accused, and the punishments of which the prophets warn. These correspondences, which are both "stylistic and theological,"[75] are related to a prominent element in Israelite (and ancient Near Eastern) penology: *talion*, or equal and similar retaliation – "an eye for an eye."[76] In his book, Miller differentiates different categories or kinds of sin–judgment correspondence he observes in the prophets: (1) general correspondence, (2)

correspondence of instrument/means, and finally (3) talionic correspondence.[77] Within the category of talionic correspondence, which is the category that best suits the majority of prophetic judgment oracles,[78] Miller outlines various subcategories: correspondence in "nominal form," the "*ka'asher* ('as') + verb" formulation, correspondence in verbs describing the punishment and the crime, the "talionic idea" without formulas, and "indirect correspondence."[79] In other words, the stylistic and conceptual correspondences that the prophets draw between crime and punishment range from close affinity to pentateuchal legal expressions of *talion* (the "nominal" form, or "X *taḥat* [for] X") to those that merely imply it. Nevertheless, the idea of a talionic logic lurks behind many prophetic judgment oracles, according to Miller, and that logic draws the processes of history, or "acts of God," into a legal framework. "One of the clear conclusions of this study," Miller asserts, "is that a notion of retributive [talionic] justice is not incompatible with an understanding of divine judgment wrought out in the process of history."[80]

As an example of "complete correspondence," Miller highlights a passage in the book of Joel:

> You have sold the people of Judah and Jerusalem to the Greeks, removing them far from their own border. But now I will rouse them to leave the places to which you have sold them, and I will turn your deeds back upon your own heads. I will sell your sons and your daughters into the hand of the people of Judah, and they will sell them to the Sabeans, to a nation far away; for YHWH has spoken.
>
> (Joel 4:4–8)

This passage has, at its center, a clear expression of the talionic ideal: "I will turn your deeds back upon your own heads." But the passage does more than that; the punishment is "a complete reversal and the victim of the crime becomes the agent of judgment against the one committing the crime. Those who were sold to a far off nation will in turn sell to a far off nation those who sold them."[81] And indeed, the same verb (*maḥar*) is used in both the crime and the punishment, to underscore their equivalence.

The connections that Miller draws between prophetic judgment oracles and the legal understanding of talion are, in the end, stylistic and discursive – they are not meant to indicate a lived experience of talionic justice from the heavens. He concludes: "the

prophets declared a *poetic justice*, not only seeing in the events of the future the enactment of Yahweh's decree of judgment, but frequently perceiving an appropriateness of the punishment to the crime."[82] It was precisely by borrowing language from the sphere of law and applying it to the divine direction of history that the prophets and the editors of their oracles endeavored to reshape the way Israelites – and later readers and hearers of these written prophetic texts – thought about history and their place in the divine cosmos.

The Riv Pattern

There is a vast quantity of scholarship on the phenomenon of the "covenant lawsuit" among Israel's prophets;[83] for the purposes of this chapter, the *riv* can be understood as a legal metaphor, "a persuasive technique by the prophet, a paranetic strategy to convince the intended audience to amend their ways."[84] The lawsuit oracle usually includes the Hebrew root *ryb*, which denotes "to contend," and is frequently used in legal contexts.[85] The structure, which varies quite a bit, usually includes a summons to heaven and earth or other natural phenomena and a description of the scene of judgment; an accusation or charge; and possibly a pronouncement of guilt and sentence.[86] The *riv* imagines, most often, Israel on trial – charged by YHWH for a variety of offenses: deserting YHWH, oppression of the vulnerable, and serious crimes like murder. For some scholars, the *riv* oracle specifically relies on widespread knowledge of Israel's covenant, an agreement between YHWH and Israel, and thus, in the *riv*, YHWH prosecutes Israel for breach of covenant.[87] For others, the *riv* may have drawn on a growing sense of a covenantal relationship between YHWH and Israel, but it relies more on a general sense of "justice and righteousness," arising naturally from the divine ordering of the cosmos.[88]

A powerful *riv* oracle can be found in the book of Micah:

Hear what YHWH says: 1
Rise, plead your case *[rib]* before the mountains,
and let the hills hear your voice.
Hear, you mountains, the dispute *[rib]* of YHWH, 2

and you enduring foundations of the earth;
for the LORD has a dispute *[rib]* with his people,
and he will contend with Israel.
"O my people, what have I done to you? 3
In what have I wearied you? Answer me!
For I brought you up from the land of Egypt, 4
and redeemed you from the house of slavery; …"
"With what shall I come before YHWH, 6
and bow myself before God on high?
Shall I come before him with burnt offerings,
with calves a year old?
Will YHWH be pleased with thousands of rams, 7
with ten thousands of rivers of oil?
Shall I give my firstborn for my transgression,
the fruit of my body for the sin of my soul?"
He has told you, O mortal, what is good; 8
and what does YHWH require of you
but to do justice, and to love kindness,
and to walk humbly with your God?

(Mic 6:1–8)

In this passage, the prophet utilizes a legal model and legal terminology in order to underscore his message of justice. The word *riv* is repeated three times, as the mountains and hills are called forward as judges: there can be no mistaking the courtroom setting and trial language in these first few verses. As with most prophetic poetry, however, there is a twist: rather than hearing YHWH's accusation, as we do in many other *riv* oracles,[89] we realize that YHWH has convened the court in order to challenge Israel to lay her charge against *him*. And then, instead of prosecuting God, Israel wants to reconcile – a model, perhaps, of restorative justice rather than an adversarial process. But Israel seeks cultic means to solve a juridical problem, and that

will not suffice; according to the last verse, it is only just action toward other people, and loyalty to YHWH, that can resolve the dispute.

Passages such as this one are found throughout the prophetic books; in fact, Second Isaiah is often deemed to be composed entirely of trial oracles, with a courtroom setting providing the overarching thematic throughline.[90] Law thus provides a discursive medium for the prophets who sought not only to warn Israel of impending disaster, but to explain Israel's suffering in light of her relationship with YHWH. According to Meira Kensky, the *riv* oracle did just that: "By using the courtroom metaphor explicitly in the *riv* pattern, the authors are not only emphasizing that no decision by God is arbitrary and capricious, but they are also suggesting that God has engaged in a particular process that seeks to channel his understandable anger appropriately."[91] Historical catastrophes, immanent or recently survived, are filtered through the language of law and rationalized as appropriate and predictable sanctions, meted out only after due process and a fair hearing.

Juridical Parable

Uriel Simon identified the prophetic genre of the "juridical parable" as "a realistic story about a violation of law, related to someone who had committed a similar offense with the purpose of leading the unsuspecting hearer to pass judgment on himself."[92] As with the *riv* oracle, however, scholars have subsequently questioned whether or not the "juridical parable" ought to be classified as a genre, considering the high degree of variability among the relatively few instances of the "juridical parable" in the prophetic corpus. George Coats, for example, suggests that the form, as opposed to the function, of Simon's "juridical parables" is not distinctive enough to constitute a distinct genre.[93] Nevertheless, comparing these stories to ancient Israelite inscriptions, Simon Parker concludes that in fact there is a subset of narratives in the Hebrew Bible that can be understood as "petitionary narratives" – stories in which individuals, seeking relief from "adverse circumstances," appeal to a higher authority, such as a family elder or even the king.[94] This subgenre is almost entirely coterminous with Simon's "juridical parable." Thus the juridical parable, or petitionary narrative, blends together the functions of law and narrative: the petitioner elicits identification and empathy from the hearer (and

reader), but also demands judgment. As Parker observes, "the petitionary narrative is incomplete: it reaches a climax, which the addressee is expected to resolve by his action in the present."[95] Indeed, even the vocabulary of the juridical parable/petitionary narrative intermixes legal and narrative terms:

> the verb *ts-'-q* appears to be used of the action of appealing or petitioning. In such contexts … it may have the more narrow sense of "appeal for a hearing," referring, that is, to the opening statement or cry of the petitioner … [Next,] where the story is not quoted, [the petitioner's] speech is referred to by the verb *spr*, a word more suited to narration than a nonnarrative appeal.

Such stories about petitioners, that demand not just identification but action, not just sympathy but judgment, perfectly exemplify the blurred lines between legal and narrative discourse in Israelite prophetic literature.

One example of a juridical parable that Simon cites, which is perhaps uncharacteristic in its second-person rather than third-person voice, may reveal precisely the intended rhetorical aims of the juridical parable literary pattern:

Let me sing for my beloved	1
my love-song concerning his vineyard:	
My beloved had a vineyard	
on a very fertile hill.	
He dug it and cleared it of stones,	2
and planted it with choice vines;	
he built a watchtower in the midst of it,	
and hewed out a wine vat in it;	
he expected it to yield grapes,	
but it yielded wild grapes.	
And now, inhabitants of Jerusalem	3
and people of Judah,	
judge between me	
and my vineyard.	
What more was there to do for my vineyard	4

that I have not done in it?
When I expected it to yield grapes,
why did it yield wild grapes?

(Isa 5:1–4)

This "legal petition" disguises itself to the reader as a love song, much as elsewhere, Nathan the Prophet's parable of the poor man's lamb disguises itself as a simple, pastoral story. The reader is lulled into the sweet rhythms of idyllic song about human relationships to nature, only to suddenly realize that it is a direct accusation of profound injustice in the relationship between human beings and their god. The reader (or hearer) is told that he or she cannot simply listen, but must *judge*. Reparative action, not just sympathetic feelings, are called for.

Israelite Laws in the Prophets

In their exhortations to just and right action, the prophets never actually cite specific commandments or stipulations in the Israelite tradition that the nation has transgressed; this is to be expected, however, when we recall that the law collections were literary phenomena in ancient Israel rather than an enforced code of law. Some Israelites may have been more or less familiar with some aspects of the legal teachings (such as perhaps the Decalogue – see below) but would be more familiar with the general ethos of justice as well as loyalty to YHWH. As Michael LeFebvre writes, "the cry of the prophets is for justice and righteousness (e.g., Mic 6:8) not for the 'rule of written law.'"[96] J. David Pleins puts it simply: the prophets understood that "the demands of YHWH entailed the pursuit of justice, a pursuit in which the nation has failed."[97]

Nevertheless, there are several examples in the prophetic appeals for justice in which reference is made to laws that are also represented in Israel's law collections.[98] Scholars have pointed out that the prophets curiously invoke only Israel's apodictic legal tradition, rather than its tradition of casuistic law.[99] However, the meaningful distinction between apodictic and casuistic law has been seriously questioned,[100] and therefore it is more convincing to approach the prophetic appeals to "law" in their denunciations of Israel's crimes in a more general sense, acknowledging that "law writings [specifically]

were not appealed to by prophets in their polemics against impure worship and social injustice."[101]

Yet, it is clear that several points of law in the Israelite legal collections are directly echoed in prophetic literature. The connections between prophetic proclamations and specific stipulations found in the law collections often appear to be more than coincidental. For example, Amos 2:7–8 rails against those who mistreat and oppress the poor, and includes one curious detail: "they who trample the heads of the poor into the dust of the earth, … they lay themselves down beside every altar on garments taken in pledge …" This message clearly parallels the spirit, if not the vocabulary, of the rule in the Covenant Code: "If you take your neighbor's cloak in pawn, you shall restore it before the sun goes down" (Exod 22:26). Both Isaiah 5:22–23 and Amos 5:12 also speak of perversion of justice in similar terms to the Covenant Code:

> Isaiah 5:22–23: Ah, you who are heroes in drinking wine, and valiant at mixing drink, who acquit the guilty for a bribe, and deprive the innocent of their rights!
>
> Amos 5:12: "For I know how many are your transgressions, and how great are your sins – you who afflict the righteous, who take a bribe, and push aside the needy in the gate."
>
> Exodus 23:6–8: "You shall not pervert the justice due to your poor in their lawsuits. Keep far from a false charge, and do not kill the innocent and those in the right, for I will not acquit the guilty. You shall take no bribe, for a bribe blinds the officials, and subverts the cause of those who are in the right."

These three texts all highlight similar points: oppressing the innocent, taking bribes, afflicting the needy. They also, in some instances, use parallel vocabulary. According to J. David Pleins, "the connections between the Pentateuch and the prophets Isaiah and Amos on this point are striking."[102]

It is not only in the area of social justice that prophetic oracles parallel the law collections, but also in the realm of cultic law. Micah, for example, excoriates Israel for various cultic misdeeds:

> I will cut off sorceries from your hand, 5:12
> and you shall have no more soothsayers;

and I will cut off your images 13
and your pillars from among you,
and you shall bow down no more
to the work of your hands;
and I will uproot your sacred poles from among you 14
and destroy your towns.

(Mic 5:12–14)

All of these cultic prohibitions are found in the pentateuchal legal collections as well:

> Deuteronomy 18:10: No one shall be found among you who makes a son or daughter pass through fire, or who practices divination, or is a soothsayer, or an augur, or a sorcerer.
>
> Leviticus 26:1: You shall make for yourselves no idols and erect no carved images or pillars, and you shall not place figured stones in your land, to worship at them.
>
> Deuteronomy 16:21–22: You shall not plant any tree as a sacred pole beside the altar that you make for YHWH your God; nor shall you set up a stone pillar – things that YHWH your God hates.[103]

Again, both in the law collections and in the prophets we see the same constellations of concerns: images, pillars, sacred poles, sorcery. All are violations of Israel's exclusive bond with YHWH; all constitute apostasy and arouse YHWH's wrath.

In addition to these individual points of law, the Decalogue as a whole is conspicuously evoked in two separate prophetic passages:

> Hosea 4:2: Swearing, lying, and murder, and stealing and adultery break out; bloodshed follows bloodshed.
>
> Jeremiah 7:9: Will you steal, murder, commit adultery, swear falsely, make offerings to Baal, and go after other gods that you have not known?

According to Anthony Phillips, "There can be no doubt that the five absolute infinitives of [Hosea] 4:2 refer to those crimes covered by the third, ninth, sixth, eighth and seventh commandments … Although neither vocabulary nor order correspond with the

Decalogue, it is difficult not to recognize an explicit reference to it, particularly as the order of crimes can be accounted for by association."[104] The same is true for the passage in Jeremiah. While Phillips and others[105] argue that the Decalogue is invoked in order to suggest that Israel has specifically breached "the covenant law of Sinai,"[106] it is equally, if not more plausible, that these prophets allude to the Decalogue, a well-known Israelite tradition, in order to appeal to the "moral ideals" it enshrines, rather than "enforceable statute."[107] The Decalogue imparts the cornerstones of Israel's venerable *torah*; the prophets hold these ideals against the reality of Israelite behavior and find the people wanting.

The prophetic accusations are written, poetically, in the indicative mood; the pentateuchal rules are written in the second-person imperative. They each belong to different literary genres, but the parallels and convergences are difficult to ignore. The aim or function of both is similar: to urge the people of Israel toward justice and loyalty to YHWH. The themes of justice (in history and society), fidelity to YHWH, and protection of the vulnerable are present throughout each. The conceptual boundaries between "legal writing" and "prophecy" are revealed to be entirely permeable.

Conclusion: Law, Teaching, and *Torah*

This chapter has surveyed several aspects of the notion of law in ancient Israel and the Hebrew Bible. First, it explored legal practice in ancient Israel, noting that legal education and even adjudication were continuous with general education in the *torah* of YHWH, and with other political or cultic offices. Next, it examined legal writing in the Hebrew Bible, observing the ways in which it is difficult, if not impossible, to isolate legal writing from other literary genres, such as narrative or prophetic oracle. Unfortunately, space does not permit a more thorough exploration of the way law features in what are known, collectively, as "the Writings" – in narrative such as the book of Ruth, and in liturgical poetry such as the Psalms.

The affinity of law with the genre of wisdom, however, requires some comment. Scholars have, for a long time, noted the connections between law and wisdom, particularly with regard to the book of Deuteronomy.[108] For Joseph Blenkinsopp, "The law is … *the* expression of divine wisdom made available to Israel."[109] For David Carr, law (as well as other genres in Torah) is continuous with wisdom in their educational and formative aims; in fact, Carr notes the resemblances between Proverbs and Deuteronomy and argues that deuteronomic authors "who were schooled in and had memorized passages such as [those in Proverbs] reappropriated their language to make heightened claims for the Deuteronomic 'Torah,' a teaching now claimed to be yet older (Mosaic) and more divine than the 'teaching' of the father and mother celebrated in traditional wisdom literature."[110] Indeed, the boundaries between "scribal advice," apodictic law (without sanctions attached), and casuistic law (with sanctions attached) are difficult to maintain.

Even the book of Job, the Hebrew Bible's most famous work of protest literature, the book of wisdom that rails against the injustices of the universe and condemns YHWH as hostile and capricious, incorporates legal language into its wisdom poetry, seeing law, as opposed to divine mercy, as potentially redemptive. As Carol Newsom observes,

> Only in the book of Job is the metaphor for a trial with God developed in such a fashion that it becomes a potential model for organizing a person's relationship with

> God as an alternative to the models of psalmic and sapiential piety … [I]n Job's speeches legal language repeatedly flares and fades. But the frequency with which Job returns to it, and its strong presence in his final extended speech in chapter 31, underscores its significance in the book as a whole.[111]

As he suffers at God's hand, Job longs for the clarity of a divine lawsuit, as the prophets described the *rib* with YHWH. He craves to experience God's wrath channeled through the formalities of a criminal trial, to take the stand and defend himself rather than being crushed and tormented: "O, that I had someone to give me a hearing; / O, that Shaddai would reply to my writ, / Or my accuser draw up a true bill! / I would carry it on my shoulder; / Tie it around me for a wreath" (Job 31:35–36).

Job, like so much of biblical literature, identifies justice as a personal, social, and divine pursuit, and it is thus woven into the fabric of his *cri de coeur*. The imaginative universe of the ancient Israelites was often a nomic one: law can be located in the highest ideals of Torah and the lowest, most desperate laments. It suffuses the language of the Hebrew Bible and mediates the relationship between individuals and their neighbors, between nations and their gods.

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[1] Fraade, *Legal Fictions*, p. 12.

[2] Fuller, *Morality*, p. 106. Fuller also discusses here the issue of the definitional feasibility of law being present even when a state-like authority to fully enforce legal rules is not operative. For him, it confuses the ability to fully realize the potential of a legal system with the definition of law itself. See also Hadfield and Weingast, "Law without the State," which provides multiple examples of societies that possessed what we might call "law" even though there is an absence of state coercion to enforce sanctions and penalties.

[3] Burnside, *God, Justice, and Society*, p. 112.

[4] Carr, *Writing on the Tablet*. See especially chapter 6, "Textuality and Education in Ancient Israel," in the sections "Education in Deuteronomy and the Deuteronomistic History" and "Other Biblical Literature as Educational Literature: Torah, Psalms, and Other Texts."

[5] To greater and lesser degrees. The class of educated, literate people in Israel would have increased as Israel became more developed as a monarchic state, and yet the number of those who were literate would have remained small.

[6] Burnside, *God, Justice, and Society*, p. 110.

[7] See Wilson, "Israel's Judicial System" and McKenzie, "Judicial Procedure."

[8] The inscription, dating from the late seventh century BCE, reads:

> Let my lord the Governor pay heed to the words of his servant. Several days ago, your servant was harvesting in Hasar-asam. The work went as usual and your servant completed the harvesting and storing of my quota of grain … Despite the fact that your servant had completed his assigned work, Hoshaiahu, son of Shobai, kept your servant's cloak. He has held my cloak for days. All my fellow workers will testify – all those who work in the heat of the day will surely certify – that I am not guilty of any breach of contract. Please order my supervisor to return my cloak either in fulfillment of the law or as an act of mercy. Please do not remain silent and leave your servant without his cloak …
>
> (Translation taken from Matthews and Benjamin, *Old Testament Parallels*, pp. 355–56)

[9] Weinfeld, *Social Justice*. See especially chapter 2, "Justice and Righteousness as the Task of the King."

[10] Even though this text might very well be late, the idea that the ability to execute justice was inspired by the gods was common in the ancient Near East; see, for example, the epilogue to the Code of Hammurabi.

[11] Burnside, *God, Justice, and Society*, p. 124.

[12] I do not wish to overstate the prevalence of this belief – we have no way of knowing how widespread it may have been, or whether the notion of "divine justice" was more likely a rhetorical device used by the monarchy and those associated with it.

[13] See Jackson, *Wisdom-Laws*.

[14] Even though justice was imagined to be a divine enterprise, it did not mean that there was no room for judicial discretion or even admitting errors in judgment. Jonathan Burnside sums it up well: "The judges do not have to claim perfection, but nor do they have to say their task is futile, either. Their knowledge of God can be sufficient to produce divine justice" (*God, Justice, and Society*, p. 138).

[15] LeFebvre, *Collections*, p. 40.

[16] Carr, *Writing on the Tablet*, chapter 6, section "Transmission."

[17] ***Ibid.***, section "Hebrew and Foreign Forms of Education in (and before) Ancient Israel."

[18] "Now therefore write this song, and teach it to the Israelites; put it in their mouths, in order that this song may be a witness for me against the Israelites."

[19] Carr, *Writing on the Tablet*, chapter 6, section "Education and Textuality across Israelite History."

[20] LeFebvre, *Collections*, p. 32.

[21] Fitzpatrick-McKinley, *The Transformation of Torah*, p. 141.

[22] Unfortunately, there is almost no direct evidence of legal practice for ancient Israel.

[23] Wells, "What Is Biblical Law?"

[24] ***Ibid.***, p. 242.

[25] ***Ibid.***, p. 243.

[26] ***Ibid.***, p. 242.

[27] ***Ibid.***, p. 243.

[28] For a discussion of the relationship between law writings and law practice in the Second Temple period, see Chapter 2 of the current volume.

[29] Barmash, "Blood Feud and State Control," p. 185.

[30] ***Ibid.***

[31] In the context of medieval communities, see Whitman, *The Origins of Reasonable Doubt*, p. 61. In the (exceptional) case in which the killer is not known, biblical law specifies a semi-cultic remedy in which the elders break the neck of a heifer and declare their innocence while seeking atonement for the homicide (Deut 21:1–9).

[32] Pamela Barmash and Jeffrey Stackert have debated the exact relationship between altar asylum and cities of refuge. See Barmash, "Blood Feud and State Control," and Stackert, "Why Does Deuteronomy Legislate Cities of Refuge?"

[33] See Num 35:16–25.

[34] Barmash, "Blood Feud and State Control," p. 190.

[35] Moshe Greenberg writes: "Outside of the Bible, there is no parallel to the absolute ban on composition between the murderer and the next of kin. All Near Eastern law recognizes the right of the slain person's family to agree to accept a settlement in lieu

of the death of the slayer" ("Some Postulates," p. 24). I am not certain that the matter is entirely clear-cut, but it does appear that compensation was a common remedy for homicide throughout the ancient Near East. See also Barmash, *Homicide*, pp. 159–67.

[36] Westbrook and Wells, *Everyday Law*, p. 78.

[37] Barmash, *Homicide*, p. 115.

[38] Greenberg, "Some Postulates," p. 26.

[39] See Barmash, *Homicide*, chapter 6, "Lex Talionis," pp. 153–77.

[40] See Carr, *Tablet of the Heart*, chapter 6, section "Education and Textuality across Israelite History."

[41] See Collins, "The Transformation of the Torah," p. 462: "[the Torah's] importance was *largely symbolic*, and a few issues had metonymic significance for the way of life as a whole."

[42] See Wright, *Inventing God's Law*.

[43] See Levinson, *Deuteronomy*.

[44] See Carr, *Tablet of the Heart*, chapter 6, section "Other Biblical Literature as Educational Literature: Torah, Psalms, and Other Texts."

[45] Walzer, "The Legal Codes."

[46] For the idea of "pluriform" revelation, see Chapter 3 of the current volume.

[47] See McCarthy, *Treaty and Covenant.*

[48] Levinson, *Chorale*, p. 49.

[49] ***Ibid.***, p. 50.

[50] Jon D. Levenson summarizes the scholarship that conflates biblical covenant with law, quoting one biblical commentator who writes: "ultimately covenant and law

become synonymous." Levenson, "The Theologies of Commandment," p. 21.

[51] ***Ibid.***, pp. 18–19.

[52] For example, see Sprinkle, "Law and Narrative," p. 251: "[The structure of the Sinai narrative reveals] the priority of covenant over law, and plac[es] the concept of fear of Yahweh at the heart of that covenant."

[53] Levenson, "The Theologies of Commandment," p. 19.

[54] Levinson, *Chorale*, p. 9.

[55] As it is with contemporary legal discourse as well. See Brooks, "Narrative in and of the Law."

[56] See Bartor, *Reading Law as Narrative*; Sternberg, "If-Plots: Narrativity and the Law-Code"; and Halberstam, "The Art of Biblical Law."

[57] Bartor, "The Representation of Speech," p. 248.

[58] ***Ibid.***, p. 236.

[59] ***Ibid.***, p. 237.

[60] See Watts, *Reading Law.*

[61] ***Ibid.***, p. 65.

[62] Watts (***ibid.***) sees this interest as connected to the emphasis in Israel on teaching and the continuities with the wisdom tradition (see below).

[63] ***Ibid.***, p. 66.

[64] For example, as slaves in Egypt. Deut 24:17–18 states: "You shall not deprive a resident alien or an orphan of justice; you shall not take a widow's garment in pledge. Remember that you were a slave in Egypt and the LORD your God redeemed you from there; therefore I command you to do this."

[65] Watts, *Reading Law*, p. 67.

[66] Bartor, "The Representation of Speech," pp. 248–49.

[67] Kazen, *Emotions*, p. 101.

[68] See Wenham, *The Book of Leviticus*, p. 311, who sees this passage as a common example of legal precedent; as opposed to Hartley, *Leviticus*, p. 406, who sees this passage as a narrative.

[69] Geller, *Sacred Enigmas*, p. 24.

[70] ***Ibid.***, p. 23.

[71] Wenham, *Genesis 16-50*, p. 297.

[72] See Schiffman, "The Patriarchs and Halakhah," p. 254, which shows that this custom was accepted by both the Dead Sea community and the early rabbis.

[73] On the detachment of law from narrative, and re-embedding in new narrative contexts, see Chapter 3 of the current volume.

[74] LeFebvre, *Collections*, p. 49.

[75] Miller, *Sin and Judgment*, p. 1.

[76] See ***ibid.***, p. 3, who traces this insight back to N. Lohfink.

[77] ***Ibid.***, pp. 105–10.

[78] ***Ibid.***, p. 106.

[79] ***Ibid.***, pp. 111–13.

[80] ***Ibid.***, p. 138.

[81] ***Ibid.***, p. 132.

[82] ***Ibid.***, p. 139, emphasis mine.

[83] This pattern was first noted by Gunkel and Begrich, *Einleitung in die Psalmen*, pp. 364–66.

[84] Kensky, *Trying Man*, p. 31.

[85] Despite the fact that *riv* does not literally mean "to file suit," I contend, contra Dwight R. Daniels ("Is There a 'Prophetic Lawsuit' Genre?"), that it can still be understood as a legal term; it is used frequently enough in legal contexts that it certainly carries a legal overtone.

[86] Huffmon, "The Covenant Lawsuit," pp. 285–86 (summarizing Gunkel and Begrich).

[87] See, for example, Bergren, *The Prophets and the Law.*

[88] LeFebvre, *Collections*, p. 49.

[89] See, for example, Jer 2:4–13.

[90] Köhler, *Deuterojesaja*, as cited by Kensky, *Trying Man*, p. 36 n. 67.

[91] Kensky, *Trying Man*, p. 38.

[92] Simon, "The Poor Man's Ewe-Lamb," pp. 220–21.

[93] Coats, "Parable, Fable and Anecdote."

[94] Parker, *Stories in Scripture and Inscriptions*, p. 13.

[95] ***Ibid.***, p. 14.

[96] LeFebvre, *Collections*, p. 49.

[97] Pleins, *The Social Visions*, p. 80.

[98] I prefer not to refer to these moments as "citations," since the prophets do not specifically "cite" a law tradition at any point; rather, they call for points of justice that the law collections, still in development, call for as well.

[99] See Bergren, *The Prophets and the Law*, pp. 62–79.

[100] See Phillips, "Prophecy and Law," p. 219: "While scholars such as Gerstenberger (1965) and Gilmer (1975) have refined Alt's rigid division between apodictic and casuistic law, others like Wagner (1972) have abandoned it."

[101] LeFebvre, *Collections*, p. 49 n. 71.

[102] Pleins, *The Social Visions*, p. 79.

[103] See Bergren, *The Prophets and the Law*, p. 183. Bergren includes a useful index (pp. 182–83) of prophetic oracles and their parallels in the pentateuchal law collections.

[104] Phillips, "Prophecy and Law," p. 225.

[105] See Bergren, *The Prophets and the Law*, p. 64.

[106] Phillips, "Prophecy and Law," p. 226.

[107] LeFebvre, *Collections*, p. 51.

[108] See Weinfeld, *Deuteronomy*; Blenkinsopp, *Wisdom and Law*; and Carr, *Writing on the Tablet*.

[109] Blenkinsopp, *Wisdom and Law*, p. 153.

[110] Carr, *Formation*, p. 419.

[111] Newsom, "The Invention of the Divine Courtroom."

2

Law in Jewish Society in the Second Temple Period

Seth Schwartz

Introduction

The legal commentaries, supercommentaries, novellae, theoretical and philosophical analyses and responsa that constituted so large and important a component of Jewish literature through the ages are largely absent in the post-pentateuchal Second Temple period. The attention to detail, the elaboration, the concentrated intellectual energy that elite Jews devoted to law nearly in its entirety for much of their history can be seen as the development of a set of specifically rabbinic tropes or practices. It is not necessary to argue for the utter novelty of rabbinic law to appreciate the revolutionary nature of the Mishnah as a text and as a template for a new mode of engagement with what was now called *halakhah*. Whatever its prehistory, no earlier Jewish text shows anything like the same totalizing aspirations, the same profusion of prescriptive imagination, and the same impulse to treat law primarily as law, and not merely as a subcategory of righteousness, sanctity, or purity, though those issues were never far from the rabbis' consciousness. The Mishnah and subsequent rabbinic literature (200 CE and following) thus have the earmarks of having issued from a highly developed, law-oriented, institutional culture.

What was Jewish law like before the shift, in the Second Temple period? How important was it? Indeed, what counted as Jewish law in the Second Temple period? These are highly ramified questions that cannot be treated in full in a brief survey article; for example, to answer them we might get bogged down in a discussion of the "canonization" of the Torah. I will indeed briefly survey evidence for the legal authority of some pentateuchal law, but most of the primary sources discussed below come from a period when all but the most "minimalist" scholars think the Torah existed and possessed some sort of authority or sanctity (which are not quite the same thing). My main goal in this chapter is to try to figure out what we can learn from literary but especially from documentary texts about the relations between the Torah, Jewish law, and Jewish society in various times and places. Literature will introduce us to the ideas and attitudes of the high clerisy who, it emerges, promoted, adored, and even fetishized the Torah but demonstrated precious little interest in applying its laws to the world outside the Jerusalem Temple or its counterpart, the sectarian community. The documents will introduce us mainly to the concerns of a lower clerisy, who were very engaged indeed with the quotidian workings of the law, but whose remains contain remarkably few –

though not no – traces of an effort to bridge the gap between normative biblical text and actual legal practice.[1] The chapter thus begins with a brief survey of the main relevant literary texts (Dead Sea Scrolls, Sirach, Philo, Josephus) and proceeds with a more detailed geographical survey of documentary remains, focusing – following the contours of the evidence– on Egypt and the Judaean Desert.

Literature

It was at one time commonly stated that there was practically no Jewish legal literature between the Torah and the Mishnah. Knowledge of how Jewish law developed from its pentateuchal sources, and how it was practiced, was extracted by hook or by crook from rabbinic texts themselves. Two things changed this. One was the discovery of the Dead Sea Scrolls. Although few of the scrolls focused on the details of the law, there was enough material in the Temple Scroll, the Damascus Document, and eventually (when it was finally published in 1994) Miqsat Ma'asei Ha-Torah (4QMMT) to justify the pioneering efforts of Joseph Baumgarten and Lawrence Schiffman to extract and analyze what was still being called, anachronistically, the *halakhah* of the Dead Sea Scrolls.[2] But these scholars were not convinced that sectarian law had much to tell us about the mainstream (cf. Shemesh, discussed below), and so there was a second trajectory of development, too. When Jacob Neusner's critiques of the scholarly practice of reconstructing Second Temple period law, and history, from rabbinic sources began to sink in, some scholars began to mine the information from texts whose purposes were either narrative (Tobit, Judith, Jubilees, Aristeas), historical (1 and 2 Maccabees and especially Josephus), homiletical/philosophical (Sirach, Philo) or, rarely, apocalyptic (1 Enoch, 4 Ezra).[3] The most important example of this technique is E. P. Sanders' by no means futile effort to produce a phenomenology of the "common" – i.e., non-sectarian – Judaism of the later Second Temple period from non-rabbinic sources.[4]

Dead Sea Scrolls

The closest Second Temple period parallels to the Mishnah – and they are not in fact terribly close – come from highly developed institutional cultures of a different sort from that which produced the rabbinic texts – sectarian rather than professional. The Dead Sea sect (as I think we may still call it) was utterly dedicated to the study of the Jewish holy books, and to a life lived in stringent accordance with their precepts. Some of the sectarian laws – like some rabbinic laws – imply a high level of creative exegetical engagement with biblical law. Indeed, the details sometimes appear not too remote from those of rabbinic law. Like the rabbis, the sectaries wondered how the biblical prohibition of "leaving one's place" on the Sabbath day might be understood and arrived at a similar conclusion; both wondered whether impurity could migrate up a stream of liquid; both wondered what the owner of an orchard was required to do with the fruit when the tree was four years old. There may be some truth to the views of scholars like Aharon Shemesh that early rabbinic law (sometimes) preserves laws and legal debates current in the Second Temple period – not only in sectarian contexts – some of which are preserved also in the Dead Sea Scrolls (DSS). Some of these debates evince sophistication in their manipulation of biblical law.[5]

DSS laws appear to feature another characteristic often ascribed to rabbinic law: creativity. This is reflected not simply in the way the author of the Temple Scroll tacitly and cleverly harmonizes conflicting pentateuchal regulations.[6] In fact he has woven biblical accounts into a kind of utopian tract that, for all its anchorage in the biblical text, features much legal invention, presented as the word of God; this conforms with the idea frequently expressed in the sectarian scrolls that God even now reveals new laws to His chosen people. We observers may easily discern that the sectaries and/or their predecessors had a strong preference for order and symmetry; they imagined a world in which everything was in its place and everything's place was part of a perfect structure. The Temple Scroll's *'ir ha-miqdash* (Temple city) is perfectly symmetrical, the calendar, too (a sectarian or pre-sectarian invention), is perfectly symmetrical – to the extent that festivals, most of them non-biblical, occur every fifty days; the human world like the cosmic world should, and one day will, follow a set of perfect and completely regular and unbendable rules.[7]

Much additional DSS literature has a peculiarly rule-oriented ethos. Even the final battle between the forces of good and evil is presented not as an apocalyptic drama but as a set of prescriptions. Yet little or none of this material feels legal in any way that we would recognize. A sense of apocalyptic urgency informs all the sect's stringencies about purity and righteousness in a way that makes even the most code-like texts, the Temple Scroll and the Damascus Document, feel less legal than hortatory or, alternatively, predictive: this is how everything will be when God's reign is restored. (Not that the Mishnah lacks hortatory elements, but they are clearly peripheral, not to mention calmer; needless to say, the Mishnah contains utopian elements, too).

Non-Sectarian Literature

In the aggregate, non-sectarian literature, aside from providing informational snippets, has a great deal to teach us about how the Jewish clerisy of the Second Temple period came to define themselves around their devotion to Torah and fear of God, to the extent that there is hardly a surviving work (besides Ecclesiastes) which does not focus on these issues. To take one example, Sirach (*c*. 180 **BCE**) identified Torah, fear of God, and wisdom; Sirach, in the high tradition of Israelite wisdom, regarded human society as generally dangerous and prone to injustice, but knew that the wise/righteous man would flourish anyway, since he understood the arcane and difficult rules by which society functions. Sirach has much to say about these rules, which he regarded as a component of Torah/wisdom. Furthermore, in a difficult and textually corrupt passage, he seems to anticipate the Dead Sea literature in counting the laws God gave to nature as part of Torah, too.[8] Yet Sirach contains very little about what we would regard as Jewish law. The intense valorization of the idea of Torah and the neglect of its details is characteristic of many other texts as well. Even the books of the Maccabees, both of which celebrate the heroic defenders of the Torah, provide few details about what the Hasmoneans' particular legal concerns were beside their opposition to idolatry and pork consumption, their approval of male circumcision, and their decision to fight wars on the Sabbath.

The works of Philo and Josephus provide the most substantial information about both legal practice and legal theory. Philo devoted most of his (surviving) literary endeavor to the hypothesis that the Torah – both the "kosmopoietic" and the historical and the legal sections – was entirely didactic, that even divine commandments had a purpose beyond mere fulfillment of God's will or observance of the terms of the covenant between God and Israel.[9] As is well known, Philo believed that the laws need to be observed, but mere observance is not enough. Philo conveys nearly no sense that the Torah provided Israel with a *legal* system, or, alternatively, he regarded such a conception as insufficient. He was not interested in legal commentary per se. The mind at work in Philo's pentateuchal essays, including the ones that provide most coverage of legal material (*Mos., Spec., Leg.*), belongs to a philosophically informed homiletician.

Josephus' narratives yield a fair amount of raw information about how Jewish law worked in practice. He informs us of the attractiveness of the pilgrimage festivals, some

of the controversies about Herod's legal behavior and about the post-Herodian high priesthood, the surprisingly widespread Jewish aversion to figurative imagery (confirmed by archeology), scattered facts about Sabbath laws and food laws, naziriteship – which we may gather from Josephus and the New Testament was an important practice in late Second Temple period Jerusalem; he informs us that Jewish law prohibits women from initiating divorce but reports a case of it anyway; information about civil and criminal law is harder to find but not totally absent. He provides practically no evidence for the existence of anything like a court system: a Jerusalem "council," whatever precisely it was, functioned as a court only sporadically (Luke-Acts and *m. Sanhedrin* both imagined a more formal institution, but Josephus was surely better informed);[10] and Josephus says nothing about courts in the countryside, which, given his urban bias, does not prove their nonexistence. Like some rabbinic texts, Josephus reports the existence of an archive in Jerusalem, but Josephus' archive contained not genealogical records but (more prosaically) property deeds and loan contracts (*JW* 2.427). Josephus' narratives of Jewish history provide the most vivid sense available of Second Temple period Jewish law as a lived system, though they do so mainly in hints and in passing comments. Furthermore, because of the nature of Josephus' narratives, they tend to focus on the experiences of kings and upper-class priests. Ed P. Sanders' famous attempt to wring every bit of information from Josephus and other sources about how "common Judaism" was lived was instructive and suggestive, but lopsidedly oriented toward the Temple and towards priestly concerns.

Like Philo, Josephus had a theory of what Jewish law is: it is the Jews' *politeia*, their constitution or the foundation of their life as a community. At least in his later work this conception was linked to a highly traditional theology: The Jews are a nation possessing a perfect constitution given to them by their god through the mediation of their perfect legislator, Moses. When the Jews are faithful to their constitution, their god protects them and everything goes well for them, and when they are not, he punishes or abandons them. Furthermore, the Jews' god, who is also the only God of the universe, favors those foreign rulers who allow the Jews to preserve their ancestral constitution and, in a minor but significant conceptual stretch, supports rulers who allow all nations to preserve their ancestral customs without molestation – an early case of the Jewish support for pluralism well known from later periods.[11] Josephus' two accounts of the

Jews' constitution (in *Ant*. 3–4 and in *Ag. Ap*. book 2) largely recapitulate selected pentateuchal laws sometimes with minor changes. The changes often but not always serve an apologetic function. In his *Life* Josephus hints that in his "upper middle class" priestly childhood environment, legal acumen was prized; elsewhere he describes certain people and groups as legal experts, and in particular describes the Pharisees as reputedly the most accurate interpreters of the laws. Yet there is little evidence of any such acumen or sophistication in any of Josephus' accounts of Jewish law.

We should conclude that Jews, or some Jews, celebrated their laws, fought for their constitution, admired and paid acute attention to it. But there are few traces before the Mishnah of anything that could be reasonably designated high legal theory, or perhaps more accurately, methodology – that is, either the product of intensely focused and systematic rumination on the law as law, or a relatively formal and rationalized approach to deriving prescriptive behavioral details from the rigidities of a schematic written code. If such methodologies did exist, the scope of their application was apparently limited mainly to cultic and priestly concerns. Our evidence even for this comes mainly from the Dead Sea Scrolls: perhaps the Pharisees and Sadducees had similar theories or methodologies, but none of their writing survives; whether traces of Pharisaic thought may be sifted from the authentic Pauline Epistles is debatable. In any case, it is not very interesting to say that the Pharisees and Essenes/Dead Sea sect admitted the authority of legal sources outside the text of the Torah (either "ancestral traditions" or continuing revelation) and Sadducees did not, when we do not know how these groups either theorized or applied their views. Some scholars have characterized the interpretive position of the Dead Sea sect as legal realism as opposed to the nominalism or formalism of rabbinic and presumably Pharisaic law (see the discussion in Chapter 3 of the current volume), but the truth is that aside from the utopian Temple Scroll we have only scraps – the approximately twenty laws discussed in 4QMMT and the somewhat smaller number (with a lot of overlap with MMT) in the Damascus Document.[12] Perhaps there is some core of validity to the commonly made distinction (though we can at least be certain that not all rabbinic law is nominalist), but we are simply too ignorant for it to matter much. About Pharisaic law our ignorance is nearly complete.

Law in the Documents

What we can do for the Second Temple period and the two generations immediately following the destruction is reconstruct some elements of how Jewish law worked, or in many cases failed to work, in society. This will introduce us to people who were not part of the high clerisy – rather, they were village scribes, small-to-middling landowners, local administrators, Jewish army officers in Hellenistic Egypt. For the Middle Ages and the early modern period, by comparison, it is occasionally possible to describe in some detail the reciprocal interactions of the rabbinic bearers of the "great tradition" of the codes and novellae, and the "little tradition" of lived communal lives: there are responsa and in rare cases archival documents which help scholars reconstruct the story. For the "rabbinic period" (70/135–640 CE) we know only the great tradition – hardly anything of the little tradition survives, so no one knows whether it was informed by the great tradition at all. For the long Second Temple period, down to 135, documents introduce us to the little tradition at a time when there is almost no evidence for the high clerisy's interest in the nuts and bolts of the law, especially outside the Temple. MMT has often been interpreted as an address (or "letter") by the leader of the sect to the high priest, which at least raises the possibility that even the very highest level of the Judaean clerisy thought deeply about the details of the law, or some aspects of it. We would know this for certain if we possessed the high priest's response; as things stand the anchorage of this text in a particular historical setting is speculative: the true, as opposed to the putative, addressee of the text could have been no one. But even if the text is what it seems to be, its halakhic (to use an anachronistic term) scope, like that of the Damascus Document, is very narrow – very little beyond temple, priesthood, sacrifice, and purity. Did the priestly leaders yield all other legal authority to heads of households, "elders," and village clerks? Was workaday Jewish law left to "tinkerers" and technicians?[13]

Elephantine

To judge from the contents of the Aramaic papyrus documents they left behind, the military unit of Yehuda'ei (Judahites) encamped in the island citadel of Yeb (Elephantine), in the Nile at the southern border of Egypt and the frontier of the Achaemenid Empire, were not precisely Jewish in any way we can recognize, but they retained a sense of corporate separation from their neighbors, both native Egyptians and other immigrant military colonists, for the two or three centuries of the colony's existence, ending *c.* 400 BCE.[14] The ethnic status of the Yehuda'ei was passed through the male line, and they married non-Judahite women without compunction and had probably done so since the colony's origin. Nevertheless, the colonists continued to give their children Hebrew names and to worship the local version of their ancestral god, called Yahu d/zi be-Yeb Birta, in traditional, or at any rate recognizably northwest Semitic style – by sacrificing sheep and goats and singing psalms – in their small temple. They continued to regard Judah as their ancestral homeland while also cultivating a connection to Samaria. Yet with two famous exceptions, their papyri show no trace of any version of Jewish law. Until nearly the end of the fifth century, there is no evidence for interaction with any traditions of biblical law or narrative. Their Hebrew names, while overwhelmingly Yahwist, are often unattested in the Bible: names of scriptural heroes two centuries later tediously common among Jews, Judah, Joseph, Jacob, Joshua, Isaac, Simon, Miriam, Sarah, Rebecca (but, for reasons still not understood, not Abraham or Moses) were unknown to the Judahites of Yeb. They worshiped the biblical God of Israel, but Yahu shared his temple with other Syrian gods, and there is no reason to believe a priori that the Judahites were devoted only to their own temple and gods. Some scholars have treated their marriage, inheritance, and civil law as if it were a version of Jewish law,[15] but the point seems moot. They clearly had no knowledge of any version of the Torah, and their legal behavior is largely indistinguishable from that of their "Aramaean" neighbors. Nevertheless, the idea that there was a kind of Aramaic/Near Eastern legal *koine* attested in the Elephantine papyri and subsequently in other documents more certainly influenced by "Jewish" norms is not implausible.[16]

Surprising signs of change appeared in the final decades of the colony's existence. In 419 BCE the colonists received instructions from one Hananiah, apparently acting

directly or indirectly under the authority of King Darius II and of Arsames, the Persian governor of Egypt, to lock up and refrain from eating leavened food and beer from the 15th to 21st of the month of Nisan, and to refrain from work during that period (Porten B 13). As has long been noted, this reports in more or less literal translation into Aramaic the words of Exod 12:18–19 and constitutes the first non-biblical reference to the idea which makes its ostensible debut in the books of Ezra and Nehemiah (though this text is almost certainly earlier than the biblical books in their current form) that Jews are obligated to follow the laws of the Torah. This text is very fragmentary so that much remains obscure; in light of the rest of the content it is odd, or at least ironic, that Hananiah invokes "the gods" in the opening of his letter – perhaps his secretary was responsible for the boilerplate. The text is often reconstructed so as to provide a reference to the observance of the Passover on the 14th of Nisan (the 15th–21st were a separate holiday, the *ḥag ha-matsot*); some scholars reconstruct the text to say that the command to observe the festival was sent by King Darius to Arsames by Hananiah, which would imply that similar commands were issued to Jewish colonies throughout the Persian Empire – thus, the Torah now enjoyed full imperial backing and was imposed on all who had the status of Judahites, wherever they lived. W. R. Arnold, in one of the first – and still probably best – treatments of the text, observed that it is not formally like other imperial rescripts and decrees in the Elephantine archive and can actually be construed as saying that it was Hananiah, not a festal decree, whom the king had sent to Arsames to serve some official function, and that the instructions about the *ḥag* came from Hananiah's own initiative, perhaps because he was in contact with the Jewish authorities in Jerusalem.[17] Thus, the Torah would still have possessed some official standing, but not the maximal version sometimes posited. A third view accepts that the command came from the king, but that it was a response to a letter from the Yehuda'ei of Yeb who had complained that some locals had tried to prevent their celebration of the festival – implying that the holiday was not being introduced, and the king was merely affirming that the Yehuda'ei had the right to follow their laws unmolested.[18] Aside from the apologetic feel of this view (the Yehuda'ei of Yeb were good Jews after all, and already knew the Torah which was thus already their traditional code/holy text), it cannot survive an application of Occam's razor: it features too much invented narrative. Anyway, if the Yehuda'ei already knew the festival of *matsot*, as they seemed to know a

version of the *pesah*, why did the king have to quote Exodus at them, instructing them in the details of its observance?

The Yehuda'ei of Yeb manifestly did not possess anything like the Torah, even after Passover of 419. But their experience does lend support to those who are inclined to take seriously some version of the claim of the biblical books that Ezra (458 BCE?) and Nehemiah (444–432 BCE) convinced the tiny population of Persian Yehud to affirm the validity of the Sefer Torat Moshe. Their Jewish supporters in imperial service elsewhere, like Hananiah in Egypt, tried to spread the good word to the best of their abilities, not without some limited official support. In 410, the military colony may have experienced further proof of the changes afoot in Jerusalem (Porten B 19–22). According to a report that their commander Yedaniah bar Gemaryah sent to Bagavahya, governor of Yehud, in 407 BCE, several years earlier the local Egyptian priests of the temple of Khnub bribed a local Persian commander to destroy the temple of Yahu-of-Yeb (a related document suggests that they found its sacrificial practice offensive. The temple had been standing since before the Persian conquest of Egypt in 525; had they tried to destroy it previously? Had changes recently introduced by Hananiah pushed the priests over the edge?). The Yehuda'ei mourned with sackcloth and ashes and appealed at once to Yehohanan, high priest of Jerusalem, to help them rebuild but, Yedaniah claims, they received no response; he wrote also to the sons of Sanballat, governor of Samaria. He now begs Bagavahya to help them rebuild their temple so that they might offer incense and meal offerings and burnt offerings (a distinctive feature of Israelite cult) to God in his honor. The same scribe who copied this petition wrote up an informal *résumé* of the response: Bagavahya and Delaiah bar Sanballat, governors of Yehud and Shamrein, supported Yedaniah's petition and encouraged their colleague the governor of Egypt to rebuild the temple of Yahu-in-Yeb, where the Yehuda'ei might offer incense and meal-offerings (but no animals).

The Yehuda'ei were strongly devoted to their national god and cult and acknowledged an enduring connection to the two Israelite sub-provinces of Palestine, Yehud and Shamrein. Yedaniah was also persistent, making repeated petitions to various authorities over several years. The common view that Yehohanan (mentioned in the book of Nehemiah as grandson of the high priest Eliashib) rejected Yedaniah's petition out of dedication to deuteronomic principles articulated in the *torat Moshe* seems broadly

convincing. Bagavahya (whose Persian name may conceal Judahite ethnicity) and Delaiah, in this case, either were less rigoristic and more willing to compromise, or were untroubled by deuteronomic scruples and refused to support animal sacrifice simply in order to avoid offending the local Egyptians. This, then, is our earliest documentary evidence, however ambiguous, for the existence and application of Torah-related Jewish law.

Hellenistic Egypt

The legal historian Joseph Modrzejewski has argued that all immigrants to Hellenistic Egypt were regarded as "hellenes," meaning that they had favorable tax status and the right to use their *politikoi nomoi* – the laws of their native *poleis*.[19] In practice this privilege was difficult to implement since groups of immigrants resident in specific areas were usually too small for the preservation of comprehensive and separate legal and judicial systems. *Dikasteria* – Greek courts – might in theory apply specific *politikoi nomoi* if the litigants wished, but in practice this is unattested. Generally speaking, if *politikoi nomoi* survived at all, it was in the realm of religion and limited areas of private law, for example if the children of two families from the same Asian *polis* decided to marry. The privilege's main importance was symbolic, but the legal and judicial systems of Ptolemaic Egypt were in any case highly pluralistic: there existed royal courts with judges called *khrematistai*, the aforementioned *dikasteria* – which used a kind of Greek common law – and the courts of the *laokritai*, or native judges, that used Egyptian law. There appears not to have been a *Personalitätsprinzip*, requiring Egyptians to use Egyptian courts and Greeks to use Greek courts, but choices might be constrained by availability: residents of areas with little Greek settlement had access mainly to *laokritai*, for example.[20]

The Jews were almost certainly the largest body of immigrants with a presumably single and discrete set of *politikoi nomoi* – the laws of the Torah. In general, it seems clear that unlike in the fifth century BCE, Egyptian Jews had by now internalized some of the values and rules of the Torah. For example, as far as we know, they no longer sacrificed to local manifestations of Yahu in temples (as all other immigrant groups did for their native gods), but worshiped the Most High God (*theos hupsistos*) in buildings called *proseukhai*, prayer(-houses): sacrifices might be offered only in Jerusalem, though to be sure Jerusalemite refugees from the Zadokite family did maintain a small Jewish temple at Leontopolis, but it was founded when the Jerusalem temple was defiled and subsequently played surprisingly little role in Egyptian Jewish life. It seems to have served mainly the local Jewish military unit, which was personally attached to the temple's Zadokite high priest.[21]

Also gone were the old-fashioned Israelite personal names used at Elephantine –which incidentally imply that the colonists retained some limited knowledge of Hebrew, perhaps through the psalms recited at their temple. The new Jewish settlers in rural Egypt seem to have lost any familiarity with Hebrew or indeed Aramaic quite quickly. They switched to Greek (there is very little evidence for Jews using Demotic Egyptian) and usually gave their children Greek names. Though they had a preference for religiously neutral names (like Theodoros – gift of the god), they did not avoid full-blown theophoric names (Apollodoros – gift of Apollo), even though the meaning of such names was perspicuous. But, like a growing percentage of Jews in Judaea in the same period, some of them gave their children identifiably Jewish names drawn from a very small biblical repertoire.

There is, however, very little evidence that the Jews settled in Egypt followed other aspects of their *politikoi nomoi*. That little evidence will be discussed below. Almost all Ptolemaic-era papyri come from the Egyptian countryside, which is to say from outside Alexandria, and Jews in rural Egypt lived in scattered settlements, not in high concentrations, with a handful of exceptions (Leontopolis, which has yielded no papyri, and a few villages with names like Samareia and Magdola). Jews thus conducted their legal lives for the most part like other *hellenes*, bringing their cases to *dikasteria* (e.g., CPJ 1.19). But there is much we do not know: in Ptolemaic Egypt as in most premodern societies, much legal activity took place unofficially, outside the courts and the village clerk's office and so left no paper trail. Furthermore, in the nature of things, the leases, tax-receipts, loan contracts, and so on that do survive tell us little about many features of Jewish legal practice: did the Jews observe the Sabbath and holidays? How? Did they observe the food rules and other purity-related rules? There is simply no way of telling. Since names in Hellenistic Egypt are an unusually unreliable index of ethnicity, it is impossible to tell how common mixed marriages were. One Hellenistic-period papyrus – a divorce document – indicates that the marriage that precipitated the divorce had been contracted according to the *politikoi nomoi* of the Jews (CPJ 1.128, Magdola, 218 BCE). Was this an exceptional case, or the tip of an iceberg? Magdola, like Samareia, was a village in the Fayyum which may have had a heavy concentration of Jewish, among other Syrian, military settlers (CPJ 1.4–5; 9). On the other hand, loan documents

in which both parties are Jews show no hesitation about charging the standard rates of interest (CPJ 1.20; 23; 24 – all military settlers, all quite large sums).

Alexandria

Much of the Jewish settlement in rural Hellenistic Egypt was military. Soldiers were an especially privileged class of immigrants and received generous grants of good land. Though there were some ethnic units in the Ptolemaic army, and other, voluntary, ways of maintaining long-term ethnic solidarity (see below on *politeumata*), hellenizing cultural pressures on military settlers were rather intense. It is obvious that the Alexandrian environment was sharply different, but very little indeed is known about Alexandrian Jewry before the very late Hellenistic period. Then we know that it was very numerous, that it possessed a truly aristocratic and Hellenized upper class. Strabo of Amaseia (quoted by Josephus, *Ant.* 14.117) stated that the Jews had an ethnarch who ruled the Alexandrian Jews and presided over a civil court; the inference that the Alexandrian Jews possessed an authoritative *politeuma* (cf. *Aristeas* 310) seems plausible. The nature of this institution is somewhat controversial (it will be discussed in more detail below), but quite likely *politeumata* were associations of military personnel from a shared ethnic background whose leadership might enjoy extensive though informal authority among non-member compatriots.[22] We possess no information about how the ethnarchic/*politeuma* court worked, what sort of law it used, how it competed with the Greek courts, or anything else about it. We also do not know if it survived into the Roman period. A Jewish archive, into which official papers were still deposited, did survive, though not necessarily for long (CPJ 2.143, 13 BCE).

The Jewish community of late Hellenistic–early Roman Alexandria was necessarily diverse. There is archeological evidence for Jewish presence in the city as early as *c.* 300 BCE, and the most aristocratic and Hellenic Jews were presumably descendants of early settlers, but the city also absorbed a continuous flow of presumably lower-class immigration from Palestine and Syria (and from the Egyptian countryside) and so could maintain a closer connection to ancestral languages and traditions than was available to the venerable military settlements in the countryside or the more established component of Alexandrian Jewry. Greek agitators protesting a visit of King Agrippa I in 38 CE mocked the Aramaic acclamations of the king's Alexandrian Jewish admirers (Philo, *Flacc.* 39). Perhaps they exaggerated: just as the pro-Greek Philo was all too eager to blame the Jews' problems on native Egyptians, aristocratic Greeks may have found it

convenient to blame poor Jewish immigrants, not the Hellenized Jewish natives of the city.

Alexandrian Jews in the early Roman period claimed the right to use their "customs," but this right was challenged in the anti-Jewish agitation that brought the administration of Aulus Avillius Flaccus (prefect 32–38 CE) to an end. It was subsequently reaffirmed by the emperor Claudius (CPJ 2.153.86–87). What these customs may have consisted of beyond the right to worship their god without disturbance is left curiously unclear in the imperial letter that constitutes our most reliable source for the legal status of the Jews in early Roman Alexandria. There is no hint that the Jews retained a recognized right to civil legal autonomy, no mention of an ethnarch or a court.[23] Indeed, Philo stated that Augustus replaced the ethnarch (or genarch) with a *gerousia*, or council of elders, whose role is not specified.[24] If these silences are significant, then we learn that the Romans were in the process of demoting and marginalizing the Jews of Alexandria: Claudius implies that the process had begun with Augustus. A further indication of this is that Jewish immigration from Syria, which had been encouraged by at least some of the Ptolemies, was effectively declared illegal, though in practice there was no way to prevent it. These were all ominous signs for the future well-being of the Jews of Alexandria and Egypt under Roman rule, but about the Alexandrian Jews' legal lives we remain largely in the dark.

Herakleopolis

The publication, in 2001, of twenty papyri of the mid-second century BCE, preserved as mummy wrappings, from the Lower (northern) Egyptian fortified nome (district) capitol Herakleopolis, has revolutionized our understanding of several controversial issues.[25] First, it has provided unambiguous proof for the existence of a Jewish *politeuma*. Second, it has greatly clarified what, precisely, *politeumata* were: to expand slightly on the definition provided above, they were organizations of soldiers originally or ancestrally from the same *polis* (in the broad sense), with a leadership (a *politarches* and *archontes*), a measure of political clout, and a large degree of legal and judicial authority. This means that *politeuma* is not simply a Greek term for "the local Jewish community" as Tcherikover thought (CPJ 1.7), but was a very specific type of organization attested sporadically for several different ethnic immigrant military groups in Ptolemaic Egypt and neighboring lands.[26] There are unlikely to have been many Jewish ones. The Herakleopolite *politeuma* received petitions mainly from its own members, but also from Jews living elsewhere in the nome or even outside it.[27] In several cases, the petitions appeal the judgments of village elders – in one case unambiguously Jewish ones – in a way that reminds us how much legal activity occurred beneath the official or quasi-official level attested in documents. Since we possess the petitions of complainants but not the *politeuma* judges' decisions, it is hard to tell precisely how much of a role specifically Jewish law played in their court. But there is some evidence. In a papyrus of 134 BCE, Philotas son of Philotas, a member of the *politeuma*, tells the following story to the *archontes*:

> I courted Nikaia daughter of Lysimakhos; the latter promised to give me his daughter and the dowry agreed on for her, which pleased me. Not only did we make determinations in common (?) but also according to the law [illegible …] Not long after, without reason Lysimakhos promised Nikaia to another man, before she had received from me the "book of separation" required by custom (*to eithismenon tou apostasiou to bublion*). I therefore request, if it seems right to you, to order to write to the Jews in the village to summon Lysimakhos to you so that if things are as I have presented them …
>
> (P.Polit.Iud., pp. 70–71)

Maresch and Cowey surveyed the Jewish legal issues involved and also noted the striking fact that the term for divorce is precisely the Septuagint's translation of the Pentateuch's *sefer keritut* (Deut 24.1). Caution is in order: even before this publication it had been argued that the Torah was translated into Greek not, as Aristeas claimed, to be deposited in the Library of Alexandria, and not, as modern scholars had often argued, to serve the liturgical needs of a Jewish community which had largely forgotten Hebrew, but to serve as the *politikoi nomoi* of the Jews. P.Polit.Iud. does indeed offer support for this view. But it is unclear just how important the Torah was for the Jewish *politeuma* of Herakleopolis. Despite the best efforts of Maresch and Cowey, traces of it are few and far between in the documents, most of which are explicable in terms of the Greek common law of Hellenistic Egypt.[28] As elsewhere in Egypt, the Jews here charged one another standard interest rates on loans. We confront the likelihood that even in a situation where we can be sure that the Jews followed their *politikoi nomoi*, these turn out to have been a combination of biblically based marriage and divorce law, avoidance of idolatrous oaths (members of the *politeuma* swore a *politikos horkos* – more or less, a Jewish oath) and common Greek civil law. Was this true of the *politeuma* court of Alexandria, too, with its huge and highly diverse constituency, or of the (hypothetical) *politeuma* court of Leontopolis, whose politarchs were Zadokite high priests who took pride in the purely traditional nature of their cultic activity?

Judaea and Arabia

There is reason to believe that in the second half of the Second Temple period, if not much earlier, the Torah was in some sense the normative law of Judaea. By Torah I mean not the Pentateuch alone, in whatever version, but a body of practice imagined by its practitioners, or at least by some of them, as standing in some relation with the authoritative text. I would like to begin by advancing the hypothesis that the *patrioi nomoi* of the Jews, whose normativity was officially recognized in 200 BCE, abrogated in 167, restored in 162, and probably remained more or less valid until the deconstitution of the Jewish nation in 70 CE, were the Torah-plus-interpretation, traditions of local practice brought into dialogue with the normative texts by the clerisy which imposed the laws, and so on.[29] Josephus hints that this remained true under Roman rule until the Great Revolt, at least to some extent: it was assumed that Herod was required to enforce Jewish civil laws (for example, those of slavery), and Jews could hope for satisfaction when they complained to authorities that a Roman troop or administrator committed offenses against Jewish legal/religious sensibilities. Not only is there much to be said for Sanders' view that many/most Jews in the first century affirmed "covenantal nomism," but we may also speculate that the law of the land in Judaea and then in Jewish Palestine in general was Jewish in the strong sense, that is, self-consciously relatable to the law of the normative code (the law of the Jewish *politeuma* of Herakleopolis was by contrast Jewish in the weak sense – it regarded itself as Jewish law but relatively little of it had any connection at all with that of the normative code). Is this hypothesis correct?

That the Jews of Palestine lived under some version of Jewish law is, it must be emphasized, speculative, though relatively well-founded speculation, but we certainly do not know at all where the jurisdictional boundaries, if any – physical or topical– of Jewish law lay. Were Galilee and Idumaea subject to them in the same way as Judaea? Did they extend to criminal law? To non-Jews living in Jewish areas? We also need to test the hypothesis that Jewish law was thought by its practitioners always to be somehow, even if loosely, related to the Torah. Assuming that the ultimate authority over Jewish law was the high priest and his associates, what was the juridical competence of the Herodian rulers, and of the representatives of direct Roman rule, all of whom shared political authority in first century Palestine in complicated and confusing ways?

We are barely in a position to know. In the years following 1960, a substantial quantity of documentary papyri was discovered, by excavators and by antiquities hunters, mainly in caves in the Judaean desert. No refugees from the Great Revolt (66–70 CE) left behind material similar to that left by Babatha daughter of Simon, apparently a refugee from the Bar Kokhba revolt two generations later (132–135 CE). This means that though we possess several dozen post-destruction documents, there are very few pre-destruction documents. There is an interesting but rather disappointing exception. Some deeds of sale on papyrus from Wadi Murabba'at, which Milik had dated to the time of the later revolt, have now been re-dated to the period of the Great Revolt.[30] In either case, they demonstrate mainly that hill-country Judaean rural life, where farming was done on very small plots and many farmers might own widely scattered parcels of land, meaning that land was of necessity changing hands constantly, and tenancy and harvest agreements were a systemic desideratum, went on much as before, even for people manifestly committed to the ideology of the rebellion (fighting in the first rebellion was scattered and infrequent and scarcely affected Judaea proper until 69 CE). These documents should be restudied for what they can tell us about life in rebellious Judaea, but it is not clear we can learn much from them for our purposes about life before 66. The Judaeans who took refuge at Murabba'at in 70 did not bring many pre-revolt documents with them, or very few survived. We might be tempted to speculate that supporters of the revolutionary state of Judaea were especially inclined to commemorate their legal activities in documentary form (pointedly in Hebrew, or rather, slightly Hebraized Aramaic), since that is one of the things that makes a state a state. This would explain the relative absence of pre-revolt paperwork. But accident may provide a better explanation. Josephus tells us that one of the first rebellious acts at Jerusalem was the destruction of the archives, which contained loan contracts, among other things presumably (*JW* 2.427): so there was plenty of bureaucratic writing in Judaea before 66 CE.

One much-discussed document, P. Murab. 18, may, upon rereading, tell us less than we had once hoped. This Aramaic papyrus is an acknowledgment of debt clearly dated to the third year of Nero (54/55 CE); it may have been drawn up in western Judaea. But the text is very fragmentary, and all that can be said for certain is that it mentions the sabbatical year in a way that *may* indicate that the sabbatical year was not to cancel the

debt. I have argued that this may imply a conception of the pentateuchally mandated debt cancellation which differs from that of the later rabbis, but still reflects engagement with biblical law: if the Bible's rule is thought to be a favor to the debtor, then the debtor can presumably renounce it and undertake voluntarily to repay a loan after the *shemittah*. The biblical rule is thereby evaded, but it is not ignored, a strong demonstration of the normative force of the law in question.[31]

More mysterious are the ostraca, dated paleographically to the early first century, recently republished by Ada Yardeni.[32] These texts were purchased on the antiquities market; their provenance is unknown; some of them are dated to year 104 of an unknown era. Many of them concern the delivery of goods to Beit Qarnaim, an unidentified village apparently in the vicinity of Jerusalem. Several of the texts mention *shabta* and *'arubat shabta* (Friday), and rather oddly record the delivery of supplies of agricultural produce on the Sabbath. It is hard to know how to understand this. A commercial transaction on the Sabbath would be prohibited by almost any conceivable interpretation of pentateuchal law. Presumably so would the payment of taxes in kind. Simply conveying supplies (and having the recipient write a receipt – but see below) might or might not be prohibited. Certainly both rabbis and Dead Sea sectaries – following the lead of Jeremiah 17– would have regarded this as a fundamental violation of Sabbath law, and it is hard to see how the biblical prohibition of labor might be reconciled with the conveyance of large quantities of commodities into a settlement, though perhaps more exegetical imagination is in order.[33] These texts remind us of the Murabba'at papyrus in that they seem to be simultaneously acknowledging biblical law (it is the Sabbath) and violating it (business as usual).

After 70

The overwhelming majority of the Judaean desert documents were written after 70, most of them not in fact in Judaea but in the Nabataean kingdom which was annexed in 106 and became the Roman province of Arabia. The relevant documents, P. Yadin, XHever/Seiyal (which includes the archive of Salome Komaise) and perhaps some of P. Murab.,[34] concern interrelated groups of people centered in the village of Mahoz ‘Eglatain (also called Mahoza), south of the Dead Sea. The village contained two to some extent separate groups, Jews and Nabataeans, though there was some – though surprisingly little, as far as the evidence shows – family line crossing. The Jews, furthermore, had extensive connections in Judaea proper, in Eingeddi and elsewhere. We do not know if Jews living under the Nabataean kings had the right to use their own laws, and unfortunately none of the extant papyri can help us answer this question. But by 106 – most of the documents are later – Jews in Judaea had long since lost their corporate autonomy and those in Arabia now joined them in having as their primary legal identity the fact that they were Roman subjects living under a version of Roman provincial law. This is not to say that all earlier customs and institutions were swept away, especially not in Arabia where the transition from Nabataean to Roman rule appears to have been relatively peaceful. The village clerks went about their business as before, drawing up contracts and leases in Nabataean or Jewish Aramaic (one of the scribes, named Yohanan bar ‘Abdobda Makkuta, is the one person in the papyri with a Hebrew name and an Arabic patronym), with Greek now added to the repertoire, and Aramaic contracts tended to record traditional provisions. P. Yadin 6 and 9, contracts between Jews written in Nabataean by the apparently ethnically mixed Yohanan, may demonstrate that the language of the document had a greater impact on the terms of the contract than the ethnicity of the contractors, with Jewish Aramaic, Nabataean Aramaic, and Greek contracts all differing slightly in form and content. Early Roman Arabia thus featured a kind of legal pluralism, at least at the level of the village, reminiscent of that of Ptolemaic Egypt. It could be argued that this situation lasted only until village scribes shifted fully to Greek, a language certainly preferred and promoted by the Roman state, but not actually legally required; but in the absence of any surviving documents from Arabia between 135 and the sixth century, certainty is impossible.[35] Because the use of Jewish Aramaic

brought with it a certain amount of self-conscious Jewishness (not always closely connected to the actual law of the Torah), the pluralistic mix included some Jewish content. But Jews would not hesitate to use Nabataean or, especially, Greek documents (and certainly showed an overall preference for the sort of Greco-Roman legal instruments and institutions well known from Roman Egypt). In conformity with the pattern in Egypt, the one and only self-consciously strongly Jewish document in the collection is Babatha's *ketubbah* (marriage contract) with her second husband, Yehudah bar Elazar Khthushion (P. Yadin 10, before 125 CE), one of several *ketubbot* of the approximate period discovered in the Judaean desert (cf. P. Murab. 20–21), to be sharply distinguished from the Greek marriage contracts in the same collections (P. Murab. 115–16; XHever/Seiyal 69; P. Yadin 18 and 37). This document declares that the marriage is contracted *[kedi]n Moshe Viyhuda'ei*, and bears a close family resemblance to the type of *ketubbah* prescribed at *m. Ketubbot* 4.7–12: both content and language are similar. It was written not by a scribe, but by the groom himself. The similarity of its language to that of *m. Ketubbot* suggests that both Yehudah bar Elazar and the rabbis drew on a very similar "recipe book." Curiously, the language of P. Murab. 21, the better preserved of the two probably earlier Judaean *ketubbot* in the collection, is similar in content but somewhat different in language. In any case, Jews in Mahoza and vicinity, including several of Babatha's relatives, seem to have felt no corporate obligation to marry "*ke-din Moshe Vi-yhuda'ei*." The Greek contracts do not resemble the Jewish ones, or *m. Ketubbot*, in content, and in one case describe the marriage as having been contracted *kata nomon Hellenikon*, according to Greek law. The acceptability of such choices seems typical of the legal pluralism of the environment.[36]

The only other document in the collection with a strong claim to follow Jewish law is P. Yadin 7, an excellently preserved Jewish Aramaic deed of gift written in Mahoz Eglatain in 120 CE. Shimon bar Menahem (father of Babatha) grants to his wife Miryam berat Yosef all his rather substantial property on the condition that he continue to enjoy usufruct in his lifetime. After his death, Miryam may dispose of the property as she wishes. The editors claim that this *donatio inter vivos* should be understood as a case of the rabbinic *matanah* (gift), an instrument meant to evade the otherwise completely inflexible biblical laws of inheritance, which made wills basically impossible. But the more convincing interpretation may be that this deed reflects and is meant to evade a

system of inheritance in which one's brother's male descendants are preferred over one's daughters, who are simply barred from inheriting (Babatha was her parents' only child). This does not conform with biblical law – which requires daughters to inherit if there are no sons (Num 27.1–11; 36.1–11) – but may reflect local practice, of Jews, or Nabataeans, or both. The three deeds of gift from Nahal Hever are all donations to women and are manifestly instruments to insure female relatives' full ownership of property in a system – not Roman provincial, but local– which clearly did not normally provide for it. The rabbis later adapted a version of the *donatio inter vivos* to serve as a kind of substitute will, but P. Yadin 7, still less its Greek counterparts, had little clearly defined connection either to the law of the Torah or to that of the rabbis.[37]

The Jews of Mahoza lived cheek by jowl with their Arab neighbors, as is demonstrated by the list of property boundaries in P. Yadin 7, and the documents are replete with evidence for the ties – economic, legal, personal – that bound the two groups together, yet they remained, if we follow the onomastic and linguistic evidence, two quite distinct groups. The Jews of Mahoza were much more likely to use biblical names than their counterparts in Hellenistic and Roman Egypt, and whether or not they preserved much Hebrew it seems clear that their primary language was Aramaic, written by them in an increasingly distinctive Jewish fashion (how or whether their speech differed from that of their neighbors we do not know). Yet, as in Egypt there are relatively few traces of markedly Jewish law in their documents: marriage "by the law of Moses and the Jews" was an option but not a requirement. Babatha's father either did or more likely did not follow the biblical laws of inheritance. However, documents written in Jewish Aramaic, or in Hebrew, may, whatever their contents, be considered Jewish by default, since in all likelihood they utilized formulas and concepts which, whatever their origins, had become traditional among the Jews of Palestine; they are the Judaean version of the laws of the Herakleopolite *politeuma* – Jewish by assertion and context.

Outside the realm of civil law, the Sabbath is mentioned several times in the documents and a suggestive argument has been made that none of the documents written by or about Jews was written on the Sabbath.[38] But there is no trace of a synagogue, a school for Torah study, *miqva'ot* (ritual baths) – physical structures that might well be mentioned in the documents. Babatha, who was illiterate, preserved her legal papers, but she possessed no non-documentary texts – biblical scrolls or even amulets – which she

considered worth keeping in her desert cave. On the other hand literary texts, especially biblical texts, were discovered in both Wadi Murabba'at and Nahal Hever, not to mention on Masada. Other aspects of ritual probably would not have any place in the documents.

Conclusion: Clerisies High and Low and the Formation of Jewish Law

The most concentrated and highly developed legal ruminations on Jewish law among the high clerisy – including leading priests and sectarian leaders, among other elites – focused on matters of special interest to the emerging institutional centers of Jewish life – the temple cult, the priesthood, purity, the priestly gifts: these are the main concerns of the most legally oriented Dead Sea Scrolls, and possibly also of some leading Pharisees, if we take seriously the implications of such polemical texts as 4QMMT and the Gospel of Matthew. All other surviving examples of the Jewish "great tradition" of the middle and later Second Temple period praise the laws and the holy books, and offer various sorts of interpretations of them, but do not focus on details of practice. For all the obsession with ritual purity characteristic of Qumran texts and at least implicit in later biblical and post-biblical writing, there is practically no elaboration on the laws of *kashrut*; the same texts recommend Sabbath observance but give us practically no idea what that might have entailed. If the main festivals were observed outside the temple, no text tells us how, except in tantalizing hints. Either the literate high clerisy devoted no attention to such matters, or they did not write about it.

They also do not say much about civil law. To be sure, the Torah itself is impractically sketchy about it: it does not say how marriages and divorces are to be performed; it rigidly limits inheritance to sons, unless there are none; it seems to prohibit interest on loans but does not offer detailed definitions; it contains a few laws about how workers are to be treated and what Israelite farmers are required to do with their land (let it lie fallow every seven years, leave the corners unharvested, etc.), but offers no guidance about drawing up deeds, or leases, or harvest contracts. Paperwork was not invented by the Achaemenids. The massive quantities of eighth–seventh centuries **BCE** bullae – clay seals affixed to rolled papyrus documents – discovered at Jerusalem and Amman demonstrate that the environment in which the Pentateuch began to be written and assembled was perhaps no less bureaucratic than that in which it assumed its final form. But we know very little about the quotidian legal lives of Israelites and Jews. The colonists at Elephantine were "pre-Jewish," though they had the Passover as a moveable feast and in their final decades began to learn about some of the laws of the *torat moshe*.

Most Jews of rural Hellenistic Egypt conducted their legal lives according to the standard Greek law of the *dikasteria*, but we now know that some followed the *politikoi nomoi* of the Jews. However, our evidence, limited though it is, seems to show that this entailed only a slight modification of Hellenic law: marriage and divorce were performed in a distinctive way – the latter following biblical law and using biblical language (the Bible in question being the Septuagint). Oaths may have avoided idolatrous elements, but otherwise the law of the *politeuma* court of Herakleopolis appears to have been Jewish primarily by assertion.

We can make only the most tentative and suggestive case that things were different in Palestine. Of pre-destruction documents, the Hebrew contracts from Murabba'at come from the period of the Great Revolt and are by definition atypical, though the transactions they record may have been common and their language may actually reflect the lower clerisy's detailed and precise attention to civil law and procedure. Little of this bears any direct relation to the laws of the Torah since the Torah provides little guidance abut such issues, but the documents are strongly marked as Jewish by the mere choice of language in which to write them. They are also Jewish in the local or demographic sense. They reflect local custom as developed by local scribes, clerks, and court officials, who had an interest both in approximating their norms to the interests of their Hellenistic and Roman rulers, but also in asserting some local distinctiveness. Obviously the latter is especially conspicuous in the revolt era documents, but the highly fragmentary P. Murab. 18, which requires repayment of debt during or after the *shemittah*, does not ignore the pentateuchal rule, but probably reflects a tradition of evasive interpretation.

Some of these traditions are attested also in the post-destruction documents from Arabia found in Nahal Hever. Jews were not required to follow such traditions. Most, as in Hellenistic Egypt, used a sort of local Graeco-Roman common law similar to that attested in Egyptian papyri of the same period. But specifically Jewish clerisiacal traditions survived too. Babatha's *ketubbah*, and the two probably earlier *ketubbot* from Murabba'at actually contain nothing "Jewish" except the claim that the marriages were contracted according to "the law of Moses and the Jews," and the fact that they are written in Jewish Aramaic. This reflects the development and emergence both of strongly localized versions of general Hellenistic near-eastern or pan-Aramaic legal norms and instruments, and of a tendency to claim such norms and instruments as specifically

Jewish, at least in the case of marriage. We know that the rabbis would later appropriate the Judaized civil law developed by the lower clerisy – the tinkerers and technicians mentioned above – and claim them – not just the marriage contract – as part of the Torah and therefore exclusively normative for and binding on all Jews (see Chapter 3 of this volume).

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P. Murab.

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[1] For a discussion of this practice in the rabbinic period, see Chapter 3 of the current volume.

[2] Baumgarten, *Studies in Qumran Law*; Schiffman, *The Halakhah at Qumran*.

[3] For a survey of what these sources have to tell us about Jewish law in the Second Temple period, see Piatelli and Jackson, "Jewish Law," pp. 19–61.

[4] Sanders, *Judaism: Practice and Belief*. See Neusner, *Rabbinic Traditions*.

[5] Shemesh, *Halakhah in the Making*. For a more skeptical view, see the essays collected in parts 2 and 3 of Fraade, *Legal Fictions*, pp. 37–319.

[6] See Crawford, *The Temple Scroll*.

[7] The idea that a covenant with nature preceded and foreshadows covenants with humanity and Israel is not specifically sectarian, and appears in Sirach – see below.

[8] See especially Sir 16.24–17.23 with discussion of Schwartz, *Were the Jews*, pp. 49–54.

[9] See Kamesar, "Biblical Interpretation in Philo."

[10] See Goodblatt, *The Monarchic Principle*, pp. 78–130.

[11] See Schwartz, *Josephus and Judaean Politics*, pp. 171–208.

[12] See Schwartz, "Law and Truth"; with response of Rubenstein, "Nominalism and Realism." For a response to Rubenstein, see Hayes, "Legal Realism" and Hayes, *What's Divine about Divine Law?*, chapters 3 and 5.

[13] My implicit parallel here is with the Industrial Revolution, wrought, according to the standard contemporary view, not by the great scientists of the Royal Society, but by the literate and mechanically adept among the textile mill-, pottery-, and foundry-owners themselves, who worked out technological problems on the job (see Allen, *British Industrial Revolution*). In my view, the literate technicians of Jewish law – clerks, teachers, arbitrators – rather than the high theorists or officials, evolved after the Destruction into the rabbis.

[14] The most comprehensive and reliable brief survey of evidence for Jewish life in ancient Egypt remains Schürer, *History of the Jewish People*, pp. 38–60 and 87–150 *passim*. Modrzejewski, *Jews of Egypt*, provides an adequate brief narrative studded with important and original argumentation. For the Alexandrian "troubles" of 38–41 CE, see Gambetti, *Alexandrian Riots*. I am not aware of an up-to-date monographic treatment of the Jews of Alexandria.

[15] A tendency present but not pronounced in the somewhat apologetic Porten, *Archives from Elephantine*. The relevant documents cited below may be found in Porten, *The Elephantine Papyri*.

[16] See Yaron, *The Law of the Aramaic Papyri*, pp. 99–113.

[17] Arnold, "The Passover Papyrus." The references to the Sabbath that Porten claims to have found on fifth-century ostraca from Elephantine are highly speculative, whereas the references to *pasḥa* seem more secure, but one case (Porten and Yardeni, *Textbook*, D7.6) clearly supports the view of biblical scholars that the pre-Priestly Passover lacked a set date, as Arnold noted.

[18] Porten, *Archives from Elephantine*, pp. 122–33.

[19] On this and much of what follows, see Modrzejewski, "Jewish Law." This predates the publication of the Herakleopolite papyri discussed below and so requires some revision.

[20] See Manning, *The Last Pharaohs*, pp. 165–201.

[21] The essential basic introduction in English to the Jews in Hellenistic Egypt remains Tcherikover's introduction to CPJ volume 1. For inscriptions from Leontopolis, and those mentioning *proseukhai*, see Horbury and Noy, *Jewish Inscriptions*.

[22] See Honigman, "Politeumata and Ethnicity"; Honigman, *The Septuagint*, pp. 98–101.

[23] Claudius' wording is ambiguous (my trans., 82ff.: "Wherefore even now I conjure the Alexandrians to comport themselves toward the Jews who have been inhabiting the same city for a long time in a mild and friendly way, and not to dishonor any of the customary (*nenomismena*) rites of their god, but to permit them to use the customs (*ethe*) which (they) also (used) under the god Augustus."

This seems to stop well short of recognition of substantive legal autonomy: the choice of the word *ethe*, instead of *nomoi*, is presumably an intentional contribution to the ambiguity of the rights Claudius is offering. I would also guess that the participial phrase *tois ten auten polin ek pollon khronon oikousi* is meant to exclude recent immigrants, of whose presence Claudius later expresses open disapproval (lines 96–98). Tcherikover's comments on these provisions are optimistic. Josephus, *Ant.* 19.280–85 presents what appears to be a heavily worked over, much more pro-Jewish, version of the same document, some of whose provisions directly contradict the papyrus letter and the statements of Philo.

[24] Philo, *Flacc*. 74; the *gerousia* had *archontes: Flacc*. 76; 80; 117. Arguably, *archontes+gerousia* supervising religious rites replaced *ethnarches+politeuma* supervising civil and religious laws. Under Roman rule the Jews of Egypt no longer counted as *hellenes*, which may have entailed not only a change for the worse in tax status but also a diminution of civic autonomy, perhaps explaining the renewed Jewish push for Alexandrian citizenship and the catastrophic results of their failure.

[25] Cowey and Maresch, *Urkunden des Politeuma*; Honigman, "The Jewish *Politeuma*."

[26] See Honigman, "Politeumata and Ethnicity."

[27] The religious and judicial authority of a Jewish military colony not only over its own members but also over other Jews in the area is reminiscent of the account of Bathyra, the colony of the Babylonian Jewish cavalry commander Zamaris, in Batanaea, in Josephus, *Ant*. 17.23–28.

[28] Kugler, "Dispelling an Illusion," offers a *very* slightly more "Jewish" reading of these texts than Honigman.

[29] Goodblatt, *Elements*, argues for a tremendously broad and dense diffusion of actual pentateuchal texts in first-century Palestine, extrapolating somewhat too audaciously from the number of biblical texts discovered at Qumran and related sites.

[30] See Eshel, Broshi, and Jull, "Four Murabba'at Papyri"; Cotton, "The Languages."

[31] See Schwartz, *Imperialism*.

[32] "Twelve Published"; this revises and expands on Yardeni, "New Jewish Aramaic."

[33] For some suggested defenses/explanations of the practices recorded in the ostraca, see Doering, *Schabbat*, pp. 387–97 – the most detailed discussion of these texts from the perspective of Jewish law known to me. Alex Jassen has pointed out in a personal communication that a legal fragment from Qumran, 4Q265, specifically prohibits the conveyance of food on the Sabbath, in a way which implies that some people specifically permitted it.

[34] For the argument that not only the Hebrew but the Aramaic documents in P. Murab. all predate 70 (against the view of the editor), see Cotton, "The Languages." This includes P. Murab. 20, a marriage contract dated to year 11; Milik assumed this a reference to the era of Arabia (and so, 116/17), but the document appears to be Judaean, not Arabian, and so Cotton prefers to date it to the regnal era either of Claudius or of Nero (51 or 65 CE).

[35] See Cotton, "Continuity of Nabataean Law."

[36] On the somewhat eccentric Greekness of the Greek contracts, see Yiftach-Firanko, "Judaean Desert Marriage."

[37] See Cotton, “Deeds of Gift”; Cotton, “Laws of Succession.”

[38] Katzoff and Schreiber, “Week and Sabbath.”

3

Law in Classical Rabbinic Judaism

Christine Hayes

The first seven centuries of the Common Era were a period of intensive legal creativity that produced the religious-cultural formation now designated "classical rabbinic Judaism." Rabbinic Judaism was a Torah-centered phenomenon predicated on the notion that Israel's relationship with her god is mediated through the covenant and its normative program as articulated in rabbinic *halakhah*.[1] The current chapter explores the ideology of Torah that lies at the heart of classical rabbinic Judaism as reflected in explicit statements about the nature, scope, authority, and purpose of the Torah; the textual practices that characterize rabbinic halakhic (legal) writings; and rabbinic divine law discourse set against competing divine law discourses in late antiquity. We begin with a brief account of the emergence of rabbinic Judaism and the general contours and character of its legal literature in Roman and Byzantine era Palestine and in Sasanian Persia before turning to the ideology of Torah attested in this literature.

Torah's Empire: The Emergence of Rabbinic Judaism

The Great Revolt against Rome (66–73 CE) decimated the political and cultural institutions of Jewish life in Roman Palestine and transformed its social fabric. With the fall of Jerusalem, the destruction of the Temple, and the cessation of the sacrificial service, priests played an increasingly marginal role in the life of the community. Prophets and kings disappeared as well as the sects known from the Second Temple period (see Chapter 2 of this volume). Like any other Roman provincial society, political power and legal authority were concentrated in the hands of the Roman governor, his staff and representatives, and the local city councils. Judges appointed by the Romans ruled according to an ad hoc mixture of Greco-Roman, eastern, and local law. In the cities and large villages, many Jews took on the religious, cultural, and social norms of their Greco-Roman neighbors.

In this postwar landscape, the rabbinic movement, an apparently fissile network of small disciple circles that bore some relationship to pre-70 scribes and Pharisees,[2] preserved and developed a Torah-centered Judaism in the post-destruction period. Involuted and peripheral, it did not quickly gain ascendancy even when its main contours were in place. The rabbinic movement gradually exerted influence in the third century, perhaps as a result of the patronage of the Patriarch, the chief representative of the Jews to the Romans. The Patriarch at the turn of the third century was R. Judah I or R. Judah ha-Nasi ("the Prince"),[3] a wealthy and well-connected landowner whose authority appears to have been widely recognized. By the end of the fourth century, the Patriarch held a higher rank in the imperial senate than did provincial governors. To the extent that the Patriarch supported the activities of rabbis in the third and fourth centuries – appointing them as judges and religious functionaries – their influence and prestige also increased. Thus, by the late third century, rabbis emerged as the new leaders of the Jewish community in Syria Palestina, and by the fourth century they may have exercised a significant degree of influence and authority over a large portion of the Jewish population.

While the Patriarch claimed descent from the house of David, the rabbis based their authority not on heredity (like that of priests and kings) or divine charisma (like that of

prophets) but on their mastery of the sacred scriptures and ancestral tradition, and on their legal expertise. R. Judah I's promulgation of the Mishnah (*c*. 220 CE), a collection of rabbinic teachings and disputes on all matters of agricultural, religious, civil, criminal, and personal status law (see further below), was surely an important boost to the rabbinic movement and the development of rabbinic institutions, such as the study house (or *bet midrash*).[4] Even so, it is unlikely that the rabbis enjoyed broad jurisdiction. The Theodosian Code of 398 granted Jewish leaders authority over religious law (liturgy, dietary rules, and the like), but all other matters (marriage, divorce, civil and criminal proceedings, inheritance) were handled by the imperial courts.

According to rabbinic tradition, an early third-century disciple of R. Judah ha-Nasi named Rav brought the Mishnah to Babylonia where it became the central element in the rabbinic curriculum, as it was in Palestine. Generations of scholars (known as *amoraim*; sing. *amora*) in both centers analyzed, debated, and elaborated upon the Mishnah, culminating in the formation of the Palestinian Talmud (fourth century CE) and the much more capacious and anthological Babylonian Talmud (seventh century CE). While the Babylonian Talmud refers to some formal gatherings of sages, it was not until the end of the talmudic period that rabbinic academies (*yeshivot*, sing. *yeshivah*) with an elaborate institutional structure, were established. Throughout the talmudic period, it was the Exilarch (also claiming descent from the house of David) who represented the Jewish community before the Sasanian king and exercised important judicial and economic authority. Unlike the close relationship between the Patriarch and rabbis in the west, relations between the sages and the Exilarch in the east were strained in the later period.

Despite the circumscribed nature of the actual jurisdiction granted to them by the imperial authorities of both Roman and Byzantine-era Palestine and Sasanian Persia, the rabbis labored diligently in the field of legal exegesis and argumentation. The result was a cultural revolution that permanently transformed the national heritage and awarded pride of place to *halakhah* (normative practice as articulated by the rabbinic class) and the study practices that produced *halakhah*. Rabbinic *halakhah* was both a highly ramified body of law unprecedented in its scope and detail, and a professionalized field of practice.[5] More significant, emphasizing normativity as the primary vehicle of the divine–human relationship,[6] rabbinic *halakhah* was totalizing in its conception and

construction of Jewish law and in its valorization of legal praxis and legal study as the heart and soul of Judaism.[7]

With the fall of Jerusalem, the characteristic elements of biblical Israel and Second Temple Judaism – the Temple, the sacrificial system, an authority-wielding priesthood, prophecy, and monarchy – were destroyed or lost all functionality. The genius of the rabbis lay in channeling the aura and authority of these divinely established institutions into "the four cubits of the *halakhah*." Imbued with the sanctity and symbolic power of the now-defunct Temple, and the authority of the institutions of prophecy and monarchy, law was at once tool and telos in the rabbinic reconstruction of Judaism.

Law as the Tool and Telos of Reconstruction: The Nature, Scope, and Authority of the Torah in the Rabbis' Own Words

b. Berakhot 8a

Raba said to Rafram b. Papa: Let the master please tell us some of the fine things that he said in the name of R. Ḥisda on matters relating to the Synagogue!

He replied: Thus said R. Ḥisda: What is the meaning of the verse:*The Lord loves the gates of Zion more than all the dwellings of Jacob?* (Ps 87:2) – The Lord loves the gates that are distinguished [*me-tsuyanim*] by *halakhah* more than the synagogues and houses of study.

And this conforms with the following teaching of R. Ḥiyya b. Ammi in the name of 'Ulla: Since the day that the Temple was destroyed, the Holy One, blessed be He, has nothing in his world but the four cubits of *halakhah* alone.

Likewise, Abaye said: At first I used to study in my house and pray in the synagogue. Since I heard the saying of R. Ḥiyya b. Ammi in the name of 'Ulla: "Since the day that the Temple was destroyed, the Holy One, blessed be He, has nothing in his world but the four cubits of *halakhah* alone," I pray only in the place where I study.

R. Ammi and R. Assi, though they had thirteen synagogues in Tiberias, prayed only between the pillars where they used to study.

In this text, the synagogue and study house of *halakhah* vie for the title of successor to the Temple. The text concludes that since the destruction of the Temple, all that God has to secure his presence in the world is the *halakhah*. Beloved to God are places distinguished by *halakhah*, and he is to be found there more than in the synagogue. Indeed since *halakhah* is the vehicle or medium of the divine–human relationship, one should pray where one studies rather than in the synagogue or, if in the synagogue, then in the place in the synagogue where *halakhah* is studied. As the site where God and humans meet, the study house of *halakhah* absorbs the aura of sanctity and the symbolic power of the temple.

This *halakhah*-centered view of the divine–human relationship animates the rabbino-centric account of the reconstruction of Jewish life after the destruction of the Temple and the decimation of communal institutions of leadership and authority.

Rabbinic works depict early sages as working with foresight and purpose to renew and sustain Jewish life in the immediate post-destruction period through the mechanism of law.[8] Within the four cubits of the *halakhah*, Jews were no less capable of attracting and maintaining the divine presence, fulfilling the communal aspirations of the covenant, and obtaining atonement for their sins than they were when the Temple and its associated institutions were operative. Thus, rabbinic sources describe Yoḥanan ben Zakkai and later Gamliel II as reconstituting the Sanhedrin and undertaking a series of *taqqanot* (rabbinic legal rulings) that transformed and preserved Judaism as a post-Temple, non-priestly creation.[9] These *tannaim* (a term that refers to the first- to third-century CE sages included in the Mishnah and related works) are credited with drawing together the legal traditions and teachings of preceding generations and establishing normative practice (*halakhah*) in accordance with the Pharisaic school of Hillel.[10] While early rabbinic sources suggest an emphasis in the postwar period on laws of purity, tithing, and calendar-setting, later texts credit the Yavneh generation with composing obligatory daily prayers in imitation of the daily sacrifices in the Temple as well as prayers and blessings for a variety of occasions[11] and adapting or transferring to the home and/or synagogue certain Temple observances – especially the ceremonies associated with the pilgrimage festivals.[12] Thus, even though the Passover lamb could no longer be sacrificed, a family observance of the Passover was possible, and the non-Temple elements of the ceremony – the eating of unleavened bread and of bitter herbs – took on a heightened importance. The basic framework of the Passover *haggadah* (the liturgy accompanying the Passover meal in the home) was likely composed in the early rabbinic period. In due course, the halakhic project came to encompass all areas of human activity. In contrast to the legal writings of the Qumran sectarians that were focused primarily (though not exclusively) on issues of concern to priests (temple, the priestly gifts, and purity), or Second Temple writings that praise the Torah but do not focus on details of practice,[13] the halakhic writings of the rabbis are maximally expansive in scope. The minutiae of property law, employment law, agricultural law, criminal law, laws of marriage and divorce, laws of oath and inheritance, not to mention Sabbath and festival law, sacral law, and purity law are the focus of the rabbis' collective intellectual energy.

Indeed, rabbinic Judaism is characterized by an enlargement of the sphere of the commandments (*mitzvot*, sing.: *mitzvah*), each of which is celebrated as an opportunity

to serve God. According to one rabbinic tradition, there are 613 biblical commandments – 248 positive commandments (injunctions to do a particular thing) corresponding to the number of bones in the human body and 365 negative commandments (prohibitions) corresponding to the number of days in the year.[14] The idea communicated by this tradition is that Israel is surrounded by commandments in both physical space and time – all actions each day are subject to commandments that can be performed in the name of God. Even actions relating to bodily functions were regarded by some sages as having religious merit.[15] The rabbis commended those who adorn or beautify the commandments and observe the commandments with joy (the "joy of the *mitzvah*").[16] Much attention is paid to the question of reward.[17] On the other hand, some sources advocate performance of the commandments for their own sake, as an expression of love for God, and not for some other purpose, gain, or benefit.[18] A compromise position maintains that all commandments – major and minor – should be observed with equal diligence and enthusiasm because the reward of each is unknown.[19]

The theoretical equivalence of the commandments is difficult to maintain in practical terms and raises a critical question: are all of the commandments of equal importance such that one should be prepared to lose one's life for them? A passage in *b. Sanhedrin* 74a records the majority position that a Jew who is ordered to violate his law on pain of death is permitted to violate the law in all but three cases – incest, murder, and idolatry. Some rabbinic authorities resist the priority accorded certain commandments and rule that one should not violate any precept at all in public, and the same talmudic passage contains legends of Jews killed for refusing to violate even minor precepts.[20]

If the locus for demonstrating Israel's dedication to and performance of the will of God shifted from the temple to the four cubits of the *halakhah*, imbuing the latter with the sacred authority of the former, the communication of the will of God shifted from the prophets to the rabbis, imbuing the latter with the sacred aura of the former. In a formulation paralleling the tradition of Ulla cited above, R. Avdimi of Haifa stated: "Since the day when the Temple was destroyed, prophecy has been taken from the prophets and given to the sages."[21] No longer does God send prophets to reveal his will to Israel, as in the biblical past and the Second Temple period. Since the destruction of the Second Temple, the task of accessing and articulating God's will for Israel falls to the interpreters of the Written Torah revealed at Sinai – the wise scribes and sages, i.e., the rabbis

themselves.[22] Seeking to secure their position as the authoritative interpreters of God's written revelation, the rabbis read themselves into Deuteronomy 17's procedure for adjudicating difficult legal cases. Deut 17:8–13 states that when a case is too difficult to decide, it is to be presented to the Levitical priests or the judge (*shofet*) in charge at the time, and the verdict is to be followed scrupulously. The rabbis understood themselves to be the "judge" in charge at the time. Not only, however, did Deuteronomy 17 provide scriptural warrant for the rabbis to serve as authoritative judges and interpreters of God's will for their community; in their view, it also served to disable any recourse to charismatic figures who might claim oracular or prophetic knowledge of the divine will. There was one legitimate path to knowledge of God's will, and that path passed through the rabbis, their interpretation of God's Torah, and their articulation of his normative demands in the form of *halakhah*.

The rabbis' halakhic program was also an alternative to the zealotry and nationalism that had exacted so high a price in the wars with Rome, especially the Bar Kokhba revolt (132–35 CE). The *halakhah* focused inward on the quest for piety and sanctity in the belief that God would bring an end to the dominion of the idolaters when God would see fit. Certainly, the rabbis retained the national hope for restoration and the rebuilding of the Temple – but these things would happen in God's own time. The task of the community until the final redemption was dedication to the life of *halakhah*, which offered a blueprint for *imitatio dei*.

Rabbinic texts that depict the rabbis as *innovators* introducing reforms to meet the challenges of a new era stand in tension with the following tannaitic tradition that draws a direct and unbroken line of cultural transmission from the biblical past to the rabbinic present:

m. Avot 1

Moses received the Torah at Sinai and handed it down to Joshua, and Joshua to the elders, and the elders to the prophets, and the prophets to the men of the great assembly.

The latter used to say three things: Be deliberate in judgment, raise up many disciples, and make a (protective) fence around the Torah.

Simeon the Righteous was one of the last of the Men of the Great Assembly.

He used to say: The world is based upon three things: The Torah, divine service, and acts of loving kindness.

Antigonus of Sokho received from Simeon the Righteous.

He used to say: Do not be like servants who serve the master in the expectation of receiving a reward, but be like servants who serve the master without the expectation of receiving a reward, and let the fear of heaven be upon you.

Yosi b. Yo'ezer of Zeredah and Yosi b. Yoḥanan of Jerusalem received from them [Simeon the Righteous and Antigonus of Sokho].

Yosi b. Yo'ezer used to say …[23]

Yosi b. Yoḥanan of Jerusalem used to say …

Joshua b. Peraḥiah and Nittai the Arbelite received from them [the foregoing pair].

Joshua b. Peraḥiah used to say …

Nittai the Arbelite used to say …

Judah b. Tabbai and Shimeon b. Shetaḥ received from them [the foregoing pair].

Judah b. Tabbai used to say …

Shimeon b. Shetaḥ used to say …

Shemayah and Avtalion received from them [the foregoing pair].

Shemayah used to say …

Avtalion used to say …

Hillel and Shammai received from them [the foregoing pair].

Hillel used to say: Be one of the disciples of Aaron, loving peace and pursuing peace, loving one's fellow beings and bringing them near to Torah …

He also used to say: If I am not for myself, who is for me; but if I am for myself alone, what am I; and if not now, when? …

Shammai used to say: Make your Torah [study] a regular habit. Speak little but do much, and receive all men with a pleasant countenance.

Hillel also used to say …

R. Yoḥanan b. Zakkai received from Hillel and Shammai

He used to say: If you have learned much Torah, do not claim credit for yourself, because it was for this purpose that you were created.

R. Yoḥanan b. Zakkai had five disciples and they were these: R. Eliezer b. Hyrcanus, R. Joshua b. Ḥananiah, R. Yosi the priest, R. Simeon b. Netana'el, and R. Eleazar b. Arakh …

They each said three things …[24]

Tractate *Avot*, one of the sixty-three tractates of the Mishnah, opens with a clear assertion of continuity across the centuries.[25] The text states that Moses received Torah at Sinai and transmitted it to Joshua, beginning a sequence of reception and transmission that continued through the elders to the prophets, to the men of the Great Assembly (in the time of Ezra) among whom was Simeon the Righteous (third century CE). The transmission continued from Simeon the Righteous and his disciple Antigonus of Sokho through five pairs of teachers – the last being the famous pair Hillel and Shammai. Hillel and Shammai transmitted Torah to R. Yoḥanan b. Zakkai who lived at the time of the destruction (70 CE) and who, in turn, transmitted Torah to five disciples, and so on.

Beginning with the men of the Great Assembly, each "link" in this chain of transmission is reported to have said three things which are then cited – generally pithy aphorisms. Additional teachings are reported in some instances, and the teachings of R. Yoḥanan's five disciples (first–second century CE) as well as those of later sages (second century CE) continue in the ensuing paragraphs. It would appear, then, that it is not only the Written Torah that is transmitted from master to disciple but additional oral teachings (the Oral Torah).

This text is one among many texts which position the rabbis as at once the sole legitimate recipients of the nation's ancient heritage and its expounders. The rabbis' Oral Torah – a massive collection of teachings, traditions, and laws that elaborate and interpret the Written Torah – is represented as continuous with God's revelation to Moses at Sinai. Various rabbinic sources make the same claim in different ways. According to a few accounts, the Oral Torah in its entirety – Mishnah, Talmuds, and midrash – was revealed in full at Sinai and relayed orally alongside the Written Torah.[26] Other rabbinic texts represent the Oral Torah as immanent within the Written Torah and developing gradually from it over the course of centuries, particularly through the application of divinely

revealed interpretive rules.[27] Despite local differences, these rabbinic accounts of the origin of the Oral Torah agree on two points: first, the Oral Torah is rooted directly or indirectly in God's revelation to Moses at Sinai; second, because the Oral Torah develops and completes the Written Torah it is essential to a full and proper understanding of God's will as expressed in the Written Torah.[28]

The paradoxical idea that the Torah revealed at Sinai is both divine and yet completed through human elaboration and interpretation is expressed by the following pair of rabbinic assertions: on the one hand "the Torah is from heaven,"[29] but on the other hand it is "not in heaven" any longer.[30] In other words, because the Torah is from heaven, it expresses the divine will and is underwritten by divine authority; but because the Torah is no longer in heaven, the interpretation of the text so as to articulate and elaborate the divine will that it conveys is an ongoing task that has been given over to humankind or, to be precise, to the rabbis.

M. Avot 1:1's portrait of the seamless transmission of a stable tradition masks a radical discontinuity. The content of the tradition that is transmitted is not constant, but grows through the addition of new teachings. Moreover, the chain of transmission of Torah presented in this mishnah, omits the one group biblically appointed to teach Torah to Israel – the priestly class (Lev 10:11) – and includes another group – the rabbis – who appear nowhere in biblical tradition. Finally, certain formal, thematic, and textual elements resonate with the text's Greco-Roman milieu as distinct from its biblical past. The pedagogical ideal of oral transmission from master to disciple is consonant with the master–disciple relationship at the heart of Greco-Roman *paideia* (education). As noted already by Henry Fischel, many of the aphorisms in *m. Avot* bear a striking similarity to Greek *chreia* in both form and content.[31] In addition, the list of sages may be compared to the *diadoche* texts of Greco-Roman philosophical schools – succession lists of recognized teachers of a particular school beginning with its founder. Such succession lists were also composed by early Christian writers from the second century CE on (e.g., Justin, Irenaeus, and Athanasius) as an authority-conferring strategy. Indeed, the combination of a series of *chreia* and a succession list is also found in Hellenistic literature.[32]

Thus, while the theme of continuity is predominant in *m. Avot*, markers of discontinuity as well as contemporary cultural influence[33] are clearly evident. Discontinuity comes to the fore in another very famous passage from the Babylonian Talmud. In this fanciful story, a rabbinic author imagines a time-travel encounter between the biblical Moses and the second century CE rabbinic master R. Akiva, an encounter that thematizes the rabbis' sense of their own tremendous distance and difference from the world of biblical Israel:

> Rav Judah said in the name of Rav: "When Moses ascended to heaven [to receive the Torah] he found the Holy One, blessed be He, engaged in affixing [decorative] crownlets to the letters." Moses said, "Lord of the Universe, why do you bother with this?" He answered, "There will arise a man at the end of many generations, Akiva b. Joseph by name, who will expound upon each crownlet heaps and heaps of laws." "Lord of the Universe," said Moses, "allow me to see him." He replied, "Turn around." Moses went and sat down behind eight rows [and listened to the discussions]. Not being able to follow their arguments, he was depressed; but when they came to a certain topic and the disciples said to the master, "Whence do you know it?" and the latter [R. Akiva] replied, "It is a law given unto Moses at Sinai," Moses was comforted. Thereupon he returned to the Holy One, blessed be He, and said, "Lord of the Universe, You have such a man, and You give your Torah by me!" He replied, "Be silent, for such is My decree." Then Moses said, "Lord of the Universe, You have shown me his Torah, now show me his reward." "Turn around," said He, and Moses turned around and saw them weighing out his flesh at the market-stalls. "Lord of the Universe," cried Moses, "such Torah, and such a reward!" He replied, "Be silent, for such is My decree."
>
> (*b. Menahot* 29b)

According to the story, Moses ascends to heaven to bring the Torah to Israel and finds God attaching final calligraphic flourishes to the text. When God explains that a man will later derive numerous laws from these seemingly meaningless squiggles, Moses asks to see the man. Transported to the second-century CE schoolhouse of R. Akiva, he sits with the least skilled students where he is at a complete loss to understand the proceedings. Moses, the very one to whom God entrusted His Torah and the first to

teach Torah to Israel, does not recognize that Torah in the hands of a rabbinic sage, a midrashic virtuoso, some 1,500 years later. The story signals a rabbinic awareness of the yawning gulf that separates the rabbis' world from the Torah of Moses and the world of biblical Israel. That this discontinuity is a cause of some anxiety is reflected in the sense of alienation and depression experienced by Moses, relieved only when R. Akiva comes upon a law he is unable to derive by means of his complex exegesis of Scripture. The law must be accepted, independent of scriptural authority, as a law stretching back to Moses at Sinai – a fact that comforts Moses. Despite an overwhelming impression of radical discontinuity, the story assures the reader of some degree of continuity, however attenuated. And yet the tragic fate that meets R. Akiva, who was martyred by the Romans during the Bar Kokhba revolt, raises the possibility that the rabbinic halakhic enterprise, even if divinely underwritten, is a dangerous one.[34]

Thus, the theme of discontinuity is openly acknowledged in some rabbinic sources (such as *b. Menahot* 29b) and denied in others. Open acknowledgment of discontinuity may be seen in *m. Hagigah* 1:8, which likens certain rabbinically elaborated laws to mountains hanging by a thread (because they are voluminous but have little scriptural support), while others simply float in the air and have no scriptural support whatsoever. By contrast, there are entire works of halakhic midrash (legal exegesis) that seek to demonstrate a biblical basis for rabbinic laws. In other words, rabbinic halakhic literature see-saws between *disclosing* the discontinuous and innovative character of rabbinic law and *concealing* it. The tension between disclosing and concealing the discontinuity between Scripture and *halakhah* is reflected in a variety of formal textual practices which in turn may be connected with a range of cultural functions.

The Textual Practices of Rabbinic Law: Questions of Form and Function

Michael LeFebvre has argued that attempts to conceal the discontinuity between rabbinic *halakhah* and the Written Torah by linking rabbinic laws to the Written Torah reflect not only an anxiety over *halakhot* that appear to "hover" in the air without scriptural support but also a shift in the perception of Scripture from a collection of descriptive legal teachings to a prescriptive legal code.[35] According to LeFebvre, law writings in antiquity exemplify one of two paradigms. In the *non-legislative paradigm*, written law

> may be a *description* of what law looks like, but what is written is not viewed as *being* "the law"… The idea of law, in these cultures, is abstract like the ideas of justice, truth, and righteousness. All of these ideas can be *discussed* in writings, but none of them are ever supposed to be *embodied* by a text … There is a distinction between actual law and law writings in the non-legislative society.[36]

By contrast, in legislative societies,

> actual law is identified with written law. A law writing is more than a portrait of law: it is law … Law is written down and becomes a *source* for legal practice … The magistrate's task is no longer to discern justice, but to apply what the law writings prescribe for a certain kind of case. In such a system, law is by definition a text. Law is no longer an abstract reality like justice, righteousness, and truth, but is textual by nature. Legal practice in such a society appeals to texts as the source of rulings.[37]

Many scholars agree that Mesopotamian law writings exemplify the first paradigm. They were not primarily regulatory or legislative in character; rather these writings served academic, pedagogical, monumental, propagandistic, or other functions.[38] The *legislative* paradigm, on the other hand is exemplified by Athenian law. According to LeFebvre, Athens is "a known source for the concept of regulatory law writing in the ancient world."[39] Reforms at the end of the fifth century led to a new use for law writings.[40] Ancestral legal traditions were harmonized and a single consistent code was produced and written on the walls of the royal stoa;[41] unwritten custom was stripped of legal force, and courts and magistrates had to follow and enforce only written laws.[42] To

paraphrase LeFebvre, Athens established not merely the rule of law but the rule of *written* law – law writings as the prescriptive source of law.

LeFebvre argues that like the cuneiform law writings, the three legal corpora of the Bible were primarily idyllic and non-regulatory[43] and were not the *source* of law. Law emerged from cases and judgments, as may be seen in biblical narratives in which justice is achieved not by consulting the Torah as prescriptive legislation but by relying on the wisdom and discernment of elders, judges and the king (e.g., 1 Kgs 3).[44] In due course, however, biblical law writings would come to be viewed as legislative, along the lines of Athenian prescriptive law. Although there is considerable debate over the time at which and the process by which the transition from a descriptive to a prescriptive view of Israel's law writings occurred,[45] LeFebvre argues that the most self-evident hypothesis is also the most likely:[46] biblical law writings shifted from the Ancient Near Eastern model of idyllic texts lacking regulatory force to the Greek model of legislation, during a period of intense Greek influence – the Hellenistic era (from the third century **BCE** on).

The perception of the Torah as a prescriptive law code, and thus the source of law, would become axiomatic for the rabbis, creating pressure to develop textual practices to (1) derive law from the biblical text where possible and (2) provide some alternative account of the authority of long-standing customary practice and received traditions when derivation from Scripture was difficult.

It is against this background that we consider the two primary forms in which tannaitic legal literature presents its findings – mishnaic and midrashic. The mishnaic form takes its name from the Mishnah, which contains many independent statements of law and does not typically cite a biblical text as the source for its legal rulings. By contrast, in midrashic works, rabbinic legal teachings are presented as arising from the (often creative) interpretation of Scripture.[47] Compare, for example, the following legal teaching as it appears in the Mishnah (where no biblical source text is provided) and in the roughly contemporaneous work of halakhic midrash, the *Mekilta deR. Yishmael* (where a biblical source text is provided):

***m. Hagigah* 1:1**

All are commanded to appear before the Lord excepting a deaf-mute, an imbecile, a minor, one of doubtful sex, an androgyne, women, slaves that have not been freed, a man that is lame or blind or sick or aged, and one that cannot go up [to Jerusalem] on his feet.

***Mekilta* Kaspa 20 (ed. Horovitz-Rabin, 333)**

"*Three times in the year you shall hold festivals [regalim] for me ... Three times in the year all your males shall see the Lord God"* (Ex 23:14–17): "Three *regalim*" – this applies to those who can travel on foot [*regel*]; "shall see" – this precludes the blind; "your males" – this precludes the women; "all your males" – this precludes the aliens, the individual of doubtful sex [*tumtum*], and the androgyne. "[*When all Israel comes to appear before the Lord your God*] *you shall read this law before all Israel in their hearing"* (Deut 16:11): "All Israel" – to preclude the sick and the minor. On the basis of this, they stated [in the Mishnah]: "All are commanded to appear before the Lord excepting a deaf-mute, an imbecile, a minor, one of doubtful sex, an androgyne, women, slaves that have not been freed, a man that is lame or blind or sick or aged, and one that cannot go up [to Jerusalem] on his feet."

According to rabbinic tradition, the obligation to appear in the Jerusalem Temple during the three pilgrimage festivals does not extend to various classes of people. The list of those who are excluded is formulated as an independent legal teaching in the Mishnah (*m. Hagigah* 1:1); in the *Mekilta* the list is derived from rabbinic interpretation of scriptural verses that refer to the pilgrimage festivals. While the interpretative methods employed are creative, the claim that the list was derived from a close reading of Scripture is plausible.[48]

Contrast the following pair of teachings.

***m. Shevi'it* 2:7**

Rice, millet, poppy seed, and sesame that have taken root before a new year are tithed after the manner of the past year, and they are permitted in the seventh year.

***Sifra* Behar 1:7 (ed. Weiss 105c)**

> Whence do we learn that rice, millet, poppy seed, and sesame that have taken root before a new year, are tithed after the manner of the past year and are permitted in the seventh year? Scripture teaches, saying "[*six years you may sow your field, and six years you may prune your vineyard and] gather in its produce*" (Lev 25:3) – on the seventh year.

The biblical laws of the sabbatical year make no mention of rice, millet, poppy seed, and sesame, and the Mishnah fills that gap with a legal teaching that clarifies their status (*m. Shevi'it* 2:7). The *Sifra* links the law concerning these grains to a scriptural verse (*Sifra* Behar 1:7), but the link is implausible. It is difficult to see how the verse in question reveals information about rice, millet, poppy seed, and sesame.[49]

The question that has long occupied scholars is which came first – the midrashic form or the mishnaic form? And what does the answer to this question tell us about the shift from a descriptive to a prescriptive view of Scripture? Some scholars argue that the prescriptive view of Torah necessitated the development of midrashic techniques of exegesis in order to derive new law from the written text.[50] Eventually, for pedagogical or other reasons, the derived legal teachings were transmitted without their biblical derivations in the form of independent statements of law (disembedded mishnah) organized by topic rather than the sequence of the biblical text. The first pair of texts cited above appears to fit this model. On this view midrash preceded mishnah and, owing to a prescriptive view of Scripture, was generative of law (*midrash yotser*).

However, some date the shift to a prescriptive view of Torah to a much later period. These scholars argue that ancient Jews had long-standing customary traditions that did not originally derive from interpretation of the biblical text. The shift to a prescriptive view of Scripture necessitated the creation of midrashic techniques[51] to link existing legal practices retroactively to Scripture. Ingenious exegetical tools, including hyperliteralism and acontextual interpretation of single words or phrases, were developed to align independent inherited traditions with Scripture (concealing the discontinuity), though on occasion the rabbis openly admitted that some laws had little or no scriptural basis (disclosing the discontinuity). The second pair of texts cited above appears to fit this model. On this view mishnah preceded midrash and with the rise of a prescriptive view

of the written Torah, midrash "attached" existing *halakhot* to Scripture in order to bolster the authority of law that lacked a scriptural base (*midrash meqayyem*).

Phenomenologically speaking, it is clear that rabbinic legal literature employs midrashic techniques in two ways – to generate, extend, define, refine, or adjudicate legal teachings on the basis of the written text on the one hand (*midrash yotser*), and to justify existing legal teachings or customary practices that were not in the first instance derived by exegesis of the written text on the other (*midrash meqayyem*). Rather than understanding these two modalities as successive steps in a diachronic development (in which midrash precedes and produces mishnah, or mishnah precedes and creates the need for midrash), some recent scholars argue that by the rabbinic period at least, the two modalities represent the diverse approaches of competing schools.

The scholar who has done the most work to identify and characterize distinct approaches to Scripture as a source of law is Azzan Yadin-Israel. Yadin-Israel argues that midrashic works traditionally associated with the school of the second-century CE *tanna* R. Akiva on the one hand[52] and the school of his contemporary R. Yishmael on the other[53] exemplify these two diverse tendencies. For the school of R. Akiva (as exemplified in the *Sifra* text cited above), midrash is a practice that serves not to generate *halakhot* from Scripture but to anchor existing *halakhot* within the scriptural text. Working without regard for a contextual or commonsense construal of the text, the interpreter takes an active role in locating independent legal traditions in Scripture. For the school of R. Yishmael (as exemplified in the *Mekilta* text cited above), Scripture is the supreme authority regarding its own meaning, and the interpreter's role is a passive one. The interpreter submits to Scripture rather than the other way around and is guided by the text in explicating its legal teachings. Thus, midrash is understood by R. Yishmael to be a mode of exegesis that generates legal conclusions from Scripture in a disciplined manner constrained by the linguistic and semantic markers of Scripture itself.[54]

That the rabbis were themselves aware of these competing perspectives may be seen in *Sifra* Zav 8:1 (ed. Weiss 33a) where R. Yosi ha-Galili expresses irritation at R. Akiva's hyperliteral interpretation of the word "kol" ("all"). Similarly, in *Sifra* Tazri'a 13:2 (ed. Weiss 68b), R. Yishmael objects to R. Eliezer's overzealous interpretation of a *vav* ("and") and declares "it is as if you are saying to the biblical text, 'Be silent, while I give an interpretation!'" In each of these cases, a *tanna* from the school of R. Yishmael

expresses shock when a *tanna* from the school of R. Akiva employs midrashic pyrotechnics to forcibly locate a legal teaching in Scripture.

According to Yadin-Israel, the Akivan method ultimately prevailed over that of the school of R. Yishmael. And yet, there is a certain irony here. For the Akivan school, inherited legal traditions (*paradosis*) enjoyed an authority independent of Scripture – hence the need to preserve them. But in order to preserve them and bolster their authority in the eyes of those who view Scripture as the sole authority on matters of law, the Akivan school employed extreme interpretive techniques that linked independent traditions to scriptural verses. In so doing, they granted victory to the Yishmaelian perspective according to which derivation from Scripture is the ultimate authority, yet they did so in Akivan terms, through noncontextual interpretive techniques.[55]

Ironies aside, as Yadin recognizes, by amoraic times, scriptural authority had become the normative authorizing model for legal teachings. Increasingly, sages are lauded as Torah scholars rather than faithful tradents of extra-textual traditions. At the same time, other rhetorical techniques for shoring up the authority of inherited traditions or customary practices that lacked a scriptural base were devised, such as the declaration that a certain law is a *halakhah le-Moshe mi-Sinai*, i.e., a law [given directly and orally] to Moses at Sinai. This designation developed as a way to confer upon laws that lack any scriptural base, an authority equal to that of Scripture. The creation of this designation is an accommodation to the ascendancy of the prescriptive view of Scripture as the source of law; it offers an alternative Sinaitic genealogy for laws not easily derived from Scripture.[56]

We have examined a set of textual practices that developed as Scripture came to be viewed as prescriptive legislation and as the ultimate source of normative authority: midrashic elaboration of minute details of scriptural language to generate new law, retroactive identification of scriptural source texts for originally independent legal teachings, and rhetorical assertions of Sinaitic origins for legal teachings and customary practices lacking a plausible scriptural source. We consider now additional textual practices and formal distinctions that followed upon the shift toward a prescriptive understanding of the nature of Scripture.

Law and Narrative, Halakhah and Aggadah in the Mishnah

As noted in Chapter 1, laws and narrative are inextricably interwoven in Hebrew Scriptures. Drawing on Robert Cover's discussion of the interdependence of law and narrative,[57] Steven Fraade notes that "the divine commandments are themselves central events in the biblical soteriological narrative, while that narrative confers both historical and teleological meaning upon the commandments."[58] However, the rising perception of the biblical text as a law book led to the disintegration of the vital link between law and narrative as early readers sought to extract and organize the legal teachings from the text. This isolation of biblical law from biblical narrative had the unintended consequence of enabling "the reductionist dichotomization of Old Testament Law (and 'legalism') vs. New Testament Spirit"[59] that would underwrite the supersessionist and antinomian impulses in Christianity.

As Fraade points out, although Second Temple period texts disembed biblical laws from their narrative settings (often to integrate them into the new narratives of the interpreting community), it is only in rabbinic texts "that we find in Judaism the first terminological designation of and differentiation between law and narrative, as *halakhah* and *aggadah* respectively, and with it, the first self-conscious reflection on their interconnection."[60] While *halakhah* refers to the normative actions or rules by which Jews should conduct their lives and is often translated "law," *aggadah* (from the verb "to tell") refers to material of widely varying genre: sage stories, parables and legends, folktales, ethical teachings, and more. Some rabbinic works are primarily, but not wholly, halakhic, and others are largely aggadic in character; yet many halakhic works also contain aggadic elements and much *aggadah* is implicitly normative. *Halakhah* and *aggadah* are thus the warp and woof of the fabric of rabbinic learning and normativity.

Even as the distinction between the two genres is asserted in rabbinic texts, it is resisted by programmatic statements and textual practices that both stress and exemplify the interdependence of the two modalities.[61] Thus, programmatic statements in tannaitic sources differentiate *halakhah* and *aggadah* as modes of study but emphasize their common divine origin or integrate them in the paideic performance of the ideal sage and teacher.[62] *Sifre Deut* 306, for example, compares the Torah to rain. Just as rain falls on diverse trees imparting each with its distinctive flavor, so the words of Torah come from

a common source but give rise to *miqra'* (Scripture) and *mishnah* (oral teaching), *halakhot* (laws), and *haggadot* (narratives).[63] The same unit goes on to describe the integration of these diverse modalities in the sage, who is not truly known until he teaches *mishnah, halakhot*, and *haggadot*.

Fraade cites *Sifre Deut* 48 as evidence for the view that legal expertise alone is insufficient for the sage. This midrash on Deut 11:22 "*If, then, you carefully keep all the commandment*" concludes:

> For you should not say, it is enough for me that I have studied laws (*halakhot*). Scripture teaches [in Deut 11:22], "commandment" [connoting one thing], "*the* commandment" [connoting a second thing], "*all* the commandment" [connoting a third thing]: study *midrash, halakhot*, and *haggadot*.

The midrash, which assumes a principle of extreme verbal economy in the formulation of the verse, understands the "otiose" definite article "the" and particle "all" to signal elements beyond the commandments, or laws, that must also be kept, specifically, aggadot. Similarly, the central importance of both *halakhah* and *aggadah* is asserted in *Sifre Deut* 317 which compares the *halakhot* to the body of the Torah and the aggadot to wine that draws the heart of the person. As Fraade notes:

> The laws may be more substantive, but it is the narratives that have the greater emotional draw, and are, therefore, necessary to sustain the laws. Indeed, midrashic commentary often serves up a medley of the two, reading law into biblical narrative and narrative into biblical law in order for the one to reinforce the other.[64]

In addition to discussing these programmatic statements, Fraade identifies four textual practices by which the Mishnah, the paradigmatic rabbinic text of "disembedded law," renarrativizes the law.[65] First, the chain of tradition set forth in *m. Avot* (see discussion above) embeds the law in a master narrative that extends the biblical narrative into the Mishnah's own historical present. Second, the Mishnah includes narrative anecdotes (*ma'asim*) featuring rabbinic figures, that both exemplify and problematize the Mishnah's rules (see below). Third, the Mishnah often presents its rules in a dialogical format that engages the reader in a dynamic of legal and narrative transaction. Fourth,

the Mishnah includes lengthy units that describe cultic, ritual, judicial, and penal procedures in narrative form. This is especially true of procedures that are no longer historically operative such as the temple rituals described in tractates *Yoma, Tamid*, or *Sotah* or the judicial executions described in tractate *Sanhedrin*.

We have already considered the first of these textual practices – (i) the master narrative in *m. Avot* 1. The remaining three textual practices (ii, iii, and iv below) require further discussion.

ii. Rabbinic Legal Anecdotes

In recent studies of the Mishnah's deployment of narrative elements in the presentation of halakhic norms, Moshe Simon-Shoshan considers the second textual practice identified by Fraade as a means for renarrativizing the law: narrative anecdotes featuring rabbinic figures.[66] He identifies three main genres of rabbinic legal anecdotes: the case story, the etiological story, and the exemplum, each of which underscores the centrality of rabbinic authority.[67] In a case story, a rabbi or group of rabbis decides a matter whose legal status is unclear – "It happened that event X occurred and Rabbi(s) Y said we do Z …" Such stories establish the authority of rabbis to interpret the law in uncertain or unknown circumstances. Etiological stories recount past events and crises that led the rabbis to alter the law: "Originally (*barishonah*) the practice was X but when event Y occurred, the rabbis made an enactment changing the practice to Z." Etiological stories present the rabbis not merely as interpreters of the law but as true innovators, making new law in response to changing times. Finally, exempla portray the rabbis as righteous individuals who are knowledgeable in the law and whose actions are precedents for proper halakhic behavior. Simon-Shoshan writes:

> Classical rabbinic literature is one of the few major Western legal corpora in which *exempla*, narratives about the day-to-day practices and deeds of great legal scholars, are given the force of precedent. This inclusion of *exempla* raises the status of these sages from mere interpreters and adjudicators of the law to actual embodiments of the law, individuals whose very actions inevitably bear witness to the proper course of behavior as defined by the *halakhah* (the system of rabbinic law).[68]

While case stories and etiological stories are found in Roman legal sources such as Justinian's *Digest*, exempla do not appear. Simon-Shoshan argues that the absence of exempla is a symptom of the secular nature of Roman law. In secular legal systems the jurist's rulings and innovations are authoritative but the actions he takes in his personal life claim no special authority. The presence of exempla in rabbinic literature is symptomatic of the fact that the rabbis were not simply jurists but also spiritual and religious leaders.[69] Exempla, in the form of holy men, are found in ancient Mediterranean civilization more generally, and rabbinic exempla stories fit into this model. Exempla reflect the rabbis' capacity as holy men transmitting ethics and values, above and beyond their role as jurists conveying a knowledge of the law. Simon-Shoshan cites Peter Brown's assertion that Jews and Christians in antiquity adopted the model of the Greco-Roman exemplar but transformed it: the righteous man of God had a revelatory quality about him and was able to bring God himself into the present.[70] In the spirit of the dual rabbinic claim that since the destruction of the Temple God has only the four cubits of the *halakhah* and prophecy has passed to the sages, Simon-Shoshan writes:

> In a world in which God's Temple had been destroyed, the rabbis held themselves out as having the potential to connect the Jews of their time to the God of their fathers. For the rabbis the essential element of the covenant binding together God and Israel is the law … A rabbi's mastery of *halakhah* thus makes him more than a technical expert, it makes him an embodiment of the divine will on earth. For the rabbis, their roles as jurists and their roles as holy men could not be disentangled. As such, they functioned as legal exemplars whose day-to-day actions and deeds were halakhic precedents worthy of being recorded and studied.[71]

According to Simon-Shoshan, the Babylonian Talmud explores two problems inherent in legal exempla. The first is the potential for observers to misinterpret the exemplar's actions and to reach an incorrect conclusion regarding the law. Because of the difficulty of properly interpreting his actions, the true sage should reduce ambiguity and act in ways that clearly signal the legal positions that underwrite his actions. A second problem, which arises from the fact that *halakhah* regulates every aspect of human life,

is the temptation to engage in constant surveillance of rabbis in order to derive legal instruction from their every deed.[72] This idea is parodied in talmudic stories in which students observe their teachers even in the privy and in the bedroom to learn from their most personal and intimate behaviors![73]

iii. The Mishnah's Dialogical Format

A great deal of the material contained in the Mishnah is encoded in the form of unresolved disputes creating a dialogical text, a form that stands in tension with the assumed prescriptive function of law. Paralleling the Mishnah's dialogical presentation of legal views, the tannaitic midrashim are characterized by a dialogical presentation of multiple derivations of the law from Scriptural sources. At times, these views are merely set alongside one another; at times, tradents are depicted as actively engaging with one another's views. As noted above, post-tannaitic sages from the third to fifth or early sixth centuries occupied themselves with detailed study of the Mishnah, analyzing its individual paragraphs in order to explicate, elaborate, extend, harmonize, differentiate, or delimit the various views contained in it. The statements (*memrot*) generated by these sages, as well as related and unrelated aggadic material, were ultimately woven together by later anonymous editors (*stammaim*) into highly dialogical superstructures of commentary and argument known as *gemara* (which means study).[74] The dialogical character of the Mishnah thus continues in the relatively concise comments, glosses, and explanations of the Mishnah found in the Palestinian Talmud and reaches its peak in the more elaborate and developed *sugyot* (units of discussion; sing. = *sugya*) of the Babylonian Talmud.

Many of the Babylonian Talmud's *sugyot* are literary and intellectual masterpieces, carefully crafted tours of a set of related rabbinic teachings, biblical verses, legal principles, hypothetical test cases, and aggadic material (about one-third of the Babylonian Talmud is *aggadah*). Although most of the material is presented in dialogue form (questions and answers, objections and rejoinders, refutations and counter-refutations), it is quite clear that talmudic discussions do not generally record actual conversations, if only because the participants in these "debates" often derive from different time periods and geographical regions. Rather, anonymous editors have brought together a wide variety of source materials in an act of grand orchestration.

The dialogical format is a clear *rhetorical* choice by the editors of the main works of rabbinic literature. The question is why was it chosen? Or perhaps, what is the effect and function of this rhetorical form? To some degree, the multiple opinions, intense dialectics and argumentation for which rabbinic texts are so famous, are an accident of history. Catherine Heszer[75] argues that for much of the tannaitic period (70–220 CE) and even amoraic period (third–fifth/sixth centuries CE), the rabbinic movement was a small, socially fragmented network of individuals lacking formal institutions for legal discussion and decision so that contacts between rabbis were informal and episodic. The rabbinic estate was thus not an organized corporate group but a loose network, making it impossible to fix the *halakhah* or achieve a majority opinion on any matter. Individual sages and their students studied the ancient traditions, generating diverse legal opinions on a wide array of subjects each of which might have its followers. These diverse teachings were later gathered together in rabbinic texts (such as the Mishnah). The later editors of rabbinic tradition employed two distinct strategies to cope with the existing diversity. On the one hand, they created anonymous views to fix the *halakhah* and marginalize dissenting views; on the other hand, they accepted disputes and controversy and legitimated them with a theory of Torah as containing multiple possible meanings and interpretations (polysemy; see below). Both the effort to establish unity and the effort to legitimate diversity, Heszer argues, are textual fictions operating simultaneously in response to a fundamental social fragmentation. This, we might say, is the reality behind the rhetoric.

What does the simultaneous deployment of these two contradictory strategies – establishing unity (by formulating anonymous rulings) and the enshrining diversity (by enshrining legal disputes) – tell us about the rabbinic legal project? We consider first the element of diversity. The overall impression created by presenting diverse views in dialogical form is one of dynamism, pluralism, and controversy rather than the stasis, univocity, and uniformity that might be expected of a system of law underwritten by the will of a singular divine being (although on this contested point, see the discussion of divine law below).

Some sources take a negative view of the phenomenon of disputes and contradictory views:

***t. Hagigah* 2:9**

> Once there were many disciples of Hillel and Shammai, who did not serve [their masters, i.e., study] sufficiently. There grew up many divisions within Israel, and the Torah became two Torahs.

However, many – particularly amoraic – sources take a positive view of what some scholars refer to as legal pluralism. Richard Hidary provides a summary of scholarship that, to varying degrees and with varying emphases, construes a small set of programmatic texts as legitimating and even celebrating the rabbinic tolerance for plurality of legal opinions in a variety of ways.[76] In some of these texts, multiple legal teachings, even if contradictory, are declared valid because they derive from a common divine source (see *b. Hagigah* 3b which states that all contradictory opinions were given by a single shepherd: God).[77] In other cases, multiplicity (or perhaps, indeterminacy) appears to be an essential feature of the initial divine revelation itself or at least an essential and divinely approved attribute of the interpretive endeavor. The following famous passage from *b. Eruvin* 13b celebrates the indeterminacy of God's revelation and retrojects the ideals of debate and pluralism onto the formative period of Yavneh immediately after the destruction.

> R. Abba stated in the name of Samuel: For three years there was a dispute between Bet Shammai and Bet Hillel, the former asserting, "The *halakhah* is in agreement with our views" and the latter contending, "The *halakhah* is in agreement with our views." Then a heavenly voice came forth, announcing, "These and these are the words of the living God, but the *halakhah* is in agreement with the rulings of Bet Hillel." Since, however, both are the words of the living God, what was it that entitled Bet Hillel to have the *halakhah* fixed in agreement with their rulings? Because they were kindly and modest, they studied their own rulings and those of Bet Shammai, and were even so [humble] as to mention the actions of Bet Shammai before theirs.

This passage reverses *t. Hagigah* 2:9 cited above and asserts that controversy between the disciples of Shammai (Bet Shammai) and the disciples of Hillel (Bet Hillel) in the first century CE was not the result of inept students; rather, it was a reflection of divine

polysemy (conveying more than one meaning at once) or at least, indeterminacy. As a consequence, even contradictory interpretations of the law can be declared "the words of the living God." Several talmudic traditions suggest that God's revelation is pregnant with multiple, even contradictory, meanings, all of which are valid. For example, *y. Sanhedrin* 4:2, 22a states that God did not tell Moses what the fixed *halakhah* is but instituted a majority rule principle so that the Torah would be interpreted (*nidreshet*) forty-nine ways in one direction and forty-nine ways in the other (cf. *Leviticus Rabbah* 26:2; and *Midrash Tehillim* 5:71 on Ps 119). Similarly, *Numbers Rabbah* 13:15 speaks of "seventy facets" to the Torah, supporting the fundamental legitimacy of diverse interpretations and determinations of the law. Whether these statements are tantamount to the claim that the Torah is multiform *in its essence* (rather than merely in its interpretation), remains a subject of scholarly dispute.

Also controversial is whether the rabbinic acceptance of pluralism is more ideal than real (more a literary phenomenon than a historical phenomenon).[78] Be that as it may, to assert the possibility and legitimacy of diverse interpretations of God's revelation even if only as an ideal has two important implications. First, intellectual inquiry and debate are more easily seen as supportive of, rather than antithetical to, the discernment of God's normative will and the pious life of Torah observance. Indeed, argument comes to be highly esteemed as leading to the greater comprehension and dissemination of God's teachings. The high value placed on argument and dialectical skill in rabbinic culture is illustrated in a poignant legend about the Palestinian *amora* R. Yohanan who fell into a deep depression when his intellectual sparring partner, Resh Lakish, died. Resh Lakish's great virtue had been to bring twenty-four *objections* to every teaching uttered by R. Yohanan so that through the ensuing dialectics and argumentation, Torah was advanced. The cultivation of Torah and the disclosure of God's normative will for Israel is best achieved in conversation with one who *disagrees*, who presses for reasons, who challenges and argues.

A second, and perhaps ironic, implication of the dialogical form and the concomitant acceptance of diversity and pluralism is ambivalence toward normativity itself. In this regard the distinction between *aggadah* and *halakhah* reasserts itself. Generally speaking, conformity in non-halakhic matters (*aggadah*) is less important to the rabbis than conformity in halakhic matters (praxis in all areas of life). The greater emphasis on

normativity in *halakhah* than in *aggadah* accounts for the popular characterization of classical rabbinic Judaism as an orthopraxy (requiring right praxis) rather than an orthodoxy (requiring right belief). Later rabbinic statements in particular assert that diverse opinions on speculative (aggadic) matters need not be adjudicated. However, in the realm of *halakhah*, the idea that God's multifaceted Torah engenders various equally valid interpretations sets up a genuine tension. How are communal norms of behavior to be established if more than one interpretation of God's law is possible? The following tradition addresses these questions.

m. Edduyot 1:4–5

> 4. Why are the opinions of Hillel and Shammai recorded [only] to be nullified? To teach the generations that one should not be insistent in his/her opinions, for the fathers of the world were not insistent in their opinions.
>
> 5. And why do we record the words of an individual among the many, when the law is [according to] the words of the many? Because if the court sees [as fit] the words of the individual, it may rely on them. But a court is not able to nullify the words of a fellow court unless they are greater in wisdom and number [than the fellow court]. If they are greater in wisdom but not number, or in number but not in wisdom, they are not able to nullify its words until they become greater in wisdom and number.

According to this text, the selection of one among a number of legitimate interpretations of God's law is effected by majority rule – a nod to normativity. But the defeated, or minority opinion is preserved and even studied, because it may be relied upon by future rabbinic authorities – a nod to pluralism.[79] One may ask, however, if defeated views are no less correct or even well-argued than the views endorsed by the majority, then on what basis does the majority determine the *halakhah*? *B. Eruvin* 13b, cited above, suggests that extra-legal considerations could tip the scales in favor of one view over another, a symptom of the fact that the law subserves larger ethical goals. Thus, in the case of Bet Hillel and Bet Shammai, Bet Hillel merited that the law should be decided according to their view because of their pious demeanor and inclusive study methods

(they cited their opponents' views first, presumably showing that they had taken them into consideration).

The value placed on procedure (majority rule and argumentation) and ethos over substance (formal "correctness") is thematized in the following oft-cited passage from *b. Metsia* 59a.

> [Regarding a certain kind of oven, R. Eliezer ruled that it is ritually pure and the sages rule that it is ritually impure.]
>
> It was taught: On that day, R. Eliezer responded with all the responses in the world, but they did not accept them from him. He said to them, "If the law is as I say, let the carob [tree] prove it." The carob uprooted itself from its place and went 100 cubits – and some say 400 cubits. They said to him, "One does not bring proof from the carob." The carob returned to its place.
>
> He said to them, "If the law is as I say, let the aqueduct prove it." The water turned backward. They said to him, "One does not bring proof from water." The water returned to its place.
>
> He said to them, "If it [the law] is as I say, let the walls of the academy prove it." The walls of the academy inclined to fall. R. Joshua rebuked them. He said to them, "When sages argue with one another about matters of law, what is it to you?" It was taught: They did not fall out of respect for R. Joshua, and they did not straighten up out of respect for R. Eliezer, and they are still inclined!
>
> He said to them, "If it is as I say, let it be proved from Heaven." A heavenly voice went forth and said, "What is your problem with R. Eliezer, since the law is like him in every place?"
>
> R. Joshua stood up on his feet and said, "*It is not in Heaven*" (Deut 30:12).
>
> What is "It is not in Heaven?" R. Jeremiah said, "We do not listen to a heavenly voice, since you already gave it to us on Mt. Sinai and it is written there, '*Incline after the majority*'" (Exod 23:2).
>
> R. Nathan came upon Elijah. He said to him, "What did the Holy One do at the time [of R. Joshua's and R. Jeremiah's bold statements)?" [Elijah] said to him, "He laughed and said, 'My children have conquered me, my children have conquered me.'"

The first-century *tanna* R. Eliezer is described as locking horns with the other rabbinic sages over the ritual purity status of a particular type of oven. R. Eliezer advances every argument he can think of, but the sages are not persuaded. He then resorts to miraculous feats to prove his view, but as the other sages wryly observe, these are not arguments and have no power to persuade. Finally, a heavenly voice indicates that the law is indeed as R. Eliezer says. To this R. Joshua boldly responds that the Torah is not in heaven, but on earth where it is to be studied and interpreted by humans through the tools of rational discourse, argumentation, and majority rule.

The late editors of this story dramatically assert not only that the majority have authority over the minority but that the sages' rulings arrived at through reasoned argumentation can defeat God – the very author of the instruction whose interpretation and application is under debate! No miracle, not even a heavenly voice, can legitimate or ground the authority of a legal view because, as noted above, athough the Torah may be *from* heaven, it is no longer *in* heaven. In other words, despite the Torah's divine origin, control over the interpretation and administration of the Torah has been ceded by God to admittedly fallible human beings who must follow proper legal processes of argumentation and majority rule. God has been locked out of the academy – or rather he is but one voice within the academy, a voice that can be overruled. God is depicted as reacting to this bold assertion of rabbinic legislative and interpretive authority with pleasure.

In the continuation of the story not cited here, R. Eliezer is punished by his colleagues with excommunication and subjected to some humiliation, presumably for failing to recognize that interpretation of God's instruction is determined by principles of rational argumentation and majority rule. Yet this overly harsh action is clearly disapproved by God, who strikes down R. Gamliel for issuing the excommunication. Majority rule is not a license for the expulsion and humiliation of the minority, since "these and these are the words of the living God." It is a procedural mechanism for the good order of the community and must be accompanied by an ethos of respect and compassion.

As we have seen, and as noted by Catherine Heszer,[80] even as they enshrine diversity and dialogism through the presentation of multiple traditions attributed to multiple tradents, rabbinic texts also establish unity by creating anonymous views that

appear to fix the *halakhah*, thereby resolving the tension between the desire for pluralism and the need for normativity. However, Steven Fraade suggests that anonymity in rabbinic literature serves to create a unique form of authorial voice and does not necessarily stand for editorial authority.[81]

Fraade describes various forms of ancient Jewish "authorhip": individual historical authorship (works attributed to an identifiable person such as Ben Sira, Philo, Josephus, Paul); pseudepigraphic authorship (works attributed to earlier biblical characters such as Enoch, Baruch or Ezra); and unattributed but historically located collective writings (such as the Damascus Document and other sectarian writings). According to Fraade, these three forms of authorial voice do not continue in "pure" form in the central texts of early rabbinic Judaism.[82] Rabbinic texts as wholes emerge from an anonymous and implicitly collective authorship; yet they contain traditions attributed to individual sages, creating a unique hybrid form:

> What, therefore, is *unique* to rabbinic collections, and might have seemed strange in their own historical contexts, is what we might call their hybrid quality of anonymity and attribution, of collective and individual voices …
>
> … it is the congruence of anonymity and attribution that is both characteristic of and unique to rabbinic literature as a whole, both with respect to its Jewish antecedents and with respect to contemporary non-Jewish writings, both Roman and Christian … On the one hand, rabbinic texts appear to claim, implicitly at least, *collective legal and interpretive authority*, while, on the other, they attribute their *diversity of legal and interpretive opinions* to individually named sages, thereby mixing up our heuristic models of types of authorial structures of narration and modes of self-presentation.[83]

Fraade sees this mix as a pedagogical strategy. The presence of attributed traditions

> serve[s] to remind us … that this is not merely a collective text of legal argument and scriptural interpretation, but a pedagogical medium that rhetorically engaged and formed *particular* rabbinic sages and their disciples, even while being the sole product or possession of *none.* If the rhetoric of scriptural citation and explication draw the commentary's audience into the words and worlds of divinely revealed

> Torah law, then the rhetoric of multiple interpretations and successive stages in logical argumentation, with partial attribution, draws them into the humanly constructed world of midrashic Torah teaching.[84]

The presence in rabbinic legal literature of various formal features (e.g., scriptural citation, dialogical presentation, attribution, anonymity) suggests that these works served several functions. The question of the purpose or function of the Mishnah is particularly salient as we consider the fourth textual practice by which the Mishnah renarrativizes law: the inclusion of units that describe cultic, ritual, judicial, and penal procedures in narrative form, many of which were no longer operative in the rabbinic period.

iv. Descriptive Units

The prescriptive view of Scripture created a special problem in the case of biblical laws that were no longer practicable after the destruction of the Temple. What was to be done with the many biblical laws regulating the sacrificial service, Temple-related purity practices, and the norms of conduct for the priestly class? What about laws that assume Israelite judicial and legal independence as well as control over the physical land and methods of food production – all in abeyance after the destruction? Remarkably, these laws were not ignored. On the contrary, two rabbinic strategies for coping with seemingly irrelevant biblical law develop in the centuries following the destruction. The first strategy that renarrativizes the law (and corresponds to Fraade's fourth textual practice) is exemplified in some parts of the Mishnah. The second strategy, which allegorizes the law, is exemplified by the Palestinian amoraic midrash, *Leviticus Rabbah*. We consider these two strategies in turn.

Even though the Temple was no longer operative at the time of the Mishnah's redaction, the Mishnah contains a significant amount of material dealing with the Temple and its ritual,[85] including more than thirty ritual narratives recounting Temple procedures and activities in sometimes minute detail. Why did the rabbis devote so much energy to the detailed elaboration of Temple ritual law when it was irrelevant in their day? Since the pioneering work of David Hoffman in the late nineteenth century, the view has prevailed that the Mishnah's redactors wished to record and preserve Temple procedure, perhaps in anticipation of the Temple's rebuilding, and that the Mishnaic descriptions of

Temple rituals were therefore among the oldest and most "authentic" materials preserved in tannaitic literature.

This bedrock assumption, accepted and elaborated by J. N. Epstein in the twentieth century, has been challenged in recent years. Important new research argues that Temple ritual narratives can no longer be accepted as authentic descriptions of historical practice, not least because many details are clearly invented.[86] Instead, these ritual narratives must be understood as privileged sites for thinking and teaching about a variety of religious and social issues. According to Cohn, Temple ritual narratives reinvent temple laws and rituals in line with the social and cultural interests of second to third century CE rabbis.

> … the Temple and its ritual were useful to them in their own time, in the late second and early third centuries. Having been born into a Temple-less world, these rabbis were not reacting to the loss of the Temple and the changes in society that resulted from this loss. Nor were they merely preserving traditions or developing the law. My contention is that in writing or talking about the Temple and its rituals, the rabbis who created the Mishnah were arguing for their own authority over post-destruction Judean law and ritual practice. They were asserting that their own tradition was correct and that all Judeans should follow their dictates.[87]

Cohn points to Temple ritual narratives in which the older institution of the council is refashioned into a powerful Court with ultimate authority over Temple ritual. By representing themselves as the heirs of this Court and giving it the hybrid legal-ritual authority that they themselves wished to have, the rabbis retrojected to Temple times their claim to power: "The invented Court of the past thus helped justify and authorize the hybrid legal-ritual role that they claimed for themselves in the present."[88] Cohn continues:

> When they looked back at the Temple and its ritual, the rabbis of the Mishnah remembered it in a way that reflected how they understood themselves and their place in society and in a way that argued for the centrality of rabbinic legal opinion and the rabbinic version of the Judaean way of life.[89]

According to Cohn, the rabbis were not the only group to draw upon the symbolic power of the Temple when staking claims to authority:

> Other groups, including non-rabbinic Judaeans, Romans and Christians, also continued to talk about the Temple (or, more abstractly, Jerusalem or Judaea) long after its destruction. The rabbis, in remembering the Temple in their unique way, were asserting the primacy of their version of what it means to be Judaean, the authority of their version of the traditional way of life, and the power to determine how all Judaeans would follow the traditional way of life …[90]

Ishay Rosen-Zvi's detailed textual analysis of the Mishnaic description of the temple ritual of the *sotah* (suspected adulteress) concludes that the ritual as described in the Mishnah is theoretical in nature, a (re)invention of second-century rabbis that does not reflect the historical practice of Temple period priests (as attested by pre-rabbinic, Second Temple sources). Rosen-Zvi shows that the Mishnah's redactor selected and shaped traditions and teachings that molded the ritual into a narrative of public punishment. The Mishnah's construction of the *sotah* ritual and the laws pertaining to the *sotah*, are best understood in the context of rabbinic discourses of sex, temptation, hiddenness, and doubt rather than marriage, family, and birth as has been somewhat naively assumed by earlier scholars. Through a comparative method that illuminates the distinctive features of the ritual as constructed by the tannaim, Rosen-Zvi shows that the Mishnah positions the woman as surely and undoubtedly guilty (contrary to her status in the biblical text), thereby opening the door to the acts of debasement that follow. Comparing the punishments inflicted on the woman with other rabbinic sources that discuss the treatment of the human body (and particularly the female body) in punitive contexts, Rosen-Zvi concludes that the treatment of the *sotah* not only violates but virtually subverts rabbinic ethics. Indeed, when compared with nineteen other instances of so-called measure-for-measure punishment in tannaitic literature, it becomes clear that the ritual of punishment in Mishnah tractate Sotah is a fantasy of complete and total control of the female body, unlimited by the normal constraints of rabbinic punitive and sexual ethics.

In addition to Temple ritual, the Mishnah contains narrative descriptions of the norms governing other procedures that were defunct after the destruction. In these cases too, the Mishnah's (re)invention of an inoperative process appears to be driven by contemporary needs rather than an impulse to preserve the past. As Beth Berkowitz has demonstrated, *m. Sanhedrin* 6–7's narrative description of criminal procedure commencing with the moment of conviction and ending with the criminal's execution constitutes a rabbinic "invention of execution" in conversation with the biblical text, the contemporary Jewish community, Roman imperial culture, and the very different Christian discourse of criminal execution.[91] The rabbis' ritualization of execution and their legal discourse about capital punishment are symptomatic of a rabbinic resistance and counterweight to Roman imperialism and a (reluctant) assertion of rabbinic authority. Berkowitz concludes that the Mishnah's ritual of execution, in which the rabbis imagine themselves to have the power to convict and kill those who reject the rabbinically defined will of God,[92] ultimately "claims for the Rabbis the power to redeem all Jews from sin and to establish for every individual a place in the world to come."[93]

The creation of ritual narratives was one rabbinic strategy by which defunct biblical laws could be made to perform important cultural work of various kinds. A second rabbinic strategy is described by Tamar Jacobowitz in an extended study of Leviticus Rabbah's treatment of the Levitical laws of ritual impurity.[94] In successive chapters, Jacobowitz shows how the rabbis (a) theologize Lev 12's purification rules for the parturient and so amplify God's role in childbirth at the expense of the mother; (b) read Lev 13–14's rules for purification from scale-disease as subtending a concern for proper speech and ethical behavior; and (c) utilize levitical rules concerning scale-disease in houses to affirm the continuing election of Israel from among the nations. The legal meaning of these biblical purity laws is not undermined; but by spiritualizing and ethicizing the laws the rabbis gave them contemporary meaning. Jacobowitz writes:

> In turning legal prescription – or more specifically, purity legislation – into serviceable discourse that meets the needs of a new "cultural situation," the rabbis of LR replace purity law with discussions of theology, ethics and national identity.[95]

Form and Function in rabbinic legal writings

What do these various forms and textual practices of rabbinic legal works detailed above tell us about these works' overall nature and function? A narrower version of this question has long occupied scholars of the Mishnah: What was the Mishnah's intended purpose?

Many answers have been proposed.[96] Y. N. Epstein understood the Mishnah to be a law *code* articulating current *halakhah*, even though the normative law is not always immediately apparent. According to Epstein, the redactor of the Mishnah was an active agent who selected, rejected, harmonized, differentiated, reformulated, and reshaped older legal teachings to produce a definitive statement of the law. However, while it is true that the Mishnah would eventually be read as a prescriptive and normative law *code*, it is not clear that this was the intention of its composers. Indeed, many of its formal features suggest that it was not: its many contradictions and unresolved disputes, its lack of comprehensiveness, and its sometimes obscure organization and arrangement.[97] These features led Chanoch Albeck to assert that the Mishnah was not a law *code* but an authoritative halakhic *collection* of earlier sources, assembled by a passive redactor who did not modify his materials but preserved them in their original forms – duplications, contradictions, and unresolved disputes notwithstanding. Recent scholarship on the Mishnah has demonstrated the interplay of both preservation and adaptation in the formulation of the Mishnah, suggesting that the Mishnah's nature is not fully captured by either term of the code/collection dichotomy.

Other definitions of the nature and purpose of the Mishnah have been proposed. For Abraham Weiss the presence of contradictory and unresolved views indicates that the Mishnah was compiled as lecture notes containing the sources used by R. Judah ha-Nasi when teaching. Similarly, Avraham Goldberg attributes a primarily pedagogical purpose to the Mishnah, but instead of lecture notes, he argues, the Mishnah was a textbook of *halakhah*. Its source materials are presented in accretive layers in accordance with sound pedagogical principles that value duplication and repetition. Jacob Neusner asserts that the Mishnah is a philosophical treatise insofar as it ignores history. But while the Mishnah certainly contains impracticable and even utopian law, its idiom is thoroughly legal, not philosophical.

None of these definitions succeeds in capturing the complex mix of forms and functions that characterize the Mishnah. As Yaakov Elman points out, the Mishnah

contains elements of a code, a collection, and a teaching manual, and in this respect it is not entirely unique. Law writings in Greco-Roman antiquity often possessed the features of all three of these generic categories.[98] Thus, although rabbinic and Roman legal writings are based on particular cultural heritages, the similarities between rabbis and Roman legal experts and the works they produced suggest that the Mishnah may be best understood as emerging from the rabbis' participation in a broader late antique cultural context.[99] Catherine Hezser identifies five areas in which rabbinic and Roman legal writings might be fruitfully compared.[100] First, she notes a similarity in Roman and rabbinic legal thinking (which is unsystematic, elliptical, and heterogenous) and legal discourse (which is casuistic and focused on problems rather than principles). Second, both rabbis and Roman jurists were jurisprudents (scholars of the legal tradition) and legal advisers to the public. Lacking the backing of public office, they possessed authority on the basis of their expertise, and developed collegial and teacher–student relationships that coalesced into "school" traditions. Their legal counsels (elicited as responsa to specific cases) were orally transmitted and eventually reduced to writing. Third, legal traditions in rabbinic and Greco-Roman society were formulated and transmitted in a variety of forms: rules and precedents, case stories (often with hypothetical elaborations), and commentaries (the Roman commentary literature on the *ius civile* and the praetorian edict are reminiscent of amoraic comments on tannaitic traditions). Fourth, large-scale codification was a phenomenon of late Roman-Byzantine times resulting in the Codex Theodosianus and later Justinian's Digest of the writings of earlier jurists, comparable to the Talmud's presentation of the teachings of earlier rabbis. Just as the editors of the Digest had freedom to alternately quote, preserve, select, dismiss, rearrange, combine, and adapt earlier teachings, so the editors of both the Mishnah and the Talmuds appear to have had significant freedom when working with earlier oral sources. In a fifth respect, however, rabbinic and Roman law are significantly different. Rabbinic *halakhah* includes not only civil law (including family law) and criminal law but also religious and ritual law. Although religious, civil, and criminal law were combined in Roman law when jurisprudence was the domain of the priests, by the first century BCE, private law was secularized. The differentiation of private law, which was the main concern of classical jurisprudence to the third century CE, public law, which was the responsibility of the emperor, and sacral law, which was the domain of the priests, has been referred to as

"probably the most fundamental legal distinction" undertaken in Roman society before the end of the Republic.[101] Thus, while rabbinic and Roman law cover many of the same legal topics (property law, inheritance law, business law, personal status law, labor law, tort law), and rabbinic law bears signs of the influence of Roman law in both form and substance, only rabbinic *halakhah* deals additionally with Sabbath and festival observance, prayer, the handling of sacred materials, ritual impurity, and inoperative Temple procedure.

In short, rabbinic legal writings employ an astonishing array of forms and textual practices that perform a wide variety of cultural functions that extend far beyond the function of prescriptive legislation. While many of these forms and functions are paralleled in the legal writings of other late antique Mediterranean cultures, their unique combination and deployment by the rabbis results in a singular body of literature.

Halakhah and Aggadah in the Talmud

The segregation and dynamic reintegration of law and narrative in the Mishnah is expanded and deepened in the two Talmuds, but particularly in the Babylonian Talmud[102] resulting in an unwieldy and heteroglossic work that defies generic classification. The Bavli is an anthological corpus containing statutes, case studies, narratives, legends, and exegesis, much (but not all) of which is presented in superstructures of complex dialectic orchestrated by an anonymous voice (the *stam*). The temptation to bring order to the chaos by imposing a *halakhah/aggadah* (law/narrative) binary is great; doing so enables readers to isolate for legal analysis the more conventionally legal portions of the Bavli, despite their dynamic narrative elements, and to isolate for literary analysis the aggadic portions, despite their legal context and complex normative claims. Several recent scholars have called for a new hermeneutic of the Bavli that deconstructs the *halakhah/aggadah* binary and explores both the legal and the narrative dimensions of the text as full and equal partners in the production of cultural meaning.

Reacting to the older approaches that viewed talmudic stories as mere historical background for legal teachings, and to New Critical approaches that viewed them as hermetically sealed entities detached from their larger legal contexts, Daniel Boyarin

emphasized the interrelations between texts of very different genres and the shared cultural currents that underlie them.[103] Boyarin's new historicism, or more specifically, cultural poetics, is a mode of criticism that understands literature as one social practice within a larger socio-cultural system of practices[104] and focuses on complexes of texts that deal with a given cultural problematic (such complexes are referred to as *discursive formations*). According to Boyarin, cultural poetics

> provides tools for a unitary explanation of halakha (religious law) and aggada (narrative), especially biographical legends about the Rabbis, as participating in the same discursive formation. Where previous generations of researchers in Jewish history have seen the biographical legends as preserving a "kernel" of historical truth, which may be used as explanatory "background" to explain legal opinions and innovations, and a later generation of scholars insisted on the "autonomy" of the aggada qua literature (Fränkel 1981), the method of cultural poetics recombines aggada and halakha, but in a new fashion. I assume that both the halakha and the aggada represent attempts to work out the same cultural, political, social, ideological, and religious problems. They are, therefore, connected, but not in the way that the older historicism wishes to connect them. We cannot read the aggada as background for the halakha, but if anything the opposite: the halakha can be read as background and explanation for the way that the rabbinic biographies are constructed – not, I hasten to add, because the halakha represents "reality" which the aggada "reflects," but only because the halakha as a stipulated normative practice is, almost by definition, ideologically more explicit.[105]

Heeding Boyarin's call to read *halakhah* and *aggadah* as two social processes that, when studied together, can help recover important cultural themes, Jeffrey Rubenstein examines stories from the Babylonian Talmud in relation to *halakhah*, especially the particular *halakhot* with which they are juxtaposed.[106] He argues that the Bavli's anonymous redactors (the *stam*) combine, rework, and embellish independent narrative sources, in order to create lengthy compositions whose relevance to the Mishnah to which they are attached is not always immediately apparent. For example, the story of the first-century destruction of Jerusalem, found in *b. Gittin* 55b–56b, is attached to a mishnah (*m. Gittin* 5:6) that lists a variety of rabbinic enactments (*taqqanot*) that strike

compromises and modify existing law for the greater good. The story of the destruction is in many ways the mirror image of the mishnah to which it is attached.[107] In the mishnah, rabbis act by bending the law to avert unintended consequences and insure peace; in the story, rabbis fail to act or assert their authority by adjusting the law for the sake of peace, with disastrous results. Rubenstein concludes that the story is less about the destruction than it is about the rabbis' responsibility to exert their legislative power for the greater good. The story is a kind of apologetic for the necessity of amendments that alter the law even as it betrays an underlying ambivalence about the very activity it seeks to justify.

Jeffrey Rubenstein follows earlier scholars in probing the similarities that exist between many rabbinic stories and the Greco-Roman *chreia* (see above). These brief anecdotes, often embellished and fabricated, that relate the deeds or sayings of wise men and convey ethical ideas and ideals, were an important part of rhetorical training and circulated in both oral and written form. According to Rubenstein, in rabbinic literature, brief anecdotes and aphorisms serve a variety of purposes: moral instruction, entertainment, propaganda, social criticism, behavioral modeling.[108]

More recently, Barry Wimpfheimer has called for a new hermeneutic of the Bavli that deconstructs the *halakhah/aggadah* binary and explores both the legal and the narrative dimensions of the text as full and equal partners in the production of cultural meaning.[109] Wimpfheimer focuses on a subset of what he calls the Talmud's legal narratives – passages that convey legal content in story form and thus defy easy classification as law or narrative. These texts provide an opportunity to reimagine law not as prescription but as a locus and a discourse for generating cultural meaning. Although the Talmud often seeks to resolve contradictions, it is also anti-code in its deployment of a rhetoric characterized by dynamism and its use of legal narratives that refuse to submit to the paradigm of prescriptive statute. In talmudic law, meaning is produced when heteroglossic narratives interact with rules and institutions. On this description, the frequent incoherence of talmudic narrative and statute (narratives often describe events and actions that violate legal expectations) is not a liability that should prompt segregation of the text's diverse strands but an opportunity for "thicker" descriptions of talmudic meaning. Attending to the text's heteroglossia means refusing to flatten narratives to conform to statutory claims on the one hand, or to under-read rules by isolating them

from the non-statutory textual elements that contextualize and inflect them. Wimpfheimer illustrates this approach by studying a set of talmudic texts dealing with social relations and rabbinic authority.[110] In one passage (*b. Qidd* 32b–33b) three halakhic teachings by the sage Rabbah convey conflicting obligations of deference for rabbis as expressed through posture, courtroom procedure, and ethical principles of jurisprudence. Interspersed among these halakhic teachings are legal narratives that contextualize Rabbah's teachings. Reading the formalistic demands of the law in the context of the surrounding political and social narratives exposes the rabbis' struggle to balance a concern for judicial equity with a concern to construct and communicate their own authority.

The Rabbinic Construction of Divine Law in the Context of Late Antiquity

The rabbis who produced the classical works of rabbinic Judaism stood at the intersection of two great divine law traditions – the biblical and the Greco-Roman.[111] To the extent that these traditions conceived of the divine in radically different ways, their notions of divine law would also diverge dramatically, creating a "cognitive dissonance" for those exposed to both traditions in antiquity. The rabbis distinguished themselves from other ancient Jewish groups who responded to this cognitive dissonance, by constructing a conception of divine law that defied the main contours of Greco-Roman divine law thinking.

In much Greek thought, divine law is divine "because it expresses the profound structures of a permanent natural order"[112] – a natural law. The Stoics were the first to refer to the natural law, which they understand to be the rational order, or logos, of the universe, as "divine law" (*theios nomos*). For the Stoics, God is not distinct from nature, and divine law is the eternal reason, or rational order (*logos*), of nature, or the eternal mind of God. According to the classic account of the Stoic theory of natural or divine law, there is only one true law: "namely, right reason (*orthos logos*) – which is in accordance with nature, applies to all men, and is unchangeable and eternal" (Cicero, *Republic* 3:33). In other words, the divine law, or the *orthos logos* that governs nature, is intrinsically rational, self-identical with truth, universal, eternal, and unchangeable, static in its perfection. As a rational order rather than a set of rules and prohibitions, it is, of course, unwritten. Its authority lies in the qualities it inherently possesses – rationality, universality, truth, and immutability – and not because it is backed by the coercive power of a legislator. By contrast, human positive law consists of concrete rules and prohibitions that are posited by human beings and delivered in written form, in words and sentences and enforced by coercive authority. Positive law is not universal but is created by persons for a particular city or state; it is subject to change and evolution over time and does not necessarily reflect truth or correspond to natural reality. Human positive law has no intrinsic character beyond its origin in and enforcement by a human sovereign. Attitudes toward even the best positive law in the Greco-Roman philosophical tradition range from ambivalent to negative, since no human possesses the rational perfection needed to devise laws that can unfailingly bring true justice and human virtue.

By contrast, according to biblical tradition, the Torah revealed to the Israelites at Sinai is divine not by virtue of the inherent qualities it possesses but "because it emanates from a god who is master of history."[113] Biblical divine law is divine first and foremost because it is authored by, it is the command of, a deity and not because it is the expression of an impersonal, rational order embedded in the cosmos. Indeed, biblical tradition represents divine law as possessing features typically associated with human positive law on a Greco-Roman understanding: it is *written*; it consists of positive rules and commandments emanating from a sovereign being and expressing that being's will; its authority is grounded not in its rational character, but in its commanding source; and it is particular and aims at separating the community to whom it is given from other communities. Indeed, the separatist purpose of the law explains the presence of commandments and prohibitions for which no rational basis is evident; the very arbitrariness of these laws ensures that they are not universal and will set Israel apart. Moreover, because the divine law is a positive enactment of a sovereign will it can be changed by a subsequent act of will. New rules and ordinances can be issued as long as there is continued access to Yahweh's will. In biblical times this is achieved by means of ongoing revelation – consulting Yahweh directly to ascertain his will – and later, by consulting his authorized representatives (Deut 17). Variability in response to the shifting circumstances of human life is an explicit feature of the divinely given law (see, for example, Deut 13, 17, Num 27). Biblical tradition does not present a theory of human positive law – for Israel, the divine law and the laws of the state are one and the same: the Torah revealed through Moses to the Israelites at Sinai.[114] Nor is the relation of this divine legislation to any kind of universal moral order theorized in any way.[115]

In the Hellenistic period, Jews who were heir to the biblical tradition encountered the very different discourse of divine law permeating and animating all aspects of Greco-Roman culture, high and low. They struggled to resolve the incongruity between the Greco-Roman concept of divine law as an unwritten *logos* embedded in nature and therefore universal, rational, self-identical with truth and immutable, with the biblical portrayal of the law of God. Biblical divine law possesses many qualities viewed in Greco-Roman tradition as unfailing markers of human positive law: it is a *written* set of *rules and commandments* designed for a *particular* community, subject to *change* as circumstances dictate, and incorporating elements such as dietary laws and purity laws

that appear *arbitrary* and *irrational* on the one hand and *not expressive of universal truths* on the other. One response to the cognitive dissonance engendered by these dueling conceptions of divine law was to try to bridge the gap by asserting that the Torah revealed to Moses at Sinai possesses the characteristic features of Greco-Roman divine law after all. This apologetic path was taken by (a) the second-century BCE *Letter of Aristeas*, which asserts that Israel's laws – even the seemingly arbitrary dietary and purity laws – are grounded in a universal divine reason and are consonant with truth; (b) the second century BCE *4 Maccabees*, which identifies the Mosaic legislation with "wisdom-loving reason" (*philosophos logos*; 5:35) and presents counterarguments to the charge that the laws are neither true nor rational; and (c) Philo (fl. first century CE), who identifies the Mosaic Law with the law of nature. Philo asserts that the Mosaic Law is the universal and unwritten law of the world-city (or cosmopolis); it contains the canons of rational, philosophical truth; and it is immutable.

Different versions of a harmonizing approach to the conflict between biblical and Greco-Roman conceptions of divine law are found in texts like 1 Enoch, Jubilees, and the sectarian writings from Qumran. In these works, the gap between the natural law and the biblical Torah is bridged not only by attributing some of the characteristic attributes of natural law to the Torah of Moses, but by attributing the characteristic attributes of the Torah to the laws that govern the natural world. As an example of the first, these works transfer the properties of truth and immutability commonly associated with natural law to the laws of Moses. The laws of Moses are said to be written on heavenly tablets that pre-date their revelation at Sinai and to carry a kind of ontological, or metaphysical, reality. As an example of the second, these works transfer the properties of commandedness, reward, and punishment from the Law of Moses to the laws that govern the natural world. Thus, the laws of nature are represented as positive decrees of God coercively enforced; and the heavenly bodies are depicted as servants of the divine will, capable of disobedience and subject to punishment if and when they deviate from the path that God has decreed for them.

These apologetic and *harmonizing* approaches to the incongruity between biblical and Greco-Roman conceptions of divine law can be contrasted with the *distinguishing* approach of Paul, a first-century Jew who also confronted the contradiction between the divine law of biblical tradition and divine law as defined by the Greco-Roman tradition.

But unlike Philo, Paul argued that the Mosaic Law does *not* possess the characteristic features of the natural divine law, but rather the characteristic features of positive law. The Mosaic Law is the written constitution of a particular people, it came into being at a specific moment and it contains irrational elements that do not conduce to virtue. In light of these features, the Mosaic Law cannot possibly be identified with the universal unwritten law of nature inscribed upon the hearts of all humans. Paul applies to Mosaic Law the ambivalent and negative discourses of written law found in Greco-Roman tradition, namely, the Mosaic Law is lifeless; a dead letter that kills the spirit; a second-best accommodation to fallen human nature; a necessary evil that rescues humankind from the brutish state of nature but which is ultimately inadequate for the inculcation of virtue. Paul's rhetoric sets the stage for the antinomian law–spirit dichotomy at the heart of Christianity, the rejection of the idea that a written law can be the vehicle for the divine–human relationship, and the Christian appropriation of Plato's claim that written laws, inherently imperfect, require a savior (*soterion*) in the form of reason (*logos*).[116]

For all their differences, the works and thinkers described above have the following in common – each accepts (to varying degrees and with different emphases) the Greco-Roman assumption that a law is divine by virtue of certain inherent traits: universality, rationality, truth, and immutability. Each accepts and works within the framework of the Greco-Roman binary of divine law and human law and seeks to assimilate Mosaic Law to one or the other of these categories. Greco-Roman conceptions of divine law are the standard against which the Torah of Israel is evaluated, with varying results. By contrast, the rabbis of the classical talmudic period (second to seventh centuries CE) resisted the divine law–human law dichotomy as characterized by Greco-Roman tradition and constructed a portrait of divine law in defiance of that dichotomy's constraints.

The rabbinic construction of divine law, or Torah, that emerges from across rabbinic literature challenges Greco-Roman assumptions about the attributes of divine law, specifically the attributes of conformity to truth, universal rationality, and immutability.

Divine Law and Truth

Rabbinic sources do not *consistently* represent Torah as necessarily conforming to or self-identical with truth of various kinds, i.e., fixed measures of an objective standard or

reality. This includes (1) formal/logical truth, (2) judicial truth, and (3) ontological or physical reality. In hundreds of passages, early and late, Palestinian and Babylonian, an explicit *conceptual* distinction is drawn between *din*, meaning the formally or logically authentic law, and the operative divine law. Pointing out that the law should be X according to formal logic (*badin*), but Scripture has declared the law to be Y, is a clear rhetorical *choice* that signals the rabbis' conscious separation of law and formal or logical truth.

Similarly, in judicial contexts, an uncompromising adherence to "truth" (assigning guilt and innocence by strict standards of justice without moderation by other values) is depicted in several texts as dangerous. It is said that Jerusalem was destroyed only because people gave judgments according to strict or formal law (*din haTorah*), when they should have stopped short of the strict or formal law (*lifnim mishurat hadin*). *T. Sanhedrin* 1:3 notes that Torah judges who render justice in a formally correct way that ignores particular circumstances, while "formally correct," are deficient. Applying theoretically correct law can be destructive – cutting through mountains, as the rabbis say. The pious individual should contextualize the law, take into account such values as humility, compassion, modesty, peace, or charity and forgo his right to the theoretically correct norm or ruling (stop short of the strict law), for in so doing he upholds other virtues, virtues that trump truth. Interpreting Deut 17:11, "you shalt not deviate from the matter which [the judges] shall tell you to the right or left," one rabbinic text declares that the judge's articulation of the divine law is to be followed "even if he tells you that right is left or left is right" (*Sifre Deut* 154). Even in the heavenly court, truth is not highly valued. As Ricky Hidary has shown, many midrashim depict God as both more and less complicit in the defeat of truth when judging humans.[117] In some texts, "God would prefer to be persuaded towards mercy by a good lawyer even at the expense of justice" and God's defeat of truth in favor of mercy and compassion is extolled as a divine virtue.[118]

In addition, the Torah's rulings do not always align with truth in the sense of physical reality or nature. One passage in the Mishnah (*m. Rosh HaShanah* 2:9–12 [8–9]) is, perhaps, the most well-known example of the idea that the rabbinic court can declare the calendar in defiance of astronomical reality. Here R. Gamliel knowingly accepts false testimony about the phases of the moon over the objection of his colleagues

and in the end he prevails. In an elaboration of the story in *b. Rosh HaShanah* 25a, R. Akiva is represented as finding scriptural warrant for the right of rabbinic authorities to determine the calendar even if in so doing they are misled or otherwise err, whether inadvertently or deliberately,[119] and *t. Rosh HaShanah* 2:1 states that erroneous calendrical determinations are valid. This rabbinic "nominalism" (defined as a *willingness* to allow certain considerations to overrule "objective reality" when determining the law) can be contrasted with the legal approach of the Second Temple and sectarian sources, which insist that the calendar must reflect astronomical fact. The rabbis' nominalist orientation to divine law may be seen in their willingness to accommodate subjective intentional states in the determination of the law and to deploy legal fictions and contrary-to-fact presumptions and judgments if doing so achieves highly valued goals. As regards intention, in numerous instances the presence or absence of the proper intention determines whether a ritual act such as prayer or a sacrifice is valid or invalid (for ritual acts, see *m. Berakhot* 2:1 or *m. Rosh HaShanah* 3:7; for sacrifice, see *m. Zevahim* 1:6), or whether an object is susceptible to ritual defilement (see *m. Kelim* 25:9). As regards contrary-to-fact rulings and legal fictions, in the case of the woman who remarries after witnesses report that her husband has died only to have her husband return, one authority allows the court to employ a legal fiction and rule that the man simply is not himself so that the woman's new marriage is not disrupted (*p. Yevamot* 15:4, 15a). An example of a fictive legal presumption is found in *m. Niddah* 1:1 which states that all women are in a state of ritual purity when their husbands return from a journey – though clearly this will not always be factually true. Related rabbinic texts suggest that the motivation for adopting lenient fictive presumptions in cases of menstrual impurity is the high value placed upon marital intimacy and the positive commandment of sexual reproduction (*b. Yevamot* 62b; *b. Bava Metzia* 84b; *b. Niddah* 31b). In short, the rabbinic conception of divine law is one in which "truth" – whether formal, judicial, physical or ontological – is not consistently privileged in the determination of the law but is occasionally trumped by other considerations and values.

Divine Law and Rationality

The divine Torah is not consistently represented in rabbinic texts as *intrinsically* rational or universally accessible by reason. Indeed, in hundreds of texts early and late, Palestinian and Babylonian, the Mosaic Law is portrayed as a divine decree containing commandments that run counter to the natural tendencies of humans or are so illogical as to inspire protest and mockery on the part of other nations, the *yetser hara* (the evil inclination), or *satan* (see *Sifra* Ahare Mot 13:9 [on Lev 18:4]).[120] Israel is frequently compared to a slave who must obey the orders of his master without question or complaint (see *Sifre Numbers* Shelah 115).[121] The fourth chapter of the *Pesiqta of Rab Kahana* is an extended celebration of the irrationality of the law of the red heifer – the ritual preparation of the ashes of the red heifer used to purify persons from corpse impurity. Indeed, the irrational and paradoxical nature of the law is hailed as proof of its divinity – a striking contrast to the apologetic approach of Hellenistic Jewish sources (the *Letter of Aristeas*, Philo's works) that sought to prove the *rationality* of the purity laws.

Divine Law and Immutability

According to the rabbis, the divine law is not immutable; on the contrary the Torah is susceptible to moral critique and modification. On occasion, the rabbis will state what the divine law is, and then set it aside in favor of a "better" (generally, morally better) ruling. We see this, for example, in *m. Gittin* 4 and 5 which list a whole series of ordinances that adjust the divine law "for the sake of the social order or the public welfare." Thus, although according to Torah law a husband is empowered to annul a divorce document without his wife's knowledge, the rabbis ruled that he may not do so, for the sake of the social order. Although a slave freed by one of his two masters is technically half-free, the rabbis compel his other master to free him, for the sake of the social order, since the man cannot otherwise marry. Rabbinic sources contain literally hundreds of explicitly marked rulings that modify the law in response to changing circumstances – historical, social, and ideological – including some rulings that abrogate Torah law.[122]

These texts suggest that divine law does not always dictate the best and most desirable answer and that humans are an essential partner in critiquing and improving the law, usually based on an intuitive sense that the law is just wrong. Indeed, as Dov Weiss has recently shown, later Palestinian rabbinic works contain more than a hundred

instances in which humans are depicted as advancing criticism of divine decrees. Occasionally, the deity concedes and divine behavior or divine law are modified as the result of human input and revision. These texts depict a fallible God, capable of error and at times in need of moral instruction by humans. Indeed, in an oft-quoted text from the Babylonian Talmud, God is said to take delight in the rabbis' ability to prevail over him even when his legal view is *not* clearly flawed and is, by the rabbis' own admission, authentic (*b. Bava Metzia* 59a).[123]

The idea of a morally evolving divine being, whose law should be subjected to moral critique and modified if necessary stands at a great distance from Greco-Roman conceptions according to which the perfect natural, or divine, law is an expression of a uniform, inflexible, universally valid and unchanging order. On the latter view, the idea of adjusting the divine natural law is nonsensical. But in a paradoxical reversal of Greco-Roman divine law tropes, rabbinic sources depict the critique and modification of the divine law – the Torah – in the light of human experience and intuition, rather than the evaluation and critique of human law on the basis of a divine rational standard. Moreover, for the rabbis, this responsive flexibility is an indicator of the Torah's origin in a caring divine will.

The rabbis of the talmudic era did not shy away from attributing to the divine Torah features considered by others in antiquity to be unfailing indicators of human positive law. In constructing a portrait of divine law whose very divinity was enhanced rather than harmed by its divorce from truth and rationality, and by its susceptibility to moral improvement and modification in response to the shifting circumstances and insights of God's covenant partner, the rabbis were entirely unique.

This unique rabbinic conception of divine law does not stand without challenge. In particular, an uneasiness with a nominalist orientation to divine law is evident especially in later strata of the Babylonian Talmud. In the medieval and modern periods, the Greco-Roman binary of natural law and positive law became controlling paradigms in the conception of divine law in the west and was embraced by the three biblical religions though in different ways and to widely varying degrees. The classical rabbinic construction of divine law was obscured by these post-talmudic intellectual developments and positions rejected by the classical rabbis found a ready reception, such as the utter

rationality of the Law (Maimonides) or the ontological realism of the Torah (Kabbalah, the Brisker school).

Conclusion

Law stands at the heart of rabbinic religiosity and the study and interpretation of Torah is portrayed by the rabbis as an intense and deeply religious expression. The minute examination of God's revealed commandments, the application of reason and logic to the discovery of God's normative will for humans in every corner of human life and activity were part of a serious effort to sanctify the most specific and concrete actions of the everyday world. Study and elaboration of the divine law was not the only mode of religious expression in rabbinic culture – certainly prayer, asceticism, even martyrdom played an important role. Moreover, study was not the chief mode of religious expression for the non-rabbinic Jew. But in classical *rabbinic* Judaism, the application of one's critical intelligence to the study of God's Torah was not a hubristic assault on holy Scripture, but the chief vehicle – mandated by God himself – for discovering and effecting God's normative will on earth.

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[1] In rabbinic literature, the term *halakhah* refers to normative practice as articulated by the rabbinic class. The Hebrew term "Torah" continues to govern a much broader semantic field than the inadequate translation "law," as will be explained below. Nevertheless, when dealing with the more explicitly normative components of Torah, I employ the terms "law" and "Torah" relatively interchangeably. Readers are reminded that the rabbinic concept of Torah is expansive and includes both form and content not regularly signaled by the English term "law."

[2] See Lapin, “Origins,” p. 214 and Heszer, “Social Fragmentation,” pp. 235, 242–48.

[3] In this volume, R. is used to abbreviate Rabbi, Rav, and Rabban – honorific titles for rabbinic sages. The name Rabbi standing alone refers to Rabbi Judah ha-Nasi.

[4] The rabbis won additional influence through their abilities as preachers, as teachers of Torah, and sometimes as holy men reputed to perform miracles, bring rain, and heal the sick.

[5] For the lack of a professionalized field of legal practice in biblical and Second Temple times, see Chapters 1 and 2 of the current volume.

[6] This is not to say that the rabbis denied other vehicles of the divine–human relationship, such as prayer or good deeds. Nevertheless, rabbinic literature is almost entirely consistent in representing *halakhah* and its study as preeminent expressions of devotion to the God of Israel. See further below.

[7] The Dead Sea sectarians were certainly devoted to the study of Torah and a life of punctilious observance, but as pointed out in Chapter 2 of the current volume, the sectarian posture toward the law lacked the rabbis’ relatively formal and rationalized approach to deriving prescriptive behavioral details from the written text of the Torah in a totalizing fashion down to the finest detail of even defunct areas of practice (such as sacrifice).

[8] The historicity of these claims (which is dubious) is not our concern in this chapter. Here, we are interested in the rabbinic ideology of Torah attested in these traditions of reconstruction.

[9] See, for example, *m. Rosh HaShanah* 4:1–4; *m. Pesahim.* 10:5; *t. Shevi’it* 1:1; *b. Berakhot* 48b; *b. Sotah* 40a, 47a; *b. Keritot* 9a.

[10] *b. Eruvin* 13b. Hillel the Babylonian was a pre-destruction sage in Herodian Judea, valorized in rabbinic literature, which contains over 300 cases recording disputes between Hillel and Shammai or the disciple groups associated with them (the House of Hillel and the House of Shammai). While it is difficult to separate legend from fact, later rabbinic tradition credits Hillel with developing new methods of biblical

interpretation and resolving various legal problems. More important, Hillel's prominence and authority are based on learning rather than social status or personal charisma. It was not until after the destruction of the Temple in 70 CE that the views of Hillel prevailed and the school of Hillel emerged as the leading school of Pharisaic Judaism, eventually representative of rabbinic Judaism generally. The leaders and Patriarchs of the early rabbinic community traced their line through Gamliel to Hillel, implying some continuity between the pre-70 Pharisees and the later sages.

[11] *b. Megillah* 17b–18a; *b. Berakhot* 28b.

[12] *m. Rosh HaShanah.* 4:1–4.

[13] See Chapter 2 of the current volume.

[14] This teaching, attributed to R. Simlai in *b. Makkot* 23b, enjoyed wide acceptance.

[15] See, for example, Hillel's reference to bathing as a meritorious deed in *Leviticus Rabbah* 24:3; see also the more comic case in *b. Berakhot* 62a.

[16] *b. Shabbat* 130a; *Leviticus Rabbah* 32:9.

[17] See, for example, *m. Avot* 2:15 and the tradition in *m. Makkot* 3:15–16 which states that God multiplied commandments for Israel in order to provide more opportunities for the merit of righteousness; see also *b. Qidd* 31a for the idea that greater reward attaches to those commanded to perform a deed than to those who are not so commanded.

[18] *Sifre Deut* 41, 48, 89; *b. Berakhot* 17a; *b. Pesahim* 50b; *b. Nazir* 23a; *b. Avodah Zarah* 19a.

[19] *m. Avot* 2:1.

[20] The terms "major" and "minor" require some clarification. With rare exception, these terms are used quantitatively rather than qualitatively. They refer to the severity of the penalty attached to a commandment, or the difficulty and effort involved in performing it. Most important, major and minor (or heavy and light) do not designate ethical and ritual commandments, the former being more important (heavy) than the

latter. See Hayes, "Were the Noahide." For attempts in the modern period to distinguish and establish the relative value of ethical and ritual commandments (privileging Judaism's ethical precepts and devaluing or dismissing the ritual or ceremonial laws), see Chapters 7, 9, and 10 of the current volume.

[21] *b. Bava Batra* 12a.

[22] The rabbinic assertion of the end of prophecy may be compared and contrasted with the position of the Qumran sectarians who understood themselves to be the privileged addressees of continuing revelation in the form of divinely inspired teachings of the sect's leadership. See Schnabel, *Law and Wisdom*, pp. 172–73.

[23] Each tradent presents teachings which are omitted here.

[24] The transmission list continues for several generations in subsequent paragraphs.

[25] For a discussion of the date and structure of tractate *Avot*, see Tropper, *Wisdom*, chapter 3 and references provided there.

[26] *y. Hagigah* 1:8, 76d; *b. Berakhot* 5a.

[27] *Sifre Deut* 313; *m. Avot* 5:22; *b. Megillah* 19b.

[28] Certainly there are important differences between the Written and the Oral Torah. A higher degree of severity attaches to the former, doubtful cases of biblical law are decided stringently while doubtful cases of rabbinic *halakhah* are decided leniently, and more. Nevertheless, rabbinic *halakhah* is underwritten by divine authority and is believed to express, in however attenuated a form, the divine will for Israel. For the rabbinic theory of the Oral Torah and its continuity with the divinely revealed Torah, see Schäfer, "Das 'Dogma,'" Rosenthal, "Oral Torah," Jaffee, "Torah in the Mouth," Fraade, "Moses and the Commandments," Sussman, "Oral Torah," and Cohen, "Antipodal Texts." For a partial list of rabbinic sources that invoke Moses and the revelation at Sinai as the ultimate authority behind rabbinic law, see Cohen, "Antipodal Texts," pp. 14–15.

[29] *b. Sanhedrin* 99a.

[30] *b. Bava Metzi'a* 59b. See the discussion of these two concepts in Elon, *Jewish Law*, pp. 240–42.

[31] Fischel, *Rabbinic Literature*, pp. 51–89. A *chreia* is a brief anecdote about a sage or proverb uttered by a sage that typifies the sage's teaching or character. The *chreia* was an important feature of Greco-Roman rhetorical education.

[32] Tropper, *Wisdom*, pp. 182–88. For more on the influence of Greco-Roman rhetoric on rabbinic literature, see Hidary, *Rabbis as Greco-Roman Rhetors*.

[33] While *simplistic* notions of influence in antiquity should be avoided, it is a fact that an innovation in one cultural tradition sometimes arises from contact with a contiguous cultural tradition.

[34] Though the author makes it clear that R. Akiva's death is not a punishment for any sin.

[35] LeFebvre, *Codes*, pp. 246–48. See Chapter 2 of this volume for the slow emergence of the perception of Scripture as a prescriptive code.

[36] LeFebvre, *Codes*, p. 23.

[37] ***Ibid.***, p. 24.

[38] Kraus, "Ein zentrales Problem," describes the Code of Hammurabi as an academic rather than a legislative document insofar as it appears to describe rather than prescribe the law. Finkelstein, "Ammi-Saduqa's Edict," likewise questioned the assumed legislative character of Mesopotamian law writings. See also Bottéro, *Mesopotamia*, p. 178, and Westbrook, "What Is the Covenant Code?" p. 30. For a dissenting view, see Lafont, "Ancient Near Eastern Laws," esp. p. 96.

[39] LeFebvre, *Codes*, p. 19.

[40] ***Ibid.***, p. 21.

[41] ***Ibid.***, p. 22.

[42] ***Ibid.***

[43] ***Ibid.***, pp. 33–36.

[44] See further, Chapter 1 of the current volume.

[45] Most scholars locate the completion of this shift in the Persian era, though its roots may stretch back to the Deuteronomic reforms of Josiah in the seventh century. See the summary of the views of Westbrook, Patrick, Frei, and Jackson in LeFebvre, *Codes*, pp. 3–8. However, as LeFebvre argues persuasively, dating the beginning of the shift to the seventh century advances in time the rise of prescriptive law in both the Greek and the biblical sources and seems extremely unlikely.

[46] ***Ibid.***, pp. 143–45.

[47] The term "midrash," from the root *d.r.sh.*, 'to inquire, search out,' refers to the study and investigation of the biblical text, as well as the results of this study. The terminological distinction (mishnaic vs. midrashic) is not perfect. The Mishnah as a corpus also contains *derashot* (derivations from Scripture) that link details of the law or attributed positions in a dispute to specific elements of Scripture. Indeed, Samely, *Rabbinic Interpretation*, identifies many hundreds of *derashot* in the Mishnah that draw conclusions on the basis of details of grammar and language and thus attest to a prescriptive attitude toward the Written Torah. Nevertheless, the terms have a heuristic utility and allow us to distinguish between scripturally sourced legal teachings that constitute the classic works of tannaitic midrash (such as the *Mekilta deR. Yishmael*, the *Mekilta deR. Shimeon, Sifra, Sifre Numbers* and *Sifre Deuteronomy*) and occasionally the Mishnah on the one hand, and scripturally independent legal teachings featured prominently in the Mishnah on the other.

[48] See the full discussion in Yadin-Israel, *Scripture and Tradition*, p. 76. Translations are taken from Yadin-Israel.

[49] See the full discussion in ***ibid.***, p. 89.

[50] For the influence of classical rhetorical techniques of interpretation as well as Roman legal interpretation on the development of midrashic hermeneutical techniques,

see Daube, “Rabbinic Methods,” and “Alexandrian Methods,” and Hidary, *Rabbis as Greco-Roman Rhetors*. For Mesopotamia precedents, see Lieberman, “A Mesopotamian Background.”

[51] Including the borrowing and adaptation of Greco-Roman techniques of interpretation; see **previous note**.

[52] The *Mekilta deR. Shimeon bar Yohai, Sifra*, and *Sifre Deuteronomy* are the main extant works traditionally ascribed to the school of R. Akiva.

[53] The *Mekilta deR. Yishmael* and *Sifre Numbers* are the main extant works traditionally ascribed to the school of R. Yishmael.

[54] For a full exposition of these views, see Yadin, *Scripture as Logos*, and Yadin-Israel, *Scripture and Tradition.*

[55] For the irony that R. Akiva, the icon of Pharisaism, undermined the independent authority of *paradosis* by connecting *halakhot* to Scripture, see Shemesh, “The Laws of Incest.”

[56] For a full discussion of the designation *halakhah le-Moshe mi-Sinai*, see Hayes, “*Halakhah le-Moshe mi-Sinai*.”

[57] Cover, “Nomos.”

[58] Fraade, “Nomos,” p. 83.

[59] ***Ibid.***, p. 84.

[60] ***Ibid.***, p. 89.

[61] ***Ibid.***, pp. 90–93.

[62] ***Ibid.***

[63] For discussion and textual variants, see ***ibid.***, p. 91 and n. 31.

[64] ***Ibid.***, pp. 93–94.

[65] ***Ibid.***

[66] Simon-Shoshan, *Stories of the Law*, and "People Talking."

[67] Simon-Shoshan, "People Talking," pp. 448–55.

[68] ***Ibid.***, p. 446.

[69] ***Ibid.***, p. 451.

[70] As per Simon-Shoshan, ***ibid.***, p. 452.

[71] ***Ibid.***, p. 452.

[72] ***Ibid.***, pp. 461–62.

[73] *b. Berakhot* 62a.

[74] The term "Talmud" refers to the totality of Mishnah plus its *gemara* commentary.

[75] Heszer, "Social Fragmentation."

[76] Hidary, *Dispute*, pp. 1–36. See also Ben-Menahem *et al., Controversy and Dialogue* and Ben-Menahem, "Correct Answer."

[77] See also the parallels in *t. Sotah* 7:11–12; *Pesiqta Rabbati* 3; *Midrash Tanhuma* Beha'alotkha 15; *Numbers Rabbah* 15:22.

[78] For dueling perspectives on this question, see Cohen, "The Significance of Yavneh" and the response by Boyarin, "A Tale of Two Synods." Cohen argues that the disunity and sectarianism that marked Jewish life in the Second Temple period was brought to an end by the destruction and replaced by a "big-tent" coalition that absorbed diverse elements to create a pluralistic but unified rabbinic Judaism. According to Cohen, the sages who gathered in Yavneh renounced sectarianism and exclusivism and absorbed many elements of Second Temple Jewish society within their ranks. Rather than the work of a sect triumphant, Yavneh was a grand coalition characterized not by uniformity and monism but by diversity and pluralism and the recognition that truth is

many, not one. Cohen was reacting to earlier scholarly representations of Yavneh as a Jewish version of the fourth century council of Nicaea in which one party triumphed and defined Christian orthodoxy and the Christian canon and expelled heretics. While Boyarin accepted Cohen's claim that a certain sectarianism centered on the Temple disappeared after 70, he also accepts Martin Goodman's claim that Second Temple sectarianism gave way to Jewish orthodoxy, as one group achieved hegemony and found it possible to plausibly portray itself as Judaism writ large. Boyarin notes that rabbinic literature contains both views of Yavneh – an exclusivist Yavneh in which a triumphant sect establishes an orthodoxy and adopts a policy of exclusion and monism, and an inclusivist Yavneh in which a big-tent coalition enshrines difference and sanctifies controversy and pluralism. He resolves the tension between these two contradictory portraits by emplotting them diachronically. The earlier traditions of Yavneh do not represent it as a grand coalition. It was not until the fourth or fifth century that rabbinic culture saw a shift in the status of dissent and the Talmud began to perceive and to portray Yavneh as a kind of ecumenical council, transmitting the continually evolving and pluriform Oral Torah.

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[79] Halbertal, *People*, pp. 50–54, points out the dueling interpretations of controversy and the preservation of disputes that animate this passage. Preserving minority opinions as live options for the future (mishnah 5) suggests that the Mishnah is a flexible or open code. Preserving defeated minority views in order to document and eternalize their rejection (mishnah 4) suggests that the Mishnah is a closed code.

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[80] Heszer, "Social Fragmentation."

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[81] Fraade, "Anonymity and Redaction."

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[82] ***Ibid.***, p. 13.

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[83] ***Ibid.***, p. 14.

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[84] ***Ibid.*** p. 24.

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[85] As Cohn, *The Memory of the Temple*, p. 2, points out: one entire order of the Mishnah (out of six), significant portions of two other orders, and portions of the

remaining three orders "relate laws of how ritual *ought* to be done in the temple and narratives about how it *was* done."

[86] ***Ibid.***

[87] ***Ibid.***, p. 3.

[88] ***Ibid.***, p. 14.

[89] ***Ibid.***, p. 14.

[90] ***Ibid.***, pp. 14–15.

[91] Berkowitz, *Execution and Invention.*

[92] ***Ibid.***, p. 7.

[93] ***Ibid.***, p. 22.

[94] Jacobowitz, "Leviticus Rabbah."

[95] ***Ibid.***, pp. 223–24.

[96] For an excellent discussion of various views concerning the nature and purpose of the Mishnah, see Elman, "Order, Sequence and Selection" and works cited there. Elman's article informs the summary presented here.

[97] ***Ibid.***, p. 55.

[98] ***Ibid.***, p. 69.

[99] Heszer, "Roman Law," p. 144.

[100] ***Ibid.***, p. 144 and *passim*.

[101] ***Ibid.***, p. 151 n. 15.

[102] Fraade, "Nomos," p. 94.

[103] Boyarin, *Carnal Israel*, p. 15.

[104] ***Ibid.***, p. 14.

[105] ***Ibid.***, pp. 15–16.

[106] Rubenstein, *Talmudic Stories*, p. 15.

[107] This story is brilliantly analyzed in Rubenstein, *Talmudic Stories*, chapter 5.

[108] ***Ibid.***, p. 7.

[109] Wimpfheimer, *Narrating the Law.*

[110] See the analysis in Wimpfheimer, *Narrating the Law*, pp. 80–84.

[111] The following section is a summary of Hayes, *What's Divine about Divine Law?*

[112] Brague, *Law of God*, p. 18.

[113] ***Ibid.***, p. 18.

[114] For rabbinic efforts to fill this lacuna by spelling out the relation of the divine law of Israel to the positive legal systems of other communities, see Chapter 4 of the current volume.

[115] Certainly, the biblical portrayal of divine law as written legislation expressing the (sometimes arbitrary) will of a divine sovereign for a particular people is nuanced and complicated by references to the law as conducive to wisdom (Deut 4:6) on the one hand and as an inseparable part of a historical covenant on the other. In other words, the biblical conception of divine law is best understood as a multidimensional entanglement of will, reason, and history that defies easy categorization. Nevertheless, it remains true that the *dominant* biblical discourse of divine law maintains that the divine law is grounded not in divine reason but divine will: God's will revealed in the form of written legislation that is not fixed and static but subject to change through historical time, and that is designed to make a particular people, not universal humankind, fit for life in a particular place, separate and distinct from other nations. In

biblical tradition, therefore, the attribution of divinity to the law did not in itself *necessarily* confer upon the law specific qualities such as rationality, conformity to truth, universality or immutability.

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[116] For a full exposition of Paul's view of the Law, see Hayes, *What's Divine about Divine Law?*, chapter 4.

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[117] Hidary, *Rabbis as Greco-Roman Rhetors*, chapter 5: "Why Are There Lawyers in Heaven? Rabbinic Court Procedure in Halakha and Aggada."

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[118] ***Ibid.***

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[119] "[R. Akiva] then said to [R. Joshua]: The text says, 'you', 'you', 'you', three times (Lev 22:32, 23:2, 23:4) to indicate that 'you' [may fix the festivals] even if you err inadvertently, 'you', even if you err deliberately, 'you', even if you are misled. [R. Joshua] replied to him saying: 'Akiva, you have comforted me, you have comforted me.'"

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[120] The passage distinguishes two kinds of laws in the Torah – those that one would expect to find included in it (such as the prohibition of murder) because they are "logical" [*din*] and widely recognized by all nations, and those that one would not expect to find included (such as the prohibition against eating pork) because they are not logical but arbitrary and inspire mockery among the nations. However, it is clear from the larger context that it is the *latter* – the unique and non-rational laws separating Israel from the abominable ways of foreign nations – that are highly valued and prized by the rabbinic authors of this text. The rational laws are unremarkable precisely because of their universal acceptance. In the medieval period, the relative value of rational laws vs. non-rational laws will be reversed by some Jewish philosophers. For more on this passage, see Chapters 4 and 5 of the current volume and for the medieval distinction between rational and non-rational laws of the Torah, see Chapter 5.

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[121] "When the holy one, blessed be he, redeemed the seed of Abraham his friend he did not redeem them as free men but as slaves. If he should make a decree and they do not accept it, he will say to them, 'you are my slaves.' When they went out into the desert, he began to issue decrees for them – some light commandments and some

heavier commandments, such as the Sabbath and the sexual prohibitions, fringes [to be worn on the hem of one's garments] and *tefillin* [phylacteries]. Israel began to object. He said to them, 'you are my slaves. For this reason I redeemed you: so that I can make decrees for you and you will fulfill them.'"

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[122] For a full treatment of this subject, see Panken, *The Rhetoric of Innovation*; see also Hayes, "Abrogation."

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[123] It should be noted that the less cited finale to this story concerning R. Eliezer and the oven of Akhnai underscores the dangers that arise when the rabbis fail to display toward those who disagree with them (R. Eliezer), the same magnanimity and tolerance that God displayed toward the rabbis when they adopted a legal position contrary to his own.

4

Approaches to Foreign Law in Biblical Israel and Classical Judaism through the Medieval Period

Beth Berkowitz

Introduction

The legal practice of ancient Jews was eclectic and determined largely by dominant regimes. The archive of Babatha, a Jewish woman who lived in second-century CE Roman Arabia, points to a local Jewish population that knew how to adapt Roman administrative procedures to its advantage (see Chapter 2 of the current volume). Her contracts mingle Greek and Hebrew as well as Roman and Jewish legal cultures. Rabbinic traditions recognize legal fluidity: *m. Gittin* 1:5 validates contracts deposited in non-Jewish archives and signed by non-Jewish witnesses, and *m. Gittin* 9:8 validates a divorce enforced by a non-Jewish court. Eclecticism and adaptation characterize not only the procedure but also the substance of Jewish law, which clearly borrowed heavily from prevailing legal norms (see Chapter 2 of the current volume). A virtual cottage industry of scholarship has emerged for biblical and rabbinic law that explores their many parallels with ambient traditions.

In the legal theory of ancient Jews, on the other hand, diversity was more fraught. The laws of the Torah were considered to possess divine authority, as were the interpretive traditions associated with them. *M. Avot* portrays Moses receiving the Torah at Mount Sinai, delivering it to Joshua, Joshua transmitting it to the elders of Israel, who transmit it to the next generation of great men in a chain that continues down to the rabbinic authors of the Mishnah. How could the laws of the Torah, given its pristine and carefully guarded transmission, be mixed and matched with other laws? Moreover, the Torah features an explicit statement prohibiting the adoption of foreign laws: Lev 18:3 instructs Israel not to imitate the practices of Egypt and Canaan or to follow their laws. Yet complete rejection of all foreign laws would have flown in the face of reality in addition to creating certain absurdities: If foreign law prohibits theft and murder, must Jewish law take a contrarian stance and permit them? Clearly the laws of the Torah could sometimes be similar to and interact with foreign laws. The question was when, and with what justification.

This chapter explores how that question was articulated and addressed in ancient and medieval Jewish texts. The chapter's interest is not the influence of foreign law on Jewish law, or the historical interaction between them, but the *conceptualization* of foreign law within Jewish law or, in other words, the discourse about foreign law found

there. To that end, the chapter focuses on the key injunction in Lev 18:3 prohibiting the adoption of foreign laws, starting with the meaning of this verse in its context in the Bible and tracing its interpretive path through Philo, midrash halakhah, and midrash aggadah, Mishnah and Tosefta, the Babylonian Talmud, and medieval Talmud commentators, with forays into the Dead Sea Scrolls and Paul's writings.[1] This chapter considers: How did Jewish thinkers understand the scope and substance of "foreign" law and distinguish it from their own? How strenuously did they pursue such a distinction, and in what cases were they willing to relax it and to allow some overlap and interaction? The chapter will consider related questions such as that of bringing cases and giving testimony in *arka'ot shel goyim* (non-Jewish courts);[2] the principle of *dina de-malkhuta dina*, "the law of the kingdom is law,"[3] which requires compliance with foreign law; and Noahide law, which presumes a body of law common to Jews and non-Jews. The discourse about foreign law found in ancient and medieval Jewish sources reveals how their authors thought about the problems that proceeded to become central for modern Jews: assimilation and acculturation; the categories of race, religion, and ethnicity as they apply to Jews;[4] and the relationship between law and narrative, and between text and context.[5]

Biblical and Second Temple Period Literature

Lev 18:3, which forms part of a preamble to the catalogue of incest and other sex taboos found in the body of Lev 18, enjoins the Israelites to reject the laws of neighboring peoples:

> Like the practice of the land of Egypt where you have dwelled, you should not practice, and like the practice of the land of Canaan to which I am bringing you, you should not practice, and in their laws you should not go (*beḥuqqotehem lo telekhu*).

The first two parts of the verse, which are parallel in syntax and word choice, prohibit Israel from the practices of Egypt and Canaan. The third part, which seems to summarize and to reinforce the first two, prohibits their laws. But what types of foreign law are prohibited? What types of foreigners are the targeted authors – only Egypt and Canaan, or any non-Israelite peoples? What is the rationale of the prohibition? Is the fatal flaw of the practice its foreignness or something intrinsic to it? What ideology of identity is presupposed and promoted by the prohibition?

The word Lev 18:3 uses for law, *ḥuqqah*, is used frequently and typically by the holiness legislation (called "H" by Bible scholars), the literary unit in which the verse appears. Deriving from the root *ḥ.q.q* (חקק), "inscribe," *ḥuqqah* in H denotes a law inscribed by a lawgiver, usually God, as is the case in the subsequent verses of Lev 18 (verses 4 and 5). The law would have been literally etched on a stone tablet, and thus the verb came to have the figurative usage of prescription or commandment. The first two clauses of Lev 18:3 use the noun *ma'aseh*, however, which throughout biblical literature most often refers to activity or work, and the connotations can vary from negative to neutral to positive, and here probably refer to general cultural practices.[6] The operative distinction between *ma'aseh* and *ḥuqqah* in this verse – if it goes beyond literary stylization, which it may not – would have to do with formality: *ma'aseh* represents the general cultural activities of neighboring peoples (informal norms), while *ḥuqqot* are their governing laws (formal norms). The verse perhaps should read, then, with *a fortiori* logic: Do not copy their casual behaviors, and certainly do not adopt their firmly held laws. But it is hard to say whether these "laws" are something procedural (i.e., the legal

system itself), ritual (i.e., the system of worship), or broader (i.e., all social norms that have the force of law).

The subsequent list of sexual taboos in Lev 18 would suggest, instead, that the term is intended to refer to them. Lev 18, like verse 3 in microcosm, comprises three sections.[7] In the first section, consisting of verses 1–5, God instructs Moses to exhort Israel to reject the practices of Egypt and Canaan and to observe the laws of God. The second section, verses 6–23, sets forth a series of prohibitions on male sexual intercourse, mostly with different degree female relatives, but also with a menstruant, another man's wife, another man, or an animal; giving one's "seed" to Molech is also included. The third and final section, verses 24–30, offers an exhortatory conclusion that picks up many of the themes of the first section and expands on them, with God spelling out the negative consequences for disobeying God's commands: defilement of the nation and of the land and exile from it. Chapter 18 as a whole can thus be thought of as a chiasmus, ABA, with the A's signifying the exhortatory frame and the B signifying the sexual taboos.

Two readings (at least) of Lev 18:3 emerge from the chiastic structure, each of which yields different answers for the interpretive questions that swirl around the verse regarding what and whose laws are prohibited, who must observe the prohibition, and why. If the verse is read within its subsection of verses 1–5, its prohibition appears to target a seemingly broad range of habits, identifies Egypt and Canaan as the target groups, outlines no clear consequences for violating the prohibition, applies it to the "children of Israel," and does not point to any inherent flaws in those practices. The passage suggests that foreign laws are prohibited less because of *what* they are than because of *whose* they are. The prohibition on foreign law reads as an attempt to preserve the integrity of Israelite ethnic identity. In the chapter context of Lev 18, however, the prohibition refers primarily to sexual practices, accuses the nations who previously inhabited the land of performing these practices, applies the prohibition to the citizen and foreigner, and provides a clear rationale for observing the prohibition and consequences for transgression. Perhaps the most striking discrepancy relates to the portrait of Egypt and Canaan: in the initial section of the chapter, they are neutral figures, while in the overall chapter's representation, they are awash in incest and bestiality and other abominations.

Other verses in the Pentateuch demand Israelite distinctiveness or separatism as Lev 18:3 does, but those verses do not prohibit foreign law per se. Their interest is worship of other gods (Exod 23:24); worship of God using unauthorized methods such as multiple altars (Deut 12:31); and worship of God using unauthorized mediums such as diviners and sorcerers (Deut 18:9). While reconstruction of biblical traditions is always speculative, we can conjecture that Lev 18:3 represents a post-exilic reshaping of the earlier paradigms of Israelite distinctiveness in Exodus and Deuteronomy.[8] The authors of this new model of separatism, who may be one and the same as the authors of the Pentateuch as a whole, may have considered their emphasis on laws and sexual practices rather than worship uniquely capable of keeping Israel intact under the new conditions of Persian imperialism.

If Lev 18:3 is itself a reworking of prior traditions, we can begin to see within the biblical corpus a reworking, in turn, of Lev 18:3. The closest reformulation comes very soon thereafter in Lev 20:23, which infuses the prohibition with strong moral language: "You shall not follow the laws of the nation that I am driving out before you. For it is because they did all these things that I abhorred them." Ezek 20's re-presentation of the prohibition retains the moral valence with which it is endowed by Lev 20:23 but applies it not to the behavior of neighboring peoples, but to that of Israel's own ancestors: "You should not go in the laws of your fathers, do not heed their rules, and do not defile yourselves with their fetishes. I the Lord am your God: Go in My laws and heed to observe My rules" (Ezek 20:18–19). Lev 18:3's "and in *their* laws you should not go" here becomes "you should not go in the laws of *your* fathers." Ezekiel adapts Lev 18:3 in order to turn the drama of Israel's covenant with God inward, to shift the tension from Israel's relationship with its neighbors to Israel's relationship with its own sinful past. Ezekiel places the blame for Israel's sufferings squarely on Israel's shoulders and, in so doing, is able to explain and to justify Israel's current state of exile in Babylon and, ultimately, to encourage and inspire Israel to change its ways.[9]

The strategic deployment of foreignness can be found again and again in the interpretive trajectory of the prohibition on foreign law, such as in the Dead Sea Scrolls, where certain burial and sacrifice practices are associated with foreigners as a means of condemning them. Two passages in the Temple Scroll, one that instructs Israel to bury their dead in separate burial sites (11Q19, column 48, lines 11–12) and one that rehearses

the Deuteronomic concern to centralize sacrifice and to extirpate sorcery and divination (column 51, lines 19–21; column 60, lines 16–17), both cast their laws as a rejection of foreign practice, as does Pesher Hosea's exegesis of Hos 2:13 (4Q166, column 2, line 16), where the pesher author criticizes his opponents for "making walk in the festivals of the [non-Israelite] nations." Only the Damascus Document polemicizes explicitly against foreign law when it prohibits the prosecution of capital cases in gentile courts (*be-ḥuqqe ha-goyim*, "according to the laws of the nations").[10] The meaning of the passage is much disputed and has even been interpreted as a *requirement* for trying capital cases in gentile courts. Gillihan's recent discussion makes a persuasive argument, however, that the purpose is to prevent individuals within the Qumran community from taking their cases to courts outside the community, and that its larger aim is to dramatize the comprehensive juridical reach of the Qumran community: If it controls capital cases, then clearly it must control every kind of case. The rejection of foreign law in this instance represents an assertion of juridical authority by a sectarian Jewish community with a strong separatist identity.

A similar concern is found in 1 Cor 6:1–11, where Paul discourages the Corinthian Christians from taking their cases to pagan courts: "When any of you has a grievance against another, do you dare to take it to court before the unrighteous, instead of taking it before the saints?" (6:1). Paul uses an assortment of rhetorical strategies in the passage in order to convince them: contrasting the insider "brothers" (*adelphoi*) and "saints" (*hagioi*) with the outsider "unrighteous" (*adikoi*) and "unbelievers" (*apistoi*); minimizing the significance of the matters for which they bring lawsuits; criticizing them for arguing with each other in the first place; prioritizing the ultimate judgment that Christians will exercise over others; shaming them for not being capable enough to orchestrate their own decisions. Sociological readings of Paul suggest that high-status members of the Corinthian church had been using the status-oriented Roman courts to promote their own interests at the expense of lower-status members, and that Paul was concerned with the divisiveness this caused.[11] The parallel of Paul with Qumran suggests that keeping one's disputes and crimes inside one's own courts was an important strategy by which ancient Jewish communities differentiated themselves from other Jewish communities as well as from non-Jewish ones, built internal unity, and constructed new nodes of authority and maintained existing ones.[12] The most famous instance of internal Jewish arbitration is the

synoptic gospels' narrative of Jesus' trial by the Sanhedrin, whose guilty verdict is portrayed as being reluctantly enforced by Roman authorities.

Philo of Alexandria reads the prohibition on foreign law in another register altogether. Philo gives Lev 18:1–5 extended attention in his commentary on Genesis 16, found in his essay, "On Mating with the Preliminary Studies" (*De congressu*). In that essay, Philo reads the figures of Abraham, Sarah, and Hagar to represent, respectively, the soul, its pursuit of virtue, and the formal education that makes such pursuit possible. In Philo's allegorical reading of Lev 18:1–5, Egypt is the land of the passions, representing the period of infancy and childhood during which human beings are unable to control their emotions, while Canaan represents the subsequent period of adolescence when vice beckons and the soul has not yet learned how to resist it.[13] When in Lev 18:3 God instructs Israel to reject the laws of Egypt and Canaan, God is teaching the importance of overcoming childhood passions, outgrowing adolescent rebellion, and learning to exercise mature, adult self-restraint. Foreign law, for Philo, is thus a matter of universal moral development, but Philo may at the same time be associating it with actual ethnic Egyptians, whom he generally depicted in unflattering terms as people incapable of controlling their passions. The irony of Philo's essay is that it invokes Lev 18:3's rejection of foreign practice in the course of advocating for a classic Greek pedagogical curriculum. This irony emerges from the complex intellectual synthesis produced by Alexandrian Jews and the intricate politics of their relationship to Roman rule and to other native Egyptian populations.

These texts and themes form the foundation for the approaches to foreign law found in subsequent Jewish traditions. Lev 18:3 introduces a paradigm of Israelite distinctiveness that features foreign law, but just what that law includes, to which foreigners it applies, and why it is prohibited remain for future interpreters to flesh out. Lev 20:23 infuses the prohibition with the language of moral disgust, while Ezek 20:18 turns it inward, applying it to the sins of the ancestors. These two developments – the moralization of foreign law, and the strategic use of the prohibition to criticize certain internal practices and to privilege other ones – become important trends. Both the Damascus Document and Paul invoke a prohibition on foreign law in a highly juridical mode as they condemn the use of courts outside the community. Whereas in the biblical texts the foreign law under discussion has more the feel of cultural habits, practices, or

nomoi in a broad sense, the Damascus Document and Paul feature foreign law in the technical sense of jurisdiction and judicial authority. We will see these two conceptualizations of law – the first a broad one that refers to cultural norms, and the second a narrower technical one that refers to judicial procedures – vying with each other in subsequent discussions of foreign law. Finally, the allegorical interpretation of the prohibition on foreign law in Philo, who highlights the philosophical and ethical over and against the sociological and political, points to a contrary and surprising trend: the prohibition on foreign law sometimes serves as an opportunity to universalize, to blur boundaries, to find common human ground, and to challenge conventional notions of difference.

Midrash Halakhah and Midrash Aggadah

As we move into late antiquity and look at rabbinic literature, two key questions emerge regarding Lev 18:3's prohibition on foreign law: Who counts as foreign, and what counts as law? Midrashic commentary compiled within the *Sifra* furnishes two approaches to these questions, the first in the body of the *Sifra* attributed to the school of Rabbi Akiva, and the second in a textual insertion into the *Sifra* attributed to the school of Rabbi Yishma'el. In the first passage, in the Akivan section, the commentary on Lev 18:3 takes a restrictive approach to the third part of the verse, understanding the final clause "and in their laws you should not go" as limiting the scope of separation between Israel and its neighbors:

> Or like the practice of the land of Egypt and like the practice of the land of Canaan you should not practice?
>
> Is it possible that one should not build buildings or plant plants as they do?
>
> [Scripture] teaches by saying, "And in their laws you should not go" – I said [this] only with respect to the laws that are legislated to them and to their fathers and to their fathers' fathers.
>
> And what did they used to do? A man would marry a man, and a woman [would marry] a woman, a man would marry a woman and her daughter, a woman would marry two [men]. For this it was said, "and in their laws you should not go."[14]

The *Sifra* first proposes that the verse prohibits Israel from adopting even the building and planting styles of its neighbors. But in the continuation, the *Sifra* claims that the function of the final clause of the verse is to rule out precisely this reading: building and planting in the same style as gentiles in fact falls outside the scope of prohibition.[15]

What the verse does prohibit, according to the *Sifra*, are "laws that are legislated to them and to their fathers and to their fathers' fathers." The *Sifra* author here imagines for gentiles an abiding, closely guarded tradition separable from "building buildings and planting plants" and proposes that this tradition is the true target of the Torah's prohibition. The examples of foreign law the passage goes on to provide – gay marriage, among other marriage combinations – are curious and can be most readily understood in light of the biblical text on which the *Sifra* comments. Since the couplings described by

the *Sifra* can be found in one form or another in the list of sexual taboos in Lev 18, the *Sifra* would appear to be suggesting that Lev 18:3, when it prohibits foreign law, refers forward to the list of sexual acts in the chapter. The *Sifra* would thus appear to understand Lev 18:3's prohibition on foreign law in a relatively restrictive way as referring only to certain "perverse" marriage practices found in the body of Lev 18 and practiced by ancient Egypt and Canaan.

The problem with this approach is that the *Sifra*'s list of practices is not identical with the prohibitions of Lev 18, which go far beyond the *Sifra*'s handful of partnerships, do not mention marriage per se, do not mention same-sex female partnerships at all, and list the partnerships in a different order. While perhaps the midrashist did not feel the need to be precise, we can also conjecture that he had his own reasons for highlighting these particular partnerships. The featuring of male homosexual marriage creates a provocative parallel between the chain of tradition possessed by the rabbis and that attributed to gentiles: instead of males teaching Torah to each other, males marry each other, and instead of transmitting Torah from one set of fathers to the next, the men transmit *to'evah* (abomination), the label given by Lev 18:22 to male homosexual intercourse. The gentile chain of transmission becomes a perfectly perverse mirror of the proper rabbinic model. The other marriage combinations that the midrash mentions reinforce the impression of a legal system perverted: in the case of male and female homosexual marriage, the literal reproduction of a new circle of legal transmitters is prevented (in the rabbinic perspective); in the case of the other two marriage combinations, patrilineage is confused, making father–son transmission difficult to clarify. These marriage practices would seem to inhibit the transmission of laws from father to son and so on, either by preventing the birth of sons or by obscuring their lineage. The content of gentile laws therefore proves deeply ironic: their laws make it impossible to have laws! The *Sifra*'s mention of homosexual marriage may be construed additionally as a critique of contemporary Roman habits, since evidence exists for Roman same-sex marriages.[16] Homosexual marriage was hardly considered legitimate within Roman gender conventions, however, and the *Sifra*'s ascription of male–male marriage to gentiles might thus be read both as satirical and at the same time as affirming conventional Roman masculine ideologies. Something similar can be said regarding the

Sifra's othering of lesbian marriage, which was also heavily criticized and marginalized by late classical writers.[17]

The second passage in the *Sifra*, the one of the Yishmaelan school in a unit called the Mekhilta de-Arayot, takes a more expansive approach to the prohibition on foreign law:

> "And in their laws you should not go" – and what [information] did the verse leave that it did not say?
>
> For was it not already said, "[When you enter the land that the Lord your God is giving you, you shall not learn to imitate the abominations of those nations.] Let no one be found among you who consigns his son or daughter to the fire, etc., one who casts spells or one that consults [a ghost], etc." (Deut 18:10–11)? What does [Scripture] teach in saying "and in their laws you should not go"?
>
> That you should not go in their habits (*nimusot*), in the things that are inscribed for them such as theaters, circuses, and stadia.
>
> Rabbi Meir says: These are the Amorite ways that the Sages enumerated.
>
> Rabbi Judah ben Baterah says: That one should not dress extravagantly (?), and that one should not grow the fringe, and that one should not cut one's hair.[18]

The Mekhilta proposes a redundancy between Lev 18:3 and Deut 18:10, which prohibits several practices it identifies as alien and idolatrous: if Deuteronomy offers these particular prohibitions, queries the midrash, what does Lev 18:3 add? According to the first position presented in the passage, Lev 18:3 adds *nimusot*, from the Greek *nomos*; the midrashist follows up not only with his own definition of *nimusot* ("things that are inscribed for them") but also with several examples drawn explicitly from contemporaneous Roman culture – theaters, circuses, and stadia. This definition of foreign law as *nomoi* and the examples of Roman leisure activities challenge the first passage's tactic of separating out a prohibited core of traditions from a broader sphere of habits. This passage instead argues that the very purpose of Lev 18:3 is to prohibit general cultural practices that might not otherwise be forbidden.

The next position, attributed to Rabbi Meir, understands "their laws" as the "ways of the Amorites." The main literary unit that treats the "ways of the Amorites" (*t. Shabbat* 6 and 7, with a parallel in *b. Shabbat* 67a–b) includes among them: tying a red

string on one's finger (*t. Shabbat* 6:1); saying "eat this date … so that you will remember me by it" (6:7); shouting at the oven, so that the bread will not fall (6:14); saying "he is poor but his end is to grow rich" if a snake falls on a man's bed (6:16). The practices consist mostly of what contemporary western religions would call "superstition." An ancient Roman intellectual might have said these practices represented an excess of religious emotion as well as an impious attribution of harmfulness to the gods. Rabbinic legislators seem to have categorized these practices as "Amorite ways" because they fall through the cracks of clearer categories of prohibition as defined by the Torah. Rabbi Meir's position thus functions similarly to the first one in referring the verse to a cultural realm considered controversial but not strictly forbidden.

Rabbi Judah ben Baterah's position, the final of the three listed in the passage, seems to understand Lev 18:3's "their laws" to be addressing physical appearance, though the wording of the text is obscure. Rabbi Judah ben Baterah presents three sub-prohibitions. The first of these uses the root *n-q-r*, which normally refers to perforation; the classical commentator Abraham ben David of Posquières (Ra'avad, *c*. 1125–1198) understands it here as prohibiting a man from being "foppish in dress in order to attract the admiration of women."[19] The second sub-prohibition, "one should not grow a fringe (*tsitsit*)" is also strange, since the phrase is found only here within rabbinic literature; Ra'avad proposes a connection with Ezek 8:3, where the word *tsitsit* refers to the "fringe" of the human head or, in other words, hair. If so, then Rabbi Judah ben Baterah is prohibiting men from growing their hair long as ancient philosophers were sometimes criticized for doing. Commentators explain the final sub-prohibition – "do not cut the hair (*kome*)" – as a reference to a particular pagan haircutting practice, one that several rabbinic texts associate with efforts to blend into elite Roman society.[20] With these three sub-prohibitions, Rabbi Judah ben Baterah would seem to be speaking of Roman elite self-fashioning that eluded formal rabbinic legislation. Like the theater, circus, and stadia, and like the "ways of the Amorites" (and included among the "ways of the Amorites" in *t. Shabbat*), haircutting and clothing for Rabbi Judah ben Baterah represent a realm with tremendous ideological charge but with relatively permissive law.

This passage offers what we might call a centripetal approach to the prohibition on foreign law: the center acts as a magnet that attracts everything to it, so that we can barely talk about center any longer when it comes to foreign law, which seems to

encompass many different features of lived experience. The previous passage, by contrast, represents a centrifugal strategy according to which things are flung away from the center so that what remains in the definition of "their laws" is only that which is transmitted for generations and that which is deeply problematic culturally and morally. The passage creates a legal core, both an explicit gentile core as well as an implicit Jewish one. At the same time it opens up a neutral space surrounding those cores in which Jews and gentiles can share habits. In the second passage's reading, on the other hand, the Torah speaks not just of cores or essences or abiding laws, but of something much broader, of habits of being.

An even broader approach to the prohibition on foreign law is found within midrash aggadah. For the pericope based on Lev 18:3 in *Leviticus Rabbah*, the verse furnishes an opportunity to explore the nature of Jewish difference and of Jewishness itself. The first half of the parashah reads Lev 18:3 in light of Song 2:2, "like a rose among the thorns," with each literary unit equating Israel with the beautiful rose and the other nations with the thorns that surround it. In the first unit, the rose becomes a metaphor for Israel's superior moral character:

> "Like the practice of the land of Egypt" (Lev 18:3). Rabbi Isaac opened "Like a rose among the thorns" (Song 2:2). Rabbi Isaac interpreted the verse as referring to Rebecca. "Isaac was forty years old when he took to wife Rebecca, daughter of Betuel the Aramean of Paddan-aram, sister of Laban the Aramean" (Gen 25:20). Why does Scripture state "sister of Laban the Aramean"? And did it not already state "daughter of Betuel the Aramean"? … Rather, the Holy One Blessed Be He said, "Her father is a deceiver (*ramay*) and her brother is a deceiver and the people of her place are deceivers and this righteous woman emerged from among them and appears out of among them like a rose among the thorns."[21]

Rabbi Isaac reads the "rose" of Song of Songs as a reference to Rebecca, and the "thorns" of the verse as her father, brother, and townsfolk: Rebecca the righteous stands out among her corrupt countrymen as does the rose among the thorns. The reading hinges on the repetition of the descriptor "Aramean" for both Betuel, Rebecca's father, and Laban, Rebecca's brother. The descriptor repeats, in Rabbi Isaac's word play on *arami* (Aramean) and *ramai* (deceiver), in order to teach about the moral qualities of the

characters. Rabbi Isaac reads the literary repetition as showing that Jewish distinctiveness is a function of moral fiber, not family.

The next unit represents Jewish difference as a function of physical appearance:

> Rabbi Elazar interpreted the verse as referring to those who departed from Egypt. "Like a rose among thorns" – Just as this rose is difficult to pick, so too when Israel was in Egypt, they were difficult to redeem. Thus it is written, "Or has any god ventured to go and take for himself one nation from the midst of another nation" (Deut 4:34). Rabbi Joshua son of Rabbi Nehemiah in the name of Rabbi Samuel ben Pazi: "One nation from the midst of another people" is not written here, or "one people from the midst of another nation," but "one nation (*goy*) from the midst of another nation (*goy*)" – these are uncircumcised and those are uncircumcised; these are growers of *blorits* and those are growers of *blorits*; these are wearers of *kilayim* and those are wearers of *kilayim*. Therefore the [divine] attribute of justice would not have allowed Israel to be redeemed from Egypt.[22]

In the analogy between Song 2:2 and the exodus narrative, just as one who wishes to pick a rose encounters the surrounding thorns as an obstacle, so too God, wishing to redeem Israel from Egypt, was discouraged by Israel's assimilation. Israel's Egyptianizing habit is represented by three examples: not circumcizing, growing the *blorit*, and wearing *kilayim* or mixed materials. The story has shifted from the patriarchs to the nation, and the locus of distinctiveness has also shifted, from moral qualities to physical appearance. The success of Israel's separateness is also now reversed – in this unit, Israel fails to distinguish itself from those who surround them, unlike Rebecca, who outshone the men around her. The intertextual frame for these claims is the rhetoric of Deut 43:4. In Rabbi Samuel ben Pazi's midrash, the reuse of the same term *goy* to describe both the Israelites and the Egyptians teaches that the two peoples had become alike. This unit articulates the public appearance of the male Jewish body as the locus of Jewish identity.

Subsequent units consider obedience to God, ritual competence, political and economic subordination, and demographic patterns as markers of Jewish distinctiveness. When the proem returns to Lev 18:3, sexual restraint comes to distinguish Israel from others:

> Rabbi Ḥunya said: [It compares to] a king who had an only daughter and he caused her to dwell in a particular alley and they all turned out to be sexual perverts. He went and caused her to dwell in another alley and they all turned out to be sexual perverts and magicians. Her father said to her, "My daughter, give it your attention so that you will not practice like the practice of these or like the practice of those." Thus, when Israel was in Egypt, the Egyptians were sexual perverts – "… whose members were like those of asses …" (Ezek 23:20). And when they entered the land of Canaan, the Canaanites were sexual perverts and magicians – "Because of the countless harlotries of the harlot, the winsome mistress of sorcery" (Nah 3:4). The Holy One Blessed Be He said to them, "My son, be cautious not to practice either like the practice of these or like the practice of those." Thus it is written, "Like the practice of the land of Egypt."[23]

In Rabbi Ḥunya's mashal, the only daughter of a king provides a parallel to the people Israel. The king's decision to strand his daughter not once but twice in alleys filled with perverts and magicians matches God's plan for Israel in Egypt and Canaan. When in Lev 18:3 God tells Israel to avoid the practices of Egypt and Canaan, what we see in the mashal is the king advising his daughter to be careful not to imitate the behaviors she sees around her. Ezek 23:20 (perhaps the most pornographic verse in all of Scripture) and Nah 3:4 provide apparent evidence for the monstrous sexual degradation of Egypt and Canaan. The mashal portrays Jewish difference as a test: Will the king's only daughter be able to resist the harlots and idolaters who surround her? Will Israel be able to do the same? The threat within the mashal is not whether the men will attack the king's daughter, as we might expect, but whether she will be able to resist copying their aggression. The king is worried not about her being violated by the men but about her being coopted by them. The king tells his daughter, *teni da'atikh* ("pay attention"): The test is of her own mental stolidity. Here in the literary artistry of midrash aggadah, the prohibition on foreign law is transformed into a meditation on the many different modes of Jewish distinctiveness, with sexual restraint central.

Mishnah, Tosefta, and Talmud

The Mishnah and Tosefta develop a more juridical understanding of Lev 18:3's prohibition on foreign law. In *m. Sanhedrin* 7:3, the Sages and Rabbi Judah debate the proper method of decapitation, the third of four rabbinic forms of capital punishment:[24]

> The commandment of those to be decapitated: They would chop off his head with a sword the way that the kingdom does. Rabbi Judah says: "This is a disgrace. Rather, they should lay his head down on the block and cut it with an axe." They said to him: "There is no execution more disgraceful than that."

The Sages and Rabbi Judah dispute which method of decapitation more effectively preserves the dignity of the criminal as he or she is executed, the sword or the axe. The Sages characterize the sword as the method of "the kingdom," an oblique reference to Rome. The Sages' surprising embrace of a Roman death penalty makes sense when we look at the full panoply of Roman punishments, among which decapitation was a relatively honorable way to die, reserved generally for the upper-class condemned. The Sages' concern with protecting the criminal's dignity leads them to adopt imperial Rome's most dignified method of execution.

It is unspecified by the Mishnah why Rabbi Judah attacks the sword method if he, too, is concerned to preserve the criminal's dignity. The Toseftan parallel fills in this gap:

> Rabbi Judah says: "Behold it says, 'And love your fellow as yourself' (Lev 19:18) – choose for him a nice execution. How do they do this for him? One lays his head on the block and cuts it off with an axe." They said to him: "There is no execution more disgraceful than this." He said to them: "Of course there is no execution more disgraceful than this, but rather, [one must do it this way] because of '… and in their laws you should not go' (Lev 18:3)."[25]

The dispute between the Sages and Rabbi Judah as it is represented in the Tosefta proves to be not only about the problem of bodily dignity but also about the problem of following foreign law. The Sages apparently allow borrowing from foreign law, while Rabbi Judah forbids borrowings even in a case when foreign law offers a more humane alternative.[26]

The Tosefta has left a cliffhanger, however: How would the Sages defend their sword method against Rabbi Judah's charge that it transgresses the prohibition on foreign law? The Sages cannot simply permit borrowings from foreign law without some reckoning with the verse. The Babylonian Talmud redactor furnishes an answer: "Since the sword is written in the Torah, we do not derive it from them."[27] According to the redactor's defense of the Sages, if a law is found in the Torah, then it is not considered to be derived from foreign law, even if that law happens to exist among non-Jews. The remaining pericope brings evidence for this principle:

> For if you do not say so, then that which is taught [in a baraita], "They [are permitted to] burn over kings, and it is not [considered to be] from the ways of the Amorites," how could we burn [it]? And is it not written, "… nor shall you follow their laws" (Lev 18:3)? Rather, since burning is written in the Torah – as it is written, "and with the burnings of your fathers …" (Jer 34:5) – we do not derive it from them. So here too, since the sword is written in the Torah, we do not derive it from them.

This baraita is excerpted from a section of the Tosefta's treatment of Amorite practices where certain practices are declared to be *not* Amorite, as is the case here with the practice of burning a king's property upon the occasion of his death.[28] What the redactor seems to be picking up on is the curiosity of the Tosefta's permission: If a practice is "not of the ways of the Amorites," then why need it be mentioned as such? The Tosefta must mention the practice of burning royal property because some doubt surrounds it. According to the redactor's logic, Jer 34:5, a verse that seems to show the origins of the practice in biblical times (though, in fact, the Jeremiah verse seems to be talking about the burning of incense rather than the burning of royal property), must be coming to dispel these doubts. The redactor thus gives a strong reading of the verse's presence, inferring from it the principle that a particular practice is not considered of the ways of the Amorites if it is found in a verse.

But a parallel pericope in tractate *Avodah Zarah* offers a different explanation for the permitted status of royal burning. That pericope deals with a contradiction between *m. Avodah Zarah* 1:3 and *t. Shabbat* 7:18 on the status of this practice. According to that

mishnah, it appears to be a pagan practice, while according to *t. Shabbat* it is explicitly declared to be not "of the ways of the Amorites":

> [The Mishnah: Business with non-Jews is prohibited three days prior to … the day of birth and the day of death. This is Rabbi Meir's opinion. The Sages say: Every death in which there is burning – there is idolatry; every death in which there is no burning – there is no idolatry.]
>
> [The Mishnah] implies that Rabbi Meir reasons that a death in which burning takes place is no different from a death in which burning does not take place: they perform [idolatrous] worship on that day. One can infer that [according to Rabbi Meir], burning is not a *ḥuqqah*. [The Mishnah] implies that our Rabbis reason that burning is a *ḥuqqah*.
>
> But behold it is taught [in a baraita]: "They [are permitted to] burn over kings, and it is not from the ways of the Amorites"! But if it is a *ḥuqqah*, how could we burn? And is it not written, "… and in their laws you should not go" (Lev 18:3)?[29]

According to the talmudic logic, we can infer from Rabbi Meir's failure to distinguish between "death days" in which burning takes place and "death days" in which burning does not take place that he holds that burning is irrelevant to the idolatrous religious observance and is therefore not a *ḥuqqah*, or religiously problematic. The pericope then deduces that the opposing Sages must presume that burning *is* an idolatrous act. This is impossible, however, if one assumes that early rabbinic traditions must be consistent (as the redactor does), since *t. Shabbat* claims explicitly that burning is not of the "ways of the Amorites." The rhetorical pattern of this pericope in tractate *Avodah Zarah* is familiar from tractate *Sanhedrin: t. Shabbat* is quoted and then queried with Lev 18:3: how could burning be a *ḥuqqah* (a foreign or idolatrous law) if the Torah prohibits the adoption of *ḥuqqotehem* (their laws)?

The redactor leaves himself two options: either to declare that burning is indeed an idolatrous practice and then to reinterpret *t. Shabbat*, or to declare that burning is not an idolatrous practice and then to reinterpret *m. Avodah Zarah*. The redactor chooses the latter route:

> Rather, according to both opinions burning is not a *ḥuqqah*, but is rather a mark of importance. And here they are disputing: Rabbi Meir reasons that a death in which burning takes place is no different from a death in which burning does not take place: they perform idolatrous worship on that day. And our Rabbis reason that a death in which burning takes place is considered important to them and therefore they perform idolatrous worship on that day, and when burning does not take place, it is not considered important, and therefore they do not worship on that day.

The redactor concludes that whether one follows Rabbi Meir or the Sages, the practice of burning is religiously incidental – "it is not a *ḥuqqah*," which for the redactor comes to refer to idolatrous worship. According to the redactor's resolution, burning serves in the Sages' view merely as a predictor for idolatrous worship rather than as idolatrous worship itself.

Both the *Sanhedrin* and *Avodah Zarah* pericopes develop new strategies for differentiating Jewish law from foreign law. The *Sanhedrin* redactor's strategy can be called nativization or scripturalization: the *Sanhedrin* redactor claims that royal burning is a Torah law, though he does not deny that it is also a foreign law. For him, the practice can belong to both legal systems at the same time. The *Avodah Zarah* redactor, on the other hand, employs a strategy we could call neutralization: the pericope robs the practice of its idolatrous meaning – he expels it from the scope of foreign law – in order to make it acceptable within the rabbinic legal system. The Babylonian Talmud thus sets the stage for a variety of medieval interpretations of "their laws" that transform it from the blunt tool wielded by Rabbi Judah to a fine surgical instrument. The *Sanhedrin* pericope's interest in etiology, in the origins of a practice, and the *Avodah Zarah* pericope's interest in taxonomy, in properly categorizing a practice, become the new battlegrounds for determining the boundary between Jewish and foreign law.

So far we have seen tannaitic and talmudic materials that focus on the prohibition against foreign law, but other rabbinic legislations feature a prohibition against foreign courts, echoing the Damascus Document and Paul.[30] The locus classicus is a baraita on *b. Gittin* 88b:

> Rabbi Tarfon says: In any place where you find non-Jewish law courts, even though their laws are the same as the laws of Israel, you must not resort to them, since it

says, "These are the judgments which you shall set before them" (Exod 21:1), before them and not before non-Jews …

A fundamental principle of judicial protectionism or isolationism is here articulated: Jews must take their cases to Jewish courts and Jewish courts only.[31] A legislation attributed to Rava on *b. Bava Qamma* 113b presents a similar protectionism when it calls for the excommunication of a Jew who testifies against another Jew on behalf of a non-Jew in a non-Jewish court.[32]

But the *Bava Qamma* passage goes on to limit the legislation to certain kinds of non-Jewish courts and to cases when the Jew is the solitary witness, and other rabbinic passages likewise offer a less isolationist picture. A baraita on *b. Bava Qamma* 113a urges the rabbinic judge of a case between a Jew and a non-Jew to adjudicate by whichever set of laws, Jewish or gentile, give the advantage to the Jew.[33] This legislation's purpose is to give preferential treatment to the Jew, but in the course of doing so it allows for legal fluidity between non-Jewish and Jewish courts. This fluidity appears also in a midrash halakhah passage parallel to the *Gittin* baraita above, which, like the *Gittin* baraita, invalidates the decision of a non-Jewish court even were it to judge according to Jewish laws but (unlike the *Gittin* baraita) at the same time validates the decision of a Jewish court that judges according to non-Jewish laws.[34]

These passages permit Jewish courts to judge according to non-Jewish laws; other passages permit Jews to use non-Jewish courts. *M. Gittin* 9:8 validates a divorce enforced by a non-Jewish court so long as it was initially ordered by the Jewish court, and an amoraic statement on the mishnah (*b. Gittin* 88b) declares that according to Torah law the non-Jewish court could even issue the divorce to begin with. The most striking non-protectionism is found in *m. Gittin* 1:5 and *t. Avodah Zarah* 1:8. *M. Gittin* 1:5 (parallel in *t. Gittin* 1:4) validates contracts kept in non-Jewish archives and signed by non-Jewish witnesses. *T. Avodah Zarah* 1:8, along similar lines, permits contracts to be drawn up and deposited in non-Jewish archives, and priests to become impure by testifying and litigating concerning non-Jews outside of Israel, in cases that involve the "rescue" of land, property, or slaves from their pagan neighbors.[35] These passages, especially the last two, seem relatively open to Jewish interaction with foreign law and

foreign courts, though the larger aims could often be described as protectionist or isolationist in their preferential treatment for Jews and suspicion of non-Jews.

Two other talmudic principles or ideas, *dina de-malkhuta dina* ("the law of the kingdom is law") and Noahide law, also seem to run counter to Lev 18:3's prohibition on foreign law, the first by recognizing the authority of foreign law, and the second by claiming for it some basic continuity with Torah law. The principle of *dina de-malkhuta dina* is attributed to the third-century CE Babylonian rabbi Samuel through a chain of transmission from the Babylonian Exilarch to Rava (or Rabbah in some manuscripts). Some scholars have taken the principle to mean that the exilarchal judges would judge according to Persian law. In Geoffrey Herman's view, it means not that the exilarchal judges wholesale adopted Persian law but that they were instructed to familiarize themselves with it in order to make sure that their judgments did not veer too far from Persian ones[36] lest Jews be tempted to turn to the court that would provide the more favorable judgment. The principle is presented in conjunction with land use laws and seems to have been formulated in order to address differences between Jewish and Persian law in that legal area.[37] The Talmud redactors already begin to understand the principle the way that the medieval writers will, however, as a more general recognition of the authority of dominant non-Jewish legal authorities, and invoke it to challenge several early rabbinic traditions that permit lying to tax collectors or that deny the legitimacy of certain contracts executed or endorsed by non-Jewish courts and of non-Jewish rules for land transfer.[38] But the principle could have been invoked in countless legal areas, Herman observes, and appears to have been known neither by many other *amoraim* (if any) nor by the Yerushalmi. Another Babylonian *amora*, Rav Nahman, in several places freely disparages Persian law.[39] *Dina de-malkhuta dina* should therefore not be seen as having in talmudic times nearly the same prominence that it came to have for medieval and modern Jews.[40]

The Babylonian Talmud has more extensive treatment of Noahide law, a term that refers to a set of commandments that were thought to have been given to humanity (i.e., "the descendants of Noah") before the emergence of Israel. The commandments are first enumerated in *t. Avodah Zarah* 8:4, where seven such commandments or prohibitions are listed and discussed pertaining to: (1) (the establishment and adjudication of) laws; (2) idolatry; (3) blasphemy; (4) sexual immorality; (5) bloodshed; (6) robbery; and (7)

(eating) a limb torn from a live animal. Additional rabbinic opinions include among the Noahide commandments prohibitions on eating blood from a live animal, on castration, on magic and other kinds of divination, and on mixed seeds. The main talmudic commentary on Noahide commandments (*b. Sanhedrin* 56a–60a) anchors them exegetically in God's words to Adam and Noah in Genesis. Scholars have debated whether the Noahide commandments were intended practically, for Jewish courts to enforce upon non-Jews when possible, or were a philosophical exercise. The fact that the talmudic treatment speaks of legal liability and judicial punishment in connection with the Noahide laws might point to the first approach, but many areas of talmudic law speak of punishments that would not have been enforceable and were clearly addressed for reasons that go well beyond practical law. The approach that looks at the Noahide commandments as an intellectual exercise features a debate over whether natural law is an appropriate term to apply to them; while some see them as a Jewish version of natural law thinking, a "rabbinic attempt to discover within the classical resources of the tradition a thread of thought that spoke to universal, inter-human concerns," others see these discussions either as distant from natural law thinking or as a rejection of it.[41]

The Babylonian Talmud generally represents law for Jews as more rigorous and detailed than law for Noahides. This comparison is captured in the principle that "there is nothing that is permitted to Israel that is forbidden to a gentile" (*b. Sanhedrin* 59a). One example provided by the Talmud of the relative severity of laws for Jews is sexual intercourse with a betrothed virgin, which for Noahides does not constitute adultery and incurs no punishment, but which for Israel incurs the death penalty (57b). Another example given is incest taboos, which for Noahides include fewer relatives (57b–58b). Noahide legal procedure is represented as blunter than that of the rabbinic court: one judge and one witness, who may be a woman, are sufficient to convict a Noahide of a capital crime, and no warning need be delivered to the defendant beforehand, whereas procedure for a Jewish defendant requires twenty-three judges, two witnesses, neither of whom can be female, and a warning (57b). Noahide law's capital penalties consist only of decapitation, which is one of the less severe methods applied to Jews, who may suffer three other capital penalties besides (57b).

But sometimes Noahide law is represented as being the stricter. One view declares Noahides liable for murder for taking the life of a fetus, a liability that does not exist for

Jews (57b). Noahides are declared liable for theft even when the value of the item is less than a *perutah* (i.e., of negligible value); the threshold of theft for Jews is higher. A contrast is also drawn regarding a female captive, who is permitted to Jews but prohibited to Noahides (59a). The talmudic discussion goes so far as to attach capital liability to a Noahide who ceases to work for a day, and to claim capital liability across the board for a Noahide's violation of any of their laws (58b; though alternative views debate the number of violations for which Noahides have capital liability, 57a). These instances in which the law for Noahides is severe when compared to the law for Jews may be intended to criticize non-Jews for their cruelty and for their misplaced priorities: addressing their stricter standards for theft, the talmudic redactor explains that non-Jews are not of a forgiving nature, and Rashi comments that "a gentile is scrupulous about a minor thing."[42] Their allegedly cruel character perhaps provides part of the justification for the infamous double standard that appears here and elsewhere in rabbinic law's treatment of non-Jews: Jews are liable for theft and murder with regard to fellow Jews, for example, but not with regard to non-Jews.[43]

Most interesting are the moments in the talmudic discussion when Israel's law and Noahide law seem to overlap. A baraita claims that the stuff of Noahide law is essentially the same as that of Israel: anything that Israel has capital liability for, a Noahide must also obey and, vice versa, anything that Israel does not have capital liability for, a Noahide is not bound by (56b). Another baraita identifies Israel's obligation to establish courts in every town with a Noahide obligation to do the same (56b), and yet another baraita pictures the Israelites at Marah receiving the same commandments (along with a few extra) that the Noahides had already accepted. The final section of the long pericope on Noahide law questions why certain key commandments for Jews – circumcision and procreation – are not also compulsory for non-Jews, and argues that whichever commandments given at Sinai were also described as being given earlier are intended for both Jews and non-Jews to observe. In its final flourish, the pericope asks whether it might indeed be possible that non-Jews have the same obligation as Jews to observe all the commandments of the Torah. This possibility is, as one might expect, denied, but the pericope leaves the impression that there is substantial common ground between the laws of Israel and the laws of non-Jews, and that differentiating which commandments in the Torah were intended for which audience is not as simple as it might seem. Noahide law

thus serves as an opportunity for rabbinic authors both to distinguish native law from foreign law but also to explore their parallels.

Medieval Commentaries

The medieval Talmud commentaries treating the prohibition on foreign law introduce a new rationalism that pervaded subsequent modern treatments of the subject. A key passage in the Tosafists (twelfth to fourteenth centuries, mainly in France and Germany) starts with the contradiction between the two talmudic pericopes on foreign law: Is burning permitted because it is scripturally derived, *despite* the fact that it is one of "their laws" (the *sugya* in *Sanhedrin*), or is burning permitted because it is not in fact one of "their laws" at all (the *sugya* in *Avodah Zarah*)? In order to resolve the contradiction, the Tosafot passage proposes that the *Avodah Zarah* and *Sanhedrin* pericopes use the word *ḥuqqah* in different ways:

> Thus Rabbi Isaac interpreted that there are two types of *ḥuqqah*, one where they do it in the name of a law for idolatry, and one where they do it in the name of the knowledge of their vanity and foolishness.[44]

According to Rabbi Isaac and the remaining Tosafot passage, *ḥuqqah* can refer either to acts of idolatrous worship, as it does in *Avodah Zarah*, or to acts of "their vanity and foolishness," which are equally prohibited though less gravely objectionable, as it does in *Sanhedrin*. In the Tosafot's reframing of the *sugya* in *Avodah Zarah*, when the latter proposes that burning is not a *ḥuqqah*, what the *sugya* means is that burning is not a *ḥuqqah* of the first more severe category, of the kind that is strictly for the sake of idolatry. Such a *ḥuqqah*, all would agree, would be forbidden under any circumstances whatsoever. Even the *Sanhedrin* authors, who offer the loophole of Scripture – "if it is written in the Torah, then we do not derive it from them" – would agree that for a *ḥuqqah* of this type, even its presence in Scripture would not be enough to legitimate it. The Scripture loophole cannot be used in such cases (which explains, according to the Tosafot's theory, why the *sugya* in *Avodah Zarah* does not invoke it).

Where the *Sanhedrin* authors do offer their Scripture loophole, we discover, is for *ḥuqqot* of the second less grave variety, *ḥuqqot* for the sake of vanity and foolishness. When *Sanhedrin* claims that burning is a *ḥuqqah* and then offers its Scripture loophole, what they have in mind is this kind of *ḥuqqah*, not the *ḥuqqah* for the sake of idolatry. The *sugya* in *Sanhedrin*, according to the Tosafot's reading, is thus a secondary literary

creation that presumes the conclusions set forth in *Avodah Zarah* that burning is not a *ḥuqqah* for the sake of idolatry. The Tosafot go so far as to say that even Rabbi Judah in *Sanhedrin*, who we would presume from the *sugya* objects to the Scripture loophole, would in fact apply the Scripture loophole for *ḥuqqot* of this relatively minor quality, as exemplified by burning. Rabbi Judah's problem with the sword is not that he does not believe in the Scripture loophole, but that he does not think the sword has any basis in Scripture. The loophole is fine – it just does not apply here. Nobody would go so far as to say, adds the Tosafot, that you do not need some loophole to legitimate gentile practices, even the trivial kind done for mere foolishness. "Their laws" should be avoided, all things being equal, even when those laws are of the less serious variety. The Tosafot's distinction thus successfully explains why *Avodah Zarah* declares burning to be not a *ḥuqqah* (it is not a *ḥuqqah* for idolatry) and why *Sanhedrin* declares burning to be a *ḥuqqah* (it is a *ḥuqqah* for foolishness) and then offers a legal loophole for circumventing its prohibited status (such *ḥuqqot* for foolishness can be conditionally circumvented).

The Tosafot emerge with a new stringency in the prohibition on foreign law. The halakhic conclusion of the *sugya* in *Sanhedrin*, when read on its own, is that gentile practices can sometimes be imitated as long as there is scriptural precedent for them. "Their laws" may be a broad category, but it is also permeable. The *sugya* in *Avodah Zarah*, on the other hand, offers a more restricted construal of the category in its claim that burning the property of a king is mere "importance" and as such does not fall under the category. The implication of the *sugya* is that if it did, it would be unconditionally forbidden, yet the number of cases in which the prohibition applies would appear to be smaller. Each *sugya* has both a lenient and a stringent dimension: the *sugya* in *Sanhedrin* is lenient in that it offers a loophole, but it is stringent in that a potentially wide array of practices fall under the scope of the prohibition; the *sugya* in *Avodah Zarah* is lenient in that it limits the scope of the prohibition, but it is stringent in that it offers no means of circumvention. The Tosafot commentary on *Avodah Zarah* picks up the stringencies of both *sugyot*, adopting the unconditional character of the prohibition from *Avodah Zarah* as well as the breadth of the scope of the category from *Sanhedrin*. Moreover, the commentary leaves behind the two *sugyot*'s respective leniencies. In taking from the *sugya* in *Avodah Zarah* the notion that there are gentile laws that are prohibited under all

circumstances, including when they might coincidentally appear in Scripture, the Tosafot ignore the leniency offered by *Sanhedrin*. In taking from the *sugya* in *Sanhedrin* the notion that even burning falls under the rubric of their laws, the commentary ignores *Avodah Zarah*'s defanging of the practice. The legal outcome of the Tosafot's commentary is thus a good deal more restrictive of Jewish practice than either *sugya* taken by itself.

The Tosafists also inject a new rationalism into the prohibition on foreign law. The particular formulation that the Tosafot introduce for the *ḥuqqah* of a less serious variety, the *ḥuqqah* "for the sake of the knowledge of vanity and foolishness," and what is later in the passage called "their custom of foolishness," launches a rationalist critique of non-Jewish law. Reason and rationality were weapons of war in the Jewish-Christian polemics that flowered in twelfth-century Europe, as disputational, philosophical, and exegetical literature of the period attests, and the Tosafists would appear to be joining the fray here. If we move from Ashkenaz to Sefarad, we find a comparable rationalism in the approach taken later by the Ran (Nissim Gerondi, *c*. 1310 – *c*. 1375), a physician to the Spanish king and to royal circles, prolific text scholar, and legal arbitrator and advocate for the Jews in Barcelona. Nissim's discussion of "their laws" appears in his commentary on *Sefer Ha-Halakhot* by Alfasi (the Rif, Isaac of Fez, born 1013, North Africa) in its section on the *Avodah Zarah* pericope:

> "They burn for kings and [it is] not of the ways of the Amorites": It is not of the ways of the Amorites, to be concerned [that it violates] "do not practice like their practices" (Exod 23:24), since the Torah prohibited only laws of idolatry – these are things of vanity and idleness, and all of them have in them some component[45] of idolatry – but things of reason, they permitted. And with burning for kings, there is a reason to burn, for the honor of their utensils, that is to say, that no other person should be able to use what he used.[46]

Like the Tosafot, Nissim Gerondi proposes that the target of Lev 18:3's prohibition, as the Talmud construes it, includes practices that are senseless "things of vanity and idleness." In this, both the Tosafot and the Ran impose a rationalist framework on the *sugya*, which does not itself thematize reason.

The operative binary for Nissim is "things of vanity and uselessness" and "things of reason." In Nissim's reading, the *sugya* teaches that Lev 18:3's prohibition targets only the former. Gentile practices that have some legitimate rationale – the *sugya* considers burning the property of a king upon his death to be an example – lie outside the scope of the prohibition. The Ran here invokes the same two categories as the Tosafot, idolatry and irrationality, but *identifies* them with each other rather than seeing them, as the Tosafot do, as two subcategories of "their laws," with the first being more severe and never permitted, and the second being less severe and conditionally permitted (if found in Scripture). The Ran's claim is that vain practices are not a different entity than idolatry proper but are in fact the very definition of idolatry.[47] The overlapping but ultimately divergent frameworks of the Tosasfot and the Ran translate into different approaches to the *sugya*'s sample case, burning. For the Tosafot, burning falls under the category of a senseless *ḥuqqah*; it is technically prohibited under Lev 18:3; it therefore requires a Scriptural basis to make it permitted. For the Ran, burning falls under the category of a rational practice (a category that does not appear in the Tosafot); it falls outside the scope of Lev 18:3; it is therefore unconditionally permitted. Nissim's conception of gentile rationality – and not just gentile *ir*rationality – is a significant development, absent in the Talmud and in the Tosafot, that gains serious traction in later halakhic traditions.[48]

Perhaps the most important halakhic statement on Lev 18:3's "their laws" is a responsum by the Maharik (Rabbi Joseph ben Solomon Colon Trabotto, 1420–1480/84, a Franco-Italian rabbinic authority), who addresses the prohibition in the course of discussing the permissibility of a cloak called the cappa, an academic gown worn in Italian universities.[49] The Maharik's responsum takes us into the period of early modernity and beyond the historical scope of this chapter, but let us observe here that the Maharik generally falls into the camp of the Ran and succeeds in making the Ran's approach to Lev 18:3 that permits gentile practices deemed to be rational the approach that tends to dominate subsequent treatments. But it is important also to observe the new components that Colon contributes to the conversation about "their laws": a concern not just with the rational but also with the moral dimensions of a practice, as well as a concern with the psychology of imitation or, in other words, with why people do the things they do and their mindset as they do it. Produced in a liminal zone between Ashkenaz and Sefarad and between the Middle Ages and modernity, both these

innovations of the Maharik can be seen as a harbinger of things to come in modern treatments of the prohibition on foreign law.

The medieval commentators also introduce new distinctions and concerns regarding the other areas of talmudic law discussed above: the prohibition on taking cases to and appearing in non-Jewish courts, as well as the principle of *dina de-malkhuta dina* and the concept of Noahide law. Hai Gaon limits the prohibition on foreign courts to cases when the Jewish court has the capacity to enforce its decisions.[50] When it does not, as Jewish courts often did not, then appearance in foreign courts, so long as those courts are reasonably honest and reputable, becomes permissible. The more isolationist talmudic positions were thus narrowly interpreted, with Rishonim developing the notion that some circumstances – such as when the desecration of God's name (*ḥillul ha-shem*) is at stake, or when the Jew called upon to testify would be subject to penalties for not doing so – might not only permit but even require Jews to appear in non-Jewish courts.[51] This trend was also restricted and resisted, however: a taqqanah from the Tosafists forbids a Jew from bringing another Jew into a non-Jewish court unless both parties agree to it – though the taqqanah does, it should be noted, permit them to under these conditions – while Naḥmanides distinguishes between adjudication and enforcement and permits gentile courts to do only the latter.[52]

Dina de-malkhuta dina was another talmudic principle, besides *ḥillul ha-shem*, that was considered to obligate a Jew to testify in a non-Jewish court, if we look at the German rabbi Ra'avan's commentary on *Bava Qamma* 113b–114a. The scope of *dina de-malkhuta dina*, however, was understood in a variety of ways. All scholars excluded from it matters of ritual observance and laws that discriminated among Jews, but some scholars also restricted it to public law (e.g., roads, bridges, taxes, monetary currency), some scholars to only legitimate laws but not exploitative ones, and many scholars – indeed, the majority of medieval halakhists – went so far as to restrict its scope to ancient laws but not to new legislations, though this highly restrictive view, because it was not held by the influential halakhic decisors Maimonides and the Rosh, fell out of favor. Other scholars gave relatively free rein to the principle: Ra'avad interpreted it to say that wherever a gap existed in Jewish law, it could be filled in with foreign law.[53] The key themes in these debates were taxation, punishment, and administration, and behind them all was the concern that the principle not undermine the integrity and authority of Jewish

law.[54] The principle was theorized by the medieval writers in a variety of ways: as a practical desideratum of diaspora life; as a consequence of a social contract between a king and his subjects; as an extension of the Jewish court's right to expropriate property, a principle from the Talmud known as *hefqer bet din hefqer*; as a form of reliance on custom; and, finally, as a function of the shared substance between Jewish law and foreign law represented in the notion of Noahide law.

Noahide law, also, earned a great deal of attention by the medieval writers, for whom it served as an opportunity, as it did for the talmudic authors before them, to explore the relationship between Torah law and foreign law. Noahide law in the medieval period hits a particularly dramatic note with a single manuscript variant in a passage from Maimonides, where Maimonides states that non-Jews who are motivated to observe the Noahide laws because they are rational, rather than because they are revealed, are neither saints nor wise men. Change one letter, however, as some manuscripts do – the word *ve-lo* to *ela* – and Maimonides is claiming precisely the opposite, that gentiles obeying their laws by dint of reason may not be saints but they are, nevertheless, wise men.[55] The crux is the role of reason in religion. This tension between reason and revelation raised by the topic of Noahide law would explode in modernity and form the foundation for major shifts in Jewish law and life.

Conclusion

The subject of foreign law – which areas are forbidden, which permitted, which potentially obligatory, and why – came to be so significant for the medieval, and later modern, commentators that it is impossible to summarize all the developments that took place with respect to it. Other themes became mingled in with that of foreign law that also deserve discussion, especially martyrdom, where the oppressive power of foreign law plays a central role; *mesirah*, the act of one Jew informing on another Jew to the non-Jewish authorities; and the king's law, which became the rubric for describing laws that maintain social order. In the major area I have treated in this essay – the prohibition on foreign law in Lev 18:3 – we see a constant interplay between boundary maintenance and boundary modification, as well as shifts in the kinds of things to which the boundary is assigned. It is easy to dismiss these prohibitions against foreign law and foreign courts as xenophobic and insecure, but resistance to foreign law is also an important strategy of cultural preservation, and in many of the passages examined here we find not a simple dismissal of foreign law but a subtle negotiation of the relationships and parallels between the laws of others and the laws of the Jews.

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[1] For greater detail and for references on the texts discussed below, see my *Defining Jewish Difference*, from which much of this discussion is drawn.

[2] See further, Chapters 6 and 11 of the current volume.

[3] For the development of this concept in medieval Jewish political theory, see Chapter 5 of the current volume and for its applications in the modern period, see Chapters 10 and 11.

[4] See the chapters in Part III of the current volume.

[5] For the relation between law and narrative, see Chapters 1 and 3 of the current volume, and for the relationship of legal texts to historical contexts, see Chapters 1, 2, and 3.

[6] The primary reason for using *ma'aseh* in this verse is probably to denigrate "foreign" behaviors, since the subsequent verses describe the behaviors commanded by God with the contrasting term *mishpat*.

[7] On the criteria of division into three parts, see Schwartz, *Holiness Legislation*, pp. 131–32.

[8] That the holiness legislation of which Lev 18 is a part is relatively late seems to be more or less the scholarly consensus; see the arguments for this position laid out in Knohl, *Sanctuary of Silence*.

[9] Jer 10:3 also features an expression akin to that of Lev 18:3: "for the laws of the nations (*ḥuqqot ha-goyim*) are delusions." The context makes clear that *ḥuqqot* there refers to idols.

[10] See Gillihan, *Civic Ideology*, pp. 191–97, and references there.

[11] See Chow, *Patronage and Power*; Clarke, *Secular and Christian Leadership*.

[12] Exploring the parallel is Delcor, "The Courts," pp. 69–84.

[13] See *De congressu* 85–88 (Colson and Whitaker [trans.], *Philo Volume IV*, pp. 498–503).

[14] *Sifra* Ahare Mot 9.8.

[15] Another possible reading is that "building buildings as they do" is a reference to the very activity of building.

[16] See Williams, *Roman Homosexuality*, pp. 242–52.

[17] See Brooten, *Love between Women*; Hallett, "Female Homoeroticism," pp. 209–27.

[18] *Sifra* Ahare Mot 13.9.

[19] This is the translation of Ra'avad in Jastrow, *Dictionary of the Targumim, the Talmud Bavli and Yerushalmi, and the Midrashic Literature*, s.v. *n.k.r/n.h.sh/n.h.r* (he discusses this text under all three entries).

[20] *B. Bava Qamma* 83a; *b. Sotah* 49b.

[21] *Leviticus Rabbah* 23:1.

[22] *Leviticus Rabbah* 23:2.

[23] *Leviticus Rabbah* 23:7.

[24] On this text, the toseftan parallel, and the Roman context, see my more extensive discussion in *Execution and Invention*, pp. 153–80.

[25] *T. Sanhedrin* 9:11 (Vienna manuscript). The Erfurt manuscript has a more puzzling version in which the Sages implicitly reverse their decision while maintaining their critique of Rabbi Judah.

[26] For attitudes to foreign law in the modern period, see Chapter 11 of the current volume.

[27] *B. Sanhedrin* 52b.

[28] *T. Shabbat* 7:18.

[29] *B. Avodah Zarah* 11a.

[30] The following discussion is indebted to Berman, "The Boundaries of Loyalty."

[31] Compare the use of non-Jewish courts as discussed in Chapter 6 of the current volume.

[32] According to the printed text, the case refers to a Jew who voluntarily ("but he did not summon him") testifies for the gentile.

[33] The standard printed edition, under the influence of medieval censors, substitutes "Canaanite thug" for "non-Jew."

[34] *Mekilta de-Rabbi Yishmael*, Nezikin 1.

[35] Talmudic citations of the baraita include *b. Eruvin* 47a; *b. Mo'ed Qatan* 11a; and *b. Avodah Zarah* 13a, b. There are many textual variations regarding the object of rescue and the type of legal activity being permitted on its behalf.

[36] Herman, *A Prince without a Kingdom*, pp. 202–09, and references there. The classic work on the subject remains Shilo, *Dina de-Malkhuta Dina*.

[37] *B. Bava Batra* 55a.

[38] Talmudic *sugyot*in which it appears are *b. Gittin* 10b; *b. Nedarim* 28a; *b. Bava Qamma* 113a-b; *b. Bava Batra* 54b–55a. See further, Chapter 5 of the current volume.

[39] *B. Bava Qamma* 58b*; b. Bava Batra* 173b; *b. Shevu'ot* 34b.

[40] See further Chapters 5 and 11 of the current volume.

[41] Lagrone, afterword to Novak, *Image of the Non-Jew*, p. 233. See further, Steinmetz, *Punishment and Freedom*, pp. 20–39, and discussion in Hayes, *What's Divine about Divine Law*?, chapter 8.

[42] Novak's translation, *Image of the Non-Jew*, p. 132.

[43] *B. Bava Qamma* 38a claims that the double standard is a punishment for non-Jews' violation of their own commandments.

[44] On *b. Avodah Zarah* 11a, s.v. *Ve-i huqqah hi*.

[45] Some versions have *tsorekh* (need) instead of *serekh*.

[46] S.v. *sorfin al he-melakhim*.

[47] An influential variant text of the Ran produces a different reading more similar to the Tosafot's: "since the Torah prohibited only laws of idolatry *and* things of vanity and idleness," instead of "since the Torah prohibited only laws of idolatry – these are things of vanity and idleness." According to this text, Nissim does not identify idolatry with vanity and idleness but, like the Tosafot, distinguishes between them as two subcategories of a larger category of prohibited practice.

[48] For the high value placed on the irrational commandments, see Chapter 3 of the current volume; for medieval Jewish interest in rational commandments, see Chapter 5, and for the emphasis on universal rational morality in modern Jewish thought and the rejection of irrational or ceremonial aspects of Jewish law, see Chapters 7 and 10.

[49] See Woolf, "Between Law and Society."

[50] It is in some versions ascribed to Sherira Gaon; see Levin, *Otzar ha-Geonim*, Bava Qamma, vol. 12, sec. 291, p. 100.

[51] Ra'avad and Ra'avan invoke *ḥillul ha-shem*; Ra'avan, Rabbenu Tam, and Ramah are among those who raise the problem of a man's inability to avoid testifying; see Berman, "The Boundaries of Loyalty," pp. 81–137.

[52] The taqqanah is cited in the Responsa of Maharam of Rothenburg; see discussion in Elon, *Jewish Law*, vol. I, p. 17; on Responsum no. 63 of Naḥmanides, see Elon, *Jewish Law*, vol. I, p. 16.

[53] *Responsa and Decisions of the Ra'avad*, 131.

[54] The concern about preserving Jewish legal autonomy was expressed with particular vehemence by Rashba in two responsa (VI no. 254 and III no. 109), though Rashba expressed an expansive approach to *dina de-malkhuta dina* in another responsum.

[55] See discussion in Novak, *Image of the Non-Jew*, pp. 163–65, where he argues for the correctness of the second version.

5

Law in Medieval Judaism

Warren Zev Harvey

What did medieval Jews think about law? What different concepts of law are to be found in the writings of medieval Jewish judges, philosophers, mystics, and commentators? To what extent did they consider the Torah of Moses to be "law"? To what extent did they seek to understand it in terms of Greco-Roman philosophic concepts, like *nomos, ratio*, or "natural law"? In this chapter, we shall examine the views of some major medieval Jewish writers on these questions.

It is well known that classical Judaism had no official list of dogmas, and consequently medieval Jewish thinkers differed radically on most theological and philosophical questions. "Two Jews, three opinions," the late Israeli Prime Minister David Ben-Gurion once quipped. However, even with all their disagreements, medieval Jewish thinkers did agree almost unanimously on one thing: the priority of law in government. Many of them probably would have concurred with the hyper-Jewish slogan, attributed, despite his denials, to the retired Chief Justice of Israel, Aharon Barak: *ha-kol shafit* ("everything is justiciable") – a slogan that may be clumsy in English, but sounds perfectly natural in Hebrew.

We shall begin our survey in the tenth century with the first great medieval rabbi-philosopher, Rabbi Saadia Gaon, and shall conclude about five and a half centuries later with the famed philosopher-statesman Don Isaac Abrabanel.

Saadia Gaon (882–942)

Rabbi Saadia ben Joseph of Fayyūm, Egypt, dean (or gaon) of the Academy of Sura, near Baghdad, was the leading authority of his time in Jewish law and a prolific author in the fields of jurisprudence, biblical translation and exegesis, philosophy, philology, polemics, and poetry. His philosophy displays Platonic, Neo-Platonic, and Aristotelian tendencies but is best described as "Kalām" or "Jewish Kalām."[1]

In his philosophic treatise, *The Book of Beliefs and Opinions*, III, 7, written in Arabic, Saadia asserts: "our nation, the children of Israel, is a nation only by virtue of its laws [*sharā'i'*]." This sentence became a motto for those who hold that the Jewish nation or the Jewish religion is defined primarily or exclusively by its laws, that is, by the Law of Moses. The sentence appears as a premise in a scriptural argument for the eternity of the Law. Saadia argues as follows. The Jewish nation has been promised by God that it will survive eternally, as it is written, "Thus sayeth the Lord, who giveth the sun for a light by day, and … the moon and stars for a light by night, who stirreth up the sea …: if these ordinances depart from before Me … then the seed of Israel also shall cease from being a nation before Me forever" (Jer 31:34–35). However, the Jewish nation is not a nation without its laws. Therefore, if the Jewish nation survives eternally, its laws, namely, the Law of Moses, will also survive eternally.[2]

According to Saadia, God gave the Law to the nation of Israel as a means for them to attain happiness, as it is written "Thou makest me to know the path of life … in Thy right hand bliss for evermore" (Ps 16:1). He explains that God preferred to condition happiness on the fulfillment of the Law, as opposed to bestowing it on everyone automatically, since one who achieves a good by effort deserves a greater reward than one who achieves it with no effort.[3] God, Saadia continues, thus gave us by the words of His prophets a religion (*dīn*) comprising laws (*sharā'i'*).[4] The Law is also needed, according to him, in order to prevent people from harming others.[5] The Law has, then, both a spiritual and a social purpose.

In *Beliefs and Opinions*, III, 1–3, Saadia distinguishes between two kinds of laws: (1) "rational" (*'aqliyyāt*, from *'aql*, intellect) and (2) "auditory" (*sam'iyyāt*, from *sam'*, hearing). The rational laws are laws that, in addition to being written in the Law, are known by unaided Reason, with no need of legislation or tradition; that is, Reason

"demands" or "requires" them (*al-'aql yuwajibu*). The "auditory" laws are laws that are not known by unaided Reason but are obeyed only because they are written in the Law, that is, they were *heard* from the Lawgiver. Although Saadia's distinction is made with reference to the Law of Moses, it obtains with reference to any system of law. It is in effect the distinction between natural law and non-natural law; that is, between laws that are required by *ratio* and valid universally and eternally (cf. Cicero, *De Republica*, III, 22), and laws that are not required by *ratio* and not valid in all places or times. As examples of rational laws, Saadia mentions theological ones, like the service of God and the prohibition of blasphemy, and ethical ones, like gratitude to those who do good and the prohibitions of murder, robbery, and lying. As examples of auditory laws, he mentions the laws of the Sabbath and festivals, the dietary laws, and the ceremonial laws. While auditory laws are not rational, they may of course be reasonable; e.g., the laws of the Sabbath have good reasons in that they afford people an opportunity to relax, study, or meet with friends. As a natural law theorist, Saadia argues that breaking the rational laws is in some sense irrational or absurd. Thus, for example, the murderer's act is self-contradictory, for if everyone were to murder, the human race would annihilate itself. This kind of argument is similar to Kant's first formulation of the categorical imperative, according to which a moral maxim must be universalizable without contradiction (*Groundwork for the Metaphysics of Morals*, 2nd Section). Or to take another example, lying is "disagreeable," for the liar thinks one thing and says another. This argument recalls Socrates' view that "everyone hates a lie," since it deceives the soul (*Republic*, II, 382a–b). It also recalls Abayye's teaching not to say "one thing with the mouth and another with the heart" (*b. Bava Metzi'a* 49a).[6]

Immediately prior to his discussion of rational and auditory laws, Saadia cites Deut 26:16, which mentions "ordinances" (*mishpatim*) and "statutes" (*ḥuqqim*). There is a rabbinic interpretation of "ordinances" and "statutes" that adumbrates partially Saadia's distinction between "rational" and "auditory" laws (see *b. Yoma* 67b; *Sifra* on Lev 18:4). According to it, the "ordinances" are laws that "had they not been written, should have been written," like the prohibitions of idolatry, incest, murder, robbery, and blasphemy, and the "statutes" are laws that seem to be purposeless and are subject to ridicule, like the prohibition of wearing a mixed wool and linen garment (Deut 22:11), the ceremony of removing the brother-in-law's shoe (Deut 25:9), and the prohibition of eating pork (Lev

11:7).[7] Saadia's distinction, however, differs from the rabbinic one on two counts. First, his distinction is exhaustive (that is, all laws are *either* rational *or* auditory), while the rabbinic one is not (that is, many laws, such as those concerning the Sabbath and festivals, are neither ordinances nor statutes). Second, he uses the term "rational," but the Rabbis did not use such philosophic terms.

It follows from Saadia's discussion that any legal system is partially "rational" or natural and partially "auditory" or positive. Certain laws are required by unaided reason, while others are not. Saadia explains that it is not superfluous for the lawgiver to legislate the "rational laws," even though they are known by unaided reason, since it takes time for an individual to discover them, and if they were not legislated, the young and the unreflective would "roam at large without guidance."[8] A legal system, continues Saadia, cannot make do with rational laws alone, since they are general and need to be complemented by particular directives: e.g., the rational law forbids stealing and fornication, but such general laws need to be complemented by particular directives concerning the acquisition of property (e.g., by labor, barter, or inheritance) and the constitution of marriage (e.g., by words, contract, or dowry).[9] While the Law of Moses, like other legal systems, is partially rational and partially auditory, it differs from non-religious legal systems in that its first purpose is not social but spiritual; namely, to guide individuals to true happiness.

Saadia's conception of law, which combined natural law with positive law in an original way, had an influence on subsequent theories of natural law. As Alexander Altmann wrote: "Saadya's theory … is an important milestone on the road that leads from the Stoic conception of natural law over Justinian's *Institutes* to Hugo Grotius' *De Jure Belli et Pacis*. In its uncompromising rationalism, it is a most remarkable expression of the spirit of *Aufklärung* with its belief in the constancy of Reason."[10]

Baḥya ibn Paquda (fl. 1050–1090)

Judge (*dayyan*) and philosopher Rabbi Baḥya ben Joseph ibn Paquda of Saragossa is author of the *Duties of the Heart*, written in Arabic. His philosophic position is eclectic and influenced by Sufi mysticism.

In the Introduction to the *Duties*, Baḥya teaches that the study of religion (*al-dīn*) has two parts: an "external science" (*al-ʿilm al-ẓāhir*) concerning the duties of the limbs, that is, actions, and an "internal science" (*al-ʿilm al-bāṭin*) concerning the duties of the heart, that is, attitudes and intentions. He explains that the duties of the heart are not optional or supererogatory, but law. Using Saadia's distinction, he writes that duties concerning the limbs are divided into "rational" (e.g., the prohibitions of murder and theft) and "auditory" (e.g., the dietary laws), while all duties concerning the heart are "rational" or based on the rational (e.g., love of God and love of neighbor). With regard to the "rational" duties, Baḥya uses the same phrase used by Saadia: reason (*al-ʿaql*) "demands" or "requires" (*yuwajibu*) them. Moreover, he argues, the duties of the heart are the foundations of all the laws, and if they are not fulfilled, the duties of the limbs cannot be fulfilled. The science of the duties of the heart thus precedes that of the duties of the limbs, for actions depend on "the intention of the heart."[11]

Judah Halevi (before 1075–1141)

Rabbi Judah ben Samuel Halevi was born in Tudela, Spain, and died in the Land of Israel. He was a preeminent Hebrew poet and author of the anti-Aristotelian dialogue, *The Kuzari*, written in Arabic.

Like Baḥya, Halevi adopted Saadia's distinction between "rational" and "auditory" laws, but took it in a new direction. In *Kuzari*, II, 47–48, he describes the rational laws as "*nomoi*" (*nawāmīs*) and "governmental" (*siyāsiyyāt*), and contrasts them to the auditory laws, which he describes as "divine" (*ilāhiyyāt*). The rational laws, he maintains, are merely a "preliminary" to the divine auditory laws. They are the bare minimum required in any society. As Plato remarked, even members of a gang of robbers observe rules of justice among themselves (*Republic*, I, 351c). According to Halevi, the rational laws are to society what "eating and drinking, moving and resting, or sleeping and being awake" are to the individual. They are a basic natural need.[12]

Having demoted the rational laws to the level of gangster morality and having agreed with Saadia that the auditory laws are not required by reason, Halevi has a problem with certain theological commandments, e.g., "I am the Lord thy God" (Exod 20:2), "Thou shalt have no other gods before Me" (Exod 20:3), and "Thou shalt not take the name of the Lord thy God in vain" (Exod 20:7), as well as the injunction to be aware that God knows a person's innermost thoughts (cf. Zech 4:10; 2 Chr 16:9). Halevi is forced to invent a third category for these commandments. He calls them "soulful" (*nafsiyyāt*).[13]

Unlike Saadia and Baḥya, Halevi was not a jurist, and not interested in jurisprudential questions in themselves. He was, however, interested in the relationship of law to prophecy. He taught that the Law was revealed miraculously to Moses at Sinai and its truth corroborated by "thousands of prophets."[14] He held, moreover, that prophets have the authority to add to the Law. As for the commandment, "Thou shalt not add thereto nor diminish from it" (Deut 13:1), he explained that it was addressed to the multitude, but prophets, priests, and judges may add to it. This position is constitutionally problematic, for it leads to the instability of the foundational legal text.[15]

Abraham ibn Ezra (1089–1164)

Rabbi Abraham ben Meir ibn Ezra was a philosopher, grammarian, mathematician, astronomer, astrologer, poet, and Bible commentator. Born in Tudela, like Judah Halevi, he fled Spain in 1140 because of the Almohad persecutions and wandered throughout Europe visiting different Jewish communities and supporting himself by writing biblical commentaries, Hebrew grammars, and scientific treatises for them. All his known works were written in Hebrew. His last book, the *Foundation of Awe and the Secret of the Law*, written in London in 1158, treats of the Law and its commandments.

Like Saadia, Baḥya, and Halevi, Ibn Ezra subscribed to a theory of natural law. Distinguishing between rational laws and others, he affirms that the rational laws are the "principal ones" (*ha-'iqqarim*). He calls them "precepts" (*pequdot* or *piqqudim*), and includes among them all the Ten Commandments, except the Sabbath. Among the non-rational laws, some, he states, are intended as reminders of the rational laws, for example, the Sabbath, which reminds us of Creation, or Passover, which reminds us of the liberation from Egypt. The rational laws, he explains, are "planted in the heart" and not dependent on a particular time or place (cf. Cicero's above-cited definition of natural law as known by *ratio* and valid everywhere and at all times). The rational laws, according to Ibn Ezra, are called "*pequdot*" or "*piqqudim*" because they are like a deposit (*piqqadon*) God has entrusted to the human mind. The ability to conceive the rational laws is achieved at adolescence, which is when one becomes a bar mitzvah or bat mitzvah, i.e., responsible before the law.[16]

The commandments, according to Ibn Ezra, may be divided into three groups: those concerning (1) the heart, (2) the mouth or tongue, and (3) deeds; that is, thoughts, words, and actions. The "principle" (*'iqqar*) of all the commandments is the faith of the heart (*emunat ha-lev*), for "as the number one is found in every arithmetical operation," so the performance of every commandment requires the faith of the heart. In emphasizing the duties of the heart, Ibn Ezra develops the approach of Baḥya. Among the commandments concerning the heart, he mentions "Thou shalt love the Lord thy God" (Deut 6:5) and "Thou shalt love thy neighbor as thyself" (Lev 19:18). Among the commandments concerning the mouth or tongue, he mentions prayers, blessings, and oaths. Most of the commandments concern deeds.[17]

Rashi (1040–1105)

Rabbi Solomon ben Isaac of Troyes, known by acronym as Rashi, was the foremost commentator on both the Hebrew Bible and the Babylonian Talmud. His simple and modest style concealed vast erudition and profound thought.

Rashi identified the Torah with law in the strict sense. In his introductory remarks to his Commentary on the Pentateuch, he writes, quoting midrashic sources: "The Torah [= the Law] should not have begun except with the verse, 'This month shall be unto you the head of months' [Exod 12:2], which is the first commandment given to Israel. What is the reason it began with Creation?" This question presumes that the Torah is *law* and that the presence in it of non-legal elements, like the story of Creation, needs to be explained. Rashi's reply to his question, following his midrashic sources, is based on the verse: "He hath declared to His people the power of His works, that He may give them the heritage of the nations" (Ps 111:6). Since God is the Creator of the entire universe, He may give the Land of Canaan to whomever He deems worthy: He gave it to the Canaanites, took it from them, and gave it to Israel. The story of Creation, thus, according to Rashi, provides a kind of defense for the Israelites in the court of international law, should they be accused of robbing the Canaanites of their land. Lands may change sovereignty, since they do not belong essentially to any nation but to God.[18]

Although he identified the Torah with law, Rashi nonetheless expounded often on its metaphysical nature. Commenting on a talmudic text, he explains that the Torah is called "*tushiyyah*" (wisdom; cf. Isaiah 28:29), since that word is homiletically composed of "*tohu*" (chaos, formlessness; cf. Gen 1:2) and "*shetiyyah*" (foundation): the Torah is *tohu*, since it is "mere speech" and "there is no real tangibility in speech," but the world is *founded* on it. Law is the foundation of the world.[19]

In his reflections on jurisprudence, Rashi stressed the distinction between questions of law and those of fact. At *b. Ketubot* 57a, he distinguishes between a debate about law and one about fact, and in so doing clarifies the enigmatic rabbinic dictum, "both are the words of the living God" (*b. Eruvin* 13b; cf. *y. Berakhot* 1:4, 3b and *b. Gittin* 6b).[20] He comments:

> When two [individuals] disagree about the opinion of another, one saying he said this and the other saying he said that – one of them utters a falsehood. However, when two Amoraim disagree about the law [*din*] or about the forbidden and the permitted, and each says, "this seems to be the reason," there is no falsehood here. Each stated his opinion, one gave a reason to permit and the other to forbid, one argues by means of a certain analogy and the other by means of a different one, and it is said "both are the words of the living God." Sometimes one reason applies and sometimes the other reason applies, for reasons may be reversed in accordance with even slight changes in the circumstances.[21]

According to the rabbinic dictum, "both are the words of the living God," two scholars express contradictory opinions, but *both opinions are legitimate expressions of the Law*.[22] How is it possible? Is God self-contradictory? Rashi explains that the dictum does not apply to questions of fact, e.g., Did X say p or not-p? If A says that X said p and B says that X said not-p, then either A or B has uttered a falsehood, and the dictum "both are the words of the living God" is inapplicable. However, if A and B dispute a question of law, interpreting it in contradictory ways, each employing different arguments, then both approaches may be reasonable interpretations of the law, and both the words of the living God. If one opinion is preferred today, it may be because of current circumstances. If those circumstances change tomorrow, the other opinion may be preferred. While controversies (*maḥaloqot*) about questions of fact may reveal negligence or malice on the part of at least one of the disputants, controversies about questions of law are vital to the flexibility and development of the law. In Rashi's view, the different contradictory interpretations of the Law, presuming they are derived by proper juridical method, are all legitimate and all "words of the living God." The task of the jurist is not to discover *the* one true interpretation of the law, but to argue for *a* reasoned interpretation of it.

Rashi's distinction between questions of law and questions of fact adumbrates the distinction often found today in jurisdictions that use the jury system, where judges decide questions of law and juries those of fact. Rashi, likewise, holds that questions of law must be decided by judges alone and not by prophets, while questions of fact may be decided by prophets. Thus, he explains, Elijah the Prophet is not competent to decide by

prophecy if phylacteries may be written on the skin of a fish, which is a question of law ("the permitted and the forbidden") but is competent to decide by prophecy whether the stench of the fish's skin is permanent, which is a question of fact. Similarly, Rashi rules that the Urim and Thummim may not be used to decide questions of law but only those of fact. David could not ask of them if he was allowed to go to war on the Sabbath, which is a question of law ("the permitted and the forbidden") but could ask if he would be victorious if he did go to war, which is a question of fact (cf. 1 Sam 23:1–2). The rabbinic principle that the Law "is not in heaven" (Deut 30:12) and must be decided by judges not prophets applies, according to Rashi, only to questions of law, not to those of fact.[23]

The Tosafists (Twelfth to Thirteenth Centuries)

The Tosafists were authors of critical "additions" or "glosses" (*tosafot*) on the talmudic text. They numbered over 100 and flourished primarily in France, but also in Germany, Italy, and England. Among them were students of Rashi, including his grandsons, Rabbi Samuel ben Meir, known as Rashbam, and Rabbi Jacob ben Meir, known as Rabbenu Tam; and his great-grandson, Rabbi Isaac ben Samuel of Dampierre, known as Ri the Elder.

In medieval Latin philosophic literature, it was debated whether an unjust law is a law. Augustine argued in his *On Free Will*, I, 5, that it is not, and his position was developed by Aquinas in his *Summa Theologiae*, I–II, q. 95, a. 2. The scholastic principle "An unjust law is not a law" (*lex injusta non est lex*) has been defended and criticized by contemporary philosophers. In the Jewish tradition, a parallel debate arose over the rabbinic rule, "The law of the kingdom is law" (*dina de-malkhuta dina*), that is, the law of the gentile government in the Diaspora is recognized by rabbinic law as being binding law.[24] Both propositions might seem at first glance to involve a tautology (law = law) or a contradiction (law = non-law). However, the proposition "The law of the kingdom is law," like the proposition "An unjust law is not law," raises fundamental ethical and juridical questions of when a law is a law, and when it stops being one. Already in the Talmud it was ruled that not every law of the kingdom is a law. Two exceptions were noted: a tax collector who is not limited by a fixed rate or a tax collector who acts on his own authority.[25] The Tosafists tried to define when the law of the kingdom is binding and when it is not.

Rashbam emphasized the voluntary acceptance of the law as a necessary condition of its legitimacy and ruled: "All taxes, levies, and practices of the ordinances of kings that they regularly enact in their kingdom are law [*dina*], for all subjects of the kingdom voluntarily accept the statutes and ordinances of the king. Therefore, it is absolute law [*din gamur*]."[26]

Rabbenu Tam held that equality is a crucial criterion for recognizing a law as valid. He explained: "The dictum that 'the law of the kingdom is law' applies precisely when the king promulgates his decrees equally for all the subjects in his kingdom, but if he

discriminates regarding one province, it is not a law [*lav dina hu'*]."[27] A non-egalitarian law *non est lex*.

Ri the Elder argues that when the authorities act unfairly and contrary to the established law, their actions are not covered by the principle of "the law of the kingdom is law." He gives the example of Jews who leave the kingdom temporarily, and their lands are confiscated by feudal lords, contrary to the established local law, which grants Jews the same status "as knights." Ri the Elder concludes: "This is not 'the law of the kingdom is law' but robbery [*gezelah*]… If there is a lord who comes to change the law and makes his own law, it is not the law of the kingdom, for this [new] law is not at all proper [*hagun*], and this is similar to the tax collector who is not limited by a fixed rate." By not "proper," Ri the Elder means that the new law does not conform to the legitimate parameters of a law. However, the word also has a moral connotation of "just" or "fair"; and the Talmud, for example, warns against the appointment of a judge who is not *hagun*.[28] Ri the Elder is asserting in effect: *Lex injusta non est lex*.

Thus, the Tosafists argued that a law cannot be recognized as a valid law if it is coerced, non-egalitarian, or unjust. It is possible that these ideas on the legitimacy of law were developed by them in conversation with Christian scholars, who also pondered the question of when a law does not deserve to be considered a law.[29]

As jurists, the Tosafists were innovative. In a responsum concerning the laws of ritual baths, the Italian Tosafist Rabbi Isaiah di Trani (died *c*. 1240) defended his right to disagree with earlier legal authorities by citing the parable devised by the scholastic philosopher Bernard of Chartres (died after 1124): "We are like dwarfs sitting on the shoulders of giants." He refers to it as "a parable of the philosophers" which he "heard from the philosophers."[30] He may have been the first jurist to adapt this philosophic parable to the sphere of law. According to Rabbi Isaac's logic, a latter-day jurist, although a dwarf compared to the early authorities, who were giants, has nonetheless the right to disagree with them because, sitting on their shoulders, that is, basing himself on their cumulative discussions, he sees things they could not see.

Maimonides (1138–1204)

Philosopher, jurist, and physician, Rabbi Moses ben Maimon, known by acronym as Rambam or by patronym as Maimonides, was born in Cordoba but forced to leave Andalusia with his family in his early teens because of the Almohad persecutions. He lived in Morocco, sojourned in the Land of Israel, settled in Egypt in about 1166, and served as a doctor in Saladin's court. As a philosopher he belonged to the school of Alfarabi, which was Aristotelian in science and ethics but Platonic in politics; however, he differed from Alfarabi in the decisive importance he gave to the discipline of law.

His first book was *A Treatise on the Art of Logic*, written in Arabic. In chapter 7 he describes the categorical, hypothetical, apagogic, and inductive syllogisms, and then remarks: "We have other syllogisms, which we call 'juridical syllogisms' [*al-maqāyīs al-fiqhīyya*], but this is not the place to discuss them."[31] From this remark it is clear that he considered legal reasoning to be different from formal logical reasoning. In chapter 8 he discusses non-apodictic syllogisms, and mentions the dialectical syllogism (*al-qiyās al-jadalī*), which has the form of a valid syllogism but in which at least one premise belongs to the category of "accepted opinions" (*mashhūrāt* = *endoxa*), e.g., public nudity is ugly, rewarding a benefactor is beautiful. He observes that since accepted opinions are undemonstrated, there is controversy (*ikhtilāf* = *maḥaloqet*) concerning them.[32] Given that Maimonides does not mention here the juridical syllogism, it might be supposed that, according to him, legal reasoning differs not only from Aristotle's demonstrative syllogism but also from his dialectical one.

In defining the sciences in chapter 14, Maimonides writes: "The governance of the city is a science that imparts … knowledge of true happiness [*al-sa'adah* = *eudaimonia*] and … the way to achieve it … The sages of past communities enacted … regimes and rules … called *nomoi* … On all these matters the [ancient] philosophers have many books… In these times, all of this, I mean the regimes and the *nomoi*, has been set aside, and people are governed by divine commands [*al-awāmir al-ilāhiyya*]."[33] Maimonides distinguishes here between two kinds of laws: *nomoi* and divine commands. He states that the ancient philosophers (e.g., Plato, Aristotle) wrote many books about the *nomoi*. However, he intimates, such books are irrelevant today because people (i.e., Jews, Christians, and Muslims) are no longer governed by *nomoi* but "by divine commands." A

desideratum is implied: a philosophic book that would analyze the divine commands in the same way the ancient philosophers analyzed the *nomoi*. Maimonides may be said to have written *The Guide of the Perplexed* in order to fulfill this desideratum.

Maimonides' first major rabbinic work was his Commentary on the Mishnah, written in Arabic and completed in Egypt in 1168. In its Introduction, he discusses the juridical nature of the Torah. He states that each individual law (*sharī'a*) was given by God to Moses at Sinai together with its explanation (*tafsīr*). The "laws" refer to the 613 commandments of the Written Law, and their "explanation" refers to the Oral Law. For example, there is a commandment of the Written Law to dwell in booths (*sukkot*) on the festival of Tabernacles (Lev 23:42), and its explanation (e.g., what is a "booth" and what does it mean to "dwell" in one) is in the Oral Law. Maimonides teaches that with regard to the 613 commandments of the Written Law that were revealed to Moses at Sinai, there has never been a controversy (*ikhtilāf* = *maḥaloqet*). As for the Oral Law, he explains, part of it comprises explanations that Moses received at Sinai and transmitted to Joshua and the elders, who transmitted them to later generations, and with regard to this part there have been no controversies. However, he continues, another part of the Oral Law comprises explanations that were deduced throughout the ages by legal reasoning, that is, by the thirteen hermeneutical rules (see *Sifra*, preface), which according to him were revealed at Sinai, and with regard to this part there have been controversies. If then there is a controversy about any law, that law was not transmitted from Sinai but deduced by legal reasoning. According to him, the reason there is controversy concerning laws deduced by legal reasoning is that such reasoning involves "dialectical syllogisms" (*al-maqāyīs al-jadaliyya*).[34] By identifying legal reasoning with dialectical argument, he does not mean that it conforms to the formal rules of the Aristotelian dialectical syllogism (as defined in his *Logic*, chapter 8), but only that it is based on premises that are "accepted opinions." Given the prevalence of legal controversies in rabbinic literature, Maimonides' division of the Law into undisputed laws transmitted from Sinai and disputable ones derived by legal reasoning suggests that the majority of the Law was not transmitted from Sinai. This position drew criticism from traditionalists who held that all talmudic law was transmitted from Sinai.[35]

The idea that the plurality of the laws was not transmitted from Sinai is illustrated by a passage from Maimonides' *Book of the Commandments*, written in Arabic around

1169. In the Introduction, Principle 2, he cites a rabbinic dictum according to which 1700 laws "were forgotten during the days of mourning for Moses" (*b. Temurah* 16a). These laws, he explains, were not received by Moses at Sinai but inferred by legal reasoning during his lifetime by him and others. He adds that the number of laws deduced by legal reasoning during Moses' lifetime must have been "many thousands."[36]

Maimonides' distinction between undisputed Sinaitic laws and disputable laws derived by legal reasoning is at bottom not theological but constitutional. It is a distinction between the legislative and judicial functions, that is, between *making* law and *interpreting* it. Since the laws legislated at Sinai were posited unequivocally, there can be no controversy regarding them; but since their juridical interpretation involves dialectical argument, there may be controversy regarding it. Like Montesquieu and Madison, Maimonides sought to distinguish clearly between the legislative and judicial functions. Unlike them, however, he was not afraid of the normative role of judges. He did not fear that our liberty would be lost if "le juge serait législateur."[37] Indeed, he embraced the proposition that judges formulate the majority of the laws. However, he insisted, their innovations must not be discretionary, but based on established law and derived by the recognized hermeneutical rules.[38]

Describing the first ruler and legislator, Alfarabi had stated that he must be supreme in philosophy and prophecy. Similarly, Maimonides emphasized the philosophic and prophetic preeminence of Moses.[39] However, Maimonides' Moses differed in one important respect from Alfarabi's first ruler. Alfarabi, like Plato, considered the direct rule of the philosopher-king to be preferable and deemed the interpretation of the laws by judges to be a compromise necessitated by the death of the philosopher-king and the failure to find a suitable replacement.[40] Maimonides, however, did not consider jurisprudence a compromise. He insisted that once the Law had been promulgated, it could be interpreted only in accordance with the rules of legal reasoning, and even Moses, the supreme philosopher-king-prophet, had no more authority to interpret it than did any other judge. Zealously defending the independence of the judicial system, Maimonides taught that prophecy cannot interfere with the interpretation of the Law, for once having been revealed, the Law is "not in heaven" (Deut 30:12).[41]

Maimonides' foremost legal work was his fourteen-volume Code of Law, the *Mishneh Torah* (= Deuteronomy = the Second Law), written in Hebrew and completed

in 1178. He distinguished in it between three divisions of the Law: (1) the Written Law, which comprises the Pentateuch, Prophets, and Hagiographa; (2) the Oral Law, which is the decided law, i.e., the forbidden and the permitted; and (3) Talmud or Gemara, which is reasoning about the Law (Hilkhot Talmud Torah 1:11).[42] The Oral Law is decided by the judges: "the Great Court in Jerusalem is the root [*'iqqar*] of the Oral Law" (Hilkhot Mamrim 1:1). It was codified around the year 200 by Rabbi Judah the Prince in the Mishnah. Since then, however, a millennium had passed, new laws had been derived in the two Talmuds, the halakhic *midrashim*, and the writings of the Geonim and other scholars. The Mishnah was thus no longer able to function adequately as a code of the Oral Law, and a new code was needed. In the Introduction to the *Mishneh Torah*, Maimonides boldly asserts that it will replace the Mishnah: "A person reads the Written Law first, then reads this [code], and knows from it the entire Oral Law."

Regarding the principle "the law of the kingdom is law," Maimonides, unlike most authorities, considered it to apply to Jewish kings as well as gentiles. He took it as a general rule concerning the enactments of any sovereign. In determining when a sovereign's law may be considered valid, he appealed to two principles: universality and publicity. A valid law must apply "to everyone" and be "known to everyone" (Hilkhot Gezelah 5:14).[43]

Maimonides' philosophical masterwork, *The Guide of the Perplexed*, was completed in the early 1190s. Its main focus is the philosophy of law. He returns in it to the distinction he had made in his *Logic* between *nomoi* and divine commands, or "nomic law" (*sharī'a nāmūsiyya*) and "divine law" (*sharī'a ilāhiyya*). A nomic law has as its goal peace and security. A divine law has peace and security as its immediate goal, but its ultimate goal is the true human perfection, i.e., knowledge of the sciences and of God.[44] The Law of Moses, Maimonides argues, is the exemplar of a divine law. It is divine because it commands the knowledge and love of God (Exod 20:2; Deut 5:6; 6:4), which commandments can be fulfilled only by the study of the sciences (*Mishneh Torah*, Hilkhot Yesode ha-Torah 1–2).[45] Since the commandments to know and love God are not explicitly defined in the Bible as requiring the study of the sciences but are defined so only in Maimonides' legal writings, it follows that the divinity of the Law depends primarily on the art of jurisprudence, not on biblical history or supernatural theology, that is, not on beliefs about what literally took place at Sinai. The divinity of the Law is thus

not a dogma about ancient historical fact, but an ongoing jurisprudential challenge. The legal decisors in every generation are responsible for maintaining or achieving the divinity of the Law. It might be inferred that according to Maimonides the worth of any legal system is contingent no less – and perhaps more – on its judges than on its initial legislation.

Maimonides' interest in the difference between the Law's initial legislation and its later juridical development led him to undertake a study of the Law in its original historical context (*Guide*, III, 26–49). "My purpose," he explained, "is to give reasons for the biblical texts [*al-nuṣūṣ*] and not for the pronouncements of the legal science [*al-fiqh*]."[46] He argues that the laws of the ancient Israelites must be understood against the background of their idolatrous neighbors, whom he referred to by the generic name of "Sabians." For example, the biblical cult of animal sacrifice is explained by him as an accommodation to idolatrous practices: since animal sacrifice was the accustomed form of religious worship in those days, the Law too commanded it, for "a sudden transition from one opposite to another is impossible."[47] To take another example, the biblical prohibition of seething a kid in its mother's milk (Exod 23:19; 34:26; Deut 14:21) is explained by him as a polemic against a conjectured idolatrous ritual.[48] Maimonides' socio-anthropological explanations of biblical law laid the foundation for the theories of John Spencer in the seventeenth century and William Robertson-Smith and James Frazer in the nineteenth century.[49]

In holding that the two sources of the Law are traditions from Sinai and inferences based on dialectics, Maimonides was a legal positivist. Unlike Saadia, Baḥya, Halevi, and Ibn Ezra, he rejected the theory of natural law. In the *Guide*, he states that all moral rules are "accepted opinions."[50] In his Commentary on the Mishnah, he criticized the use of the term "rational law" to designate the moral commandments and remarked it had been used in this sense by Jewish scholars "who fell ill with the illness of the Kalām theologians."[51] Law, Maimonides explains, is "not natural" but "enters into what is natural,"[52] that is, it addresses a problem that arises out of human nature. The problem is natural, the solution positivistic.

Naḥmanides (1194–1270)

Rabbi Moses ben Naḥman was born in Girona and died in Acre. Talmudist, Bible commentator, and kabbalist, he is known by the acronym Ramban, the patronym Naḥmanides, and the Catalan name Bonastruc ça Porta. Although in his kabbalistic exegeses he was a mythopoeic thinker, his legal writings reflect extraordinary analytic acuity.

Like Saadia, Baḥya, Halevi, and Ibn Ezra, but unlike Maimonides, Naḥmanides affirmed the rationality of the ethical laws. In explaining how the generation of Noah, who had not been given explicit laws by God, could have been punished by Him for committing incest and robbery, Naḥmanides comments: "these are rational commandments [*mitzvot sikhliyyot*] and every creature who knows his Creator must observe them, as it is written [regarding Abraham's children and household] 'that they may keep the way of the Lord to do righteousness and justice' (Gen 18:19)."[53]

As a proponent of natural law, Naḥmanides would be expected not to share Maimonides' legal positivism. Moreover, he had a strong reason to reject positivism: He held that the commandments of the Law reflect supernal truths revealed at Sinai. Nonetheless, he was influenced by Maimonides. He developed a jurisprudence that was positivistic in practice but supernaturalistic in theory. Interpreting Deut 17:11, "thou shalt not depart from the word which [the judges] shall tell thee right or left," he cites a rabbinic interpretation: "even if the [judge] tells you that the right is left or the left right" (*Sifre Deut* 154).[54] He understands this to mean that one must accept the decision of the High Court even if it seems contrary to truth. "The need for this commandment," he explains, "is very great," for opinions differ regarding new cases and controversies [*maḥaloqot*] arise; and this commandment prevents the Law from becoming "many Laws." In other words, the "very great" need for this commandment is pragmatic. One must accept the decision of the judges, he concludes, regarding both the laws they received by transmission from Sinai and those they inferred by hermeneutics. This is essentially Maimonides' positivistic position. However, Naḥmanides, unlike Maimonides, holds that the entire Law in all its details (including everything inferred by hermeneutics) was literally revealed to Moses at Sinai. In order to square this traditionalist theory with his legal positivism, Naḥmanides posits that "the spirit of the Lord is upon the ministers

of His sanctuary" (cf. Ezek 45:4), that is, God watches over the judges of the High Court, helping to insure that their decisions correspond to what was revealed to Moses at Sinai, and thus their errors are rare.[55]

Controversies, Naḥmanides explains, exist because of the very nature of legal reasoning. Like Maimonides, he insisted on the difference between scientific proofs, which are apodictic, and legal proofs, which are not. In the Introduction to his *Criticisms* on Rabbi Zeraḥiah Halevi's *Book of the Light*, he tells his readers that he does not expect them to be convinced by all of his arguments, for controversy [*maḥaloqet*] is intrinsic to talmudic study. He writes: "everyone who studies our Talmud knows that in controversy among its interpreters there are no apodictic proofs … for there is not in this science [= the legal science] a clear proof like the computations of geometry or the demonstrations of astronomy."[56]

In his discussion of the principle "the law of the kingdom is law" in his novellae on *b. Bava Batra* 57b and in his responsa, Naḥmanides follows Maimonides and the Tosafists. Like Maimonides, he stipulates that a law of the kingdom is law only if it applies "to everyone" and is "known to everyone." Elaborating on this, he states that the principle applies only to established laws "written in the chronicles and law books," but not to a "new law" concocted ad hoc. Accordingly, a sovereign's sudden demand for unprecedented tributes is not a legitimate law but "robbery." In support of his view that ad hoc royal decrees are not considered law, he cites the previously mentioned decision of Ri the Elder, which denied the validity of a French lord's appropriation of Jewish property in violation of the established local law equating Jews with knights. Naḥmanides adds that the prohibition of "new" or ad hoc laws applies also to kings of Israel, and thus the prophet Samuel, in constituting the monarchy, defined precisely what is permitted to the king (1 Sam 8:11–19). In insisting that the king's decree be based on established written law Naḥmanides restricts the legislative power of all sovereigns, Jewish or gentile, and subjects them to the rule of law.[57]

The *Zohar* (Late Thirteenth Century)

The *magnum opus* of the Kabbalah, the *Zohar*, written in Aramaic, appeared in Castile in the late thirteenth century. It was attributed to Rabbi Shimeon bar Yohai and his colleagues, who flourished in the Land of Israel in the second century. However, it seems to have been composed by a circle of thirteenth-century mystics, including Rabbi Moses de Léon, who based themselves in part on earlier material. Some members of the circle may have been students of Naḥmanides.

Commenting on Num 9:1, the *Zohar* explains that the text does not simply repeat the commandment concerning the paschal lamb (cf. Exod 12:1–28) but hints at mysteries concerning the divine emanations or *sefirot* of Tiferet ("year" = sun) and Malkhut ("month" = moon). At this point, the *Zohar* seizes the opportunity to state that the laws of the Torah are not merely laws, like those of the nations, but they conceal mystical secrets. Rabbi Shimeon is quoted as saying: "Woe unto the person who says that the Law consists of mere stories and everyday matters!" Indeed, he continues, if one is concerned only with everyday matters, "we could make a more praiseworthy *torah*"! Moreover, he remarks, with regard to everyday matters "there are even among the law books of the world superior things." Rather, he teaches, one must distinguish between the Law's garments, its body, its soul, and its soul of souls. Its garments are the stories, which correspond to the physical world. Its body (= *gufe torah*) consists of the laws or commandments, that is, the Oral Law, symbolized by the *sefirah* Malkhut. Its soul is "the real Torah" (*oraita mamash*), i.e., the inscrutable Written Torah, symbolized by the *sefirah* Tiferet. Its soul of souls is God. "Fools," mocks Rabbi Shimeon, "look only at the garments," but the wise seek to know the body beneath the garments, and the soul behind the body, and the soul of souls behind the soul.[58] The Torah is law, but not primarily law.

The erotic notion of uncovering the Torah is made more explicit in a second Zoharic passage. In the course of an exposition of Exod 21:1–11, a parable is told. The Torah is likened to a "beautiful princess," hidden in her palace, who has a secret lover lingering outside by the gate. She opens a window, revealing her face. She hints to her lover, beckoning him to approach. First, she speaks to him from behind a curtain. This is called *derashah* ("exposition"), that is, the thirteen hermeneutical rules of legal exposition.

Second, she speaks to him from behind a veil, using allegory, that is, homiletic or philosophic interpretation, called *haggadah* (narration). Third, she speaks to him "face to face," revealing her most intimate secrets, concealing nothing. This is the level of the perfect lover of the Torah.[59] Law is presented here as the first step toward the mystical love of God.

Solomon ibn Adret (1235–1310)

All-time master of the rabbinic responsum, Rabbi Solomon ben Abraham ibn Adret of Barcelona, known as Rashba, wrote some three thousand responsa on virtually every topic in Jewish law, replying to correspondents from Europe, Africa, and Asia. He also wrote novellae on many tractates of the Babylonian Talmud, several legal treatises, and a commentary on aggadot. A student of Naḥmanides, he was both a rigorous jurist and a kabbalist. By virtue of his pragmatic thinking on civil law, he is often said to be the most relevant of all medieval rabbis to the issues of religion and state in contemporary Israel.

In an epistle to Rabbi Meir of Rothenburg, Rashba explained why his court in Barcelona had agreed to the execution of an informer, although according to Jewish law only the dissolved Sanhedrin had the authority to pronounce the death penalty, and even if his court did have such authority, Jewish law requires stringent conditions before the death penalty may be pronounced, e.g., the accused must be forewarned in the presence of two witnesses. Rashba gives some arguments in defense of his court, and then writes: "Moreover, we did not judge but were asked by his majesty the King [of Aragon] to examine the case and give him our counsel … We said that he could execute [the informer], for all these things [namely, the strict procedures obtaining in capital cases] apply by scriptural decree [*gezerat ha-katuv*] only to the trials of the Sanhedrin … but not to the law of the kingdom [*dina de-malkhuta*]." Here Rashba has dramatically expanded the principle of "the law of the kingdom is law." When a Jewish court acts in the name of the gentile kingdom, it acts in accordance with the law of the kingdom, not Jewish law. Furthermore, continues Rashba, somewhat surprisingly, there is a similar situation regarding the kings of Israel. Thus, King David without due process had Rechab and Baanah executed for murdering Ish-bosheth (2 Sam 4:5–12) and Solomon without due process had Joab executed for murdering Abner and Amasa (1 Kgs 2:29–34). Rashba is ultimately not distinguishing between Jewish law and gentile law, but between the law of Jewish courts and the law of the sovereign. He further explains that the former is insufficient to preserve peace, for "if you base everything on the law of the Torah … the world would be desolated." The procedures of the Sanhedrin, he asserts, "multiply murderers," since they make it almost impossible to execute a criminal (see *b. Sanhedrin* 49a; cf. *m. Makkot* 1:10). In judging according to the laws of the kingdom, he stipulates,

the judge is interested only in "knowledge of the truth." He concludes: "Whoever is appointed [to judge] by the king judges according to the laws of the kingdom, for the king establishes the land through these laws [cf. Prov 29:4]."[60]

The law of the king or kingdom, unhampered by due process, is thus necessary to "establish" the land and prevent its "desolation." This view occurs often in Rashba's writings. In one responsum, he discusses whether local Jewish lay magistrates (known as *berurim*) have the power to impose fines or inflict corporal punishment. He concludes: "It seems to me that if the witnesses are reliable according to the magistrates, they are permitted to impose fines or corporal punishment, all at their discretion, and this is for the sake of the maintenance of the world [*qiyyum ha-'olam*]; for if you base everything on the laws defined in the Torah … the world will be destroyed."[61] In another responsum, he is asked by the magistrates whether they can accept testimony of relatives, women, or minors (whose testimony was generally not accepted in Jewish courts). He replies that the question is "simple," for the restrictions on testimony were imposed only according to the law of the Torah, but magistrates whose mandate is to judge on the basis of "the welfare of the city" (*tiqqune ha-medinah*) must act at their discretion according to the needs of the hour and by "license of the government."[62] In a third responsum, he writes: "All these matters [concerning taxes] do not go according to the laws of the Torah," but according to local customs and regulations, and the regulation that a claimant must pay his taxes before judgment is rendered on his complaint is indeed due to the "emendation of the world" (*taqqanat ha-'olam*), for otherwise "taxes would never be collected" and swindlers would be encouraged. Laws have to meet one pragmatic test: do they contribute to the public welfare?[63]

Bestowing legitimacy on the pragmatic or "secular" laws of kings and *berurim*, Rashba solved many problems. However, reading his responsa, one is left wondering: What is the use of the civil and criminal law of the Torah, which leads to the desolation of the world? What was the worth of the rulings of the Sanhedrin, based on laws that do not "establish the land"? Answers to these questions were given by another Barcelonan, Rabbi Nissim of Girona (see below).

Gersonides (1288–1344)

The Provençal philosopher, Rabbi Levi ben Gershom, known as Ralbag or Gersonides, was the leading Jewish Aristotelian after Maimonides. He wrote commentaries on most of the Bible, supercommentaries on many of Averroes' Aristotelian commentaries, logical and mathematical works, and the scholastic *Wars of the Lord*.

In the Introduction to his Commentary on the Pentateuch, Gersonides includes a discussion of law. He agrees with Maimonides and Naḥmanides that legal reasoning differs from scientific reasoning: proofs in law differ from those in mathematics or physics because "the nature of this legal subject matter … does not lend itself to such verification, as the Philosopher made clear in the *Ethics*."[64] Unlike Maimonides, but like Naḥmanides, he endorses the traditionalist view that all the laws in the Talmud were revealed at Sinai. However, unlike both Maimonides and Naḥmanides, he takes a critical view of the thirteen hermeneutical rules. He holds that they were not revealed at Sinai and they are not a paradigm of legal reasoning. Following a view held by the Geonim, he asserts that they were not used by the rabbis to deduce laws, but were used by them merely as a heuristic aid (*remez ve-asmakhta*). Moreover, he continues, the thirteen hermeneutical rules are untrustworthy tools of legal reason, for "a person can overturn all the laws of the Torah with those arguments, such that it is possible with them to declare the crawling thing pure, as our Rabbis have mentioned [*b. Eruvin* 13b]."[65] Therefore, he declares, he has developed a new set of nine exegetical principles, which he calls "*meqomot*," that is, *topoi*, in the Aristotelian sense, and announces he will use them to derive the Oral Law from the simple sense of the Written Law. He does not claim that his derivations are true, but only that they are "possible." He argues that they are preferable to the rabbinic derivations because they are more straightforwardly connected to the biblical text and thus easier to remember. He also maintains that they offer a more reasonable basis for legal argument.[66] To illustrate the difference between Gersonides' approach and that of the rabbis, one example may be given. According to the law of the paschal sacrifice, one could join a group convened to eat it only while the animal was alive. The rabbis deduced this from a play on Exod 12:4: the words "*mikhsat*" (in the phrase "according to *the number* of souls") and "*takhosu*" (in the phrase "*ye shall make your count* for the lamb") seem related, but the latter may be understood as meaning "*ye*

shall slaughter the lamb," i.e., in the presence of "the number of souls" (*b. Pesaḥim* 89a; cf. 61a). Gersonides deduces the law simply from the definition of the word *seh* (lamb), which refers to a live animal.[67]

David ibn Bilia (Flourished First Half of the Fourteenth Century)

Rabbi David ibn Bilia, a Maimonidean from Portugal, wrote several books, including a Commentary on the thirteen hermeneutical rules. Unlike Gersonides, he believed they are incisive tools of legal reason. He argues, moreover, that they can be explained by the Aristotelian theory of the syllogism (e.g., the rule of *gezerah shavah* is parsed as an analogical syllogism). In short, *pace* Maimonides and Gersonides, legal reasoning can be reduced to formal logic. Ibn Bilia's work was the first major representative of a fascinating rabbinic genre in which the thirteen hermeneutical rules are explained by Aristotelian logic. This genre achieved its heyday in the fifteenth century with Rabbi Isaac Kanpanton and his circle. It argued resourcefully for the scientific nature of law.[68]

Nissim Girondi (*c.* 1310–1376)

Author of a Commentary on *b. Nedarim*, a Commentary on the *Halakhot* of Rabbi Isaac Alfasi, novellae on several tractates of the Babylonian Talmud, rabbinic responsa, and a collection of philosophic homilies, Rabbi Nissim ben Reuben, known as Ran, was a judge in Barcelona.

In his "Homily on Justice" (on Deut 16:18), Ran develops Rashba's ideas on law. The office of the judge, he begins, is necessary, for without it "the whole world would be destroyed." However, he explains, there are two concerns in rendering judgment: (1) the welfare of the city (*yishuvo shel 'olam*) and (2) "righteous judgment" (*mishpat tzedeq*). The first is utilitarian or consequentialist, the second deontological. These two concerns, he observes, sometimes conflict: maintenance of security may require punishment of the innocent, and true justice may lead to the inability to convict dangerous murderers. The need to balance these two concerns is thus a basic challenge in jurisprudence. Ran explains that the Law addressed this challenge by separating the roles of the judge and the sovereign. The former is authorized to judge only according to "righteous judgment," while the latter is responsible for the welfare of the city. Ran agrees with Rashba that judgment wholly according to the law of the Torah will "multiply murderers." However, unlike Rashba, he expresses a deep proto-liberal sympathy for the protection of the accused's rights ensured by the law of the Torah: "There is no doubt that all this [that is, the strict rules regarding forewarning, evidence, testimony, etc.] is proper from the standpoint of righteous judgment; for why should an individual be executed if he did not know he was putting himself in a position of being liable to the death penalty?" Since true justice may lead to the multiplication of murderers, the king is given by the Law the authority to intervene in the judicial process and to judge without due process.[69] However, Ran insists that such royal intervention should be only in cases where the security of the polity is threatened: "the matter of judgment, in its greater part and in its principal part [*rubbo ve-'iqqaro*], is given over to the Sanhedrin, and in its lesser part [*mi'uto*] to the king." The sin of the people of Israel in the days of Samuel was that they wanted a king "like all the nations" (1 Sam 8:5–6; cf. Deut 17:14), that is, "they wanted the principal part of the judgment … to be given to the king."[70] Ran considered "righteous judgment" to be more an ethical or religious value than a political one. In

emphasizing this value, the Law, according to him, compromises its effectiveness as a political instrument. In this connection, he makes the following comment that seems to be an interpretation of a dictum from the *Zohar* quoted above: "It is possible that there may be found among some of the ordinances and laws of the nations that which is closer to the maintenance of political order than that which is found in some of the ordinances of the Law."[71] In his comments on the role of the judges, Ran seeks to demarcate the extent and limits of their independence.

Ḥasdai Crescas (*c*. 1340–1410/11)

A disciple of Ran, Rabbi Ḥasdai Crescas was born in Barcelona and died in Saragossa. He wrote the anti-Aristotelian *Light of the Lord*. A major element in his critique of Aristotelian physics was the affirmation of actual infinity: his universe had infinite space, infinite time, and probably infinite worlds. He was praised by Spinoza for his proof of God which posited the possibility of an infinite chain of causes and effects. The notion of infinity played a role also in his theory of law. In criticizing Maimonides' methodology in the *Mishneh Torah*, he faulted him for preferring particular examples (*peratim*) to general rules (*kelalim*). "The greater part of the commandments," he wrote, concerns the possible, which is infinite. "Since there is no ratio between an infinite number and a finite one, it follows that there is no ratio between what is apprehended of the finite number of particulars mentioned [in the *Mishneh Torah*] and what is not apprehended of the infinite number of particulars not mentioned in it." Laws, Crescas argues, must be framed as universal propositions.[72]

Joseph Albo (*c.* 1380–1444)

Rabbi Joseph Albo, a student of Crescas, participated in the Disputation of Tortosa in 1413–1414 and wrote the popular *Book of Principles*. There are, he writes in *Principles*, I, 7, three kinds of law (*dat*): (1) natural, (2) nomic, and (3) divine. The first comprises the basic rules of justice necessary for political welfare and is common to all humans at every time and place; the second comprises rules concerning what is becoming and unbecoming, is set down by sages, and is designed to meet the needs of a particular people in a particular place and time; the third comprises rules concerning true human happiness and is ordained by God through a prophet.[73] Albo's threefold distinction recalls Maimonides' above-mentioned twofold distinction between nomic and divine laws in *Guide of the Perplexed*, as well as Aquinas' fourfold distinction between eternal, natural, human, and divine laws in his *Summa Theologiae*, I–III q. 93, a. 1. Albo in effect revised Maimonides' distinction by adding Aquinas' category of natural law, and giving a more supernatural sense to the category of divine law. His theory of law was appreciated by Grotius, who called him "a Jew of most keen judgment."[74]

Isaac Abrabanel (1437–1508)

Born in Lisbon, Don Isaac Abrabanel served as a minister to Kings Afonso V and John II of Portugal, King Ferdinand and Queen Isabella of Castile, and, after the Expulsion of the Jews from Spain in 1492, to Italian dukes. He died in Venice. Although he made a career serving royalty, he was an anarchist or communist in his philosophy. He was the author of a Commentary on the Bible, a Commentary on Maimonides' *Guide*, and other works on philosophy and religion. His thought about law was influenced by Seneca's portrayal of the *saeculum aureum* in his Epistle 90.

Abrabanel believed in the Stoic ideal of living according to Nature. The sin of Adam was that "he did not content himself with the natural things" but indulged in luxuries.[75] Living according to Nature, for Abrabanel, means equality. Until King Nimrod, "all human beings were equal in rank, since all were children of one individual."[76] "Nature," he asserts, "made human beings free and equal by birth."[77] The sin of the generation of the Tower of Babel, according to him, was the lust to build a City, in which are found all sorts of artificial evils, including private property and political power.[78] Originally, he writes, human beings had no private property: "all things … were common to all equally, for no private individual had land or anything else for private use; for everything was common and equal for all, just like language." The change came when people began to say "mine is mine and thine is thine."[79] For Abrabanel, law is a necessary solution for an unnatural problem. It will be needed even in the messianic era. When Abrabanel, true to his anti-monarchism, describes the messianic era in his *Salvations of His Anointed*, he explains that the messiah will not be a king, but a *nasi*, a president of the Sanhedrin.[80]

Conclusion

This concludes our survey of the views of medieval talmudists, philosophers, and mystics on the nature of law. All of them assigned much significance to law, and in their political theory most argued explicitly for the supremacy of the judges over the sovereign. This preference for the judges over the sovereign reflects on Judaism itself as a tradition that sees law as a vehicle of divine–human interaction and attributes to it consummate importance.

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[1] See Stroumsa, "Saadya."

[2] Saadia Gaon, *Beliefs and Opinions*, p. 158 (Arabic, p. 132).

[3] ***Ibid.***, III, exordium, pp. 137–38 (Arabic, pp. 116–17). This opinion was debated among the Mu'atazila in the generation before Saadia. See Schwarz, "Theodicy," p. 339.

[4] Saadia Gaon, *Beliefs and Opinions*, III, 1, p. 138 (Arabic, p. 117).

[5] ***Ibid.***, p. 139 (Arabic, p. 117).

[6] ***Ibid.***, pp. 138–47 (Arabic, pp. 117–22).

[7] See the discussion of this passage and the rabbinic approach to irrational laws in Chapter 3 of the current volume.

[8] Saadia Gaon, *Beliefs and Opinions*, III, 1, p. 138 (Arabic, p. 117).

[9] ***Ibid.***, III, 3, pp. 145–47 (Arabic, pp. 122–24).

[10] Altmann, "Saadya's Conception," p. 333.

[11] Baḥya ibn Paquda, *The Book of Direction*, pp. 87–90 (Arabic, p. 21). In distinguishing between duties of heart and limbs, Baḥya may have followed Rabbi Samuel ben Ḥofni. See Sklare, *Samuel ben Ḥofni Gaon*, pp. 176, 200. The rabbis debated whether performance of the commandments requires "intention" (*kawwanah*). They agreed prayer requires intention of "the heart," but disagreed about various other commandments (*b. Berakhot* 13a–b, 31a; *b. Eruvin* 95b–96a; *b. Pesaḥim* 114b; *b. Rosh Ha-Shanah* 28a–29b; *y. Pesaḥim* 10:3, 37d.).

[12] Judah Halevi, *The Kuzari*, pp. 111–12 (Arabic, pp. 68–69).

[13] ***Ibid.***, III, 11, pp. 144–45 (Arabic, pp. 98–99).

[14] ***Ibid.***, I, 11, p. 44 (Arabic, pp. 9–10).

[15] ***Ibid.***, III, 40–41, p. 173 (Arabic, pp. 124–25).

[16] Ibn Ezra, *Yesod Mora*, chapters 4 and 5, pp. 123–24 (English, pp. 74–75). See also Ibn Ezra, *Commentary*, pp. 130–31 (on Exod 20:2). On the precepts, see Ibn Ezra, *Commentary on Psalms* (in standard rabbinic Bibles), 19:9; 107:11; and 119:27, 104, 128.

[17] Ibn Ezra, *Yesod Mora*, chapter 5, pp. 126–27; chapter 7, pp. 136, 147–49 (English, pp. 78–79; 91, 104–06); *Commentary*, p. 121 (on Exod 20:2).

[18] Rashi, *The Pentateuch*, p. 2 (on Gen 1:1). See *Tanḥuma* Bereshit, paragraph 11, p. 4a; *Genesis Rabbah* 1:2; *Yalqut Shim'oni*, 187, on Exod 12:1.

[19] Rashi, Commentary on *b. Sanhedrin* 26b, s.v. *tushiyyah, devarim shel toho*.

[20] See Ben-Menahem, "Controversy in Jewish Law."

[21] Commentary on *b. Ketubot* 57a, s.v. *qa mashma' lan*. See discussion of the phrase "both are the words of the living God" in Chapter 3 of the current volume.

[22] See the discussion of this passage in Chapter 3 of the current volume.

[23] Rashi, Commentaries on *b. Shabbat* 108a, s.v. *mai im yavo' Eliyahu*; and *b. Eruvin* 45a, s.v. *hare Shemuel u-vet dino*. On the Law "is not in heaven," see, e.g., *b. Bava Metsi'a* 59b and *b. Temurah* 16a, and the discussion in Chapter 3 of the current volume.

[24] See *b. Gittin* 10b, *b. Nedarim* 28a, *b. Bava Qamma* 113a, *b. Bava Batra* 54b–55a. The dictum is attributed to Samuel of Nehardea. See the discussion in Chapters 4, 10, and 11 of the current volume.

[25] *b. Nedarim* 28a, *b. Bava Qamma* 113a. Cf. Roth, *Dina de-Malkhuta*, p. 2: "The law of the kingdom is law: but also when Hitler is head of State? The law of the kingdom is law: but what about the racial laws?"

[26] *Tosafot* on *b. Bava Batra* 54b, s.v. *dina de-malkhuta dina*. The Commentary is printed in standard editions of the Talmud.

[27] Quoted in Rabbi Josef Caro, *Bet Yosef*, in Rabbi Asher ben Jehiel (= Rosh), *Arba'ah Turim, Ḥoshen Mishpat*, Hilkhot Gezelah, 369, p. 60a; cf. Rosh on *b. Nedarim* 28a, s.v. *be-mokhes*.

[28] *Tosafot* on *b. Bava Qamma* 58a, s.v. *i nami mavriaḥ ari*. Regarding the judge who is not *hagun*, see *b. Sanhedrin* 7a.

[29] On relations between Tosafists and Christian scholars, see Kanarfogel, *The Intellectual History*, pp. 37–110.

[30] Isaiah di Trani (Rid), *Responsa*, 62, pp. 301–03. See Kanarfogel, *The Intellectual History*, pp. 106–07. Cf. Melamed, *'Al Kitfe 'Anaqim*.

[31] Efros, "Maimonides' *Treatise on Logic*," p. 47. Arabic text available in his "Maimonides' Arabic *Treatise on Logic*," p. 13. Cf. Lameer, *Al-Fārābī*, pp. 233–58.

[32] Efros, *Logic*, pp. 47–48 (Arabic, pp. 13–15). Controversy, according to Maimonides, is a function of demonstrability; thus, there is none in mathematics, some in physics, and much in metaphysics. See Maimonides, *Guide*, I, 31, p. 66 (Arabic text, p. 44).

[33] Efros, *Logic*, p. 64 (translation modified) (Arabic, p. 33).

[34] Maimonides, *Introduction to the Commentary*, pp. 40–44 (Arabic, pp. 327–28).

[35] Rabbi Jair Bacharach (d. 1701), *Ḥavvot Ya'ir*, no. 192, pp. 183a–b, criticized Maimonides' position and estimated that according to him "less than one percent" of the talmudic laws are Sinaitic. In support of the traditionalist view, he cites *b. Berakhot* 5a (on Exod 24:12). Cf. Halbertal, *Maimonides*, pp. 99–107.

[36] Maimonides, *The Commandments*, part 2, pp. 376–77 (Arabic text, p. 15).

[37] See Montesquieu, *De l'Esprit des lois*, XI, 6; Publius, *The Federalist*, letter 47.

[38] See Harvey, "Maimonides on the Generality of the Law," pp. 253–72.

[39] Maimonides, "Introduction to *Sanhedrin* 10," 7th Principle, pp. 419–20; cf. 6th Principle, pp. 418–19 (Arabic, pp. 371–72).

[40] Alfarabi explains this in his "Enumeration of the Sciences," p. 5; "Book of Religion," pp. 8–10; "Selected Aphorisms," pp. 57–58; "Political Regime," pp. 79–82; and "Virtuous City," V, p. 15. See Alfarabi, *The Political Writings*, pp. 37–38, 79–80, 99–100, and *On the Perfect State*, pp. 239–53. Mahdi, *Alfarabi and the Foundation*,

p. 116 (cf. pp. 166–68), sums up Alfarabi's position: "[J]urisprudence is a second-best alternative, the best being a true successor. The art of jurisprudence … becomes necessary due to the absence of a true *imām* and king."

[41] Maimonides, *Introduction to the Commentary*, pp. 44–45, 61–62 (Arabic, pp. 328; 334–35).

[42] The *Mishneh Torah* is found in standard editions. Thirteen of its fourteen volumes have been published in English translation by Yale University Press, New Haven, 1949–present. *The Book of Knowledge*, which has not yet appeared in this series, is available in M. Hyamson's translation, New York: Bloch, 1937.

[43] Rabbis Meir of Rothenburg and Samson ben Zadok, *Haggahot Maimoniyyot* (in standard editions of the *Mishneh Torah*), Hilkhot Gezelah, 5:14, n. 9, compare Maimonides' view to Rabbenu Tam's.

[44] Maimonides, *Guide*, II, 40, pp. 381–85 (Arabic, pp. 270–72).

[45] ***Ibid.***, III, 27–28, pp. 510–13 (Arabic, pp. 371–73).

[46] ***Ibid.***, III, 41, p. 558 (Arabic, p. 409).

[47] ***Ibid.***, III, 32, pp. 325–27 (Arabic, pp. 383–85).

[48] ***Ibid.***, III, 48, p. 599 (Arabic, pp. 439–40). An Ugaritic text, as first deciphered by C. Virolleaud, H. L. Ginsberg, U. Cassuto, and others, reads: "cook a kid in milk" (*tbḥ gd bḥlb*). The text was heralded as a confirmation of Maimonides' conjecture. Later scholars, however, rejected this reading. See Haran, "Seething."

[49] Roth, *The Guide*, pp. 74–76. Cf. Assman, "Moses as Go-Between," p. 164: "[W]e can discern a line of tradition" from Maimonides to Freud "with Spencer as a hinge" between them.

[50] Maimonides, *Guide*, I, 2, pp. 24–25 (Arabic, p. 16); II, 33, p. 364 (Arabic, p. 256).

[51] Maimonides, *The Eight Chapters*, chapter 6, p. 77 (translation modified) (Arabic, p. 389).

[52] Maimonides, *Guide*, II, 40, p. 382 (Arabic, p. 270).

[53] Naḥmanides, "Sermon on Psalms 19:8," in *Kitve Rabbenu Moshe ben Naḥman*, vol. I, p. 173. See also Naḥmanides, *Perush*, pp. 48 and 52 on Gen 6:2 and 13.

[54] For this rabbinic teaching, see Chapter 3 of the current volume.

[55] Naḥmanides, *Commentary*, p. 423 on Deut 17:11, and his criticisms on Maimonides' *Book of the Commandments*, in Maimonides, *Sefer ha-Mitzvot*, shoresh 1, p. 17. Cf. Rashi, *The Pentateuch*, p. 90, on Deut 17:11. In his *Commentary*, p. 434, on Deut 19:19, Naḥmanides says God would not allow the judges to execute the innocent. His opinion seems to be that the High Court can err, but Providence prevents grave errors. On his view on the mystical meaning of the Law, see Scholem, *On the Kabbalah*, pp. 38–40.

[56] Naḥmanides, *Milḥamot Ha-Shem*, in Rabbi Isaac Alfasi, *Halakhot*, in standard editions of the Babylonian Talmud, *haqdamah*, p. iiib.

[57] Naḥmanides, *Ḥiddushe Bava Batra*, p. 48a; Naḥmanides, *Teshuvot*, no. 47, pp. 75–78.

[58] *Zohar*, III, *beha'alotekha*, 151b–152a. The word translated here by "law books" is the neologism "*qafsire*," whose meaning is unclear (cf. *Zohar*, I, *bereshit*, 37a; *vayyishlaḥ*, 177a). English translation in Matt, *Zohar*, pp. 43–45, 204–07. Cf. Matt, *Zohar: Pritzker Edition*.

[59] *Zohar*, II, *mishpatim*, pp. 99a–b (English, pp. 121–26, 249–54). Cf. Scholem, *On the Kabbalah*, pp. 53–57.

[60] Rashba, *Iggeret*, in Kaufmann, "Jewish Informers," pp. 235–36. See Lorberbaum, *Politics and the Limits of Law*, pp. 117–22.

[61] Rashba, *Responsa*, 3, 393. Cf. Lorberbaum, *Politics and the Limits of Law*, pp. 115–17.

[62] *Responsa*, 4, 311. Cf. Lorberbaum, *Politics and the Limits of Law*, pp. 112–15.

[63] *Responsa*, 3, 398. Cf. 3, 412. See Feuchtwanger, "Political Theory," pp. 145–72.

[64] Gersonides, *Be'ur 'al ha-Torah*, Genesis, introduction, pp. 5–6. See Aristotle, *Nicomachean Ethics*, I, 3, 1094b; cf. *Metaphysics*, III, 1, 995a.

[65] *Be'ur*, Genesis, introduction, p. 5.

[66] ***Ibid.***, pp. 5–13. See Touati, *La pensée philosophique*, pp. 506–13; and Cohen, "Gersonides' Alternative," pp. 255–84.

[67] *Be'ur*, Genesis, introduction, p. 7; pp. 127–28 on Exod 12:4; pp. 172–73 on Exod 13:13.

[68] See Ibn Bilia's commentary on the thirteen hermeneutical principles as found in Rosenberg, "The Commentary on the Thirteen Attributes," pp. 59–69. See Ravitsky, "Talmudic Methodology," pp. 184–99. On the genre, see Ravitsky, *Logiqah Aristotelit*.

[69] Ran, *Derashot*, Homily 11, pp. 410–19. Parts of Homily 11 are translated in Walzer *et al., The Jewish Political Tradition*, pp. 156–61. See Harvey "Liberal Democratic Themes," pp. 197–211.

[70] Ran, *Derashot*, pp. 419–22.

[71] ***Ibid.***, pp. 415–18.

[72] Crescas, *Or Adonai*, pp. 5–7. See Spinoza's Letter on Infinity (Epistle 12, to Ludwig Meyer) in Spinoza, *Collected Works*, vol. I, p. 205.

[73] Albo, *Sefer ha-'Iqqarim*, pp. 78–80.

[74] Quoted by Husik, in ***ibid.***, p. xviii.

[75] Abrabanel, *Perush 'al ha-Torah*, p. 89 on Gen 2:5–7; cf. p. 175 on Gen 11:1–10.

[76] ***Ibid.***, p. 172 on Gen 10:1–8.

[77] ***Ibid.***, pp. 177–78 on Gen 11:1–10.

[78] ***Ibid.***, p. 177.

[79] ***Ibid.***, pp. 178–79. Cf. *m. Avot* 5:10. See Harvey, “Anarchism,” pp. 213–30.

[80] Abrabanel, *Yeshu‘ot Meshiḥo*, chapter 3, p. 26b.

Part II

◈

Enlightenment, Emancipation, and the Invention of Jewish "Religion"

6

From Enlightenment to Emancipation

Verena Kasper-Marienberg

The dissolution of Jewish jurisdictional boundaries is often thought to be a product of emancipation, which allowed or forced Jews to refer to non-Jewish courts rather than rabbinic courts. However, there is, in fact, strong evidence of the phenomenon of Jewish referral to non-Jewish courts already in the centuries prior to emancipation, particularly in the time of the Enlightenment in the eighteenth century. It was deeply connected to the legal framework provided by the political entities of the regions in which Jews settled. This holds true not only for Jewish communities in the Holy Roman Empire but also for various other European Jewries, such as those in the Polish-Lithuanian Commonwealth, in the various Italian states, France, the Dutch Republic, as well as for the Jewries of the Ottoman Empire.[1]

This chapter will focus on the well-documented Jewish community of Frankfurt am Main as an example to point out the various ways in which Jews, as individuals or as a community, engaged with non-Jewish courts in the Holy Roman Empire throughout the eighteenth century. It will explore the different motives, forms, and consequences of this historical phenomenon and will attempt to contextualize it within the various regions of the Holy Roman Empire and several neighboring states. The closing discussion as to whether or not this phenomenon can be regarded as having a causal connection with the emancipation process is strongly linked with the material presented in Chapter 7 of the current volume, which will discuss the intellectual discourses of the Enlightenment within and outside of the Jewish world that accompanied this process.

The Permeable Borders of the Frankfurt Ghetto

The Frankfurt Ghetto (*Judengasse*, lit. Jewish lane) was established in 1462 along the outside of the city walls of Frankfurt am Main. Jews had lived in Frankfurt since as early as the twelfth century, settling around the city center and sharing their area of residency with surrounding Christians. However, it was not long before the ghetto was no longer separate from the city. As Frankfurt grew beyond the old city walls, the Jewish lane was soon topographically integrated into the city. Nevertheless, three entrance gates were closed at night and on Sundays and Christian holidays, marking a clear separation from the rest of the city and locking the Jewish inhabitants of the street, which was only a quarter of a mile long, inside.

The legal basis for the Jewish settlement in Frankfurt from 1424 on was the so-called *Judenstättigkeit*, a local Jewry ordinance similar to those of many middle-sized and larger dominions of the Holy Roman Empire in the early modern period.[2] It regulated the number of Jewish families that were allowed to live in the Jewish lane and of those who were regarded as protected Jews (*Schutzjuden*), i.e., tolerated inhabitants of Frankfurt with certain (minor) rights and obligations. In addition, it contained numerous instructions and prohibitions concerning the lives of Jews in Frankfurt, addressing such issues as clothing and housing regulations, limitations on Jewish trade and merchandise, taxes, and restrictions on full membership in the community. Particularly important in this context is the fact that it also defined the areas of jurisdiction on which the Jewish rabbinic court[3] and the Jewish lay leaders could rule – usually minor civil cases and ritual matters[4] – and the types of cases that would have to be resolved at the various city courts. It retained the theoretical possibility for all Frankfurt Jews to appeal to the city courts against decisions made by the Jewish courts. The *Judenstättigkeit* was to be continuously renewed, adapted, and paid for by the Jews until 1617, at which point it was finally made permanent by order of Emperor Matthew (who reigned from 1612–1619) after a severe riot against the Jews in Frankfurt.[5]

The emperors were able to intervene in the regulation process regarding the Frankfurt Jews because Frankfurt was an imperial city; as such, the emperors were formally in charge.[6] In (legal) theory, the emperors also owned the so-called *Judenregalien*, special rights they held over all Jews throughout the empire since the

Middle Ages due to their supposed status as the emperor's special servants (lat. *servi camerae regis*). In reality, these rights had generally been sold to the numerous princes, counts, lords, and urban authorities that allowed Jewish settlements within their borders. Therefore, the emperors no longer had many opportunities to protect or rule over the Jews of these dominions. Meanwhile, local authorities consistently replaced them in the role of protectors and beneficiaries of the Jews.[7]

Even if direct access between Jews and emperors was hindered in some places, three imperial institutions – the Imperial Diet, the Imperial Chamber Court, and the Imperial Aulic Council (*Reichstag, Reichskammergericht*, and *Reichshofrat*) – offered Jews living in the empire a means by which to reach out to the imperial level during different periods and with regard to certain legal issues. Denial or detention of justice, for example, was an eligible (and distensible) cause. The same holds true for cases of contempt of imperial privileges, which ensured the basic security of Jewish property and settlement since the reign of Charles V (who reigned from 1519–1556).[8] Appeals against certain lower-level court decisions and claims against noble non-Jews, who had a direct feudal relation with the emperor, were also litigable at the imperial courts. Several thousands of cases were reviewed in these institutions, particularly in the Imperial Aulic Council, which was the closest to the emperor himself. The numbers demonstrate that throughout the early modern period Jews actively reached out to imperial institutions whenever possible.[9]

Moreover, Jews had to engage with different non-Jewish local courts in civil cases that could, by definition, not be issued at a rabbinic court, such as in cases involving non-Jews or the property of non-Jews, as well as in severe criminal cases. In Frankfurt, the lower city court, the "mayor's audience" (*Bürgermeisteraudienz*), would see cases that involved Jews on a nearly daily basis.[10] This frequency was probably not unique, as it arose from intense interaction and business contacts with non-Jews. Jews from Frankfurt and elsewhere also reached out to the imperial supreme courts for appeals against local court decisions or in order to sue noble debtors. Clearly, they were not always the claimant and would find themselves forced to formally proceed as the defendant in non-Jewish courts.

As a consequence, engaging with non-Jewish courts was a common experience for early modern Jews in Frankfurt and presumably throughout the empire, requiring at least

a basic knowledge of legal procedures, court hierarchies, and non-Jewish law. Even if they were represented or consulted by (Christian) lawyers, a certain understanding of possible courses of action within the non-Jewish jurisdictional system was indispensable. However, this use of non-Jewish courts did not undermine or limit the authority of the Jewish jurisdiction, particularly as it had been in practice for centuries.[11]

Of far greater importance in this regard may have been the rising occurrence of cases between Jews that found their way to non-Jewish courts in the eighteenth century, rather than or after being brought to the rabbinic court or before Jewish lay leaders.[12] Although we do not yet have concrete numbers, in the case of Frankfurt, an "abundance of internal Jewish proceedings"[13] is documented in the records of the lower city court. These conflicts took place between individual Jews as well as between individual Jews and the Jewish community. Whether the Jewish courts were circumvented by taking internal cases directly to a non-Jewish court or overruled by a non-Jewish court, it can be assumed that both occurrences would have been perceived as undermining or competing with the authority of Jewish jurisdictions.[14]

The Jewish community of Frankfurt pursued numerous, as of yet uncounted lawsuits on a local as well as on an imperial level against decisions of the city council of Frankfurt (which also served as the local court) that tried to make rulings related to Jewish internal affairs,[15] such as real estate and commerce regulations, the composition and competencies of the Jewish board of lay leaders, and the acceptance of new members to the community, as well as in matters of property, inheritance, and guardianship. What may initially be regarded as little more than the common approach of a late early modern authority attempting to cut into the autonomic sphere of a religious group in order to gain more power over its subjects is actually far more complex. As it turns out, a significant number of the city council's decisions was based on initiatives of Jewish community members going against decisions of the board of Jewish lay leaders and/or, most likely to a lesser extent, against those of the rabbinic court.

As noted elsewhere in this volume, the official attitude within the Jewish community toward taking internal litigable cases to non-Jewish courts was highly dismissive.[16] Nevertheless, numerous striking testimonies can be found, such as the following testimony of the prestigious Frankfurt rabbi Pinchas Horowitz (1731–1805), who stated that "indeed, in our times we can find many people from our religion who omit this and

who climb over their fence and do not go to their Jewish judges."[17] Although he labeled this behavior as a transgression, it would seem that practice clearly differed from what was regarded as the norm in eighteenth-century Frankfurt, which is not a particularly unusual phenomenon.[18]

An exemplary case may serve to show the possible entanglement of Jewish and non-Jewish jurisdictions in Frankfurt and beyond in the late eighteenth century. Around 1777, a Jewish woman named Hanle Ursel, a descendant from a Frankfurt Jewish family who was raised by her grandparents in Hamburg, got into a major conflict with the Jewish community leaders in the *Judengasse*.[19] She wanted to marry the son of a local protected Jew and thereby become an official member of the Jewish community of Frankfurt. The community leadership denied her request, despite the fact that she seemed to meet all of the official requirements for acceptance: she had inherited half a house in the Jewish lane, she had a significant asset, and she had a prospective husband from a local family.

The issue discouraging her acceptance was a rather scandalous one for the time: she had come to Frankfurt one or two years earlier in order to marry another Jewish man. The wedding had indeed taken place but Hanle had given birth to a child only two months later, with the new husband not being the father. The marriage ended in divorce and if the internal Jewish community regulations (*takkanot*) of Frankfurt had been carried out, Hanle likely would have been required to leave Frankfurt.[20] Instead, she tried to remarry and become a full community member. When the Jewish leadership denied her request, the young mother took matters into her own hands and went to the next available non-Jewish court in Frankfurt, the mayor's audience. There she claimed that a youthful indiscretion should not result in her eternal exclusion from her only hometown, and that she would rather accept the non-Jewish punishment for such cases (a rather small monetary penalty) than the ruling of the Jewish jurisdiction.

The decision to bring a case that seemed to fall clearly under the jurisdiction of the Jewish community to a non-Jewish court had specific consequences for Hanle. The Jewish leadership sanctioned her with a ban issued by the rabbinic court.[21] A ban at that time could mean a variety of punishments, from being excluded from synagogue service and aspects of communal life to actual physical exclusion from the Jewish lane.[22] It

seems that in Hanle's case the ban was not imposed in its strongest form and was directly related to her bringing the case to the attention of a non-Jewish court and not to the issue of having a child out of wedlock, which had already for some time been tolerated by the community. This action might simply demonstrate that the community leadership would not allow the transgression of legal actions by community members to pass without comment. The leadership chose to label such transgression with its distinct tool of disapproval, which had as direct and public an effect on the social life of the banned individual as possible.

However, the community's course of action was not restricted to internal sanctions. The leadership became actively involved in the trial held in the non-Jewish courts. In extensive pleadings it defended its decision and asked that the case be referred back to the community. When the first court decision nevertheless was made in favor of Hanle and her new groom, the Jewish leadership petitioned to the next higher city court. When this court also decided that Hanle should be able to remarry and become a member of the Jewish community, an appeal was even made to the Viennese Supreme Court. By then, the case had stimulated a general and major discussion of the religious autonomy of the Jewish community between the Jewish leadership and the city courts.

Hanle's case demonstrates that Jewish community members did not necessarily transgress the boundaries of Jewish jurisdiction in order to leave the community or to damage its reputation, but rather in order to obtain decisions more favorable to their individual positions. Hanle actually used the non-Jewish court to gain readmittance into the community in order to become a respected member within it. She was willing to risk the public dishonor of being banned. Evidently, transgressing the jurisdictional boundaries between the Jewish and non-Jewish courts and being a prospective loyal Jewish community member were not mutually exclusive in her eyes or in those of many other individual Jewish community members who took similar actions. Despite a certain hesitation to transgress,[23] in concrete situations, Jewish community members frequently used the accessibility of overlapping multiple jurisdictions in their favor.

This case also demonstrates that the Jewish community was represented in non-Jewish courts through its leadership. Although it might not have acted on its own initiative within the context of non-Jewish courts, the leadership often had no choice. Over time, involvement in non-Jewish courts led to well-prepared juridical strategies on

the side of the Jewish leadership, which included, for example, the hiring of professional (Christian) legal representatives, a filing system in order to use former case documents as precedents, and the systematic use of formal procedures to delay proceedings.[24] In this way, the Jewish community leaders became well prepared for prospective lawsuits that were filed against them. In addition, they began to take advantage of the non-Jewish courts against community members when it was expedient for them, as in the case of community members whose power and financial independence made them less susceptible to social pressure. In such cases, the community leaders would ask the city or the imperial courts for help in exerting their own authority within the community.

The outcome of the cases on the imperial as well as on the local level, as far as is known for now, do not indicate a clear pattern as to whether venturing into non-Jewish courts played in favor of the individual community members in Frankfurt rather than the community, or vice versa. In the case of Hanle, the imperial court actually decided in her favor by referring the case back to the city court. However, there exist many cases in which the imperial courts as well as the city courts rather strengthened the authority of the community leaders.[25] It seems to have been a flexible and dynamic system of interacting and overlapping jurisdictions that worked actively until the Napoleonic wars and their aftermath brought a temporary end to the traditional legal framework for Jews in Frankfurt.

There is therefore no necessary and direct link between the diminishing of rabbinical power throughout the eighteenth century and the phenomenon of increasing transgression of Jewish jurisdictional boundaries. It seems from cases such as Hanle's that community members who sought the attention of non-Jewish courts did not do so because of a lack of respect for the rabbinic court or because they questioned its legitimacy, but rather because this course of action seemed appropriate for conditional and pragmatic reasons.[26] As of yet, we do not know enough about the ambiguous jurisdictional power held by the Jewish lay leaders in the community to define their role in this process. However, it is known that the rabbinate in Frankfurt and in many other places became strongly affiliated with, if not dependent upon, the Jewish lay leaders.[27] Several documented testimonies of community members regarding nepotism, corruption, and bias among this powerful group of lay leaders raise the question of whether their ambivalent perception within the Jewish community in combination with their lack of

jurisdictional qualification might not have had a major influence on the decision to seek the attention of a non-Jewish court.

Urban and Rural Spaces

In order to put the developments in Frankfurt into a broader context within the Jewish world, it is indispensible to look at other Jewish communities or settlements within the Holy Roman Empire that faced different legal frameworks. Given that the vast majority of Jews in Central Europe during the early modern period lived in the countryside rather than in cities (as they used to do in the Middle Ages), conclusions regarding Jewish legal experiences with non-Jewish courts that are drawn from urban communities can be of limited value. Furthermore, the majority of Jewries in the Holy Roman Empire were located under the dominions of noble rulers who had taken over from the emperors the power to rule on Jewish affairs. These Jews faced legal structures different from those of Jews living in areas that were structurally open toward the imperial level, like imperial cities.

Two major phenomena concerning the engagement of Jews with non-Jewish courts and the dissolution of boundaries between Jewish and non-Jewish courts in these different settings will be discussed. First are the systematic intervention in and institutionalized takeover of Jewish jurisdictions through the administrative bodies of certain dominions. Second are the availability and varied forms of rabbinical jurisdiction in rural Jewish settlements and their impact on internal Jewish conflicts.

(1) One of the most prominent dominions to again accept Jewish settlements after a long period of exclusion starting in the late sixteenth century was the Margraviate of Brandenburg and later kingdom of Prussia. From 1671 on, Jews were again allowed to settle in certain parts of Brandenburg-Prussia on the basis of constantly changing ordinances and regulations, the most important among them being the so-called *Generalreglements* of 1730 and 1750.[28] These ordinances contained strict limitations regarding the numbers and social status of Jews who were allowed to settle, classifying them into different groups of profitability, limiting the succession of protection and right of settlement to just one child, and burdening every household with immense payments. Nevertheless, by the middle of the eighteenth century, the eastward-growing kingdom held a Jewish population of approximately 14,000 people, growing even further through the final annexation of additional portions of Poland over the following decades.[29]

Prussia is often viewed as the cradle of modernity for German Jewry due to the Haskalah center in Berlin, represented by prominent figures such as Moses Mendelssohn (1729–1786) as well as by the important writings on Jewish emancipation by the Prussian civil servant Christian Wilhelm von Dohm (1751–1820).[30] However, if the focus is shifted from the intellectual, cultural, and proto-industrial elite scene in Berlin to the very restrictive legal and economic conditions the majority of Jews in the kingdom faced until the beginning of the nineteenth century, the situation appears unfavorably different.[31]

Regarding the legal sphere, certain differences compared to the situation in cities like Frankfurt must be clarified. Prussia had acquired from the Hapsburg emperors the privileges (*Judenregalien*) necessary to be able to impede or prevent the access of its Jews to the imperial level. If there were appeals in civil cases made by Jews that were able to reach beyond the local level, they probably would have been directed to the appellate courts that existed in the different provinces of Prussia.[32] Echoing the example of the princely administration in Berlin, the authorities of different provinces of Prussia created so-called *Judenkommissionen* (Jews' commissions) that would deal with Jewish issues, among them civil cases concerning Jews. These local Jews' commissions would be subordinated under the Berlin judicial authorities, tangled between local special regulations and demands from Berlin.[33]

The Frankfurt community, under the protective hand of the emperor, was able to maintain its autonomy of jurisdiction also in minor civil cases until the end of the empire in 1806. The political attitudes and practices directed toward Jews in Prussia were more rigid and unstable, deeply shaped by the claim of ultimate decisive power of the Hohenzollern princes (and later, kings) and their maneuvering based on financial considerations and their personal contempt for Jews. The privilege of 1671 permitting Jewish settlement in certain areas of Brandenburg contained quite favorable conditions meant to attract Jews to resettle. These included the right to install lay leadership and a rabbi, but the intention to limit jurisdiction to so-called ceremonial issues was clear at an early stage.[34]

However, the following ordinances of Frederick William I and his successors tended to restrict Jewish life in every concern, and were ultimately intended to limit the Jewish population as much as possible. In order to gain greater administrative control, the Jews'

commissions in Berlin sought to centralize the competencies of regulations concerning Jewish life. This included the confirmation and thereby control of Jewish leadership and the rabbinate, as well as the increasing limitations of Jewish jurisdiction even in ceremonial and ritual matters.[35] Already in the early eighteenth century, ordinances referred "all disputes among Jews as well as among Jews and Christians" dealing with amounts less than 100 Reichstaler to the Jews' commission as the specific jurisdiction for Jewish issues, while the rabbinic court should rule only in cases among Jews up to the very low amount of 5 to 6 Gulden.[36] The later ordinances of 1730 and 1750 still included the ability of rabbis and lay leadership to rule in disputes among Jews, especially in conflicts concerning Jewish ceremonies, but linked any form of punishment (especially the ban) to the confirmation of non-Jewish authorities.[37] However, they clearly stated that the Jewish leadership would "not be entitled to actual jurisdiction,"[38] labeling Jewish jurisdiction thereby as a privilege and temporary concession granted by the prince, not a corporative right of the Jewish community.

On the other hand, there were certain local regulations that legally framed Jewish life in Prussia as well. While some cities, such as Magdeburg, maintained their privilege to not tolerate any Jews within their borders, other authoritative entities developed their own regulations that sometimes may have contradicted state directives.[39] Certain prominent Jewish individuals, like the rabbi Arend Benjamin Wolff, succeeded in obtaining very favorable privileges from the Berlin authorities, privileges that would omit the central ordinances altogether and actually enable a significant expansion of rabbinical jurisdiction for a certain period of time.[40] These inconsistencies, which are quite typical for early modern statehood, make it difficult to see and describe any actual pattern in terms of the legal options of Jews within and outside Jewish jurisdiction in Prussia, which may very well have been dependent on situation and local context. As for now, it must be assumed that the oppressive direction of government in Prussia limited Jewish legal options in non-Jewish courts to social matters and in Jewish courts to not clearly defined but increasingly limited ceremonial issues.

(2) If we leave the northeastern portion of the Holy Roman Empire and turn instead to the southwest, the political map becomes increasingly fragmented. The areas of Swabia and Upper Swabia were characterized by a multitude of differently sized and scattered dominions, some as tiny as a little village, while others were as prestigious as

the episcopal city of Augsburg. This specific multilayered political structure offered many favorable living spaces for Jews and led to an agglomeration of Jewish settlements during the early modern period. However, there was no center in terms of a unified community structure that would define and determine Jewish life, as occurred in the big urban communities like Frankfurt. Instead, Jews in the countryside lived – some in bigger settlements[41] and some with just their own or a few other families – mostly in an individual protective relation to the local authority.[42]

The bigger settlements developed various communal structures, often with a lay leadership dominated by the economic elite as well as a rabbi. The latter often took on auxiliary duties, like the ritual slaughter of kosher animals and/or the education of children.[43] Smaller settlements, however, would not necessarily have the option of having their own rabbi and would have to turn to larger communities in the area when searching for a rabbinical jurisdiction of some kind. In the late sixteenth and early seventeenth centuries, this was facilitated by the establishment of the so-called *Landjudenschaften* (territorial Jewries). These representative fora for all Jewish householders living in a certain area or dominion, would also establish *Landesrabbinate* (territorial rabbinates) that could and should be addressed in matters pertaining to internal Jewish conflicts.[44] However, even if in many cases it was possible to bring internal Jewish cases to a rabbi or a rabbinic court, it might have required too great an effort to reach out to the rabbinic jurisdiction in another location.[45]

In the countryside, the lives of Jews and Christians were even more intermingled than in the city, since there were often fewer restrictions concerning housing and even co-housing than in the cities. Jews were highly integrated into the rural economy, predominantly overseeing the important local trade of cattle and agricultural products. These interactions led to conflicts that were brought to local jurisdictions, and Jews would proceed in non-Jewish lower courts or before local non-Jewish judges in a routine fashion. There must have existed a certain general knowledge of the non-Jewish judiciary system, as legal representatives were probably not so common. In addition, given that the non-Jewish lower jurisdictions were less institutionalized in the countryside, the levels of personalized acquaintance with local judges were presumably higher than in urban areas.

In most cases, the autonomy of Jewish jurisdiction in the southwestern rural settlements was more or less restricted by the authorities to ritual and ceremonial cases,

similar to the developments in other territories.[46] However, the scope of ceremonial issues was often not clearly defined and could in practice encompass most civil cases between Jews as well. Jewish communities in the southwest seemed to have used this lack of clarity to keep a variety of civil cases within the Jewish jurisdictions.[47] Nevertheless, internal Jewish cases – even those that could have been handled by a rabbi or a rabbinical court – did find their way into the non-Jewish lower courts or local judges. Although we have little statistical information regarding the frequency of such occurrences in the countryside, exemplary studies have shown that these were not unique, and there seems to have been an increase in such cases in the eighteenth century.[48] Non-Jewish courts were used as alternatives to rabbinic jurisdiction as well as a court of appeal for internal Jewish cases.

In some cases, less common in the urban context of the empire, Jews voluntarily brought contracts that were issued by their rabbi to the non-Jewish authorities for additional ratification. These included not only business contracts but also marriage or divorce certificates and wills.[49] While these cases did not necessarily represent legal conflict, being, rather, administrative acts with a legal dimension, they demonstrate the integrated functioning of Jewish and non-Jewish jurisdictions in the contemporary Jewish perception. They might also, in some places, hint toward a decline in trust of rabbinical expertise or authority. Another factor that might have encouraged the use of non-Jewish courts by rural Jews of this area is the evidence that even lower rural courts showed little anti-Jewish bias in their civil rulings during the eighteenth century.[50] This may have been due to the economic importance of Jews, especially in rural societies, as well as to the growing status of Roman law in the legal culture of the empire. Roman law defined (protected) Jews, just like Christian burghers, in theory, as *cives romani* (lit. Roman citizens, later probably used in the sense of legal subjects of the empire), giving them an equal standing in court and security of property.[51] While these Roman legal principles were mostly applied in the imperial courts – and therefore provided yet another reason for Jews to maintain relations with the imperial level – it is known that the imperial jurisdiction served as a model for the lower jurisdictions. The growing number of learned jurists in the service of territorial rulers also promoted a higher degree of professionalism

among judges, as well as impartiality of jurisdiction, all of which could indirectly work in favor of the Jews.[52]

Broadening Ashkenaz

The complex legal development within the empire was not unique in the larger European milieu of the time, which is not surprising considering that legal ideas and scholarship permeated geographical borders. Nevertheless, the engagement of Jews with non-Jewish law and jurisdiction was deeply connected to the amount of communal autonomy granted in the various Jewish settlements, and thus took slightly different paths in the neighboring countries of the Holy Roman Empire. Two examples will be examined to demonstrate the wide range of Jewish litigation at non-Jewish courts in pre-emancipation Europe.

If one crossed the eastern borders of the Holy Roman Empire, until the late eighteenth century one entered the Commonwealth of Poland-Lithuania. Poland-Lithuania surpassed all other European countries in terms of the sheer number of Jewish inhabitants and its prominent rabbinic scholars. During the eighteenth century, it was home to about 750,000 Jews, approximately ten times the Jewish population of the Holy Roman Empire. At that time, the majority of Jews lived on the estates of magnates (noble territorial rulers), especially in their so-called private towns in the eastern part of the Commonwealth. Jewish life in Poland was significantly more urbanized than it was in the empire, in contrast to the general population trend, which followed western patterns of mostly rural settlement.[53]

The legal situation for Jews was dominated by the protective relationship with magnates stated in individual or community privileges, a competency that the nobles had taken over from the Polish crown. At first glance, the situation appears to be quite similar to the situation in the empire. However, scholars have shown that these privileges derived from a different legal tradition. Jews were seen not primarily as special servants of the crown, but as equivalent to the city burghers. They therefore had a better legal standing than the Jews of the empire had, including the right to keep prestigious possessions like weapons and real estate.[54] The autonomous sphere of the Polish Jewish communities was significantly more comprehensive than those of the Jewries in the empire and included very complex communal structures and institutions on regional as well as supra-regional levels.[55]

Similarly, their legal jurisdiction competencies seem to have far exceeded those of their neighbors, including not only all civil cases between Jews but also minor criminal

cases.[56] Although more separated from the outside world than their counterparts in the Holy Roman Empire, Jewish community members nevertheless brought internal conflicts with other Jews from the rabbinic court to magnate or royal non-Jewish courts for appeals. This phenomenon, although already present prior to this time, would increase in the eighteenth century, presumably due also to the magnates' increasing interest in and control of the judicial structures and personnel of the Jewish communities within their dominions.[57] However, the traditional Jewish society and community, which – like the Christian feudal societal structure – was predominant in the Polish region well into the nineteenth century, seemed to have handled the crossing of jurisdictional borders in a flexible manner. These occurrences did not necessarily jeopardize the Jewish jurisdiction and occurred instead along clear social lines.[58] Although the magnate administration increasingly attempted to intervene in the Jewish autonomous sphere and major reform plans were discussed at the end of the eighteenth century, as was the case in the empire, the autonomous institutions seem to have been able to maintain their competencies significantly more successfully.[59] This may have been due not only to the external political events culminating in the partition of Poland and interrupting any reform plans, but also to the immense role Jews played within the estates' economies. The strong and long-lasting position of the Polish magnates, and ultimately their conservation of traditional societal models for their own benefit, probably helped this as well.[60]

If one crossed the borders of the Holy Roman Empire in the opposite direction, to the west, one entered the kingdom of France. Here, the Jewish population and legal frameworks of Jewish settlement were even more diverse than in the empire, as there were not only Ashkenazi but also several Sephardic communities present, something that within the empire could only be seen in the city of Hamburg. Although France had officially expelled its Jewish population under Charles VI in 1394, Jews were able to (re)settle in certain areas of France in the following centuries.

In the eighteenth century there were major Sephardic settlements in the southern Bordeaux region, which showed distinctive characteristics of cultural assimilation. They benefited from an extraordinarily good legal status compared to other Jewries, derived from when they were still living as "Conversos" (i.e. crypto-Jews expelled from the Iberian Peninsula in the late fifteenth century).[61]

The papal dominions of Comtat Venaissin and Avignon allowed Jewish settlement within their borders, as was the case in the Italian Papal States. However, the papal government imposed a very specific legal confessional framework upon the Jewish communities. As early as 1621, the Roman Rota [i.e., one of the papal courts] decided that Jewish internal disputes had to be ruled according to general law [Lat. *ius commune*] and no longer according to *halakhah*. While this meant the integration of genuine Jewish disputes into general jurisdiction at a very early point compared to the Holy Roman Empire or Poland-Lithuania, it seems that no improvement in Jewish legal status resulted from it. Although Jews were considered to have civic rights according to the abovementioned Roman principle of *cives romani*, they were still subordinated under the confessional interest of the state.[62]

Besides these mostly Sephardic Jewish settlements, there were the Ashkenazic settlements in Alsace and Lorraine, which by the second half of the eighteenth century had become French border areas with the Holy Roman Empire. The legal framework of these Jewish communities derived from their former status in the empire, which they were generally able to maintain through the confirmation of the status quo by Louis XIV (Alsace 1657/1674) and Louis XV (Lorraine 1766). [63] The Alsatian Jewish settlements were mostly rural, very similar to the bordering German territories, and mostly shared their legal framework of individual protection through noble rulers and the development of *Landjudenschaften*.[64] In numbers, they exceeded all other Jewish settlements in France, totaling about 20,000 Jews in the late eighteenth century. Although often described as especially traditional communities, like the German rural Jewries, the Alsatian rural Jews lived in close contact with their non-Jewish neighbors and probably developed similar patterns of litigation within and outside Jewish jurisdiction, as did the Jews living on the other side of the Rhine.[65]

Paris saw a revival of Jewish life in the eighteenth century, formed by an incoming population mostly from other parts of France, but also from other European regions and the Ottoman Empire. However, the legal status of these small Sephardic and Ashkenazic communities remained unofficial and highly precarious until the revolutionary period.[66]

The Jewish community of Metz in Lorraine was the biggest urban population close to Alsace. The development of legal practices in this community can serve as an example of premodern integration of non-Jewish law in Jewish courts.[67] The common tendency

to avoid gentile courts was evident and enforced by the Jewish leadership in early eighteenth-century Metz, just as it was in the other surrounding Jewish communities.[68] However, the rabbinic court opened itself to the French legal system in the second half of the century and helped Jewish community members in using both the gentile as well as the rabbinic jurisdiction. This development followed external measures in the Metz *parlement*, which prohibited certain disciplinary measures of the rabbinic court and continuously restricted the Jewish civil jurisdiction.[69] Still, the reaction to these repressions of the rabbinate of Metz is quite significant.

Especially in cases of civil contracts between Jews, the Metz rabbinical court often encouraged Jewish litigants to make sure that not only the halakhic requirements but also the requirements of French law were met. There is evidence of cases in which the Jewish judges would seek the help of French legal advisers instead of or before making a decision.[70] This intermingling with French courts and civil law can even be traced in the extensive incorporation of French terms into Jewish judicial procedures in Metz.[71] While all of this shows that the early modern Jewish courts were deeply challenged by the competition with non-Jewish courts, it also speaks to the flexibility that premodern rabbinical jurisdiction showed toward gentile jurisdiction if needed for upholding a claim of authority in internal Jewish legal cases.

Emancipation: Freedom of Choice at Last?

The term "Jewish emancipation" often evokes the idea of a clear break with the legal traditions of the past, a sort of legislative event that would have made the European Jews equal citizens in their countries and opened up the possibility of integration into their surrounding Christian societies. Nothing could be further removed from reality. Already, the simple question of when emancipation actually "happened" provokes many different answers, ranging from the mid-eighteenth to the late nineteenth century. Most scholars today understand the term as referring to a multi-stage intellectual, political, social, cultural, and legal process happening over a period of approximately 100 years and resulting in legal equality and citizenship for Jews at very different times in the various European regions.[72]

However, with the important exceptions of France and the Netherlands, the actual legal enactments of full equality and citizenship for Jews in the often newly shaped European countries would in most cases happen only at the very end of this process, mainly in the 1860s and 1870s. Until then, the process was very much characterized by the simultaneity of reenactments of traditional legal structures and new, gradually improving legislations, not only concerning Jews but also other social groups with minor legal status, for example farmers.

Both France and the Holy Roman Empire developed important intellectual discourses regarding the "Jewish question" during the eighteenth century that spread throughout Europe and ultimately gained influence in practical politics as well. In the German states, the discussion of legal equality did not come without the ambiguous demand for "civic improvement" (*bürgerliche Verbesserung*) of the Jews, while the French discourse called especially for the abandoning of any form of Jewish communal autonomy. Most intellectuals involved in the debate agreed that Judaism was supposed to become a free private religious endeavor of individuals who should no longer be legally represented through the Jewish communities nor be exempt from general jurisdiction.[73]

However, the political starting point was set in Austria with the so-called *Toleranzpatente* (lit. edicts of tolerance) of Joseph II in the early 1780s, which were granted for most of the Hapsburg hereditary and crown lands (i.e., lower Austria, Hungary, Bohemia, Moravia, Silesia, and Galicia). While these edicts opened schools,

higher education, most professions, and military service for Jews living within their scope, they did not abandon the strong limitations of settlement connected to social status as well as the restrictions on freedom of movement. They were far from asserting any kind of legal equality for Jews and indeed were not intended to do so. Their ultimate aim remained to turn Jews into "beneficial subjects" (*nützliche Untertanen*) for the state, something that could not happen according to the thinking of the time as long as Jews continued to live in autonomous groups intellectually out of reach of the non-Jewish education system. For this reason autonomous Jewish community structures, first among them rabbinic jurisdiction, were further restricted if not disempowered.[74] These ideas were not without echoes in the Jewish communities, which developed demands for internal reform of Jewish leadership.[75] The edicts of tolerance were widely perceived in the Jewish world as representing a profound change for the better, presumably because of their public recognition of the problematic conditions under which Jews had to live.

The French revolution and the Napoleonic expansion across Europe brought an abrupt acceleration to the process of legal equality. Most of the central European states affected by Napoleonic rule developed legislation enacting civic rights for Jews.[76] However, the Napoleonic era turned out to be only a short interlude, and already in 1812, with the Congress of Vienna determining the future of Europe after Napoleon, the idea and realization of Jewish legal equality was again abandoned in most countries. Some areas returned to their old practices, while others decreed new acts of legislation that provided partial improvement in the legal standing of Jews but were modified or even revoked after some time. In parts of Italy, Jews even had to return to living in ghettos.[77] It was not until the revolutionary movements of the mid-nineteenth century, which changed the political landscape of Europe, that the idea of legal equality for Jews would find widespread political agency among the liberal forces that ultimately altered the legal reality in Europe.[78]

Regarding Jewish litigation during this period, the most profound difference from the pre-Napoleonic setting would probably be the erratic character of both of the legal systems to which Jews turned – the Jewish as well as the non-Jewish. Rabbinic courts were increasingly restricted, leaving very little choice to individuals who might prefer one court over the other. The disappearance of legal representation through the community might well have had negative effects on Jews of the lower social strata, as these were the

individuals most likely to receive some form of legal aid and/or protection through their communities. In Prussia, for example, since the very early nineteenth century rabbis remained only with the right to function as consultants in non-Jewish courts when Jewish ceremonial issues were involved.[79] The ultimate decisions were left to the non-Jewish judges, who would not necessarily be sensitive to all halakhic requirements.[80]

Still, the mere idea of resolving cases involving Jewish issues according to *halakhah* and not according to general law in non-Jewish courts during this transitional period might very well be considered a vestigial premodern element reflecting the (neglected) importance of religion in the ostensibly secularizing societies. However, without any enforcement on the part of the state, European rabbinic jurisdiction slowly transformed into a voluntary jurisdiction, as it is still known today outside of the state of Israel.

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[1] As it is beyond the scope of this chapter to discuss the developments in all these complex political entities, Poland-Lithuania and France will serve as comparative examples. For further insight into Jewish litigation within and outside of Jewish jurisdiction in other European areas and beyond, see the selected following works, which offer additional references on the subject. In the Italian states: for the Papal States and cities, see Stow, “Equality under Law”; for Venice, Ravid, “Venetian Government”; for Florence, Siegmund, *The Medici State*; for Trieste, Dubin, *The Port Jews*. For the Dutch Republic, see the contributions of Kaplan and Fuks-Mansfeld in Blom, Fuks-Mansfeld, and Schöffer, *Jews in the Netherlands*; and Litt, *Pinkas*. For the Ottoman Empire, see Hacker, “Jewish Autonomy” (in Hebrew language); Ben-Naeh, *Jews in the Realm of the Sultans*.

[2] In his comparative study of various dominions of the Holy Roman Empire, Laux recently pointed out that the early modern Jewish ordinances (*Judenordnungen*) were the “central instrument of legislation concerning Jews.” While smaller dominions often kept the practice of individual protection, the larger territories sought to create more general ordinances that regulated and restricted the lives of all Jews in their dominion. Nevertheless, individual privileges, at times even contradicting the general regulations, could exist simultaneously. Laux, *Gravamen und Geleit*, pp. 105–08.

[3] For additional insight into the structure and work of the Frankfurt rabbinic court, see the recent introduction in Fram, *A Window on Their World*, particularly pp. 20–50 and Preuß, *»sie könten klagen, wo sie wollten«*. For a historic description of the Frankfurt rabbis and their schools, see Horovitz, *Frankfurter Rabbinen*.

[4] For a detailed description of their competencies, see Gotzmann, *Jüdische Autonomie in der Frühen Neuzeit*, pp. 206–31.

[5] The so-called Fettmilch Aufstand (lit. "Fettmilch uprising," named after leading rebel and pastry baker Vincent Fettmilch) against the Frankfurt city council led to a pogrom against the Frankfurt Jews in 1614, resulting in a short-term expulsion of the Jews. By order of Emperor Matthew, Fettmilch and his companions were executed, and the Jews were brought back to Frankfurt in a triumphal procession. See Soliday, *A Community in Conflict*; Helen and Ulmer, *Turmoil, Trauma, and Triumph*.

[6] For a detailed survey of all imperial, free, and Hanseatic cities and their relation to the emperors, see Johanek, "Imperial and Free Towns."

[7] Hsia, "The Jews and the Emperors"; Battenberg, "Rechtliche Rahmenbedingungen."

[8] Wendehorst, "Imperial Spaces as Jewish Spaces," pp. 443–48; Hsia, "The Jews and the Emperors," pp. 74–75.

[9] See the studies presented by Staudinger, "'Gelangt an eur kayserliche Majestät mein allerunderthenigistes Bitten'"; Kasper-Marienberg, *"Vor Euer Kayserlichen Mayestät Justiz-Thron"*; Hsia, "The Jews and the Emperors"; Battenberg, *Das Reichskammergericht und die Juden*; Frey, *Rechtsschutz der Juden*.

[10] Gotzmann, *Jüdische Autonomie in der Frühen Neuzeit*, p. 225. In addition, the higher urban court of the city council seems to have seen cases on a nearly weekly basis that involved Jews. See, for example, the exemplary samples for the seventeenth century in Kasper-Holtkotte, *Die jüdische Gemeinde von Frankfurt/Main*, pp. 507–19.

[11] For the use of non-Jewish courts and attitudes to non-Jewish law in the premodern period, see Chapters 2 and 4 of the current volume. See also the short summary in Berkovitz, "Acculturation and Integration," pp. 280–81.

[12] Descriptions of internal Jewish cases reaching non-Jewish courts well before that time exist. See Fram, *A Window on Their World*, pp. 55–56. Nevertheless, the eighteenth century seems to have observed the peak of this phenomenon.

[13] Gotzmann, *Jüdische Autonomie in der Frühen Neuzeit*, p. 225.

[14] Rosman, "The Role of Non-Jewish Authorities," p. 53.

[15] Gotzmann, *Jüdische Autonomie in der Frühen Neuzeit*, pp. 225, 272–73. For the seventeenth century, see Kasper-Holtkotte, *Die jüdische Gemeinde*, pp. 110–85. As for the imperial level, more concrete numbers exist: the Jewish community and/or individual community members of Frankfurt were involved in approximately 480 cases at the Imperial Supreme Court in Vienna, amounting to approximately one-third of all Jewish cases seen by this court in the eighteenth century. See Kasper-Marienberg, *"Vor Euer Kayserlichen Mayestät Justiz-Thron"*, pp. 43–50.

[16] For attitudes to non-Jewish law, see Chapter 4 of the current volume.

[17] Rabbi Pinkas Horwitz in a legal opinion for the authorities of Mannheim, ISF Ffm, Ugb D 33, Nr. 30B, quoted after Gotzmann, *Jüdische Autonomie in der Frühen Neuzeit*, pp. 468–73, quote on 472. For a similar comment of the Metz rabbi Eybeschütz in one of his commentaries on the *Shulḥan Arukh* in 1775 see Katz, "To Judge and to Be Judged," pp. 456–57.

[18] Also see Edward Fram's discussion of this phenomenon in Frankfurt in Fram, *A Window on Their World*, pp. 54–62.

[19] For details on the case and the archival material available, see Kasper-Marienberg, "Jewish Women."

[20] Litt, *Jüdische Gemeindestatuten aus dem aschkenasischen Kulturraum 1650–1850*, 64, 478. §29 of the Frankfurt *takkanah* from 1675 relating to out-of-wedlock pregnancies, which provided for banning the mother from the community, as well as her being confined to her house for half a year.

[21] Gotzmann, *Jüdische Autonomie in der Frühen Neuzeit*, pp. 268, 287.

[22] ***Ibid.***, pp. 322–57.

[23] ***Ibid.***, pp. 134, 156–57.

[24] Kasper-Marienberg, *"Vor Euer Kayserlichen Mayestät Justiz-Thron,"* pp. 118–28, 250–51; Gotzmann, *Jüdische Autonomie in der Frühen Neuzeit*, pp. 128, 172, 403.

[25] Gotzmann, *Jüdische Autonomie in der Frühen Neuzeit*, pp. 397–461; Kasper-Holtkotte, *Die jüdische Gemeinde*, pp. 95–106; Kasper-Marienberg, *"Vor Euer Kayserlichen Mayestät Justiz-Thron"*, pp. 199–202, 228–30, 288.

[26] Fram (*A Window on Their World*, p. 61) shows that the Frankfurt rabbinical court was still highly frequented in the late eighteenth century and therefore suggests not overstating the phenomenon of Jews going to non-Jewish courts.

[27] Gotzmann, *Jüdische Autonomie in der Frühen Neuzeit*, pp. 312–21. Breuer and Graetz, *Tradition and Enlightenment*, pp. 165–72.

[28] See the collection of selected legislative and administrative acts concerning Jews in Prussia of Stern, *Der preussische Staat.*

[29] Schenk, *Wegbereiter der Emanzipation?*, p. 17.

[30] For a discussion of these discourses, see Chapter 7 of the current volume.

[31] For an account of the economic repressions that systematically turned the majority of Prussian Jews into a collective of poor individuals and peddlers over the course of the eighteenth century, see the recent study of Schenk dealing with the infamous coerced Jewish trade of Royal Prussian porcelain. Schenk, *Wegbereiter der Emanzipation?* Also see Laux, *Gravamen und Geleit*, pp. 96–142.

[32] Studies presenting statistics regarding the presence of Jews in the courts of Prussia are lacking as of yet. Regional studies highlight singular occurrences. Aside from these, conclusions must be drawn from the numerous normative ordinances that existed for Jews, which, however, may very well reflect a bureaucratic ideal rather than real practice.

[33] Bernd-Wilhelm Linnemeier documented these provincial Jews' commissions for the princedom of Minden, in the western part of Prussia. See Linnemeier, *Jüdisches Leben*, pp. 447–56.

[34] Gotzmann, *Jüdische Autonomie in der Frühen Neuzeit*, pp. 86–87. In contrast, see the interpretation in Schmidt, "Entwicklung der Jüdischen Religionsgesellschaft," pp. 35–36.

[35] Schmidt, "Entwicklung der Jüdischen Religionsgesellschaft," pp. 37–40.

[36] ***Ibid.***, pp. 38–39, 48.

[37] ***Ibid.***, pp. 70, 77, 85–86. Gotzmann, *Jüdische Autonomie in der Frühen Neuzeit*, pp. 88–89.

[38] Schmidt, "Entwicklung der Jüdischen Religionsgesellschaft," p. 86.

[39] Linnemeier, *Jüdisches Leben*, pp. 454–56.

[40] Gotzmann, *Jüdische Autonomie in der Frühen Neuzeit*, pp. 87–88.

[41] In some villages, the so-called *Judendörfer* (lit. Jews' villages), Jewish inhabitants amounted to one-third or even two-thirds of the population. See Ullmann, *Nachbarschaft und Konkurrenz*, pp. 38–40, and Kießling, "Zwischen Vertreibung und Emanzipation."

[42] Aside from Swabia and Upper Swabia, a large number of these very small settlements have also been documented in Franconia, in the southeast of the empire. On the early modern (rural) rabbinates in this region, see the survey presented by Wilke, "Landjuden und andere Gelehrte."

[43] Ullmann, *Nachbarschaft und Konkurrenz*, p. 164. It was not uncommon for rural rabbis to have multiple roles within the community as well as other professions. For similar examples from the north of the empire, see Werner, "Entwicklung des jüdischen Gemeindelebens," pp. 61–65.

[44] For a compilation of original sources on the German territorial Jewries, see Kohen, *Die Landjudenschaften in Deutschland*.

[45] We know of earlier cases in which Jews sought out non-Jewish courts because there was simply no rabbinic court available. See Fram, *A Window on Their World*,

pp. 65–67. Also Gotzmann, *Jüdische Autonomie in der Frühen Neuzeit*, pp. 160–61. On the questionable level of autonomy in German territorial Jewries, see the survey presented by Battenberg, "Die jüdischen Gemeinden," particularly pp. 126–36. Battenberg highlights the increasing influence of princes on the territorial Jewries and their successful attempt to limit contacts to rabbinic jurisdictions outside of their dominion.

[46] Ullmann, *Nachbarschaft und Konkurrenz*, pp. 191–92; Mordstein, *Selbstbewusste Untertänigkeit*, pp. 304–14.

[47] For example, Johannes Mordstein documented a letter from 1794 of the *parnassim* (the community leaders) of the Jewish communities of Wallerstein and Pflaumloch to the local authorities about their ruling of all cases "in which Jew goes against Jew" (*wo Jud contra Jud auftritt*). The local authorities seem not to have even known about that practice prior to this point in time, demonstrating that they clearly did not pay much attention to what was in practice a fairly comprehensive Jewish jurisdiction. Mordstein, *Selbstbewusste Untertänigkeit*, pp. 303–04.

[48] For example, Sabine Ullmann (*Nachbarschaft und Konkurrenz*, pp. 189–94) showed in a random sample from the years 1738 to 1742 from the village of Binswangen, which accommodated approximately forty-six Jewish households at that time, that twenty-six internal Jewish cases were taken to the non-Jewish lower court. In the nearby village of Buttenwiesen, which housed approximately forty-three Jewish families, thirty-five such cases were documented in a time period of thirteen years in the middle of the eighteenth century. For the same phenomenon in the rural area bordering France, see Ulbrich, *Shulamit and Margarete*, pp. 186–89, regarding the village of Steinbiedersdorf, which was near the rabbinic court in Metz and had its own rabbi from 1768 on, and still saw Jewish community members turn to non-Jewish courts in internal Jewish conflicts. Similar cases were found in the former French town of Breisach by Wiebel, "Selbst- und Fremddarstellung," pp. 229–32.

[49] Ullmann, *Nachbarschaft und Konkurrenz*, pp. 191–92. However, we know about similar practices outside the empire, including in the city of Metz in France as well as in the city-state of Florence under the Medici. See Berkovitz, "Acculturation and Integration," pp. 276–77; Siegmund, *The Medici State*, pp. 270–71.

[50] Ullmann, "Die jüdische Minderheit," pp. 556–59.

[51] For more on the *cives romani* idea in the writing of early modern jurists, see Güde, *Die rechtliche Stellung*, pp. 47–66. For insight into its impact on Jews, see Battenberg, "Juden als 'Bürger.'"

[52] For a discussion of the impact of early modern jurists on territorial jurisdictions, particularly in Württemberg, in the southern part of the empire, see the articles in Schnur, *Rolle der Juristen*.

[53] Hundert, *Jews in Poland-Lithuania*, pp. 11–12, 20, 25, 28, 103. Two-thirds of the Jews in the Commonwealth lived in (small) towns and made up approximately half of the urban Polish population.

[54] Sorkin, "Beyond the East–West Divide," pp. 248–49; Teller, "Telling the Difference," pp. 114–16, 141.

[55] For a discussion of the famous overarching organization of the Council of Four Lands, the *Va'ad Arba' Aratzot*, see the introduction in the *Encyclopedia Judaica*, which offers additional references; Ben-Sasson, "Councils of the Lands."

[56] Hundert, *Jews in Poland-Lithuania*, pp. 80, 84–85; Rosman, *The Lords' Jews*, pp. 55–61; Teller, "Telling the Difference," pp. 120–22, 127–28.

[57] Hundert, *Jews in Poland-Lithuania*, pp. 80, 107; Teller, "Radziwill, Rabinowicz, and the Rabbi of Swierz," pp. 247–48; Rosman, *The Lords' Jews*, pp. 54, 57–58, 61, 187–201; Rosman, "The Role of Non-Jewish Authorities," p. 58.

[58] Teller ("Radziwill, Rabinowicz, and the Rabbi of Swierz," p. 247) argues that rich Jews in particular would have been able to circumvent the Jewish jurisdiction. Rosman ("The Role of Non-Jewish Authorities," pp. 60–61) mentions that the approach to non-Jewish courts was even formalized, and that important Polish Jews could generally avoid Jewish juridical punishments.

[59] Hundert, *Jews in Poland-Lithuania*, pp. 99–100, 108.

[60] Teller, "Telling the Difference," pp. 131–32, 138.

[61] For the history and legal framework of Sephardic life in the Bordeaux region, see the introduction and comprehensive references in Nahon, "La nation juive portugaise."

[62] See Stow, "Equality under Law." On the history of the Jews in the Comtat Venaissin and Avignon, see Moulinas, *Les juifs du Pape* and Mrejen-O'Hana, "Pratiques et comportements religieux."

[63] On the history of the Jews and their legal status in Alsace and Lorraine, see Kaplan, *Beyond Expulsion*; Hyman, *The Emancipation of the Jews of Alsace*; Berkovitz, *Rites and Passages*.

[64] Schwarzfuchs, "Alsace and Southern Germany."

[65] Berkovitz, *Rites and Passages*, pp. 19–21.

[66] See the article of Landau, with further references; Landau, "Nation marginale."

[67] For the following remarks on Metz, see Berkovitz, *Rites and Passages*, chapter 1, and Berkovitz, "Acculturation and Integration."

[68] See Katz, "To Judge and to Be Judged."

[69] Berkovitz, "Acculturation and Integration," pp. 280–82.

[70] ***Ibid.***, pp. 283–85.

[71] ***Ibid.***, pp. 273–74.

[72] For an overview, see the articles on the different emancipation processes of the various European countries in Birnbaum and Katznelson, *Paths of Emancipation*. Using the example of the Papal States, Kenneth Stow offers evidence of the *longue durée* character of emancipation in particular and of the notion that "privilege or even legal empowerment, regardless of how broad, is not the same as true emancipation." Stow, "Equality under Law," quote on p. 323.

[73] For an introduction and further references, see Hess, *Germans, Jews, and the Claims of Modernity*; Iancu, "Emancipation and Assimilation"; Oliel-Grausz, "L'émancipation des Juifs de France"; Bernardini and Lucci, *The Jews: Instructions for Use*.

[74] From 1785 on, Joseph II issued orders to close rabbinical courts in favor of local gentile courts, for example in Moravia and Silesia via order (*Hofdekret*) from May 27 and 28, 1785. Scari, *Systematische Darstellung*, p. 160; Kestenberg-Gladstein, *Neuere Geschichte*, pp. 66–67.

[75] See Chapter 7 of the current volume. For a specific discussion of the internal challenge of rabbinical jurisdiction, see Gotzmann, "Rabbiner und Bann."

[76] See the recent survey presented by Friedrich Battenberg ("Judenemanzipation," particularly paragraphs 14–21) of the many different legislative acts in the German states in particular, but also in the European context, which also offers additional references.

[77] Segre, "Emancipation of Jews in Italy," pp. 216–18.

[78] For an introduction and further references, see Rürup, "Liberalismus und Emanzipation."

[79] Gotzmann, *Jüdische Autonomie in der Frühen Neuzeit*, p. 89.

[80] Gotzmann mentions (***ibid.***), for example, that Prussian courts recognized Jewish marriage contracts but no longer acknowledged the requirement of a *get* (i.e., Jewish bill of divorce) for divorce. This circumstance probably gave rise to extremely complicated situations, as a *get* is obligatory for any future marriage of divorcees according to Jewish law. The legal reframing of Jewish marriage was a particularly problematic issue during the late pre-emancipation period in several European countries. See the discussion and references in Dubin, *The Port Jews*, pp. 174–97.

7

Enlightenment Conceptions of Judaism and Law

Eliyahu Stern

Introduction

On June 27, 1656 the Jewish community of Amsterdam excommunicated Baruch d'Espinoza (1632–1677). Modern Jewish and Christian European thinkers would come to see Spinoza's punishment as highlighting the most despotic political features of the corporate structure of early modern Jewish life.[1] Spinoza never referred to the episode in his writings, but it must not have been far from his mind when he sat down to pen his major work on religion and politics, *Tractatus Theologico-Politicus* (Amsterdam, 1670). In one fell swoop Spinoza took what at first glance seemed to be the pious and sacred religious legacy of the Jews and turned it into a blueprint for the organization and structure of a political entity. The biblical story of the Hebrews and the Mosaic Law were transformed into a case study in politics and state legislation. Judaism was stripped of its moral and ethical content; it was portrayed as having only political and not religious value (the political and the religious being mutually exclusive categories in Spinoza's eyes). Spinoza pitted this political Judaism against a moral Christianity, arguing that while Christianity and the moral message of the New Testament embodied a model of true religion, Judaism and Mosaic Law represented a model for politics.

Spinoza's systematic political representation of the Mosaic Law was a highly developed expression of a larger movement in early modern political thought that employed the history of the Hebrews, and in some instances the rabbinic critique of biblical monarchy, to explain the nature of political sovereignty. Specifically, Spinoza's ideas were directed at supporting republican forces in local Dutch political disputes.[2] Eventually, they would become part of a large-scale conversation about the boundaries of the modern state, the separation between church and state, the authority of the sovereign, and the nature of secular politics.[3]

For European Jews living on the cusp of the Enlightenment, however, the notion that the Judaic tradition represented a blueprint for modern politics would prove highly detrimental. Raising the Judaic tradition to the forefront of modern *political* thought placed an intellectual barrier before Jews seeking emancipation. Namely, it cast them as being part of a political group, a nation that had lost its state and refused to let go of its own laws and ordinances. Spinoza's position raised the question: if the Mosaic Law was simply the legislation of a defunct Hebrew state and the Jews were in their essence a

political group, then what did it mean that contemporary European Jews still observed the Mosaic Law? What was signified by Jews' insistence on marrying only other Jews and on observing the rite of circumcision? Christian clergymen had traditionally interpreted Jews' continued observance of the law as a rejection of Christ's universal message. The identification of biblical Judaism as a forerunner of modern secular politics insinuated that the observance of Mosaic Law was not only an expression of blasphemy vis-à-vis a Christian God but also an expression of sedition vis-à-vis the state.

The early modern political understanding of the Hebrews ran parallel to often inchoate but socially pervasive ideas about the nature of Jewish identity and Judaism in the early modern period. Throughout Europe, Jews lived in autonomous communities. The corporate structure governing European Jewish life was commonly seen as a Jewish state within a state. Jews were depicted as an economically and administratively separate and distinct group. They had their own court system, their own taxation policies, pillories, and policemen responsible for ensuring the upkeep of communal norms and statutes.[4] Jewish rabbinic authorities, such as Moses Isserles (1520–1572) and his students, produced detailed codes of law, providing legal instruction on economic and social relations. Jews even possessed the right of excommunication, in which an individual, like Spinoza, could be effectively rendered homeless by breaking Jewish law.

Thus, when eighteenth-century French and Prussian Jews lobbied for emancipation, the first impediment they encountered was the accusation of dual loyalty. This charge would lurk behind what would become popularly referred to as "the Jewish Question." Leading European statesmen and philosophers debated well into the latter part of the nineteenth century whether Judaism was in fact a political identity rather than a "religious" or even "ethnic" identity and whether the Mosaic Law expressed Jews' subservience to a legal order outside the framework of the state.

The German philosopher Moses Mendelssohn (1729–1786) was one of the first and certainly the most eloquent defender of Judaism's status as a strictly religious identity. Mendelssohn never directly confronted Spinoza's critique of Judaism, yet his writings uniquely responded to the questions left open by the early portrayal of the Mosaic Law as political. With impending legislation by Prussian and Austro-Hungarian governments granting Jews political rights, Mendelssohn saw it as his task to explain the meaning and nature of Jewish law in the context of the state.

The German Socrates fundamentally challenged the Amsterdam philosopher on the question of what Jewish law represented in contemporary European life. Mendelssohn maintained that Jewish law was not a symbol of political authority. Rather, it reflected the practices and ceremonies of a religion based on the principle of persuasion, teaching, and instruction.

Depicting Judaism as a religious entity was complicated by rabbinic recourse to mechanisms of coercive enforcement – a phenomenon characteristic of political entities. Thus, Mendelssohn argued that the coercive elements expressed in the Mosaic Law as well as those found in early modern Jewish corporate communities were not constitutive of Judaism. Whereas Spinoza identified Judaism as a political entity and Jewish law as the exemplar of what is now considered state law, Mendelssohn identified Judaism as a religion and held up Jewish ceremonial law as a test case for true freedom of expression. While both agreed that the state should have a monopoly on Law (as a coercive power that forces one to act in a certain manner), they disagreed on the nature of Judaism and its ceremonial elements. The capacity of a state to protect the right of Jews to practice their rituals and ceremonies, according to Mendelssohn, was a litmus test for the protection of all minority rights.

This chapter provides a genealogy of early modern understandings of Jewish law, describing the arc that runs from the early modern equation of Mosaic Law as Law to Mendelssohn's reinterpretation of Jewish law as a non-coercive religious practice. Mendelssohn was influenced by a host of early modern political sources, most notably, Hobbes and Locke. However, Spinoza's political theory and, ironically, his own excommunication offer the strongest challenge to Mendelssohn's non-political interpretation of Jewish law. The following micro-history begins by addressing Spinoza's discomfort with the apostle Paul's view of the Law as a religious expression. It concludes by presenting the emergence of the modern notion of Jewish law, as ritual, through an analysis of Mendelssohn's critique of the corporate structure of early modern European Jewry.

Spinoza and the Mosaic Law

In his *Theological-Political Treatise*, Spinoza used the historical roles played by Jesus and Moses, respectively, as windows onto the differing natures of politics and religion. Whereas Christ "promises spiritual reward" and "taught the universal law alone," Moses was a "legislator" responsible for governing over a particular people, the Israelites. Christ's overriding concern was to offer moral teaching. "And this he [Jesus] did chiefly due to the ignorance of the Pharisees who supposed that man lived well by defending the laws of the state, or the Law of Moses, despite the fact that this Law … related only to the state and sought to compel rather than instruct the Hebrew."[5] For Spinoza, Moses was a political leader par excellence. The knowledge God imparted to him was ultimately sound military and political advice. Moses was the leader of a nation – an unwieldy nation that needed the discipline of law in order to centralize resources and defend itself against its enemies.[6]

Spinoza emptied the Mosaic Law of its ethical and moral authority. While this meant that none of Moses' enactments, including the Ten Commandments, possessed a religious character, it also provided the state with unmitigated authority to protect itself against individuals and groups that threatened its authority. Moses' laws could be said to have been only incidentally moral. The Bible's main purpose was to describe some of the Israelites' political struggles. For Spinoza, "it is not as a teacher or a prophet that Moses requires the Jews not to kill or steal; he decrees as a legislator." According to Spinoza, "the commandment not to commit adultery relates only to the interest of the commonwealth and the state. If he [Moses] had wanted to give moral instruction that would relate not only to the needs of the state but also to the peace of mind and true happiness of each individual, then he would condemn not only the external act but also the consent of the mind itself, as Christ did."[7]

Spinoza attacked the rabbis of the Talmud (whom he considered to be Pharisees) for conflating state law and morality and for insisting on the authority of Mosaic Law even after Jews lost their political sovereignty.[8] The Pharisees assumed that Mosaic Law was still operative. Their hatred toward Christianity led the Pharisees to reassert the authority of the Law even after the destruction of the Temple. The Pharisees had

misinterpreted the nature and purpose of the Mosaic Law thereby distorting both the Bible's true political legacy and conversely the very essence of religion.

Spinoza's political interpretation of Mosaic Law was certainly selective, forcing him to either ignore or reinterpret various passages in Scripture that did not immediately conform to his theory. One such example is his contorted reinterpretation of the apostle Paul's attitude toward the continued observance of Mosaic Law by Jews. While it is debatable whether Paul actually promoted continued observance of the Law by Jews or was merely indifferent, it suited Spinoza's purposes to assert that Paul actively opposed it. In chapter 3 of *Theological-Political Treatise* Spinoza entertains possible objections to this interpretation of Paul. "I find another text in the *Epistle to the Romans*," he says, "which weighs still more with me, namely 3:1–2, where Paul appears to teach something different from what we are asserting here."[9] The scriptural passage bothering Spinoza appears in the following context (*Epistle to the Romans* 2:17–3:2):

> But if you call yourself a Jew and rely on the Law and boast of your relation to God and know his will and determine what is best because you are instructed in the law, and if you are sure that you are a guide to the blind, a light to those who are in darkness, a corrector of the foolish, a teacher of children, having in the law the embodiment of knowledge and truth, you, then, that teach others, will you not teach yourself? While you preach against stealing, do you steal? You that forbid adultery, do you commit adultery? You that abhor idols, do you rob temples? You that boast in the law, do you dishonor God by breaking the law? For, as it is written, "The name of God is blasphemed among the Gentiles because of you." Circumcision indeed is of value if you obey the law; but if you break the law, your circumcision has become uncircumcision. So, if those who are uncircumcised keep the requirements of the law, will not their uncircumcision be regarded as circumcision? Then those who are physically uncircumcised but keep the law will condemn you that have the written code and circumcision but break the law. For a person is not a Jew who is one outwardly, nor is true circumcision something external and physical. Rather, a person is a Jew who is one inwardly, and real circumcision is a matter of the heart – it is spiritual and not literal. Such a person receives praise not from others but from God. Then what advantage has the Jew? Or what is the value of

> circumcision? Much, in every way. For in the first place the Jews were entrusted with the oracles of God.

The text lends itself to multiple interpretations. On the surface Paul's position presents a hierarchy of religious observance. On the lowest rung is the individual who claims to abide by the Mosaic Law but nonetheless sins. Such a person uses the outward observance of the law to cover up his sinful behavior. On the highest rung there are those whose "hearts" and "bodies" have been "circumcised." While it is unclear if there is any difference between those whose "hearts" have been "circumcised" and those whose "heart" and "bodies" have been "circumcised," it is clear that for Paul, "Circumcision indeed is of value if you obey the law [meaning the law of the heart]." Not only can Jews still abide by their Law, but if they do so in a manner consistent with morality, they express an exalted form of religiosity. Thus for Paul, the observance of the Law is not simply to be equated with political legislation. Rather, if practiced in concert with correct beliefs, the observance of the Law could be understood as a religious virtue.

Paul's endorsement of (or indifference to) the continued practice of Jewish law challenged Spinoza's theory of the Law as a form of political legislation. Paul's position presented a problem for Spinoza, who either sincerely believed or at the very least wrote under the pious guise of believing that the New Testament expressed a unified understanding of religion. While Spinoza understood Paul to be an accommodator, willing to tinker with his beliefs and ideals when communicating with the masses, he still found it necessary to radically reinterpret Paul's position. "But if we consider the principle doctrine Paul is trying to teach here," explained Spinoza, "we shall find that it does not conflict with our view at all." Spinoza then rehashes the general argument for his interpretation of Paul's view of the Law, rejecting the possibility that the Romans passage contravenes it; for, "God sent Christ to all nations, to free all men equally from servitude of the Law, so that they would no longer live good lives because the Law so commanded, but from a fixed conviction of the mind." Spinoza flatly rejects the possibility that Paul could have advocated the observance of the Law as a religious expression.

Spinoza's discussion of Paul and the practice of the Law is immediately followed by an examination of Jewish life after the destruction of the Commonwealth. "The Jews

today," he writes, "have absolutely nothing they can attribute to themselves but not to other people." He suggests that their continuous "observance of circumcision" and "their external rites" have provoked the wrath of the nations under which they have lived, suggesting that anti-Judaism is a function of Jews asserting their national differences.

Spinoza insinuated that anti-Judaism was understandable in light of the Jews' chronic adherence to Mosaic Law while living under the dominion of another *natio*. As Nancy Levene has argued, Spinoza sees Jewish law in the absence of a Jewish homeland as detrimental to Jews themselves. For the Law lacks any real power to promote human flourishing. In other words, not only are Jews who practice Jewish law bordering on sedition, but they also fail to ever engage in morally inspired behavior.[10] They are neither religious people nor loyal citizens. It is unclear, however, if Spinoza would have endorsed the state's outlawing Jews from practicing Jewish law. This question can be better understood in light of Spinoza's more general theory of the Sovereign and freedom of conscience in society.

Spinoza believed that "the purpose of the State is to free everyone from fear so that they may live in security … Therefore the true purpose of the State is in fact freedom."[11] Spinoza cautioned that the most successful forms of government are those that allow for a maximum degree of freedom of thought. In the ideal setting philosophically correct ideas, religion, and politically expedient actions converge together in one unity. However, he asserted that ultimately the sovereign possesses full authority to establish rulings and coerce his subjects to abide by them. The sovereign controls all levers of power in society, even religion. Couching his ideas in biblical motifs he argued: "The right of the Priesthood" always rested upon the edict of the sovereign power.[12] The sovereign stands above the ethical and the religious. It is necessary, Spinoza continues, "for the State and for religion, to assign the authority of what is religiously right to the sovereign power alone."[13] In any instance in which the sovereign feels the state is being threatened, the sovereign is allowed to take the actions necessary to ensure its survival. This legal latitude includes the outlawing of any religious or legal expression that runs counter to the sovereign's laws or established religious beliefs.

Spinoza labels as "seditious" individuals who seek to distinguish between state law and religious ideals.[14] He was deeply suspicious of religious expressions that ran counter to the religion of the state. Spinoza thought that minority religions should not be given a

free hand in acquiring sizable swaths of lands or erecting large buildings and, as noted by Jonathan Israel, "still less to exercise a near unrestricted sway over their members, as the Amsterdam Portuguese synagogue had once sought to dictate to him."[15] The sovereign is entitled to arrest those who claim that religious knowledge or prophetic experiences instruct them to behave in a manner contrary to that which is sanctioned by the state. As Michael Della Rocca notes, "Spinoza quite remarkably and boldly allows a great deal of scope for freedom of thought and speech, but … he also draws … a sharp line between speech and other forms of action, and countenances sweeping restriction on the latter even while granting almost complete freedom to the former."[16] Spinoza leaves unanswered the question of what it would mean for a group to continue to follow the laws of a sovereign and pay homage to a state that no longer exists. Or more concretely, he does not tackle the question of whether the observance of Jewish law in the context of European states is "seditious" or simply an innocuous set of practices that do not undermine or threaten the sovereign. This question would be at the forefront of all future debates over Jewish emancipation.

Moses Mendelssohn and Rabbinic Law

In the eighteenth and early nineteenth centuries, Spinoza's philosophical ideas were popular mainly in radical Enlightenment circles. Famously, Mendelssohn was forced to clear his friend Lessing's name from the charge that he was a closeted Spinozist.[17] However, the political depiction of the Jews, put forward by Spinoza, was widely assumed in discussions dealing with Jewish rights. Spinoza's depiction confirmed the worst stereotypes of the early modern Jewish corporate structure. While Spinoza perhaps presented the most extreme and rigorous theory of Judaism's political history, many other leading philosophers described Ancient Judaism in political terms. The Englishman Thomas Hobbes (1588–1679) in chapter 36 of his work *Leviathan* (1651) preceded the Dutch heretic in identifying the Israelite kingdom as a genuine political entity. Hobbes contrasts a Hebraic Kingdom ruled by human kings to one that is governed by God alone. Hobbes identifies the rise of the kings as a practical concession for the ordering of life in a non-messianic age. Hebrew Scriptures convey both eternal laws and the particular political character of Judaism.[18]

Hobbes and Spinoza were only two of many early modern thinkers that saw the Bible as a political constitution and looked to Jewish and even rabbinic sources to develop theories of governance. As the political theorist Eric Nelson has argued, seventeenth-century European intellectuals mined not only biblical but also talmudic texts for models of political leadership. Thinkers ranging from Hobbes and Spinoza to Hugo Grotius (1583–1645) and James Harrington (1611–1677) saw Jewish writings as a basis upon which to build modern politics.[19] In retrospect these developments certainly raised the profile of Jewish ideas and Jewish thought in western life. However, they also worked against the political interests of contemporary Jews seeking greater rights and freedoms in emerging European states. Precisely what was so enticing about the legacy of the Jews to western European political thinkers – the legal and political features of biblical and rabbinic literature – was used to prevent contemporary Jews from being emancipated.

The first supporters of Jewish emancipation (commonly known as the Maskilim) were forced to address the assertion that Jews were a political group.[20] They responded by arguing that Judaism's critics had it backwards. It was the discriminatory economic

policies of European states that encouraged Jews to create their own laws and retain their political independence. The claim that Jews were a chosen people was kept alive through discriminatory policies toward Jews. It was anti-Judaism that caused Jews to turn inward. If granted equal rights and opportunities, there was nothing in Judaism or Jewish law that prevented its adherents from becoming upstanding and loyal citizens. Christian Wilhelm von Dohm (1751–1820) gave voice to these sentiments in his *Über die burgerliche Verbesserung der Juden* (*On the Civil Improvement of the Jews*, 1781). There he argued that "certainly the Jew will not be prevented by his religion from being a good citizen, if only the government will give him a citizen's right. Either his religion contains nothing contrary to the duties of a citizen, or such tenets can easily be abolished by political and legal regulations."[21] Dohm believed that the Hebrew Bible expressed the religious principles of "morality" and "charity." Jewish law was primarily a function of the rabbinic tradition and not the legacy of the Mosaic tradition. Rabbinic laws and rites still practiced by Jews either were innocuous or over time would be discarded.

Dohm even thought that the state could tolerate a certain degree of Jewish political autonomy provided that Jews were in no way working toward returning to Palestine or following laws or ordinances that directly contradicted those established by the government. Jews would continue to operate as a kind of state within a state, replete with their own ecclesiastical bodies and the authority to excommunicate heretics. These privileges, Dohm claimed, would not preclude them from enjoying the same protection and economic rights granted to all other citizens.

Some Jews thought that Dohm's proposal failed to address the core problem surrounding the political status of Jews in particular and the role of religion more generally. Most notably, Moses Mendelssohn, who strongly supported Dohm's overall program and encouraged him to write his tract, expressed serious reservations regarding his allowance for Jews to remain an autonomous community. Mendelssohn believed that it was precisely the Jewish exercise of excommunication that made Judaism appear as something that it was not: a political nation.[22]

Specifically, Mendelssohn was bothered by the recent excommunication of the acculturated Jewish businessman Netanel Posner by the Altona-Hamburg rabbi, Raphael ha-Kohen (1722–1803). Among those who came to Posner's defense were Protestant thinkers who charged the Hamburg rabbi with expressing fanatical Papist tendencies.

Mendelssohn was deeply embarrassed by the Posner affair and disturbed that Dohm could permit such behavior to continue in the context of the modern state.[23] Though Mendelssohn never explicitly mentions Spinoza's excommunication and makes only passing reference to him in *Jerusalem*, the trials and tribulations of the Dutch philosopher might well have been haunting him when he argued that neither church nor state had the right to coerce people to abide by religious doctrines or prescribed norms. In fact Mendelssohn believed that excommunication and the political aspects of Judaism were counterproductive to achieving religion's goals. Instead of ensuring its upkeep, excommunication pushed away those most in need of religion.

Mendelssohn first addressed the political status of Judaism and the right of excommunication in the publication of his German "Preface" to Menashe ben Israel's *Vindicae Judaeorum* (Berlin, 1782). While Menashe's treatise, written in 1656, was directed at refuting the opponents of the re-admission of Jews back to England, Mendelssohn's "Preface" was written amidst a large-scale public conversation about the possibility of granting Jews equal rights in Austrian lands. Mendelssohn used his "Preface" to argue against Dohm. Judaism, he maintained, was a religion and as such had no right to excommunicate its adherents or operate in any way as a political entity. He lambasted what he called the "pernicious prerogative" of excommunication, explaining that "I do not find that the wisest of our forefathers ever did claim to possess the right to exclude individuals from religious practices."[24] Mendelssohn's position staved off the critique of Jewish dual loyalty.

However, Mendelssohn's response exposed Judaism to a different criticism. Namely if Judaism was not political, then what differentiated it from Christianity? If the Mosaic Law was not a means of organizing and governing society, then what purpose did it serve? Such were the questions posed to Mendelssohn by the Protestant August Friedrich Cranz (1737–1801) in the wake of the publication of Mendelssohn's "Preface." Cranz supported Jewish emancipation and vehemently opposed the right of Jewish excommunication (he too condemned Raphael ha-Kohen's actions), but he could not fathom how Mendelssohn's de-politicized version of Judaism differed from Protestant Christianity. As noted by Alexander Altmann, Cranz specifically pointed to Mendelssohn's "Preface" where Mendelssohn "plainly depriv[ed] the synagogue of its principal force, denying … its right to exclude." By denying that Judaism politically

authorized the enforcement of its laws and rulings, Cranz inferred that Mendelssohn had *de facto* embraced Christianity. Another critic of Mendelssohn, Daniel Ernst Mörschel (1751–1798), mistakenly concluded that Mendelssohn was neither Jewish (since he seemed to have denied the political nature of the Mosaic system) nor Christian (because he had not embraced Christ), but rather a Deist. Cranz and Mörschel's responses highlighted not simply the willful ignorance of critics looking to philosophically ensnare the Jewish thinker but also the pervasiveness of the belief that Judaism was political.

Mendelssohn replied to his detractors by redefining what constituted Jewish law.[25] Hinting at both Cranz's and Spinoza's extreme positions, he attacked those who sought to "pigeonhole" Judaism into one of two categories: a Protestant version of "religion" or a state-based concept of a "nation."[26] On the one hand, Spinoza insisted that Mosaic Law as a coercively enforced constitution rendered Judaism a political identity. On the other hand, Cranz and Mörschel insisted that if Judaism was not a political entity but taught principles of morality and charity, then it was not different from Christianity or Deism. Judaism, asserted Mendelssohn, was neither a form of Protestant Christianity/Deism nor a nation without a state. Rather, it was a religion (*pace* Spinoza), but it was based on a non-coercive code of (ceremonial) law.

Mendelssohn used the second half of his work *Jerusalem* (Berlin, 1783) to redefine the nature of the relationship between Judaism and the law.[27] He distinguished between two types of Judaism, one biblical, defined by a Mosaic constitution, the other rabbinic, defined by the voluntary observance of ceremonial laws. The Mosaic Constitution of the biblical period was not, however, directed at supporting an ecclesiastical power system. It was the basis of a theocracy under which all were equal before God. The breaking of the Sabbath was punished in the same manner as all civil crimes that compromised the authority of the lawgiver, God. While Mendelssohn's version of biblical Judaism included a religious dimension and had certain ethical features, he conceded that biblical Judaism was a political entity. However, Mendelssohn drew an important historical distinction between biblical and post-biblical Judaism. There was a "Mosaic constitution," Mendelssohn admitted, "but this constitution only existed once … It has disappeared," he continued, "and only the Omniscient knows among what people and in what century something similar will again be seen." [28] The rabbis of the Talmud made void the Mosaic constitution, he claimed, ushering in a new era in the annals of Judaism. When the Jews

had a state, Jewish law comprised both political and religious aspects. With the fall of the state only the religious component remained.

For Mendelssohn, the Judaism before and the Judaism after the fall of the Temple were similar but different. Both eras were defined by the law, but with the fall of the Jewish Commonwealth Judaism relinquished its political identity and all political powers including the right to excommunicate. In other words, the "Judaism" that excommunicated Spinoza was in fact a chimera, a vestige of Judaism's biblical past. It was symptomatic of Judaism's unhealthy ghettoization, the result of outside forces and the political and economic exclusion of Jews.

Mendelssohn still believed, however, that the law defined rabbinic Judaism (he called it a *Gesetzgebung*). But unlike the Dutch philosopher, he did not believe that rabbinic law necessarily contradicted ethics (natural law); nor was it necessarily only political (requiring a state).[29] Mendelssohn parted ways with Spinoza by "relating" ceremonial law to "eternal truths."[30] Rabbinic law connected "life with theory," promoting "personal felicity" and acting as a handmaiden to ethics. It was not meant to organize and structure society; "knowing no coercion, [it] uses only the staff called gentleness, and affects only mind and heart."[31]

Unfortunately, Mendelssohn only vaguely explained the way the ceremonial law "related" to ethical principals. In *Jerusalem*, he apologetically defended capital punishment as it appears in the Bible by citing the rabbis' disclaimer that it happened only once in every seventy years. In other parts of his oeuvre, he worked to ensure that Jewish law never explicitly contradicted reason or ethics. For example, in Mendelssohn's translation and commentary to the Bible he reinterpreted certain ethically problematic passages based on the rabbis' interpretive proclivities. In his commentary to Exod 21:24, where the Bible asserts the principle of "an eye for an eye," Mendelssohn follows the rabbis and claims that the text should not be read literally.[32] The Bible does not mean *lex talionis* but rather a form of monetary payment. In a similar fashion, Mendelssohn penned a response to the Duke of Mecklenburg arguing that although Jewish law dictates that the dead should be buried within a twenty-four hour period, it allows for burial to be delayed three days in order to ascertain that the individual is no longer alive. In other words, Mendelssohn interpreted the law to conform to scientific advancements and concerns regarding human life. In such cases, Mendelssohn did not deny the binding

nature of Jewish law, nor did he ever claim that it should yield to reason or ethics. Rather, his exegetical approach assumed that the laws did not contradict reason or ethics.

Mendelssohn, however, rarely delved into the nitty-gritty details of ethically controversial rabbinic rulings or talmudic passages, the stuff that would become fodder for nineteenth-century anti-Semites and the task of nineteenth-century Jewish apologetics. One might say that Mendelssohn ingeniously, or disappointingly, did not offer a systematic explanation for the specific reasons of Jewish law (perhaps because, as he said in *Jerusalem*, the commandments were always constantly changing based on time and place). For those who continued to see religion in strictly ethical terms, he failed to provide the robust in-depth ethical description of the commandments witnessed in the writings of the late nineteenth-century German philosopher Hermann Cohen.

Mendelssohn not only avoided offering a systematic epistemological justification for Jewish law, but he drew his only scriptural argument for the assertion that the Lawgiver never rescinded the Law from Jesus' life; "he who is born into the Law must live according to the Law, and die according to the Law." Employing Jesus as proof text had a certain polemical quality, but it did not seriously address the rationale for the continued observance of the law. However, Mendelssohn's chief concern in *Jerusalem* was not to explain the purpose of the ceremonial law, nor to relate rabbinic law to eternal truths. Certainly these ideas can be gleaned from Mendelssohn's writings, but they were not his focus. Mendelssohn's chief concern was justifying the practice of Jewish rituals and ceremonies in the context of the state.

Thus, Mendelssohn ended *Jerusalem* not with a defense of rabbinic law but rather with an impassioned plea for Jewish law becoming a platform for celebrating difference in the context of the state. Turning to those whom he hoped would one day be his fellow citizens he explained:

> At bottom a union of faiths, should it ever come about, could have but the most unfortunate consequences for reason and liberty of conscience. For supposing that people do come to terms with one another about the formula of faith to be introduced and established, that they devise symbols to which none of the religious parties now dominant in Europe could find any reason to object. What would thereby be accomplished? Shall we say that all of you would think just alike

> concerning religious truths? Whoever has but the slightest conception of the nature of the human mind cannot allow himself to be persuaded of this. The agreement, therefore, could lie only in words, in the formula. It is for this purpose that the unifiers of faiths want to join forces; they wish to squeeze, here and there, something out of the concepts; to enlarge, here and there, the meshes of words, to render them uncertain and broad that the concepts regardless of their inner difference, may be forced into them just barely. In reality, everyone would then attach to the same words a different meaning of his own; and you would pride yourselves on having united men's faiths, on having brought the flock under a single Shepherd. Oh, if this universal hypocrisy shall have any purpose whatsoever, I fear it would be intended as a first step again to confine within narrow bounds the now liberated spirit of man … Brothers, if you are for true piety, let us not feign agreement where diversity is evidently the plan and purpose of Providence.

For Mendelssohn, the purpose of Jewish law is precisely to assert the importance of difference. While it is unclear if Mendelssohn's argument was based on strong normative pluralistic political commitments or on a more calculated assessment of practical human heterogeneity, it proffered a new argument about the nature of Jewish law and its relationship to the modern state. Jewish rituals were not simply an innocuous set of actions that did not harm or help the state. Their upkeep and continued practice were not simply to be tolerated. Rather, as Michah Gottlieb has noted, Jewish ceremonial law was Mendelssohn's litmus test for cultural pluralism.[33] Jewish law highlighted the way in which minority groups' particularistic cultural heritages reflected the diversity of human existence. Governments that failed to allow Jews to observe their ceremonial laws were destroying the "plan of providence."

Mendelssohn argued his case in terms of the state's responsibility to ensure freedom of thought and expression – *pace* Spinoza. However, as Steven Smith notes, "in *Jerusalem* the case for toleration goes beyond anything found in the *Treatise*."[34] By including Judaism under the rubric of "religion," Mendelssohn expanded Spinoza's concept of "freedom" so as to include actions (Jewish ceremonial law). True freedom was not limited to the ability to think as one pleased but also included the ability to act in

ways that did not directly conform to the norms and mores of a majority culture or the laws of a state.

Mendelssohn's contributions to the development of Jewish law primarily reside in his liberating it from its coercive biblical and early modern political connotations. Mendelssohn transformed Jewish law into a set of rituals and ceremonies that expressed a practical, non-dogmatic form of religiosity. Ironically, Mendelssohn universalized the particularity of Judaism, asking the state not only to tolerate freedom of thought and action but to celebrate cultural difference in civil society.

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I would like to thank Michah Gottlieb for his comments and suggestions on earlier drafts of this chapter.

[1] On the various reasons put forward for Spinoza's excommunication, see Yovel, *Spinoza and Other Heretics*, pp. 3–14. On the reception history of Spinoza's excommunication, see Schwartz, *The First Modern Jew*, pp. 113–55.

[2] On the political-historical factors behind Spinoza's decision to use the Hebrews as his model, see Rosenthal, "Why Spinoza Chose," and more generally on the use of the political legacy of the Hebrews in Dutch culture, see Dunkelgrün, "'Neerlands Israel.'"

[3] On the influence of Spinoza's political writings in German lands, see most recently Israel, "The Early Dutch and German Reaction."

[4] On the political structure of early modern Jewish communities, see Katz, *Tradition and Crisis*. For the porousness of, and interactions between, Jewish and non-Jewish jurisdictions, see Chapter 6 of the current volume.

[5] All translations of Spinoza's *Tractatus* are taken from Benedict de Spinoza, *Theological-Political Treatise*, as translated by Michael Silverthorne and Jonathan Israel.

[6] On the political aspects of Spinoza's conception of the Mosaic Law, see Balibar, "Jus-Pactum-Lex"; Balibar, *Spinoza and Politics*, pp. 42–50; Smith, *Spinoza, Liberalism*, pp. 95–101, and James, *Spinoza on Philosophy*, pp. 83–119.

[7] See Spinoza, *Theological-Political Treatise*, p. 70.

[8] ***Ibid.***

[9] ***Ibid.***, p. 52.

[10] See Levene, *Spinoza's Revelation*, pp. 154 and 216–17.

[11] See Spinoza, *Theological-Political Treatise*, p. 252.

[12] ***Ibid.***, p. 245.

[13] ***Ibid.***, p. 234.

[14] ***Ibid.***, p. 244.

[15] See Israel's "Introduction" to *Theological-Political Treatise*, p. xxiii.

[16] See Della Rocca, *Spinoza*, p. 215. See also Gottlieb, "The Limits of Liberty."

[17] On Mendelssohn's reception of Spinoza, see Schwartz, *The First Modern Jew*, pp. 35–55.

[18] On Hobbes' conception of the Israelite Kingdom, see Harvey, "The Israelite Kingdom of God."

[19] On early modern thinkers' employment of the rabbinic critique of monarchy, see Nelson, *The Hebrew Republic*, pp. 23–57.

[20] On the politics of emancipation and its relationship to the concept of the autonomous Jewish community, see Sorkin, *The Transformation*, pp. 63–79.

[21] For a translation of Dohm's work, see Mendes-Flohr and Reinharz (eds.), *The Jew in the Modern World*.

[22] For an overview of Mendelssohn's contributions to the Enlightenment and his response to Dohm, see David Sorkin's excellent chapter on Mendelssohn in *The Religious Enlightenment*, pp. 197–206.

[23] On the Posner affair, see Feiner, *The Jewish Enlightenment*, pp. 134–38.

[24] Mendelssohn's argument against excommunication would be repeated more forcefully in *Jerusalem*. There (p. 73) he argued that, "excommunication and the right to banish, which the state may occasionally permit itself to exercise, are diametrically opposed to the Spirit of religion." All translations of *Jerusalem* are taken from Mendelssohn, *Jerusalem or On Religious Power and Judaism*, as translated by Allan Arkush.

[25] On Mendelssohn's response to Cranz regarding Jewish ceremonial law, see Arkush, *Moses Mendelssohn*, pp. 224–29.

[26] See Mendelssohn, *Jerusalem*, p. 131.

[27] Altmann in his "Introduction" to Mendelssohn, *Jerusalem*, correctly notes that the second half of Mendelssohn's *Jerusalem* was directly addressed to refuting Spinoza's characterization of Judaism as a nation (pp. 22–25).

[28] See Mendelssohn, *Jerusalem*, p. 131.

[29] See Altmann's "Introduction," to Mendelssohn, *Jerusalem*, p. 23, and more generally on Mendelssohn, Spinoza, and the law, see Smith, *Spinoza, Liberalism*, p. 175.

[30] See Altmann's "Introduction," to Mendelssohn, *Jerusalem*, p. 24.

[31] See Mendelssohn, *Jerusalem*, p. 130.

[32] See Mendelssohn, *Gesammelte Schriften*, 16:206.

[33] See Gottlieb, "Mendelssohn's Metaphysical Defense."

[34] See Smith, *Spinoza, Liberalism*, p. 177.

8

Rethinking *Halakhah* in Modern Eastern Europe: Mysticism, Antinomianism, Positivism

◈

Menachem Lorberbaum

Introduction

Rabbinic tradition treats Judaism as a form of life. Its foundational work, the Mishnah, displays this form of life in rich detail. When taken as a whole, as a normative regime structuring human life in the face of God, the Mishnah imparts a rare and raw sublimity. Theological discourse, however, is a rarity in the work. This fact reflects a characteristic backgrounding of direct and overt concern with the nature of the divine and a foregrounding of normativity in the religiosity that rabbinic tradition cultivates.

Criticism has been leveled at the rabbinic focus on normative praxis not only by Paulinian detractors who degrade *halakhah* as legalistic, but also by central voices within the tradition such as the eleventh-century Sufi spiritualist Baḥya Ibn Paquda, Maimonides the great twelfth-century philosopher-halakhist, and the kabbalistic traditions of both theurgic and ecstatic orientations.[1] These voices represent, in different ways, a rethinking of rabbinic Judaism attendant upon its medieval theological turn. The theological turn involves an epistemic shift in the comprehension of Judaic religiosity calling for a reevaluation of the relation between praxis and consciousness. The ability of practice to determine the sacred is conceived of as intimately connected to the practitioner's comprehension of the spiritual and its cultivation.[2]

Ibn Paquda's *Duties of the Heart* and Maimonides' *Guide of the Perplexed* share a bi-focal conception of religiosity distinguishing the "outer" from the "inner." Ibn Paquda further developed this duality as a distinction between sets of pairs – body and soul, limbs and heart – and Maimonides as a distinction between the political and the intellectual.[3] Although clearly demarcating a hierarchy of dignity and value, both foci are deemed necessary for human flourishing. Therefore too, this reevaluation of religious values did not undermine the integrity of either halakhic normativity or halakhic discourse. Philosophically speaking, halakhic norms were conceived as reflecting intellectual, ethical, or spiritual principles. Nevertheless, while the norms might teleologically cohere with these principles and perhaps even promote them, halakhic discourse and argumentation are not understood to be derived from them. Thus, in his many hundreds of legal responsa, Maimonides dons the hat of the jurist rather than the philosopher and speaks primarily in the voice of the former. This does not mean that *halakhah* is impermeable to philosophical or spiritual discourse. However, even

expansions of the range of halakhic normativity are carried out in the language of *mitzvah* (commandment) and argued for in accordance with the canons of halakhic reasoning; and at its height, e.g. Maimonides' great legal code, *Mishneh Torah*, the project is one of reframing, or enveloping anew, the rabbinic form of life.[4]

This configuration of the relationship between praxis and consciousness is essentially the same in the case of ecstatic kabbalists such as Abraham Abulafia and his students.[5] Theurgically inclined kabbalists, however, conceived of the basic relation differently. The halakhic nomos is viewed as a ritualistic occasion for a spiritual exercise of theurgic significance. The normative praxis enables an engagement with the divine pleroma. The latter is accessed and activated by the adept through his intentions and consciousness (*kavvanah*) as affected by means of his halakhic activity. The sacramental character of the *mitzvot* is a function of their participation in the Godhead. The praxis is at first glance this-worldly; the religious drama of which it is a part is, however, divine. Theurgic Kabbalah thus overcame the bi-focal dichotomy of religiosity.

It must be stressed that these kabbalists also essentially respected the integrity of halakhic normativity and of halakhic discourse. The theosophical and mythic discourse of the thirteenth-century Naḥmanides and Solomon ibn Adret, or the sixteenth-century Joseph Karo, all towering halakhic scholars, did not decisively alter their halakhic treatises. Expansion of the range of normative praxis did not alter the core practical concerns of the rabbinic form of life but rather served to deepen it and hone its details.[6] These writers were all respected members of the primary elite of the normative Jewish community and formative halakhic figures.

Lurianic Kabbalah provided the most dramatic elaboration of *kavvanot* (intentions) in the literature of Kabbalah. *Kavvanot* are here developed as an immense superstructure informed by detailed theosophic configurations.[7] This superstructure "both reflected and transfigured" its halakhic base,[8] which led in the seventeenth century to the greatest of inner crises experienced by halakhic Judaism prior to the all-encompassing secularization of modernity, namely Sabbateanism.[9] Sabbateanism is the movement devoted to the belief in the messianic calling of Shabbatai Tzvi (1626–1676) who ultimately apostatized and converted to Islam. It was the first messianic movement to transcend a specific region in the Jewish exile and cover the entire diaspora. The movement was profoundly informed by Lurianic norms of piety, yet at the same time its mystical theology centered

on the antinomian moment as a redemptive moment.[10] The sheer weight and thematic independence of the mythic superstructure of Lurianic Kabbalah eventually brought about the collapse of the base of halakhic normativity and practice.

Sabbatean heresy on the one hand and Spinoza's reevaluation of Jewish political theology on the other (see Chapter 7 of the current volume) signify the demise of medieval forms of Jewish religiosity and social structures. This chapter explores paradigms of halakhic Judaism that emerge as a result of the steady erosion of traditional forms of Jewish religiosity and social structure in early modernity. Ḥasidism, the revolutionary movement of religious and communal revival in eighteenth-century Eastern Europe, continues to enjoy a vital presence in contemporary Jewish life. The movement takes its inspiration from Rabbi Israel ben Eliezer Ba'al Shem Tov (Besht, 1700–1760) and his circle of intimates.[11] The Besht's teachings cultivated a mystically informed embrace of concrete experience, an ecstatic form of this-worldly religious sensibility. Those raising their voices in opposition, literally dubbed *mitnagdim*, opponents, accused the Besht's followers of normative laxity at best and Sabbatean heresy at worst. The *kulturkampf* between the camps forged the religious profile of Eastern European Jewry popularly understood in terms of the learned and scholarly elite versus the pious but ecstatic multitude.[12]

At the core of the debate are two emerging religious ideologies cultivating competing visions of the role of *halakhah* in Jewish religiosity. Ḥasidism, as a movement of religious revival, is an attempt to foreground God. The image of the Besht and his teachings inspire a theology of presence. The circle of the Ba'al Shem Tov, spiritualistic in orientation, maintains that *halakhah* does not exhaust human contact with the sacred. The alternative position, here exemplified by Rabbi Ḥayyim of Volozhin (1749–1821), is positivistic in orientation, arguing that the halakhic norm is the sole and exhaustive carrier and mediator of the sacred.[13] Rabbi Ḥayyim articulates a theology of the secular. In a secularized world divine immediacy is not ontologically at hand. These paradigms of *halakhah* are enmeshed in competing visions of Jewish piety which they in turn reinforce.[14]

Ba’al Shem means magician, wonder worker, or perhaps shaman.[15] As his appellation indicates, the Besht’s image is imprinted on Jewish religious imagination in terms of his vocation. He did not bequeath written works. But his touch on those surrounding him was transformative. The largest collection of teachings cited by a direct acquaintance of the Besht is that of Rabbi Jacob Joseph Katz of Polonoye (1710–1784). Rabbi Jacob Joseph was a scholar in his own right and served as rabbi of a number of communities. His collection of sermons *Toledot Ya’akov Yosef* (1781), was the first published version of teachings of the circle of the Besht. It is hence a milestone in the development of the religious discourse that would ultimately lead to the formation of Ḥasidism as a movement. The writer is deeply immersed in Lurianic Kabbalah, and its “writings” are cited throughout, most especially its theurgic directives. The sermons themselves follow the weekly portion of Sabbath Torah reading and they include scores of teachings (*shemu’ot*) from “my teacher,” i.e., the Besht. Besides promoting a novel form of piety and religious sensibility, Rabbi Jacob Joseph clearly took upon himself the task of setting the teachings of the Besht in writing.[16]

Even if we view the Besht as a member of the secondary elite among Polish Jewish communities, Rabbi Jacob Joseph was clearly a member of the primary one. He served as rabbi in various communities where he headed the rabbinic court and was tied by marriage to Rabbi Ḥayyim Tsanzer, one of the heads of the *kloyz* (study house) in Brodie, arguably the most illustrious institution of advanced Torah scholarship and learning in Eastern Europe. It should not surprise us then that upon its publication *Toledot Ya’akov Yosef* stirred Jewish society and was publicly burned by opponents.[17] It was a voice that could not simply be ignored.[18]

The sermon examined here takes its cue from a famed talmudic tale of Rabbi Shim’on bar Yohai (Rashbi) and his son (*b. Shabbat* 33b). The story begins with a debate concerning the civilizatory project of the Roman Empire. Rashbi criticizes the Romans, arguing that the baths they build are for pampering themselves, the bridges for collecting customs, and the markets for harlots. Word of his criticism makes its way to the authorities and he and his son are forced to flee for their lives, hiding in a cave for twelve years. The cave provides them with an opportunity for a life of disembodied

contemplation. When they finally reemerge, the pair is confronted with the mundane activities of people pursuing their livelihood. They are dismayed by what they see and everything they gaze upon goes up in flames. A heavenly voice then declares: "Have you emerged to destroy my world?" whereupon they are relegated to a second term in the cave for an additional twelve years, the term of punishment of the wicked in hell. It is only upon their second exit that they reconcile themselves to God's world and, gaining a new appreciation of the project of civilization, they too partake in *tikkun olam*, the tuning or well ordering of the world. Rabbi Jacob Joseph begins his sermon by expounding the story:

> At first, they were of the opinion that worship of God consists solely in a person engaging himself in Torah [study], prayer, fasting, weeping etc. Therefore, also, when they saw people who were not engaged in this way, they were incensed.[19]

The seemingly saintly pair had a constricted notion of worship. Its scope extended to the traditionally recognized preoccupation of the pious: intense involvement in Torah study and prayer and penitential activities such as fasting and weeping. The incredulous reaction of this saintly pair to the mundane preoccupations of ordinary Jews called attention to the imperfections of the life of ordinary people, its judgmental stance thus evoked divine wrath, and to such a degree that a heavenly voice sent them right back. The second retreat led them to reevaluate the nature of religiosity:

> They sensed that this could only be in order to instruct them in a more equitable path, the path of mercy [*raḥamim*]: [Namely,] attending to the fact that in all the details of a person's occupation, the blessed divine name is also [present], and that is considered worship of God.

Awareness of God's all-pervasive presence while performing the most mundane of our activities, and not only when partaking in the official norms of the *halakhah*, is worship of God. It is "the path of mercy" because it concomitantly entails an acceptance of the world.[20]

> It is not only the one who engages solely with Torah and prayer who is considered a worshiper of God. For by behaving in this way he arouses [divine] antagonism

against the people of the world who do not behave this way. Rather, a person is considered a ladder – even when it is poised on the earth [i.e.] the lowest rung is in the earthly grossness of matter.[21]

Jacob's ladder is here located within each person in his quality as a microcosm, and it reaches from the highest rung on which the deity hovers to the lowest, "the earthly grossness of matter." Piety that construes the sincere occupation with the here and now as religious laxity evokes divine wrath, while acceptance inspires divine grace. *Tikkun olam* is thus transformed so as to take on a salvific stature. To quote Gershom Scholem with regard to Lurianic Kabbalah: "Salvation means actually nothing but restitution, re-integration of the original whole, or *tikkun*, to use the Hebrew term."[22]

Indeed, *Toledot Ya'akov Yosef* is fascinating for the stance in the world that it seeks to cultivate among kabbalists who are intimately involved with *kavvanot*: It teaches them how to magnify the theurgic potential of the mundane, rendering it too an occasion for ecstatic intensity. Rabbi Jacob Joseph stresses "that the possessors of understanding [*ba'ale binah*] know how to unify." Unification is a technical term: The mystic unifies the aspects of divinity in his consciousness, and hence ontologically speaking, renders transparent the presence of divinity in the world.[23] This is accomplished, he says, "even [while they are engaged] in tales and discourse with their friend."

A case in point is the Besht's interpretation of the story of the two merrymakers in *b. Ta'anit* 22a (see below). For Rabbi Jacob Joseph, the tale and its interpretation exemplify the ethos of worship imparted by his teacher. The tale seems to have been of particular importance for the Besht. Rabbi Jacob Joseph mentions a number of times that to decipher its theurgic significance, the Besht resorted to a special mystical revelatory technique: "a dream query." The mystic readies himself in body and soul and recites a special prayer seeking a revelatory response to his query in his dream. This technique may be compared to the Besht's famed "ascension of the soul" during the prayer of Rosh Hashanah, 1747, related in a letter to his brother-in-law Gershon of Kotov.[24] This epistle is a rare extant document written by the Besht himself. The ascension described is via the pillar of the world to the heavens where the Besht encounters the Messiah. The Besht asks the Messiah when will he finally come and redeem the world. The latter replies that his coming is directly linked to the time "when your teachings shall spread

and be revealed in the world."[25] Compared to this dramatic affirmation of personal destiny the Besht's interpretation of the story of the two merrymakers is modest. Yet it is no less important with regard to the heart of religious practice. The technique is nocturnal in timing and the issue specific: The Besht seeks a revelation as to the significance of the text at hand. His query should be viewed as a reenactment of the narrative situation of the story as we shall now see.

Rabbi Baroka of Hoza'ah enjoyed an intimacy with Elijah the prophet who would often appear to him. Once they went together to a certain market that Rabbi Baroka would frequent. Elijah asked him whether there were any among the people present in the market that could be expected to have a portion in the world to come. Rabbi Baroka replied negatively. Elijah then proceeded to point out ordinary people, those with lowly occupations, and Rabbi Baroka ran after them interrogating them as to their deeds. The story ends with this encounter:

> By and by a certain pair came along.
>
> He said to him, "These too are among the members of the world to come."
>
> He went to them and asked: "What do you do?"
>
> They said: "We are merrymakers. We cheer sad people. So too when we see two people quarrelling with each other we make the effort to make peace between them."

The Besht reenacts the setting of the tale by seeking to comprehend what, specifically, makes the two so worthy. He discovers that relieving one's fellow of sorrow, endowing the other with happiness, is a mending of the deepest rifts of being. It is in and of itself an act of redeeming the divine presence (the *shekinah*, which is none other than the world itself), of making it one again with God:

> By means of a query the matter was imparted to him [the Besht]: For these two merrymakers devoted themselves completely to making a connection with [perhaps: befriending] every single person and [thus] unifying the Holy One, Blessed be He, in all the minutiae of a person's deeds, whether at home or in his business, in general or in particular; except in the case of a sad person (God forfend), when it was impossible to bring about a unification, to connect with him. They would

> therefore cheer him with their words until he became happy again and so connect with him so that he too cleaved with them to Him, may He be blessed … and this is a great principle.[26]

Sadness is a rift; in person and in being. Happiness inspires a wholeness of being. Gnosis consists in the awareness of the theurgic significance of the mundane and appreciating the fact that the deepest meaning of exile is the rift in being, while redemption is reconceived as a moment of accord, the integrity of the happy person.

Interestingly, the Besht taught that even when a person experiences sexual rejection and confides in a comrade hoping to dissolve his sadness "by the closeness of friendship, the need to speak to one's friend even if he is hypocritical, this too is unification."[27] The dialogical encounter between two persons, even if somewhat attenuated by the hidden agendas of the participants is nonetheless motivated by a deeper need of being, namely the solidarity of friendship. Hence, this too is unification.

Transgression is a test of the boundaries of solidarity and of unification. Thus Rabbi Jacob Joseph continues to stress that:

> For example, when he sees another person committing a transgression etc., the righteous person [*tzaddik*] can by [adequate] *kavvanah* engage in unifications [of God] and worship of God equivalent to his engaging in Torah.

Adequate reinterpretation of an event of transgression redirects the event to an occasion of unity of God and world hermeneutically transforming its original character as an instance of alienation and rupture. Hence, not only is the normatively neutral an occasion of worship, but transgression can also be so reconceived.

The sermons we have been following show a keen appreciation of the regulative role of talmudic *aggadah* for determining the values defining the place of *halakhah* in Jewish religiosity and its boundaries vis-à-vis the sacred. Appreciating the existential texture and theurgic richness of the Besht's teachings, however, also highlights the way they engage in testing the limits of normativity. If all human actions are an occasion for significantly encountering God, what particular need is there of a strict normative way of religious life? But this question is limited in power. The inner integrity of a religious regimen has to be examined in its own right. The fact that it does not exhaust all avenues

for cultivating the sacred does not entail its superfluity or vacuity. It is, after all, the form of life of an entire community conceived of as a congregation of worship. Moreover, and as Rabbi Jacob Joseph argues, the normative regimen of *halakhah* is of paradigmatic significance for its followers.

> The principle of all our worship – in Torah, prayer, the *kavvanot* of the *mitzvot* and *kavvanot* of eating – and its entire purpose is to sift the holy sparks from the depths of the shards and elevate them. The business of human beings also follows this as its model.[28]

The pious elite extend the scope of practice well beyond the dictates of the normative *halakhah* and recognize the value of pious engagement in the mundane and routine "business of human beings." It is precisely in these terms that they express the ethos of piety [*hassidut*].

The *tzaddik*'s reaction to transgression raises a troubling question: How does Rabbi Jacob Joseph's position differ from the Sabbatean position? Does a theology of presence undermine the integrity of the normative? If indeed it is the case that "elevating the lower rung to the higher is the need on high" (i.e., of divinity) and that "in order to elevate one must first descend to that [lower] rung,"[29] what remains of the safeguards of normativity?

> If it happens that one mistakenly and thoughtlessly [finds himself in a transgressive situation], he should join the multitude in order to elevate them. He should not however sin intentionally and consciously in order to join the multitude to elevate them. This – no.[30]

Rabbi Jacob Joseph distinguishes between intentional and unintentional transgression. Why should this distinction make a difference? He explains:

> As I heard in the name of my teacher [the Besht, there is] a good reason: for when he sins mistakenly and unknowingly it is possible to make amends by repentance. By the [correct] intention [with regard to the sinful act] he imparts meaning [*da'at*, literally knowledge] to it and elevates it. This is not so when he knowingly [*be-da'at*] sins: how will he amend it? This is the meaning of the Talmud's statement

> "He who says 'I will sin [now] and repent [later]' will not be granted occasion to repent" (*b. Yoma* 85b).[31]

The meaning of an action is a function of the agent's consciousness as informed by his guiding intention. Sinning knowingly compromises one's intentions and therefore one's consciousness as an agent, thereby depriving one of the avenue of amending. It is the very means of amends that have been compromised.

This position is profoundly different from antinomian sacred sinning. Shabbatai Tzvi takes the Torah scroll under the canopy as his wife and would in future sign his letters as "the husband of the dearly beloved Torah."[32] This act expresses a patriarchal intimacy with the Torah, a sovereign stance that allows him to violate it as an expression of the privilege of intimacy.[33] Violation here is expressive of the redemptive moment. But Rabbi Jacob Joseph clearly states:

> Since, however, one might err in purposely sinning so as to connect with those [lower] rungs to elevate them, as indeed heretics have done in their apostasy, Scripture then states "that he is not to come at will into the shrine" (Lev 16:2).[34]

Approaching the sacred necessitates difference and differentiation between inadvertent (redeemable) sin and intentional (non-redeemable) sins. Put differently, and in contrast to Sabbateanism: if one argues in Socratic fashion that one cannot knowingly sin, then one cannot authentically commit a sacred sin because once conceived as sacred it is no longer a sin![35] One can at most redeem the sinful act after the fact by reconceiving it. Repentance assumes the integrity of sin *qua* sin, and only then can it effect a reversal.[36] In this respect Rabbi Jacob Joseph, following the Besht, assumes the integrity of the halakhic norm.[37]

The complexity of Rabbi Jacob Joseph's conception of the *tzaddik* lies in the responsibility the latter assumes for redeeming the depths of human and cosmic falling. He does not deny sin or evil and does not fall into the error of conflating them with the good. Though it remains true that sin is in need of redemption, transgression is not confused with the norm. "Indeed, engaging first with the evil inclination is dangerous and who knows if one would later succeed in escaping its exile!"[38]

The Besht's shamanic vocation colors his ontological and normative sensitivity. His perspective on being assumes the privileged transitional stance of the liminal. Anthropologically speaking, this perspective exposes the gaps between nature and culture. Cosmologically speaking, it underscores the fact that the meeting between heaven and earth does not issue in a tight fit. The mystical moment developed by the Besht's circle is keenly aware of the tendency of human culture to treat its ontological constructions, most especially its norms, as determined. This mysticism is cultivated by teaching an ontological openness to the world, an ecstasy (*devekut*) that seeks to renew one's stance in the world in all its aspects. In Victor Turner's words:

> Liminality may perhaps be regarded as the Nay to all positive structural assertions, but as in some sense the source of them all, and more than that, as a realm of pure possibility whence novel configurations of ideas and relations may arise.[39]

The mystics seek to attenuate the hold of culture while revitalizing their stance in it. In terms of rabbinic discourse, we might say that the Besht takes to heart Rabbi Eliezer's statement (Mishnah Berakhot 4:4) criticizing his colleagues' halakhic determination that prayers should be said at fixed times: "If one makes his prayer fixed, his prayer is not a beseeching." However, instead of abolishing fixed ritual, the Besht seeks to revitalize it.

The ecstatic quality of behavior and prayer encourages "'interstructural' human beings,"[40] and it is this unsettling moment of being beyond good and evil, permitted and prohibited, that evokes the accusation of antinomian anarchy.[41] It is no wonder then that the Besht always remains opaque in his presence in the Ḥasidic tradition. He never speaks for himself. He is present in a form of conspicuous absence that enables the liminal moment to continue its vitality. (In this respect a biography of the Besht defeats its purpose.) It also explains the care taken by his circle to be well measured in the manner of publicly displaying his mystical discourse. The Besht's liminal positioning cannot really be emulated by his students and they cannot afford to publicly underscore it in their teachings.[42] The development of the Ḥasidic community in the generations following will seek to emulate this basic relation in the form of a congregation centered on the charismatic *tzaddik*. This community is constituted upon the constant tension

between the normative, even in its reactionary form, and the intense mystical liminality of its vital center, the *tzaddik*.

A Theology of the Secular

The traditional form of socio-religious organization of the Jewish community that conceived of itself as a congregation, the *kahal* or *kehillah*, was local in character. It understood itself as the local instantiation of Jewish collectivity. The gradual erosion of this model is a mark of the transition to modernity.[43] The Ḥasidic community was a modern alternative and in contrast to the traditional community organized itself round its charismatic center, the *tzaddik*. Its members periodically left their families and home town communities for extended sojourns in the *tzaddik*'s court. The Ḥasidic court was predicated upon the growing fissure between congregation and community in modernity.[44] Rabbi Ḥayyim's *yeshivah* was another novel institution. Like the Ḥasidic community it too was trans-communal and fraternal. The *yeshivah* in Volozhin he founded in 1803 did not belong to the local community. It was institutionally and financially independent. This fact made the head of the *yeshivah*, like the Ḥasidic *tzaddik*, independent of the local community. Yet its center was not a charismatic mystical figure standing in tension with the peripheral ordinary. Rather, it succeeded the traditional hall of study of the local community that was integral to the synagogue and served as a site for intergenerational interaction. In the new *yeshivah*, young elite students from all over Europe congregated as a community of the learned pursuing a life devoted entirely to the study of Talmud under the auspices of a towering scholar of impressive analytic acumen.[45] The *yeshivah* was viewed as a home for cultivating the rabbinic ethos of halakhic scholarship and intellectual excellence. The Ḥasidic court and *yeshivah* demarcated new poles of Jewish religious community in Eastern Europe.

Rabbi Ḥayyim of Volozhin's classic *Nefesh ha-Ḥayyim* (The Soul of Life), published posthumously in 1824, is the most important articulation of an alternative vision of *halakhah* and is a mystically informed critique of the Ḥasidic ethos.[46] The critique is integral to the author's project of founding the modern *yeshivah* and may be treated as its theological manifesto. Rabbi Ḥayyim was a disciple of Rabbi Elijah, the Gaon of Vilna (1720–1797), the driving force behind the critique of Ḥasidism and its persecution.[47] There is no doubt of Rabbi Ḥayyim's intimacy with the Gaon. Still, Rabbi Ḥayyim was an independent scholar of stature and his conception of the epistemic and normative status of Kabbalah is novel.[48]

Central to *Nefesh ha-Ḥayyim* is a religiosity informed by the tension between two positions: a theoretical and acosmisticly inclined panentheism on the one hand and an existential secularism on the other. As regards the first, R. Ḥayyim writes:

> The master of all (may His Name be blessed) fills all the worlds and in truth the creatures do not form any partition at all (forbid!) excluding Him (blessed). There is really nothing other than Him (blessed) in all the worlds: from the uppermost of all to the lowest depths of the depths of the earth. So much so that you might say that there is here no creature and world at all; rather all is full of the substance of His simple oneness.[49]

This is a powerful articulation of an acosmistic view. Only God exists and his plenitude fills all with no recognizable boundaries. It is only the expressions "in truth" and "really" that give rise to the suspicion that this may not be his final word. Indeed he continues to expound the midrashic statement that "the world is not God's place, rather He is the place of the world" (*Bereshit Rabbah* 68:9):

> All the places experienced in reality by the senses are not substantive places. Rather, He (may His Name be blessed) is the place of all places. From His blessed perspective they are as naught, as if they are no reality at all, even now as before creation.[50]

The qualification is here pronounced: It is a matter of perspective. From the divine perspective there is no other reality but God. This implies that the human perspective differs.[51] It finds its expression in the following understanding of the process of emanation:

> Indeed as the [worlds] descended the links [of the chain of being, they underwent] enormous [descents] in links and rungs … so much so that they became gross and depleted in their holiness and light … until in this world they became profane [*hullin*]. We [human beings] behave in it in a profane manner.[52]

Standard Neoplatonic descriptions of the great chain of being begin with the intellect and end with matter, and that too is the standard presentation in kabbalistic texts. Rabbi

Ḥayyim's account is striking because the end of emanation is the *saeculum*, the worldly, the profane. The sense of the Hebrew word *ḥol* is not desecration; it rather designates a realm void of holiness, vacuous in its neutrality regarding the holy. The human perspective of the world is secular and that is our manner of being in it. God is not experienced by us as immediately present.[53]

Throughout his work, Rabbi Jacob Joseph interprets the biblical adage "In all thy ways know thou Him" (Prov 3:6) to mean that "one should make matter into form." This interpretation is senseless in standard Aristotelian heliomorphism according to which matter is coalesced into a substance by means of its formation. In the context of a Neoplatonic emanationist metaphysics that understands form and matter on one graded continuum, it may be understood as an ascent in being. On Rabbi Ḥayyim's construal of emanation, however, the Neoplatonic conception is rendered empty. Mundane reality is not open to transformation. On this understanding, the sacred is constructed as a realm within the *saeculum*,which is achieved by demarcating normative space. As human beings the only avenue to the sacred that is open to us is this constricted space, forged by the great effort of regimentation, the four cubits of the *halakhah*.[54]

Halakhah is the practical regimentation of a way of life that reflects the worldly manifestation of the Torah. Study is the highest form of engagement with Torah and most especially actualizes its divinity. "The hidden elevated source of the holy Torah far transcends all the worlds, the primal root of His holy emanation (may He be blessed), the mystery of the supernal garment."[55] The Torah precedes being. Revelation occurs by means of a clothing of the divine in the word, and the Torah's revelation within the world creates the possibility of the sacred. Therefore "were we all, heaven forbid, to set it aside and completely abandon it, the worlds too would all be completely annulled."[56] This sense of urgency, of making the Torah present by means of its study, was instantiated in the daily routine of the *yeshivah* at Volozhin. The study of Torah continued in shifts twenty-four hours a day, throughout the entire year lest there be a moment void of Torah in the universe.[57] Self-transcendence – to the degree possible to beings constricted by the mundane – was achieved by delving into the Torah in study and deciphering the divine will.[58]

Rabbi Ḥayyim's conception of *halakhah* engenders a thorough reevaluation of the epistemic status of Kabbalah and of the normative weight of *kavvanah*. Following his

presentation of the distinction between the divine and human perspectives, Rabbi Ḥayyim issues the following exhortation:

> Indeed we have already prefaced our discussion with [the Rabbis'] parable describing their words as coals of fire. One should take great caution regarding their coals and not enter [the mystical paradise, *pardes*][59] to contemplate[60] and to investigate too much those things which permission is not granted to contemplate, for he shall be burnt, heaven forbid. So too, with regard to this terrible matter [i.e. acosmism]: it is pertinent only to a wise person who understands of his own accord[61] the internals of the matter solely by an appraisal of the heart,[62] darting back and forth,[63] so as to render enthusiastic one's purity of heart in prayer-worship. But contemplating this too much is a grave danger. The Book of Creation says of this: "And should your heart run, return to the place."[64]

This passage should be read against the background of the great dissemination of Kabbalah in the previous century and most especially the mystical reevaluation of traditional Kabbalah in Ḥasidic circles.[65] Drawing on traditional exhortations, Rabbi Ḥayyim here describes his previous elaboration of acosmistic theology as an esoteric teaching that should not be unwisely elaborated. The worthy adept to whom these topics may be imparted is in fact capable of comprehending them on his own. For such a one, a hint would suffice or, on a more radical reading, discursive presentation is unnecessary because he comprehends with his own heart. Put differently, the very fact that a student is in need of oral teaching of these themes is the best indication that he is unworthy. Moreover, the religious value of Kabbalah is not, as traditionally conceived, as a redemptive gnosis but as, at most, an enhancement of one's devotion.

Rabbi Ḥayyim feared the Ḥasidic ethos of encouraging religious enthusiasm in the form of ecstatic *devekut* elaborated by the reinterpretion of key kabbalistic notions. Indeed, Rabbi Menachem Mendel of Vitebsk (1730–1788), student of Rabbi Dov Ber of Mezerych (1710–1772) who met the Besht in his youth, articulates this view in an elaboration of a statement by the latter: "All the Torah [one studies] and all the *mitzvoth* [one performs] are not (heaven forbid) of any use for a person if they are [performed] without *devekut*."[66] The statement captures well the religiosity promoted by the Besht

and his circle of students. It is rooted in an oft-cited adage of the Besht that is the key to the mystical existentialism of Ḥasidism:[67] "Wherever a person's consciousness [*mahshavah*] extends, there he is entirely."[68] This wholeness of mind and person in one's being on the ethical level is paralleled by the sense of divine presence on the theological one. Rabbi Menachem Mendel stresses the implications of the theology of presence: "There is no vacuum in the world; there is only receptivity of impurity or purity and sacredness."[69]

Rabbi Menachem Mendel was explicitly targeted in the earliest diatribes against the Ḥasidim. He and his younger colleague Rabbi Shneur Zalman of Liadi (1745–1812), the leading figures of Lithuanian Ḥasidism, sought to present the case for their theology to the Gaon in the hope of engaging him in conversation so as to alleviate his staunch opposition. The Gaon, however, refused them an audience.[70] It is against the background of the kind of arguments they surely had in mind that Rabbi Ḥayyim justifies his own published foray into these matters:

> Truly I would have prevented myself from speaking of this matter at all, for the ancients of blessed memory hid it carefully … but I reflected and saw that this [secrecy] was appropriate for them in their respective generations. Now, however, many days have passed with no teacher [available] and each person takes the path equitable in his own eyes and follows his own intellect, and every inclination of the thoughts of the human heart is full only of the flight of thought to wherever his intellect shall veer.[71] And surpassing all of this (and it has become a parable in the mouths of fools too) is the exclamation – "is not every place and every thing complete divinity?" Their eyes and hearts [are intent] all their days to delve into this matter and speculate on it, to such a degree that the hearts of unseeming youths have drawn them to determine all their deeds and practices according to this comprehension.[72]

Rabbi Ḥayyim disparages the Ḥasidic ethos. It matters little whether this is an authentic report or a satirical portrayal for the main point is that the crass form of pantheism undermines the very ontological distinctions that condition normativity. True, the acosmistic position might be said to be theoretically apt:

> Even so, His greatness and sublimity, may He be blessed, is such that He contracted, as it were, His blessed glory so that the reality of the worlds could exist, and the forces and creatures could be created anew as difference and as differentiated matters occupying independent space: holy and pure places and the opposite, impure and soiled ones. This is from our perspective. That is to say, that our understanding perceives their reality by sense only as they appear. And our entire obligatory orderly regimen regarding which we have been commanded by His mouth (blessed), a law not to be transgressed, is constructed upon the basis of this perspective.[73]

Halakhah is conditional upon the existence of difference. Without differentiation, normative determination of the world is impossible for there would be no categories of permitted and prohibited, pure and impure, good or bad. It is for this reason that Kabbalah cannot provide the grounding rationale of the normative. Positive *halakhah* has its own integral rationale and is not premised upon kabbalistic gnosis. Kabbalah is at most a realm of subjective speculation for enhancing devotion. Rabbi Ḥayyim's esotericism is not only a social or political recasting of the religious status of Kabbalah but also a reevaluation of its epistemic status.[74] That is why *halakhah* precedes Kabbalah; the latter is conceived mainly as a means for enhancing individual devotion.

Esotericism fits the notion of a contracted divinity and its implications for normativity, and it fits our existential experience as sensual beings for whom God remains transcendent. "Because from the perspective of His essence (blessed) … there is no place for Torah or commandments at all."[75] It is therefore fitting that Talmud, the foundational text of positive *halakhah*, would be considered the primary text to be studied at the Volozhin *yeshivah* and Kabbalah not be part of the curriculum. This too was the norm adopted by the Lithuanian *yeshivah* tradition as it continued to develop over two centuries.[76]

Rabbi Ḥayyim's critique of kabbalistic theological speculation is complemented by his critique of *kavvanah*, the role of an agent's intention in defining normative actions:

> It is incumbent upon us to keep and to perform whatever is stated in the holy Torah, written and oral, in all its laws and statutes, at the time allotted [for their observance], in all their finer points and details, with no deviation at all. And when

> the Israelite person adequately fulfills them, even if he has no *kavvanah* or any knowledge of the reasons for the commandments and the secrets of their intention even so the worlds are amended and suffused [thereby] with holiness and light … Indeed with regard to all the *mitzvoth* the principle thing impeding their fulfillment is the [material] details of the activity involved.[77]

Action clearly precedes intention. The detailed fulfillment of the *mitzvah*, not the intention of the agent is constitutive.

Like the Ḥasidic masters whom he profoundly critiques, Rabbi Ḥayyim too engaged in a reappraisal of Kabbalah. The former transformed the mystic moment to a catalyst for an ethos of enthusiastic *devekut*. In Immanuel Etkes' words: "Through emphasis of religious consciousness – the yearning for mystical closeness to God – the classical distinction between 'revealed' and 'secret' loses its importance" for all actions are overtly charged with mystical significance.[78] The great paradox of *Nefesh ha-Ḥayyim*, however, is that Kabbalah is employed throughout the book to justify its own transformation from redemptive gnosis to subjective devotional lore. Halakhic positivism is here a theological commitment. *Halakhah* exhausts the sacred because it constitutes the realm of the sacred in the mundane. From this perspective there is no possibility of drawing a stable line between the Ḥasidic position that *halakhah* does not exhaust the human approach to the sacred and Sabbatean antinomianism. From the perspective of *Nefesh ha-Ḥayyim*, Ḥasidism, no less than Sabbateanism, undermines the ontological integrity of the sacred as defined by *halakhah*. From a Ḥasidic perspective, however, this is a gross misunderstanding. The present analysis reveals that the polemics between the Ḥassidim and their opponents was based upon incommensurable foundational beliefs. For the question of the place of *halakhah* in religious life is foundational to the tradition of rabbinic Judaism.[79] The debate, therefore, often progressed at cross purposes: the two sides talked past one another rather than to one another, each convinced that it alone represented complete allegiance to the halakhic form of life.

Halakhah as Ideology

The Besht's teachings inspired a renewal of Jewish religiosity in Eastern Europe that ultimately led to profound changes in its socio-religious structures. These changes stood in direct relation to the spread of Kabbalah in the eighteenth century. They reflected a reappraisal of Jewish religiosity consequent upon the continuing echoes of the Sabbatean upheaval in its many facets: the breakdown of traditional structures of rabbinic authority and the potent connection between Kabbalah and prophetic enthusiasm.[80] For all the differences stressed above between Ḥasidism and Sabbateanism, this perspective underscores the continuities that may be rooted in their shared mystical tradition.[81] A failed messianic movement is also a failure in the attempt to renew Judaism, and it is in this respect that the figure of the Besht looms large. The Besht succeeded in promoting a reevaluation of Jewish theological and mystical sensibility that was perceived by those surrounding him to be transformative, both personally and communally.

Rabbi Ḥayyim was a "white revolutionary," i.e., a revolutionary whose core values were deeply conservative. His debt to the Gaon lay in the notion of a pristine Torah that can be recovered by a lifelong commitment to uncovering the *urtext*s of Jewish classical learning.[82] Indeed, the ongoing impact of the Gaon was as a role model; if not for emulation then as a regulative ideal and guiding aspiration for future *yeshivah* students. Combining halakhic learning and analytic prowess, the scholar took the place of the holy man as represented by Luria, the Besht, and the Besht's emulators. Rabbi Ḥayyim advocated a return to the Talmud, the legal-theoretical reflection upon halakhic praxis, as the text of Jewish scholarly engagement. This in turn was premised on the understanding that *halakhah* exhausts the human engagement with the sacred, and complements it. The halakhic norm constitutes the sacred and is grounded in the Torah as the worldly manifestation of divine will. Kabbalah is esoteric, private, and subjective; it is action that precedes intention.

Rabbi Ḥayyim is truly revolutionary in his rejection of the medieval legacy, philosophical or kabbalistic, of locating meaningful religiosity in the inwardness of the subject. Halakhic positivism is here an attempt to return to the core values of the form of life of rabbinic Judaism, to a Judaism in which *halakhah* is the sufficient grounding norm of the religious community. Inwardness is reduced here to devotion, i.e., the nature of

the agent's commitment to the norm and the quality of its fulfillment. It does not make for an independent arena of religious life.[83]

Rabbi Ḥayyim's interpretation of Kabbalah is a daring move. It should, however, be stressed that the Gaon's students were all seriously immersed in Kabbalah. Moreover, the historiosophic interpretation of Lurianic Kabbalah that the Gaon adopted, following Moses Ḥayyim Luzzato, led many of them to settle in the land of Israel as an activist move of messianic significance.[84] Rabbi Ḥayyim was an important supporter, if not a catalyst, of this move even though he himself remained behind.[85] Can the theology of *Nefesh ha-Ḥayyim* cohere with all this?

Placing Rabbi Ḥayyim in context yields a number of possible resolutions to this paradox:

1. The subjective status of Kabbalah is a derivative of its esotericism not its grounding. For the uninitiated, Kabbalah is subjective. Initiation will engender a shift in its epistemic status.

2. Following the former point, the subjectivization of Kabbalah in *Nefesh ha-Ḥayyim* is a political move on Rabbi Ḥayyim's part to counter Ḥasidic enthusiasm. Just how political depends on how politically flavored one understands his esotericism to be. In any case, judging from the curriculum of the Volozhin *yeshivah*, this subjectivization was taken with utmost seriousness.

3. From the historiosophical perspective, Rabbi Ḥayyim reported that the Gaon viewed his epoch as the lowermost point of sacred history. Understood as a theology of the *Zeitgeist*, the theology of secularization would cohere with this conception.

Moreover, Rabbi Ḥayyim could be engaged in theological-political activism on a number of different fronts informed by independent agendas.

Rabbi Ḥayyim's conception of Kabbalah is inseparable from his halakhic positivism. In this respect his project crucially overlapped with that of Moses Mendelssohn (see chapter 7).[86] The emancipation of Jews in western Europe prompted Mendelssohn to reassess Jewish political theology. Mendelssohn provided a formula that could argue for

civil rights for Jews against Christian detractors on the one hand and guide an allegiance to Judaism while leaving the ghetto behind on the other.[87]

Rabbi Ḥayyim's conservatism should be compared to that of Rabbi Moses Sofer (Hatam Sofer). Sofer is famously known for his anti-reformatory adage "Anything new is forbidden by the Torah" forbidding halakhic innovation.[88] Yet Sofer was more of a traditionalist than a positivist when it came to *halakhah*. The preservation of communal custom and way of life was a primary concern of his. Although not bearing a Ḥasidic allegiance like that of the students of the Besht, Sofer's position helps understand the profoundly reactionary quality of Ḥasidic communities in the future development of modernity. The creation of the Ḥasidic fraternal congregation generated a loyalty not to halakhic positivism per se but to the customary way of life of the holy congregation down to the details of the garb of the forefathers of the holy community.

All of these trends fed into what would become an effort to stabilize a Jewish Orthodoxy in the nineteenth century. The historical demarcation of Orthodoxy has been much discussed by historians. The controversy surrounding Ḥasidism, however, should lead us to ponder the analytic power needed by the concept of Orthodoxy in understanding Jewish modernity. Viewed in light of the relation to *halakhah*, to culture, and to mysticism, there is no overarching theological commitment that can hold a convincing and coherent position regarding all three. Jewish Orthodoxy will necessarily be a loose political coalition of incommensurable theologies. The challenge of its politics may be understood as the ongoing effort to preserve this coalition through the ideology of a halakhically committed community whose power lies more in its ability to exclude competing ideologies than in its ability to provide a compelling and overarching theology of Judaism. This political conception of orthodoxy is perhaps made necessary by the theological impasse between a theology of presence typified by a divine surplus far exceeding *halakhah* on the one hand, and a halakhic positivism that is threatened by secularism on the other. The best of religious politics, however, can never fill a theological void.

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[1] See Idel, *Kabbalah*, pp. xi–xvii. Though contested, the distinction affords a useful typology for the present analysis.

[2] See Margolin, *Inner Religion*.

[3] Baḥya Ibn Paquda, *The Book of Direction*, pp. 87–89; Maimonides, *Guide*, III, 3, 27–28, pp. 510–14.

[4] See Twersky, *Introduction*, pp. 356–514; Hartman, *Maimonides*; Halbertal, *Maimonides*.

[5] See Idel, *Kabbalah*, pp. 53–58.

[6] This by no means implies that changes to practice as reflected in talmudic law and additions to it were minor. But Kabbalah, as a form of Jewish theological rhetoric, excelled in seamlessly inserting itself into the texture of Jewish traditional discourse. In the words of Jacob Katz (*Halakhah and Kabbalah*, pp. 12–13, my translation): "It

was not added as a novel row upon previous ancient traditional ones but rather emerged as it were from between the tiles of the earlier rows." See too his perceptive characterization of the ritualistic sensibility of Kabbalah in contrast to that of philosophy, pp. 54–55. Ta-Shma, *Ha-Nigle*, convincingly argued that a main contribution of the Zohar to halakhic praxis was in putting the weight of the mystical voice behind the tradition of Ashkenazi custom, thereby lending a unique thickness to the halakhic form of life. Custom rather than renewed normative enactment is the driving force in the Zoharic literature.

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[7] See Fine, *Physician*, p. 219. Weinstein (*Break the Vessels*) presents an analysis of Lurianic Kabbalah as a new episteme in Jewish mysticism. The novelty of Lurianic Kabbalah was not in the superstructure framing of the mythic content of *kavvanot* but in its guiding myth. In their own eyes, the kabbalists were *exposing* an essential relationship between meaning and derivative praxis, not *inventing* it. In the words of Rabbi Moses Cordovero, one of Luria's teachers and important predecessors in Safed: "It is not from the *mitzvoth* that the *sefirot* are derived; rather, the *mitzvoth* are derivative of the *sefirot*. For when we perform the *mitzvah* we unify the power – to which the *mitzvah* alludes as a branch of the *sefirah* to its root. This is the will of our Creator, that we unify His *sefirot*, for in their light we will see light. For His substance inheres in them and it is the glory of His kingdom in the world that we institute [*netakken*] his palaces and thrones so his presence [*shekhinato*] resides amongst us" (*Pardes Rimmonim*, Gate 8 chapter 1, fol. 35b–35c, my translation).

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[8] Rosen, "Benjamin," p. 45.

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[9] See Scholem, *Sabbatai Sevi*.

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[10] Scholem, "Redemption," pp. 78–141.

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[11] Rosman, *Founder of Ḥasidism;* Etkes, *The Besht*.

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[12] Dubnow, *Toledot*; Katz, *Tradition and Crisis*, pp. 221–26; Albert, "The Hasidic Movement"; Etkes, *The Gaon*, pp. 73–79.

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[13] Stern (*The Genius*, pp. 83–95) has understood the debate along these lines too. Indeed, he attributes the position of the Torah as sole mediator of the divine to the

Gaon himself. Even if we were to accept this interpretation of the Gaon's position, his statements remain scant while Rabbi Ḥayyim's articulation is robust, and theologically speaking, revolutionary; see further *infra*.

[14] The boundaries set for portraying these paradigms are necessarily historically artificial. The price, however, must be openly stated as the aspects not included would clearly color a fuller development of these themes. Two points merit special mention: (1) The crucial question of how the development of forms of religiosity in Europe is conditioned by the response to *haskalah* (enlightenment); (2) The important halakhic works of central Ḥasidic figures from the third generation following the Besht.

[15] On Ḥasidism and magic, see Idel, *Hasidism*. On the Besht in particular, see Rosman, *Founder of Hasidism*, pp. 13–15; Etkes, *The Besht*, pp. 7–78; Garb, *Shamanic Trance*.

[16] See Drezner, *The Zaddik*; Stern, *The Genius*, pp. 87–88.

[17] Stern, *The Genius*, p. 68.

[18] Piekarz (*Beginning*) sets the work in its literary context and Gries (*The Book*, pp. 54–56) describes the initative to publish it.

[19] Ha-Kohen, *Toledot Ya'akov Yosef*, Vayetze fol. 27a. Translations of Hebrew originals throughout are my own.

[20] The semantic range of the key terms in Rabbi Jacob Joseph's sermon bears a striking similarity to that of Israel Hazzan's Sabbatean *Commentary to Psalms* cited in Wolfson, "The Engenderment," p. 228 n. 81. Hazzan was Nathan of Gaza's secretary and his commentary to Psalms (or *Commentary on the Midnight-Vigil Liturgy*) is a unique Sabbatean document. Torah of Grace (*ḥesed*) signifies Islam and is contrasted with the Torah of Truth; see Scholem, *Sabbatai Sevi*, pp. 780, 857, 863–64. However, the differences are crucial: for Rabbi Jacob Joseph mercy takes the place of grace, and elevation of the worldly is for him a *tikkun* of the *shekhinah* rather than sacred sinning. See too Piekarz, *Beginning*, pp. 299–302, and Liebes, *On Sabbateanism*, pp. 97–98. For the title of Hazzan's work, see Maciejko, *The Mixed Multitude*, p. 268 n. 29.

[21] *Toledot Ya'akov Yosef*, Vayetze, fol. 27b.

[22] Scholem, *Major Trends*, p. 268.

[23] See Werblowsky, *Joseph Karo*, pp. 71–75; Buber, *The Hasidic Garden*, pp. 70–73.

[24] See Etkes, *The Besht*, pp. 272–88, for the text of the epistle and its analysis.

[25] Etkes renders it "Once your learning becomes publicly known and is revealed in the world" (***ibid.***, pp. 275–76). For the Hebrew original, see Etkes, *Ba'al Hashem*, p. 296, Koretz version.

[26] *Toledot Ya'akov Yosef*, Tetzaveh, fol. 71b.

[27] ***Ibid.***, final notebook, fol. 194c.

[28] ***Ibid.***, Yitro, fol. 59b.

[29] ***Ibid.***, Metzor'a, fol. 91d. See too the dramatic elaboration of the thematics of Zohar, Bereshit, 79b–82a (in Daniel Matt's translation in *The Zohar: Pritzker Edition*, pp. 15–24), in Kitetze fol. 189c–189d. The calculated transgression is here presented as the definitive character of the ḥasid. Rabbi Jacob Joseph suggests an antinomian rendering of Maimonides' conception of the ḥasid in *Mishneh Torah*, Laws concerning Character Traits 1, 5 as one who deviates from the ethical golden mean.

[30] *Toledot Ya'akov Yosef*, Metzor'a, fol. 92b.

[31] ***Ibid.***, Ahare, fol. 95d.

[32] Scholem, *Sabbatai Sevi*, pp. 159–60; Goldish, *The Sabbatean Prophets*, pp. 5, 147; Maciejko, *The Mixed Multitude*, pp. 26–28. See too Wolfson, "The Engenderment."

[33] "The paradox of 'doing a good deed by sinning' (as the Talmudic phrase goes) began to manifest itself in Sabbatai's behavior [and] this paradox proved to be his one distinct and dangerous contribution to the movement that bore his name. Once he became invested … with supreme religious authority, the paradoxical pattern of his behavior determined the pattern of the movement's theology. The inner law of the

Sabbatian movement sprang from the depth of its founder's personality" (Scholem, *Sabbatai Sevi*, p. 147). The theosophy informing this dramatic act might be that of Shabbatai's mystery of faith; see ***ibid.***, pp. 119–23, 961–62, 870, and especially Liebes, *On Sabbateanism*, pp. 9–34.

[34] *Toledot Ya'akov Yosef*, Ahare, fol. 95d.

[35] I thank my colleague Yuval Jobani for this articulation. Cf. Mishnah Bekhorot 5, 3.

[36] See Dov Baer of Mezhirech, *Maggid Devarav Le-Ya'akov of The Maggid*, 163, p. 263; Liebes, *On Sabbateanism*, p. 350 n. 179.

[37] Rabbi Jacob Joseph continuously deliberated the parameters of the *tzaddik*'s descent. *Toledot Ya'akov Yosef*, Ḥukkat, fol. 152a argues that the permissibility of intentional descent to the realm of "impure thought" is debated among the *tana'im*. (See too the formulation on fol. 153b at the end of the sermon.) The final sermon of the portion is a meditation on the exile of the *shekhinah* as expounded in the Lurianic *Pri Etz Hayyim*, Laws of the Reciting of the Shema, fol. 39c. Rabbi Jacob Joseph here argues in a different vein that it is the *shekhinah* and not the *tzaddik* that is the agent that "descends to the depths amongst the shards to sift the sparks" (*Toledot Ya'akov Yosef*, Ḥukkat, fol. 153c). Albeit after being aroused by the latter.

[38] *Toledot Ya'akov Yosef*, Va-yishlah, fol. 32a.

[39] Turner, "Betwixt and Between," p. 97. For a fuller discussion of this theme in the teachings of the Besht's other great student, the "Maggid" Dov Ber of Mezerych, see Lorberbaum, "Attain the Attribute." Cf. the work of the *tzaddik* as conceived by Rabbi Abraham "the Angel" son of Dov Ber in terms of dissolving "combinations" (*tzerufim*) and combining them anew (*Hessed le-Avraham*, p. 59).

[40] Turner, "Betwixt and Between," p. 93. The structural centrality of parturition to liminality explains the stress on ritual immersion in this circle. See Kallus, "The Relation."

[41] On the opening moves against the Ḥasidim, see Wilensky, *Hasidim and Mitnagdim*, pp. 27–31. On the comparison to Sabbateanism, see Elior, "On Sabbatianism," vol. II, pp. 495–532. The question of antinomianism in kabbalistic discourse has recently

attracted renewed attention. For a consideration of these issues, see Liebes, "Sabbatianism"; Garb, *The Chosen*; Wolfson, *Venturing Beyond*.

[42] This liminality is amply achieved in another venue: the Ḥasidic tale. Indeed Rabbi Nahman of Bratzlav, the Besht's greatgrandson, is reported to have said: "The storytelling of the Besht is a novelty; such storytelling was hitherto not revealed. Only in the writings of ARI of blessed memory, can something similar be found in some places" (Nathan of Nemirov, *Hayye Moharan*, p. 289 section 280; cited in Lederberg, *Sod HaDa'at*, p. 214 n. 28). See Buber, *Tales*; Elstein, *The Ecstatic Story*, pp. 9–38. The first important phenomenological reflection on the Besht's form of mysticism and religiosity is *Shivḥe Ha-Besht* (English: *In Praise of Baal Shem Tov*, translated and edited by Ben-Amos and Mintz). The question of historical authenticity of the stories is in this respect marginal to the phenomenological character of the work.

[43] See Katz, *Tradition and Crisis*, pp. 8–9; Stern, *The Genius*, pp. 3–8.

[44] The dramatic case of breakaway congregations in the wake of the secondary diaspora of Spanish congregations following the expulsion is an important precursor and is discussed by Rabbi Eliyahu Mizrahi in his responsa. For a discussion of this case, see Walzer *et al.* (eds.), *The Jewish Political Tradition*, vol. 1, pp. 409–14. The new congregation tended to organize itself as a community independent of the one previously in the locale. See also the case of the controversy concerning the donning of phylacteries in the interim days of the Passover and Sukkot holidays in Katz, *Halakhah and Kabbalah*, pp. 114–24.

[45] Stampfer, *Lithuanian Yeshivas*; Etkes, *The Gaon*, pp. 169–72, 202–08.

[46] See Lamm, *Torah Lishmah*; Magid, "Deconstructing the Mystical," pp. 21–67. Magid (p. 25) argues that "R. Hayyim's presentation is an anti-mystical reading of Kabbala which requires us to re-think the relationship between Kabbala and mysticism, two categories which have often been conflated … it uses Kabbala as the ideological base for an anti-mystical devotional ideology." Lamm (*Torah Lishmah*, pp. 65–73) points to Rabbi Ḥayyim's moderation with regard to Ḥasidism and views the work as an attempt to promote a guarded reconciliation. The reading proposed here emphasizes the depth of the alternative proposed in the book; cf. Eisenman, "The Structure"; Etkes, *The Gaon*, pp. 151–69. The guarded tone of Rabbi Ḥayyim's

critique sets him apart from zealous critics and polemicists of the previous generation like Rabbis Moseh Hagiz and Jacob Emden (for the latter see Carlebach, *The Pursuit*). My focus on Rabbi Ḥayyim here should not detract from an appreciation of the role of these figures as early modern, conservative, critical intellectuals whose mastery of published media played a crucial role in the future development of orthodoxy as a modern Jewish religious ideology.

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[47] See, e.g., Rabbi Ḥayyim's introduction to the Gaon's commentary on the Zoharic *Sifra de-Tzeniuta* (Vilna, 1821). The hagiographical text can be read not only at its face value but with a satirical twist responding to Ḥasidic hagiographical oral traditions and writing. The discussion in Etkes, *The Gaon*, pp. 10–36, treats this introduction as a historical document central to understanding the Gaon and the reception history of his persona. Sifting through hagiography so as to reconstruct a biography of the Gaon (parallel in many ways to the difficulties attending such an undertaking with regard to the Besht) is central to all recent scholarly biographies devoted to him. See too Shuchat, *A World*, pp. 35–53; Stern, *The Genius*, pp. 1–3, 13–36.

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[48] "The disciples who studied Torah with [the Gaon] were few in number, and they were not disciples in the common sense of the word – students who acquired most of their knowledge from him. In fact, they were mature scholars who visited him from time to time or stayed with him for a brief period" (Etkes, *The Gaon*, p. 2). The boundaries between hagiography, admiration, and biography are also unstable with regard to Rabbi Ḥayyim's relationship to the Gaon, as reflected in divergent scholarly reconstructions. See Lamm, *Torah Lishmah*, pp. 4–9; Etkes, *The Gaon*, pp. 151–53; Shuchat, *A World*, pp. 73–75, 90–91. With regard to Kabbalah, see Ross, "Rav Hayim of Volozhin," pp. 154–55.

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[49] *Nefesh ha-Ḥayyim*, 3:2, p. 69. On the resonance of Ḥasidic theology in this presentation, see Lamm, *Torah Lishmah*, pp. 9–23, and Ross, "Rav Hayim of Volozhin," pp. 154–55.

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[50] *Nefesh ha-Ḥayyim* 3:3, p. 69.

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[51] See Lamm, *Torah Lishmah*, pp. 80–84; Ross, "Rav Hayim of Volozhin," pp. 159–64.

[52] *Nefesh ha-Ḥayyim* 4:27, pp. 116–17.

[53] Cf. Ross, "Rav Hayim of Volozhin," pp. 166–67.

[54] Rabbi Ḥayyim's theological combination of the *saeculum* and commandment is reiterated in the work of such twentieth-century Jewish thinkers as Yeshayahu Leibowitz and Emmanuel Levinas. In his "Religious Praxis," pp. 3–29, Leibowitz articulated an anti-metaphysical and anti-mentalist fideistic conception of a Judaism exhausted by the relation of *mitzvah*, of being commanded. For Levinas, "faith purged of myths, the monotheist faith, itself implies metaphysical atheism" (*Totality and Infinity*, p. 77). His rejection of onto-theology leads to his argument that "thought of God cannot be in terms of Being but in terms of ethics" (Sheffler, *Interpreting*, p. 149).

[55] *Nefesh ha-Ḥayyim*, 4:26, p. 116.

[56] ***Ibid.***

[57] Etkes, *The Gaon*, p. 206.

[58] On the Torah as an instantiation of the divine, see Scholem, *On the Kabbalah*, pp. 32–86, 124–25. See also Ta-Shma, *Ha-Nigle*, pp. 42–44, who rightly sees this as a very ancient theme. The question of the nature of a religiously worthy study of Torah was at the heart of the debate between Rabbi Ḥayyim and the Ḥasidim, and this has received much consideration; Lamm, *Torah Lishmah*, is devoted to this debate. See also Ross, "Rav Hayim of Volozhin," p. 167; Etkes, *The Gaon*, pp. 172–84.

[59] See Scholem, *Jewish Gnosticism*, pp. 14–19; Halperin, *The Merkabah*, pp. 83–94.

[60] *Le-hitbonen*. This can also be rendered gaze. On the ethics of gazing in Jewish mysticism, see Halbertal, *Concealment and Revelation*, pp. 18–27.

[61] This is the criterion set by Mishnah *Hagigah* 2:1 for an adept worthy of expounding the chariot.

[62] *Shi'ura de-liba*. Cf. *b. Megillah* 24b and the discussions in Scholem, *Major Trends*, pp. 49–50; Idel, *Kabbalah*, pp. 90–91; Wolfson, *Through a Speculum*, pp. 144–87.

[63] Following Ezek 1:14: "And the living creatures darted back and forth like a flash of lightning" and its appropriation in *Sefer Yetzirah* (see the **following note**).

[64] *Nefesh ha-Ḥayyim* 3:3, p. 69. For the citation see Hayman (ed. and trans.), *Sefer Yesira*, §5, p. 72. It should be noted that the Besht expanded this instruction regarding contemplative practice to regulate the after effects of powerful mystical moments experienced as a devastating fall. Proper preparation for *devekut* includes an awareness of the lower rungs one might descend to following the high moments, as well as an awareness of the nature of the *tikkun* incumbent upon the adept so as to render a re-elevation possible. Central to this process is an awareness of the realms awaiting the *tzaddik* as well as a yearning for a redemptive presence. See Kallus, *Pillar of Prayer*, pp. 51–57.

[65] On the dissemination of Kabbalah in early modernity, see Goldish, *The Sabbatean Prophets*, pp. 167–70; Maciejko, *The Mixed Multitude*, pp. 75–58; Weinstein, *Break the Vessels*, pp. 44–48, 118–20. On the reevaluation of Kabbalah, see Lorberbaum, "Attain the Attribute," pp. 209–17. Rabbi Shneur Zalman of Liadi, the founder of Ḥabad Ḥasidism, stressed the issue of the adequate interpretation of Lurianic Kabbalah as a central issue in the debate surrounding Ḥasidism. Following him, the status of Lurianic Kabbalah became an important theme in Ḥabad theology. It seems, however, that it was the debate itself that threatened to brand Ḥasidism as heresy (*minut*), and this in turn led to conceiving this form of Kabbalah as a component of an orthodoxy in the strict sense of the term. Such a status is not evident in the loose manner of appropriation of this form of Kabbalah throughout most of the eighteenth century.

[66] Menachem Mendel of Vitebsk, *Peri ha-Aretz*, pp. 66–67. For the Ḥasidic concept of *devekut*, see Scholem, "*Devekut*," pp. 35–73. The medieval foundations of the concept are thoroughly explicated in Afterman, *Devequt*.

[67] This formulation goes beyond the classic debate between Martin Buber and Gershom Scholem concerning Ḥasidism, the former viewing it in existential terms and the latter declaring it mystical. See Margolin, *The Human Temple*, pp. 3–40.

[68] *Toledot Ya'akov Yosef*, Shelah, fol. 132b. See Margolin, *The Human Temple*, pp. 106–14, 294–302; Kauffman, *In All Your Ways*, pp. 134–37.

[69] *Peri ha-Aretz*, p. 73.

[70] See Hallamish, "The Teachings," pp. 268–69; Etkes, *The Gaon*, pp. 79–86, 96–100; Stern, *The Genius*, pp. 85–86.

[71] Paraphrasing Gen 6:5.

[72] *Nefesh ha-Ḥayyim*, 3:3, pp. 69–70.

[73] ***Ibid.***, 3:5, p. 71.

[74] "And when one has been graced by Him (blessed be his Name) to comprehend the hidden [secrets] of the holy Torah bequeathed to us as a blessing by the elevated holy ones, the sages of the Talmud (like Rashbi [and] in the later generations such as the holy rabbi, awesome man of God the AR'I [Isaac Luria] of blessed memory who have enlightened our eyes [to comprehend] some of the reasons and intentions of the *mitzvoth*), it is only for his own contemplation as an individual according to his intellect and comprehension … So that he should be stimulated and aroused" (*Nefesh ha-Ḥayyim* 1:22, p. 46). Rabbi Ḥayyim's subjectivist position with regard to Kabbalah may be viewed as an additional step in the epistemic emphasis typical of his tradition. (It should, however, be emphasized that the subjectivist status of the mystical coheres with an epistemic emphasis but is not a necessary derivation.) Leading back to the Gaon and Moshe Ḥayyim Luzzato's interpretations of Lurianic Kabbalah, this tradition interpreted Lurianic myth as parabolic; it held the theosophic structure to be that of the deity as comprehended from a human perspective. These are all derived from His actions but in no way descriptive of His essence. See **n. 51** above and Shuchat, *A World*, pp. 115–51.

[75] *Nefesh ha-Ḥayyim*, 2:4, p. 50.

[76] Cf. Etkes, *The Gaon*, p. 201. In the last few decades, there has been a dramatic change in this respect and a renewed dissemination of Kabbalah; see Garb, *The Chosen*; Meir, *Rehovot ha-Nahar*, pp. 19–73, 109–66. Recently, *Nefesh ha-Ḥayyim*

itself has come to be read more as an invitation to Kabbalah than as a dismissal of its place in the curriculum.

[77] *Nefesh ha-Ḥayyim*, 1:22, p. 46.

[78] Etkes, *The Gaon*, p. 159.

[79] It is precisely this point that has been missed by historians in the attempt to address the gap between the slightness of the infringements attributed to the early circles of Ḥasidim and the vehemence of the reaction toward them; see Wilensky, *Hasidim and Mitnagdim*, vol. ı, pp. 17–19, and Etkes, *The Gaon*, pp. 93–95 and p. 256 n. 47.

[80] See Goldish, *The Sabbatean Prophets*, pp. 122, 129, 166. Maciejko (*The Mixed Multitude*, pp. 241–43) discusses the perceived connection between religious enthusiasm, in this case Frankist, and revolutionary politics at the end of the eighteenth century.

[81] Mendel Piekarz, *Beginning*, pp. 299–302.

[82] Katz (*Halakhah and Kabbalah*, pp. 121–22) emphasizes its acceptance as itself an indication of the erosion of the traditional community and the primacy of custom. For Stern (*The Genius*) the Gaon's ethos of learning exemplifies the new privatized religious culture, with his towering presence lending this culture a prescriptive status. See, however, Kahana, *From Prague to Pressburg*, for a discussion of the deeper roots of the puristic trend in the traditions of European Torah scholarship and its critique by Rabbi Moshe Sofer against the background of the complex relation between *halakhah* and Kabbalah.

[83] The second generation of Lithuanian *yeshivah* students discovered how problematic an ethos and an educational agenda this was, as is witnessed in the development of the *mussar* movement. The movement attempted to reconstitute inwardness in the *yeshivah* world. Given, however, the deep secular existential stance at the foundation of Rabbi Ḥayyim's project, one wonders whether the project of *mussar* was destined to fail. It was invoked to cultivate religiosity in a secular culture and in a scholarly ethos that assumed a secular ontology. It is not clear that such a religious education can achieve anything more than indoctrination or a constant call to sacrificial

submission of the will to the alienating norm. See Etkes, *Rabbi Israel Salanter*, pp. 318–24.

[84] Shuchat, *A World*, pp. 132–51; Garb, *Moshe Ḥayyim Luzzato*.

[85] Shuchat, *A World*, pp. 88–96.

[86] Cf. the discussion of the Gaon and Mendelssohn in Stern, *The Genius*, pp. 63–82.

[87] See Graff, *Separation*, pp. 110–32.

[88] See Walzer *et al.* (eds.), *The Jewish Political Tradition*, vol. I: *Authority*, pp. 293–95.

9

Antinomianism and Its Responses in the Nineteenth Century

David Ellenson

In her perceptive book on Judaism in the modern West, *How Judaism Became a Religion*, Leora Batnitzky argues that prior to the late eighteenth century "Judaism and Jewishness were … religion, culture, and nationality [simultaneously]."[1] However, spurred on by the ideals of the European Enlightenment and desired political-social emancipation, Jews began to reject such broad notions of Judaism and Jewishness as inappropriate for the contemporary world. Simply put, from Moses Mendelssohn (1729–1786) on, western Jewish religious intellectuals often reduced Judaism to a "confession" in terms that were congenial to a culturally regnant western Protestant Christian notion of religion as "faith." Batnitzky shows how one nineteenth-century Jewish religious thinker after another – for all their differences – redefined Judaism in private religious terms that were increasingly apolitical and non-nationalistic – and often in ways that were hostile to the dominant role that law occupied in premodern Judaism.

To be sure, there were Jewish groups in the past such as the Sadducees or the Karaites who challenged the authority of the rabbis and the Oral Law. Though neither group abjured the authority of law altogether, both the Sadducees and the Karaites in opposition to adherents of rabbinic Judaism affirmed the legitimacy of the Written Law alone. In contrast, normative rabbinic Judaism consistently affirmed the doctrine of a Twofold Law – Written and Oral – as divine and advanced the belief that this divinely revealed Twofold Law was *the* means whereby humanity could encounter God. The central early modern code of classical Jewish Law, the Shulchan Aruch (1564), that great work which attempted to apply the strictures of rabbinic law to every dimension of human life, proudly captured this belief when it cited, as its frontispiece, the words of Ps 16:8, "I have set God before Me always." Through the countless rules and regulations

contained in its pages, the Shulchan Aruch bore witness to the nomian nature of normative Judaism with its belief in Twofold Law.

With the advent of modernity, this situation began to change and countless Jews began to evidence antinomian postures and practices. Gershom Scholem argued that Shabbatai Tzvi and the Sabbatean Movement initiated this process, employing the language of Jewish mysticism to revolt against the *halakhah*.[2] Other scholars such as the social historians Azriel Shochet and Todd Endelman looked not to doctrine but to lifestyle and pointed out that vast segments of the Jewish people cast off the yoke of the law in seventeenth- and eighteenth-century Germany, France, and England as modernity encroached.[3]

However, Batnitzky centers her account of these years on Germany. She points out that Jews in Germany did not revolt against the mandates of traditional Jewish law through a subversive reading of Jewish mystical doctrines as the Sabbateans had done, nor did they simply acculturate into the mores of the larger society as Jews in France or England had. Rather, a host of nineteenth-century German-Jewish religious leaders, influenced by critical approaches to history that they had learned about as students in the German academy, appealed to a history of evolution and change in Judaism as a basis upon which to establish an approach to their religion that did not regard law as central or all-encompassing. In so doing, these men provided a rationale for religious reform and the emergence of Jewish religious movements that would challenge the hegemony of rabbinic Judaism with its notion of an unchanging and eternal Jewish law.[4]

The cultural ambience of the modern setting, Batnitzky argues, led many Jewish religious thinkers to understand Judaism as a religion in Protestant terms, and this caused them to redefine and reduce – and sometimes abjure altogether – the place of law in Judaism. As she observes, "Adherence to religious law, which is at least partially, if not largely, public in nature, [did] not seem to fit into the category of faith or belief, which by definition is individual and private."[5] While the doctrine of a Twofold Written and Oral Law and the role of *halakhah* as the foundation for Jewish life and practice were at the heart of classical rabbinic tradition, these matters of doctrine and law became the foci of great debate and disagreement among nineteenth-century German- Jewish religious leaders.

The insights and summary Batnitzky offers provide the starting point for an

examination of antinomianism and its responses in the Jewish world of the 1800s. This chapter will explore this topic by initially focusing its gaze on the Reform Movement in nineteenth-century Germany. It will discuss the earliest stirrings of the Reform Movement in Hamburg and then turn to the writings of some of its most prominent and representative proponents on Judaism and the role of law within it. The Reform Movement began initially in Germany under the leadership of layman Israel Jacobson in the 1810s and constituted the first denominational response brought on by the transformations that emancipation and Enlightenment brought to Jewish life. In the second decade of the nineteenth century, the lay-led Reform Movement sought principally to recast traditional modes of Jewish worship in accord with nineteenth-century German aesthetic standards. However, with the rise of *Wissenschaft des Judentums* and its attendant ideal that Judaism was not only *in* but *of* history, i.e., that Judaism developed through time and had to be understood in cultural context, an ideological foundation was established that would allow for the growth of a non-Orthodox *Liberales Judentums* in Germany. While it might be imprecise to characterize Reform spokesmen such as Samuel Holdheim and Abraham Geiger as completely "antinomian," insofar as they affirmed the ethical elements of Jewish teachings as eternal and binding, it is unquestionably accurate to assert that as leaders of the Reform trend in nineteenth-century German-Jewish religious life, these men and others employed this ideological insight about the evolution of Judaism in history – each in his own way – to promote a position that both weakened the traditional commitment of Judaism to law and promoted a universalistic ethos that downplayed or rejected altogether the importance of Jewish ceremonial law and allowed for full Jewish participation in the world of German civil society and culture.

Of course, there were traditionalists as well as liberals in the Jewish community who disputed the stances that these proponents of Reform put forth regarding traditional *halakhah* and its place in Judaism. Foremost among them were Rabbi Zacharias Frankel (1801–1875), head of the Breslau Jewish Theological Seminary and father of the Positive-Historical trend in German *Liberales Judentums*, and Rabbi Samson Raphael Hirsch (1808–1878), the major champion of Orthodox Judaism in Germany and rabbi of the *Israelitische Religionsgesellschaft* (IRG) in Frankfurt. Both these men and others in their camps issued sharp critiques of the positions on Jewish law adopted by their

Reform colleagues even as they fashioned conceptions of *halakhah* and its role in Judaism that allowed for the promotion of Jewish civic emancipation. To be sure, Frankel spoke as a Positive-Historical Jew who shared a commitment to *Wissenschaft des Judentums* with his Reform colleagues, while Hirsch spoke as an Orthodox Jew who championed a view of Jewish law as eternal and unchanging. Nevertheless, each argued in his own distinct way against antinomianism, and both men were certain that Jewish religious authenticity required an ongoing commitment to Jewish law. After presenting the positions of Reform spokesmen on Judaism and Jewish law, this chapter will conclude with a summary of the positions advanced by these opponents of antinomian trends so as to defend the ongoing place of law within Judaism.

The stances of these thinkers on Judaism and Jewish law, and the disagreements among them, embody more than an internal Jewish discussion concerning the place of law in Judaism. Instead, all of their positions were carved out in response to two prominent German thinkers – Immanuel Kant and Bruno Bauer. In his *Religion within the Limits of Reason Alone*, Kant characterized Judaism negatively as nothing more than "*statutarisches Gesetz* – statutory law," and the Protestant theologian Bruno Bauer, in his 1842 *Judenfrage* (*The Jewish Question*), had stated that Jews were unfit for political emancipation on account of the legal character of the Jewish religion. Jewish writers – for all the differences among them – were keenly aware of the dismissive portrait of Judaism that Kant had drawn as well as the attacks Bauer issued. They were aware of the broad influence their standpoints had on the German public as Jews struggled to articulate a culturally respectable vision of Judaism and realize a desired civic emancipation. Their positions cannot be fully grasped without an appreciation of this contextual factor, and the arguments of Kant and Bauer will be briefly summarized and presented so that the attitudes advanced by these Jewish leaders concerning antinomianism and its relationship to Judaism, as well as the factors that shaped their descriptions of Jewish law itself, can be fully revealed. In so doing, the character of nineteenth-century Judaism in the West can be illuminated across denominational lines.

Earliest Reform and Jewish Law

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."[6] A year later the Hamburg Temple was officially dedicated and in 1819 the first edition of the Hamburg Temple *Gebetbuch* (prayer book) 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 classical rabbinical sources and ignored others 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 legal 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. He too gathered together alternative halakhic sources to provide a traditional warrant for the deeds of the Reformers.[7]

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.[8]

The Judaism of these earliest Reformers was surely not an antinomian one, and these first champions of Reform Judaism were committed to defending their reforms within the framework of a traditional Jewish legal system. As Gerald Blidstein has observed, the Hamburg Temple Reformers and their defenders in the first decades of the nineteenth century were tied to the "authority of [legal] precedent" to sanction their actions.[9] Nevertheless, as Jay Harris has pointed out, "the persons who remained faithful to Jewish law and tradition were suspicious of those who advocated such changes on the basis of Halakha,"[10] and two decades later the suspicions of these traditional Jews would be confirmed by the ideological postures Reform exemplars would adopt in their writings on the role and nature of law in Judaism.

Reform Approaches to Jewish Law and Jewish Civic Emancipation: Holdheim, Samuel Hirsch, and Geiger

As Steven Lowenstein observed, "The 1840s were the crucial decade for the creation of a Jewish religious Reform Movement in Germany."[11] The reissue of the Hamburg Temple Prayerbook in 1841 and the formation of the radical Frankfurt Society of Friends of Reform (*Reformverein*) in 1843 with its rejection of ritual circumcision of Jewish boys, its advocacy of moving the Jewish Sabbath from Saturday to Sunday, and its opposition to the authority of talmudic law in Jewish life pushed Reform rabbinical leadership to call three rabbinical conferences in Brunswick, Frankfurt, and Breslau in 1844, 1845, and 1846.[12] A significant number of university-educated Reform rabbis recognized that the time had come to put forth a principled approach to Reform and the matter of law. An 1842 book, *Theologische Gutachten ueber das Gebetbuch nach dem Gebrauche des Neuen Israelitischen Tempelvereins in Hamburg*, as well as the published rabbinical conference proceedings of the 1840s provide the first evidence of their attitudes toward these matters. In the decades to follow, the viewpoints of these Reform ideologues and advocates regarding the question of Jewish law would evolve and find ever fuller expression. While there would be more than a score of Reform rabbis who would address this topic and take up the cudgels on behalf of a Reform approach to *halakhah*, three – Samuel Holdheim (1806–1860), Samuel Hirsch (1815–1889), and Abraham Geiger (1810–1874) – occupy a place of special prominence and illustrate the range of Reform opinion concerning the nature of Judaism in general and the matter of antinomianism in particular.

Before turning to these three men and their views, it will be instructive to summarize the relevant views of Kant and Bruno Bauer. As mentioned above, Kant had derided Judaism as being nothing more than "statutory law." This critique was intended to dismiss Judaism as promulgating an immature religious ethic which could be reduced to nothing more than an externally imposed system of heteronomous legislation.[13] As such, Judaism was fully discordant with the autonomous ethic that Kant had described in his 1797 *The Metaphysics of Morals* as the only moral position worthy of adoption by mature men and women. Even when Kant acknowledged that Judaism contained moral

elements that were accessible through reason alone, the legal character of Judaism "perverted" these pure moral sentiments and transformed them into binding statutes that were obeyed only because of the threat of external compulsion. Thus, in speaking of the Ten Commandments, Kant wrote that even had they not been revealed publicaly, they would still have been arrived at through reason. However, in Judaism these laws were obeyed not in response to an internal, autonomous recognition of the morality inherent in them. Rather, they were obeyed because they were imposed by a lawgiver upon people who feared the consequences of disobedience.[14] The Reform ideologues to be discussed below were keenly aware that this pejorative Kantian characterization of Judaism and the role of law within it had wide cultural currency. In offering their own portrayals of their religion, these Jewish thinkers attempted to portray Judaism in line with the Kantian notion of morality as a defense against the charges of the Koenigsberg sage.

Jewish thinkers were equally anxious to craft a response that would defend Judaism and the Jews against Bauer as well. His *Judenfrage* provided the foundation for those who argued that adherents of religious Judaism were unfit for political emancipation and German civic involvement. The writings of Holdheim, Samuel Hirsch, and Geiger on Judaism and its relationship to Jewish law were either explicit or implicit responses to Bauer no less than Kant, and they were designed to make the case that adherence to Judaism was compatible with the demands of citizenship in the modern political order.

In his *Jewish Question*, Bauer argued that the Jew, by his very nature, could not be emancipated and he claimed that the only way for Jews to be worthy of emancipation was to surrender all the national traits that marked Judaism. "As long as he is a Jew," he wrote, "his Jewishness must be stronger in him than his humanity, and keep him apart from non-Jews. He declares by this segregation that … his Jewishness … is his true, highest nature, which has to have precedence over his humanity."[15] For this reason, "the Jews … cannot amalgamate with the nations and cast their lot with them."[16] They must "always remain a foreign element."[17]

Bauer argued, in effect, that the Jew could not be integrated into the modern political order because the Jewish religion demanded that the Jew place fidelity to Judaism over allegiance to a state marked by a putatively neutral public sphere. Emancipation could not be granted to the Jew until he was prepared to surrender the imperatives of his religion and the demands of its laws – when the Jew would be willing,

for example, "to go to the Chamber of Deputies on the Sabbath and participate in public discussions."[18] Bauer asserted that the Jews had to surrender their particularity – their language, the initiatory rite of circumcision for their sons, Sabbath and dietary restrictions – as a condition for political emancipation. Only then could the Jew become a full member of the state.[19]

Bauer pressed this point by devoting an entire section of his pamphlet to an analysis of the transactions of the Paris Sanhedrin, an assembly of seventy-one prominent Jewish laymen and rabbis convened by Napoleon in 1807 for the purpose of defining "doctrinal principles" that would guide the Jewish people so that they would prove to be worthy citizens of the modern French state. The preamble to the nine resolutions adopted by the Sanhedrin maintained that Judaism had religious principles that were eternally binding and political regulations that were no longer valid inasmuch as the Jewish people no longer constituted a nation. Bauer dismissed as a lie the distinction the delegates drew between the political and religious obligations Judaism imposed on its adherents. He observed that many of the major addresses the delegates delivered were offered in Hebrew and only later translated into French. This was emblematic of the primacy the Jews accorded their own nation. Bauer wrote:

> It would be fine if the Jew openly declared, "I want – since I wish to remain a Jew – to keep only that much of the Law which seems to be a purely religious element. Everything else which I recognize as anti-social I shall weed out and sacrifice." But instead he pretends to himself and wants to make others believe that in this distinction between political and religious commands he remains in accord with the Law, that the Law itself establishes this distinction … Judaism cannot be helped, the Jews cannot be reconciled with the world, by this lie.[20]

In making this distinction between political and religious elements in Jewish law and teaching, the Notables of the Paris Sanhedrin were drawing upon the well-known rabbinic legal principle of "*dina de-malkhuta dina* – the law of the land is the law."[21] This principle is attributed to the talmudic sage Mar Samuel and asserts that the laws of the country in which Jews live are binding.

Bauer dismissed this attempt on the part of the Paris Sanhedrin as illusory and proclaimed that the Notables were engaged in prevarication and distortion. The nationalist component in Judaism could not be simply eliminated altogether. The character of Jewish law in Judaism meant that the Jewish religion itself made the Jew *qua* Jew unfit for participation in the modern political order. This argument garnered a great deal of attention, and the positions that nineteenth-century Reform and other Jewish thinkers put forth on the nature of law in Judaism were written in reaction to Bauer as well as in response to internal Jewish debate over the character of the Jewish religion and the role of law within it.

Holdheim responded to Bauer immediately in his 1843 *Ueber die Autonomie der Rabbinen*. On the one hand, this work can be seen as an expression of classical liberal political theory. It attempted to distinguish between public and private spheres and sought to carve out a position for particularistic religious commitments in the private realm. Holdheim argued that Judaism had the right to exist in the modern nation-state so long as it did not interfere with the individual Jew's performance of duties in the public realm.

Judaism could allow for this, Holdheim maintained, because after the destruction of the Temple, those national-political dimensions of Judaism and Jewish law that had promoted Jewish separatism and autonomy in ancient days could be cast away as obsolete. Contra Bauer, Holdheim maintained that the dictum of *dina de-malkhuta dina* – because it allowed for the separation of national-political elements in Judaism from religious ones – provided an authentic Jewish warrant that made the Jew fit for enfranchisement in the modern political setting. A Jewish soldier, for example, was no less required to serve in the military on the Sabbath than his Christian counterpart was on a Sunday. Bauer was wrong not to recognize that Judaism, no less than Christianity, allowed for the fulfillment of civic obligations.[22]

In *Ueber die Autonomie der Rabbinen*, Holdheim succinctly put forth his argument on the nature of law in Judaism that justified the division he had drawn between the religious and national-political dimensions of Judaism:

> That which is of an absolutely religious character and of a purely religious content in the Mosaic revelation and in the later historical development of Judaism … and which refers to the relationship of human beings to God … has been commanded to

> the Jew by their God for eternity. But whatever has reference to inter-human relationships of a political, legal, and civil character was originally meant only to apply to the given conditions of such a political and civic existence … Yet it must be totally deprived of its applicability, everywhere and forever, when Jews enter into relationships with other states or … when they live outside the conditions of the particular state for which the law was initially given."[23]

In making this argument, Holdheim asserted that the place of law in Judaism was limited temporally to the hoary past when Jews dwelt in the Land of Israel.

The Sages of the Talmud failed to realize that the destruction of the Jewish state fulfilled God's purpose. They mistakenly conflated religious and national laws within Judaism. During the Middle Ages, the rabbis still had political authority and were loath to discard it. However, Holdheim maintained that the loss of Jewish political autonomy should be viewed positively as it allowed the Jewish people to fulfill its universal spiritual-ethical mission. The loss of Jewish political authority was beneficial for the advancement of morality and character for Jews and gentiles alike.

In adopting this stance, Holdheim advanced a position regarding the distinction between the temporal-particularistic and ethical-universalistic dimensions of Judaism that would echo over and over again throughout his works. Writing in 1845, he stated:

> If one were to trace the source of most of the biblical ceremonial laws, one would find … that their purpose was to separate Israel from those other nations … If Israel had been the only nation in the world … there would only have been a simple, universal Moral Law."[24]

He further claimed that

> concepts such as that of a Chosen People, with all the particularistic laws associated with it, must be given up by us, if only in the interest of the purity of our Mosaic religion – if we are to see in the fall of our former peoplehood the beginning of the messianic kingdom, in the destruction of legalistic particularism the foundation-stone for the building of a universalism founded upon a pure humanity.[25]

In making this claim, Holdheim eviscerated the Jewish attachment to broad swaths of the law. He abrogated the validity of ceremonial-ritual as well as national-political components of Jewish law and asserted that Judaism should center exclusively on morality. Indeed, in his zeal to promote the universalistic elements of Jewish law, Holdheim argued in his 1843 *Ueber die Autonomie der Rabbinen* that in Judaism even marriage was a civil and not a religious matter,[26] and he championed, one year later at the 1844 Brunswick Rabbinical Conference, a measure on the issue of mixed marriage that stated, "Members of monotheistic religions in general are not forbidden to marry if the parents are permitted by the law of the state to bring up children from such wedlock in the Jewish religion."[27] In his 1850 *Gemischte Ehen*, he went so far as to claim that the traditional Jewish legal prohibition against mixed marriage was no longer justified in the modern era.

Holdheim's introduction to his 1852 collection of sermons typifies his convictions. In the preface, Holdheim wrote:

> The author regards it as the task of the Jewish sermon to study the ethical spirit of Judaism's oldest institutions which, though vanished from life, proudly, as immortal monuments of the Jewish spirit, look down upon the millennia to illuminate and warm the spirit and heart of the Jewish community and to awaken in its bosom a lasting love of and attachment to the inexhaustible legacy of the religion of their fathers. It is only the firm belief in the immortality of the ethical spirit, for which the national-religious institutions once served as the material shell that give rise to a feeling of comfort over the disappearance of the institutions themselves …[28]

By nullifying those parts of a Jewish legal tradition that were foreign to a Protestant-Enlightenment conception of "religion," Holdheim not only justified Jewish entry into the modern political order but also promoted an attitude toward the law that was far removed from that of classical rabbinic tradition and clearly constricted the areas of life that Jewish law traditionally addressed. He gave explicit voice to his mature position in his 1859 *Ma'amar Ha-ishut* where he asserted that any affirmation whatsoever of rabbinic Judaism and its legal teachings was nothing more than a commitment to falsehood and distortion.[29] His oft-quoted 1845 statement in his *Das Ceremonialgesetz*, "The Talmud

speaks out of the consciousness of its age and for that time it *was* right, I speak out of the higher consciousness of my age and for my age I *am* right,"[30] fully captures his belief in human progress and autonomy.

In the final analysis, Holdheim would not abide the rabbinic doctrine of *hidardarut ha-dorot*, the decline of the generations from Sinai until now. Instead, he asserted that Jewish authority ultimately rests in the autonomous conscience and reason of the leaders of the Jewish people in a more advanced modern age – and not in teachings derived from rabbinic teachers of yore.[31] Only the ethical components of Jewish law remained permanently valid in his thought. Holdheim condemned rabbinic Judaism no less than Kant and ultimately produced a portrait of Judaism as ethics in keeping with the spirit of Kant. It is small wonder that Heinrich Graetz, commenting upon these views of Holdheim, wrote, "Since Paul of Tarsus, Judaism had not known such an enemy in its midst, who shook the whole edifice to its very foundation."[32]

Samuel Hirsch, Chief Rabbi of Luxembourg from 1843 to 1866,[33] in his 1843 *Religionsphilosophie der Juden* and his 1844 *Die Reform im Judenthum* as well as in letters and other writings espoused a conception of Judaism that both echoed and went beyond the positions that his colleague Holdheim had adopted on the issue of Jewish law. An exploration of his views will produce a more nuanced understanding of the similar yet different views that nineteenth-century spokesmen for Reform Judaism adopted on the question of antinomianism in Judaism.

In his *Die Reform im Judenthum*, Hirsch, like Holdheim, was critical of talmudic Judaism. He claimed that the Talmud presented the traditions of the past and that the rabbis over time failed to appreciate that while religious principle remains constant, every age has the privilege of altering the external forms of Judaism.[34]

Hirsch did concede that the ceremonial-ritual aspects of Judaism were of some utility. After all, ritual reminded the Jews of their ethical task. However, ritual was of no import in and of itself. Instead, the purpose of the ritual forms is exclusively symbolic of the eternal principles of the religion. Consequently, Hirsch charged, later generations were overly attached to law and erroneously identified Judaism as embracing *nomos*.[35]

In a telling passage that expresses his critique, Hirsch condemned Orthodox rabbi Samson Raphael Hirsch (1808–1888) for wanting "to know Judaism only from its literature – Pentateuch, Prophets, Writings, Talmud and Midrash."[36] In doing this,

Samuel Hirsch charged that Samson Raphael Hirsch erroneously affirmed an outdated position that viewed law as central to Judaism. Indeed, according to Samuel Hirsch, this stance was "initiated by Christians … and has been echoed thousands of times from Paul to Hegel." Hirsch maintained that the commitment to law that Samson Raphael Hirsch and Orthodox Judaism displayed meant that the Orthodox and their spokesmen were committed to meaningless duties devoid of moral import. He contended that the essential error of the Orthodox lies in placing "so much weight upon the externals of Judaism," that they ignore

> the warning of the venerated Jewish sage R. Hiyya, "Do not make the fence greater than the main thing, lest it collapse and destroy the plants" (Bereshit Rabbah ch. 19). It recognizes as pious and authentic Jews only those who hold fast to the externals. By their account, the externals alone are enough to be a pious Jew."[37]

The Orthodox mistakenly believe that through their external actions "the Jew enters into a relationship of service with God."No less than Paul in the New Testament, they incorrectly identified Judaism with law.[38]

Samuel Hirsch maintained that the essence of Judaism was to be found not in law but in the notions of freedom and morality. Indeed, Hirsch proclaimed that the notion that the human being is above all free and unfettered by the dictates of law stands at the heart of Jewish religious tradition. As he wrote:

> The human being first becomes uniquely human with the word "I." In what does this "I"-statement consist? [It consists] in freedom itself. We can articulate what is unique to the human being by saying: the human being is a free essence, born to freedom. Freedom is what first makes the human being into the human being.[39]

In short, *nomos* plays no role.

In offering this description of Judaism, Hirsch built upon the foundations that Kant himself had erected in his philosophical writings on ethics. In his *Metaphysics of Morals*, Kant famously began with the notion that the only thing that is unqualifiedly good is a "good will." He then went on to point out and affirm the distinction between the realm of nature and the realm of morality. The former operates according to set laws and patterns.

Nature is amoral. It is not marked by intentionality. In contrast, the kingdom of ethics in which human beings operate is marked by freedom and choice. Unlike the mechanistic world of nature, humans operate within a domain marked by volition. Judaism understood this and called upon persons not to be reconciled to fate. Rather, humans are called upon to acknowledge the responsibility that is thrust upon each individual to actualize freedom through choice. Hirsch underscored this point by asserting that "Religious life [consists of] nothing other … than eternally self-realizing freedom. Religious life is the life in freedom."[40]

Samuel Hirsch did not conceptualize this freedom as license to do whatever persons want. Rather, he asserted that freedom constituted the liberty to perform our duty. Humanity could never be free unless humans did what they ought to do. In language reminiscent of Kant, Hirsch contends that "the eternal ought" is to become the law of human life. As he wrote, "You must make the eternal ought the law of your life by your own volition."[41]

In Hirsch's schema, Judaism is both the religion of duty and the religion of freedom. Judaism affirms the consciousness of this freedom and teaches that duty is not a burden, but an expression of dignity. The prophets were the quintessential exponents of this philosophy, and the ethical monotheism that they propounded – not *nomos* – is Judaism. Unfortunately, rabbinic Judaism perverted these teachings of the prophets by growing into a religion of outward law, where performance of an ethical obligation was regarded as no more sacred than the observance of dietary laws. However, this was wrong. Hirsch wrote, "All forms that cannot be informed by inner spiritual content have no right to exist. Talmudic Judaism is therefore condemned to extinction or death." He then contended, "Humanity knows of God as the principle and cause of its freedom. God wants the human being to be free. The abstract concept of God is conferred immediately with abstract freedom."[42] God creates Humanity as an expression of His very being and His love. The human is free to work out his freedom as he wills.

This emphasis on freedom led Hirsch to respond to Christian critics like Hegel who contended that Christianity was the apogee of "absolute religion." He faulted the Christian dogma of original sin as simply wrong, and he rejected the claim that humankind had fallen from grace and could only be forgiven and redeemed vicariously through the expiatory death of Jesus on the cross. Hirsch proudly proclaimed that

Judaism rejected these dogmas. Judaism, in contrast to Christianity, was not shrouded in the paradox and mystery of a savior who is simultaneously a man (finite) and God (infinite). Instead, Judaism asserts that human beings, created in the image of God, are volitional beings marked by reason and choice. Judaism – contra its modern-day critics – is not the religion of slaves who bow obsequiously to a commanding God because of fear of reward and punishment. Rather, Judaism is the religion of freedom that promulgates universal values and charges the Jew with the mission of sanctifying existence. Its truths are accessible through reason. The rationality and ethics of Jewish teachings allow Judaism to present a new understanding of religion to the world that can benefit all humanity. It is in this sense that the Jewish people are chosen to establish God's kingdom on earth, a world marked by truth and virtue. Judaism, not Christianity, is the true expression of "absolute religion."[43]

Furthermore, the goals of Judaism – the establishment of a world marked by justice and truth – constitute more than just the modern manifestation of "absolute religion." They also define the telos of Judaism as parallel to aims of the modern state. Work on behalf of civil society is now law for the Jew, for the messianic thrust of civil society will allow God's kingdom to be realized. The world has arrived at the threshold of a future where freedom, truth, and justice for all are about to be realized. That which society seeks – truth and justice for all – is exactly what Judaism promotes. Present-day Judaism has joined in the larger struggle of civil society that seeks to make all men free.[44] As Andreas Gottzman has pointed out, Hirsch, by identifying civil society with the universal goals of Judaism, dissolved the conflict between religion and state for the Jew and responded to Bauer's charge that the Jew was unfit for emancipation.[45] Furthermore, any symbol which restrains the Jew from fulfilling that goal must be cast aside. Instead, symbols appropriate to the age must be created. In making these claims, Hirsch redefines Judaism apart from any rabbinic or traditional conception of law. From a traditional Jewish perspective, his antinomianism was unbridled.

Abraham Geiger (1810–1874) of Breslau and Berlin, arguably the foremost spokesman for Reform Judaism in the nineteenth century and the founder of the Hochschule fuer die Wissenschaft des Judentums in 1872, had a more conservative bent than his colleagues Holdheim and Samuel Hirsch. As Petuchowski has observed, his approach to Judaism was "organic," not "revolutionary."[46] This element in his character

caused him to be open to retaining traditional Jewish customs and rituals in ways that his Reform peers were not. Indeed, he forthrightly declared, "I am not willing to subscribe to a complete abolition of all ceremonial law in Judaism."[47]

Nevertheless, Geiger was unquestionably a Reform Jew, and his stance on Jewish law was surely akin to that of Holdheim and Samuel Hirsch. He recognized that his view of Judaism was not identical to that of more traditional co-religionists, and he admitted that he departed from a strict observance of Jewish law. In an 1858 letter, Geiger cited an anonymous critic of Reform Judaism who had charged that Reform was marked by a "wholesale renunciation of Jewish law." The critic asked, "Can anyone who subscribes to such … still claim to be a Jew?"[48]

Geiger responded unapologetically on behalf of Reform Judaism to his disputant. He wrote:

> Should present-day Judaism be robbed of its solemn sanctity just because it does not punctiliously adhere to *all* the ceremonial rites of old? Is it not true that, even today, Judaism joyously marks the Passover holiday as the celebration of Israel's entry into the history of the world; that it still solemnly celebrates Shavuot as the feast marking revelation and the glorious beginnings of true faith; that it views the New Year even now, not as an occasion for gay and noisy congratulations, but as a solemn admonition for introspection, and the Day of Atonement as a magnificent solemnization of self-abasement and spiritual purification?

Geiger then continued by defending his vision of Reform and claimed that his approach to Judaism was a legitimate one in keeping with the historical stream of Jewish tradition despite his admitted departures from the talmudic-legal and nationalistic dimensions of the Jewish past. As he phrased it:

> Should I really be deprived of my portion in the great history of Judaism, in the splendid spiritual struggles of the prophets, in the heroism of the Maccabees against decadent Hellenism and in Israel's persevering fight against the Roman world conquerors; should I lose my share in the intellectual flowering in Spain, in the Provence, and in Italy, and in the great upsurge of the modern era; in short, should I forfeit my portion in the profound spiritual nature of the entire history of Judaism

> just because I do not share the views of the talmudists and casuists and the philosophies of Ibn Gabirol and Maimonides with regard to ceremonial law, and because I do not join Judah Halevi in the pilgrimage to Jerusalem?[49]

In viewing this statement, it is clear that whatever authority and importance Geiger may have accorded the rituals and observances of the Tradition did not stem from a commitment to the mandates and license of classical Jewish law. He foreshadowed this position in a sermon he delivered on July 21, 1838, in Breslau. There the youthful Geiger stated, in tones that echo the viewpoints of Holdheim and Samuel Hirsch,

> So, too, my Israelite, be very mindful of the pure and genuine grain of wheat in your faith, of the pure fear of God, so that you will work in behalf of the welfare of mankind. The outer shell, the ritual forms, are but the bearers of the spirit in which the spirit becomes visible and by which it may mature; but do not forget that they are of no further use to piety once they no longer bear the spirit within them. Times and circumstances change, and necessitate many modifications and new institutions which, in keeping with contemporary circumstances, are needed to keep our religion alive … All that changes is the outer shell, only some outward forms undergo modification; the essence remains intact.[50]

The consistency of these views regarding the ephemeral nature of the ceremonial commandments within Judaism over his lifetime is evidenced years later by the mature Geiger. Writing shortly after the publication of his famed *Urschrift und Uebersetzungen der Bibel* in 1857, Geiger proclaimed:

> Even at a time when the bulk of ceremonial law was held in far higher esteem and was deemed far more binding, the sages of old nevertheless declared that he was a Jew in the true sense of the word who would merely reject idol worship and would not associate any other power with the One God.[51]

Geiger elaborated on these sentiments and expressed his views on Jewish ceremony and faith as well as the ultimate mission of Israel when he straightforwardly asserted,

> The core [of Judaism] is the pure faith in God. At a time when unbelief and superstition, idolatry and nature-worship were rampant everywhere, this core had to be enveloped in a mass of ceremonies, so that the pure spiritual treasures would not be crushed. But now spring has long since come into the life of mankind. [The entire] civilized world has discarded primitive idol worship and the concepts of God and His worship have been refined. Hence the spirit of Judaism no longer needs the rough mantle. On the contrary … it must shed it in order to sow the seeds of its ideals that they may bear fruit in the total development of mankind.[52]

For Abraham Geiger, there was a creative spirit inherent in Judaism that produced principles and moral ideals of undying authority. However, in his schema, ceremonial laws were seen only as instrumental. They were tangible ever-evolving representations of the spirit. No single ceremony was enduringly binding. As Michael Meyer writes of Geiger:

> Israel's task in the world was to preserve and propagate that message whose basic content remained unchanging, though its elaboration evolved from age to age. The message was sustained by the ongoing working of God's spirit in and through Israel. It was that spirit, divine in origin, but human in expression, Geiger argued, which assured the continuity of Judaism even as it was destined ultimately to become the religion of humanity.[53]

Geiger articulated the basis for this approach to Jewish law and the mission Judaism assigned the Jewish people in countless writings over his lifetime. However, in his *Das Judenthum und Seine Geschichte*, published in three volumes in Breslau from 1864 to 1871, Geiger lucidly articulated his historical approach to Judaism and clearly offered an alternative to Orthodox notions of revelation as the ground for Jewish religious authority. Simply put, Geiger rejected the notion of divine revelation at Sinai and posited instead that the Jewish people possessed a "religious genius" that allowed it to discern through reason "the close relationship between the spirit of man and the Universal Spirit." This allowed Israel to "grasp the higher challenges of human existence and perceive the profound ethical quality in man with clarity and intensity" from its origins in the Bible until the present day. Israel serves as the vehicle for divine revelation, and the Jews, "as

the people of revelation," have been the bearers of universal spiritual and ethical messages throughout history.[54]

In his lectures, Geiger outlined four periods of Jewish history. The first period, which Geiger labeled the period of Revelation, is found in the Bible. In this period, the original genius of the Jewish people for religious and ethical perception emerged. Geiger identified the second period as one of Tradition. The rabbis of the Talmud here adapted the Judaism of the Bible to the demands of life, and Geiger speaks at great length of the genius and flexibility that marked so many of the *tannaim* and *amoraim* as original and creative voices of the Jewish spirit. However, the period of the sixth to eighteenth centuries was one of Rigid Legalism. While Geiger recognized the creative insights and spirit of men like Maimonides, Rashi, Ibn Ezra, and Saadia Gaon during these years and heaped praise upon them as individuals, he simultaneously maintained that the dominant ethos of this period in Jewish history was one marked by an inflexibility that removed Israel "from the present" and led Israel "to remain part of a past that was misinterpreted."[55] The final achievement of this period in Jewish history was symbolized by the Shulḥan Arukh (1654) of Rabbi Joseph Caro, a work in which everything from the past was rigidly codified in final form in a "Judaism of law and statute."[56]

This schema led Geiger to hail the modern age as one of Liberation and Criticism. He declared, "The Middle Ages and the inflexibility that is associated with it have come to an end."[57] He felt "a new world was about to rise,"[58] one in which the "creative force of revelation" that Israel had unleashed during the time of the Bible would continue to "pulsate" and the "holy, ennobling spirit" of Judaism would "fructify the times anew" by giving "birth to new forms … in accordance with new needs and situations."[59] The nineteenth century had loosened the legalistic fetters of the previous period through the use of reason and critical, historical investigation without interrupting the connection with the past. Judaism would be renewed apart from the law.

The content of the Reform position that Holdheim, Samuel Hirsch, and Geiger proclaimed is captured in a representative Reform statement of Principles adopted at the Leipzig Synod of 1869. The Synod declared in a statement of principles that Judaism was

> in agreement with the principles of modern society and of the state as these principles were announced in Mosaism and developed in the teachings of the prophets, viz., in agreement with the principles of the unity of mankind, the equality of all before the law, the equality of all as far as duties toward and rights from the fatherland and the state are concerned, as well as the complete freedom of the individual in his religious conviction and profession. The Synod recognizes in the development and realization of these principles the surest pledges for Judaism and its followers in the present and the future, and the most vital conditions for the unhampered existence and the highest development of Judaism. The Synod recognizes therefore that it is one of the essential tasks of Judaism to acknowledge, to further, and to represent these principles and to strive and work for their realization.[60]

The connection between Reform Judaism and the philosophy of an Enlightenment political liberalism that had made Jewish emancipation possible could not be more pronounced. They celebrated the end of a Jewish period of legalism. For them the authority of Jewish law had come to an end. Scripture was vital not because it was divine revelation, but because it was the depository of Israel's literary testimony that preserved the eternal principles of truth, rationality, ethics, and justice that were at the core of Judaism. To be sure, Judaism contained ritual elements. However, they were nothing more than temporary vessels that carried forward the eternal ideals and principles of Judaism throughout the ages. These Reform thinkers felt they had refuted the charges Bauer and Kant had lodged against Judaism and Jews and were confident that they had created a Judaism that was fully congenial with the demands of the modern state and modern ethical thought. The link with Jewish history was not broken. However, the link with *halakhah* as traditionally conceived and practiced surely was. While the Reform connection to the ethical teachings of Judaism were such that it may not be fair to label Reform thought of this era as completely antinomian, as viewed from the standpoint of more traditional Jewish thinkers it was surely anarchic. This chapter will conclude by considering how Orthodox critics led by Rabbi Samson Raphael Hirsch and the Positive Historical School of *Liberales Judentums* headed by Rabbi Zacharias Frankel chastised

the Reformers for what they regarded as their inauthentic approaches to Jewish religious faith and law.

Positive-Historical and Orthodox Responses

The leaders of the more conservative wing of *Liberales Judentums* in Germany led by Rabbi Zacharias Frankel of the Jewish Theological Seminary in Breslau and the heads of the Orthodox Movement in Germany under the guidance of Rabbi Samson Raphael Hirsch of the Separatist Orthodox *Israelitische Religionsgesellechaft* in Frankfurt were hardly sanguine about the positions that Reform rabbis like Holdheim, Geiger, and Samuel Hirsch had adopted in relationship to Jewish law. Despite their theological differences concerning revelation and history, both Positive-Historical and Orthodox Judaism were characterized by an ongoing commitment to the centrality of Jewish law in Judaism and their criticisms of Reform Jewish stances on this issue as well as the Reform Jewish leaders who put forth their views on the matter were severe.

Adherents of Positive-Historical Judaism adopted theological positions that were in important respects akin to that of the Reformers. Specifically, Frankel and his followers, like the spokesman for Reform, spoke of the historical nature of Jewish religious tradition. Rather than affirming the notion of a timeless law impervious to change, they adopted the canons of modern critical scholarship that spoke of Judaism as being not only in but of history. Frankel and other proponents of Positive-Historical Judaism, no less than their Reform colleagues, were embedded in the cultural milieu of nineteenth-century Germany. They were devoted to *Wissenschaft des Judentums*, which was, as Ismar Schorsch has observed, "the most potent intellectual force on the German Jewish scene." Yet, these men, as Schorsch further notes, "began to wield *Wissenschaft* … conservatively to defend traditional Judaism and to resist Reform [and its attacks on Jewish law]." For these men, history "revealed" the ongoing centrality of law in Judaism. To abrogate or cast aside Jewish law rendered Judaism inauthentic and fatally diminished the essence of Jewish faith.[61]

Frankel had absolutely no affection for Holdheim. When he passed away in 1860, Frankel opposed Holdheim's burial alongside the graves of other talmudic scholars in Berlin, stating,

> But if death elevates, it does not turn an enemy of positive Judaism into its friend, and it does not transform a person for whom the foundations of Judaism lacked all

binding nature into a believer. To bury him alongside those old teachers shows contempt both for the deceased and for the beliefs they maintained.[62]

The antipathy Frankel felt for Holdheim stemmed from a lifetime of bitter disagreement with the Reform champion. In a private letter to his colleague Rabbi Michael Sacks in 1844, Frankel initially said that it was not yet worthwhile to attack either Holdheim or Geiger or their Reform party publicly. He contended that the time for that would come.[63] However, when Holdheim published *Die Autonomie der Rabbinen*, Frankel could not constrain himself. In the pages of his *Zeitschrift fuer die religioesen Interessen des Judenthums*, Frankel accused Holdheim of being a traitor to the Jewish religion, and his attacks on Holdheim were full of invective. Holdheim and the Reformers had identified Jewish legalism as a transitory and contingent element in Jewish faith. Reform had maintained that the ethical monotheism of "Mosaism" and the universal morality of the biblical prophets constituted the enduring core of Judaism. The legal elements of the tradition were therefore transitory and contingent and could be discarded as belonging to the past. Frankel further chided Holdheim and the Reformers for promoting the notion that "state" and "religion" embraced identical aims of "morality, humanity, and justice." To assert that the state promoted these humanistic ideals no less than Judaism erroneously cast the state in a sanctified light. Indeed, this view allowed Holdheim and Samuel Hirsch to *subordinate* Judaism to the state. Yet Frankel ridiculed this contention – which led Holdheim to grant religious sanction to the motto, "Obedience [to the civil law] is every citizen's first duty – as a reduction of religion."[64] Holdheim, and by extension Reform ideology, turned the state into an object of religious veneration and reduced Judaism to insignificance, thereby reducing Judaism to a system based on a "dog's obedience."[65] By arguing that marriage was a civil act and that Judaism could therefore cede control over marriage to the state, Frankel charged that Holdheim had sold the religious integrity of Judaism for "a mess of pottage." Judaism could not surrender such authority to the state.[66]

Frankel would not subordinate Judaism to the state, nor did he feel such surrender was required for the Jew to participate as an equal in the civil order as Reform had claimed. Judaism had no reason to apologize for its sense of morality, and Frankel felt the Jew could proudly be wedded to both traditional Jewish law and contemporary

cultural and political norms. Frankel did not agree that Jewish participation in the modern political order was dependent upon the assignment of marriage to a civil realm, nor was it contingent upon the abandonment of traditional Jewish commitments to rabbinic and Jewish ritual law. His position is indicative of the Positive-Historical trend in German *Liberales Judentums*, which took an approach to the question of the ongoing centrality of law to Judaism decidedly different from that of the Reform wing of German *Liberales Judentums*.[67]

Spokesmen for Orthodox Judaism were surely no less critical of the Reform party and its stance on Jewish law than were Frankel and his Positive-Historical camp. They also charged that the Reformers had gone beyond the pale of authentic Judaism, and the publication of *Die Autonomie der Rabbinen* by Holdheim unleashed a torrent of fury against Holdheim and his Reform compatriots. In a pamphlet that received wide circulation, Rabbi Pinchas Heilprin thundered,

> I ask you, Holdheim! Tell me, where has your heart gone? And if according to your word, you would say, "All who are sanctified in marriage are sanctified according to the authority of the rabbis," – "according to the authority of the rabbis" we have heard! "According to the authority of heretics and non-believers like you," we have not heard![68]

Samson Raphael Hirsch also could not tolerate the positions that Holdheim put forth in *Die Autonomie*, including his contention that *dina de-malkhuta dina* could be employed to designate marriage as a civil act that fell under the legitimate purview of the state. In *Zweite Mitteilungen aus einem Briefwechsel ueber die neuste juedische Literatur*, Hirsch fulminated against Holdheim's abdication of rabbinic authority in Jewish matrimonial law and contended that the argument Holdheim constructed about intermarriage was inconsistent and involved misinterpretations of talmudic passages.[69] He labeled Holdheim's *Autonomie* as "anti-Talmudism in disguise" and even compared Holdheim to King Jeroboam who brought disaster upon the Jewish people.[70]

To be sure, Samson Raphael Hirsch, like Frankel and the representatives of Reform, desired to participate fully in the civic and cultural life of nineteenth-century German society. He justified this desire for accommodation to the modern world in a

comment he issued on the phrase, "*beḥuqqotehem lo telekhu* – You shall not follow their practices," found in Leviticus 18:3. Hirsch wrote:

> This statement is explained by the Torah as follows: You may imitate the people among whom you live in everything that they practice on rational grounds, but nothing [that they practice] from grounds related to their religious customs or with immoral customs.[71]

This understanding allowed for an Orthodox accord with the modern world. Hirsch's views affirming the legitimacy of Jewish cultural integration into the contemporary setting were akin to the proponents of German *Liberales Judentums*. Cultural and religious integration was unquestionably the hallmark of the nineteenth-century German-Jewish community.

However, this overlap among all sectors of the German-Jewish community of the time should not obscure the real theological differences over law and revelation that distinguished Samson Raphael Hirsch and the Orthodox from the Reform Movement and the champions of *Liberales Judentums*. As Hirsch, speaking about the relationship between revelation and Jewish law, phrased it: "The Written Law and the Oral Law are equal. Both were revealed to us from the Mouth of the Holy One, Blessed be He."[72] Decades later, writing in his newspaper *Jeschurun*, Hirsch defined his stance once more with absolute clarity: "Jewish law is perfect and everything about it is fundamental – one has the choice of acknowledging it fully and completely, or denying it."[73] His commitment to Jewish law as timeless and to the divine authority that he posited as providing for its foundation inexorably led him to condemn his Reform opponents – and even Frankel despite the latter's embrace of Jewish law! As his colleague Rabbi Esriel Hildesheimer (1820–1899) of Berlin, in an observation that could have been made by Hirsch, was to word it: "How little is the principled difference between the [Breslau] reformers who do their work with silk gloves on their hands and the Reformer Geiger who strikes with a sledgehammer."[74]

The Orthodox argued that the abandonment of traditional Jewish law on the part of Reform Judaism resulted from a Reform rejection of the classical rabbinic belief upon which authentic Judaism rested, and they believed the historicist views of Frankel and the

Positive-Historical school would lead to the same rejectionist end. As Rabbi Zvi Hirsch Chajes of Zolkiew charged, the Reformers did not accept the doctrine of "*Torah min ha-shamayim u'nitzhiteha*," the divinity and eternality of Jewish law. They saw Jewish laws and practices, "like women's fashions, as going in and out of style. Like fashion-conscious women, they were all too anxious to discard the old in favor of the new."[75] Since, "in their disgusting opinion, the Torah is not eternal," Reform ideologues were "*kofrim* – heretics."[76] In making this charge, Chajes echoed the views of Rabbi Ya'akov Ettlinger of Altona, the teacher of Samson Raphael Hirsch, who charged that these Reform rabbis were *kofrin b'ikkar*, ones who denied the most fundamental principles of Jewish faith.[77]

Chajes, like Samson Raphael Hirsch and other Orthodox peers, reserved his most venomous views for Holdheim, who, he accurately noted, had opposed traditional Jewish laws of marriage and divorce as well as the ritual of circumcision. Chajes further charged that Holdheim had advocated moving the Sabbath from Saturday to Sunday and that he would not allow the shofar to be blown on Rosh Hashanah. While Chajes recognized that Geiger was more moderate than Holdheim, he nevertheless bound the two men and others in the Reform camps all together. All of them had traversed the boundary of acceptable Jewish belief and practice.[78] Chajes queried, "What do we have in common with these people? How are these people able to call themselves by the name of Israel? They have abandoned the fundamental beliefs that serve as the foundation for Jewish faith."[79]

A Brief Afterword

The arguments among the men discussed in this chapter over the role and authority of law in Judaism continue to echo in Jewish religious circles to this day. The ideological divides among denominational camps in contemporary Judaism still center on diverse viewpoints over *halakhah* and its foundations in ways that were articulated in the characterizations and disagreements among men like Holdheim, Samuel Hirsch, and Geiger on the one hand and Frankel and Samson Raphael Hirsch on the other. From this perspective, the nineteenth-century debates over the place of *nomos* in Judaism transcend the time and place in which they took place. They not only cast light on the past but also retain enduring relevance for students of Judaism as well as for the lives of Jews today. The content of those positions and disputes are echoed in the theological and legal stances and affirmations that are present in the contemporary Jewish world.

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[1] Batnitzky, *How Judaism*, p. 2.

[2] See a number of Scholem's essays on this topic, especially "The Crisis of Tradition in Jewish Messianism," and "Redemption through Sin," which are included in Scholem, *The Messianic Idea*. As Arthur Hertzberg, in his foreword to the 1995 edition of this volume, p. ix, wrote, "In Scholem's view, the modern era in Jewish history began with [a revolt] against the accepted prevailing [norm] of Jewish life in earlier centuries – that Jews must obey the prescribed Halakhah … [Scholem] asserted that the modern era in Jewish history began with the breaking of the conventional barriers of faith and practice by Shabbatai Zevi and his prophet, Nathan of Gaza … The adherents of Shabbatai Zevi kept alive a Jewish teaching of rebellion against the law."

[3] For the views and researches of Shochet, see his *'Im hilefei tkufot*, while the work of Endelman can be viewed in his *The Jews of Georgian England*.

[4] Whether rabbinic Judaism of the classical talmudic period actually maintained such a view of divine law is discussed in Chapter 3 of the current volume.

[5] Batnitzky, *How Judaism*, p. 1.

[6] Petuchowski, *Prayerbook Reform*, p. 49.

[7] For a summary of this controversy and its literature, see ***ibid.***, pp. 49–54 and 84–98, as well as Meyer, *Response to Modernity*, pp. 53–61.

[8] Petuchowski, *Prayerbook Reform*, p. 98.

[9] Blidstein, "Early Reform and Its Approach," p. 85.

[10] Harris, *How Do We Know This*, p. 157.

[11] Lowenstein, *The Mechanics of Change*, p. 85.

[12] ***Ibid.***, pp. 85–86. Also see Meyer, *Response to Modernity*, pp. 100ff.

[13] Kant, *Religion within the Limits of Reason Alone*, p. 116.

[14] ***Ibid.***

[15] Bauer, *The Jewish Problem*, p. 22.

[16] ***Ibid.***, p. 47.

[17] ***Ibid.***, p. 55.

[18] ***Ibid.***, p. 67.

[19] ***Ibid.***, pp. 110ff.

[20] ***Ibid.***, p. 122.

[21] See the discussion of this legal principle in Chapters 4, 5, and 11 of the current volume.

[22] ***Ibid.***, pp. 96ff.

[23] Holdheim, *Ueber die Autonomie*, pp. 49ff.

[24] Holdheim, *Das Ceremonialgesetz*, pp. 24ff.

[25] ***Ibid.***, pp. 73ff.

[26] Holdheim, *Ueber die Autonomie*, p. 159.

[27] Plaut, *The Rise of Reform Judaism*, p. 222.

[28] Holdheim, *Neue Sammlung*, p. vii.

[29] Holdheim, *Ma'amar Ha-ishut*, pp. 23–26.

[30] As quoted in Meyer, *Response to Modernity*, p. 83.

[31] *Ibid.*, p. 81.

[32] Graetz, *History of the Jews*, p. 680.

[33] In the last decades of his life, Samuel Hirsch served pulpits in Philadelphia and Chicago.

[34] Hirsch, *Die Reform im Judenthum*, pp. 16–17.

[35] *Ibid.*, p. 17 and pp. 64ff.

[36] These selections from the writings of Samuel Hirsch are taken from Greenberg, *Modern Jewish Thinkers*, p. 183.

[37] *Ibid.*, p. 190.

[38] *Ibid.*, p. 184.

[39] *Ibid.*, p. 185.

[40] *Ibid.*, p. 187.

[41] Quoted in Hirsch, *Rabbi Emil G. Hirsch*, p. 102.

[42] Greenberg, *Modern Jewish Thinkers*, p. 191.

[43] On all these points about Samuel Hirsch and Hegel, see Frishman, "True Mosaic Religion," pp. 285ff.

[44] *Ibid.*, pp. 294ff.

[45] Gotzmann, "Zwischen Nation und Religion."

[46] Petuchowski, *Studies in Modern Theology*, p. 260.

[47] Wiener, *Abraham Geiger*, p. 288.

[48] *Ibid.*

[49] *Ibid.*, p. 289.

[50] *Ibid.*, pp. 247–48.

[51] *Ibid.*, p. 284.

[52] *Ibid.*, p. 286.

[53] Meyer, *Response to Modernity*, p. 99.

[54] Wiener, *Abraham Geiger*, p. 181.

[55] *Ibid.*, p. 196.

[56] *Ibid.*, p. 214.

[57] *Ibid.*

[58] *Ibid.*, p. 195.

[59] *Ibid.*, p. 185.

[60] The statement of the Leipzig Synod is printed in Philipson, *The Reform Movement*, p. 293.

[61] Schorsch, *Heinrich Graetz*, pp. 8–9 and 11.

[62] Cited in Braemer, "Samuel Holdheim," p. 211.

[63] *Ibid.*, pp. 217–18.

[64] Frankel, "Review," pp. 207–08, as cited in Gotzmann, "From Nationality to Religion," p. 53.

[65] *Ibid.*

[66] Ellenson, *After Emancipation*, p. 146.

[67] ***Ibid.***, p. 153.

[68] Heilprin, *Teshuvot*, p. 71.

[69] Holdheim, *Zweite Mitteilungen*, pp. 16–17.

[70] As cited and discussed by Rosenbloom, *Tradition*, pp. 80–82.

[71] Hirsch, *Horeb*, p. 505.

[72] Hirsch, *Shemesh Marpei*, p. 206.

[73] Hirsch, *Jeschurun*, p. 34.

[74] Hildesheimer (ed.), "Harav azriel hildesheimer," p. 66.

[75] Chajes, *Minhat Kena'ot*, pp. 978–81 and 985.

[76] ***Ibid.***, p. 1004.

[77] Ettlinger, *Binyan Tziyon*, p. 74.

[78] Chajes, *Minhat Kena'ot*, pp. 999–1003 and 1006–08.

[79] ***Ibid.***, pp. 979 and 985–86.

10

New Developments in Modern Jewish Thought: From Theology to Law and Back Again

Yonatan Y. Brafman

Despite the expectations of many, the twentieth century witnessed continued constructive intellectual engagement with *halakhah*. Over the course of the eighteenth and nineteenth centuries, the dissolution of the European *kehillot*, the semi-autonomous Jewish communities, and the related political pressure for Jews to integrate into emerging nation-states rendered observance of *halakhah* voluntary and eventually less widespread. The collapse of what had been a nearly all-encompassing social form of traditional Jewish life created new, non-Jewish social reference groups for Jews and destroyed the "plausibility structures" that had made the observance of *halakhah* the default option for many Jews.[1] In this new political and social context, both enlightenment and feminist critiques of the authority of *halakhah* were leveled. Jewish thinkers who sought to reaffirm the significance of *halakhah* were thus required to confront them in order to convince modern Jews, whose primary social and intellectual context was European and American culture, that observance of Jewish practice was defensible and even valuable.

Their efforts transitioned from theology to law and back again over the course of three waves. In the first third of the century, a philosophical-theological debate concerning *halakhah* and revelation was conducted among liberal German-Jewish thinkers, including Hermann Cohen (1842–1918), Martin Buber (1878–1965), and Franz Rosenzweig (1886–1929). This debate responded to the Enlightenment critique of Judaism expressed most famously by Immanuel Kant (1724–1804) that focused on its legalism. By midcentury, Orthodox Jewish thinkers in Israel and the United States, including Joseph Soloveitchik (1903–1993) and Yeshayahu Leibowitz (1903–1994), reacted to the views of their German-Jewish predecessors by developing philosophies of

halakhah, according to which Jewish law is foundational for Jewish thought. In the century's later decades, feminist thinkers, including Judith Plaskow (1947–), Rachel Adler (1943–), and Tamar Ross (1938–), initiated a discussion that continues into the twenty-first century concerning the compatibility of feminism and *halakhah*. This discussion recapitulates and extends the prior waves in moving from theology to law and back again.[2]

In the following, I examine each of these waves in turn. I first explore the debate among Cohen, Buber, and Rosenzweig with a focus on whether they accepted the Enlightenment criticisms of Judaism, aimed to answer them, or rejected their premises. I next analyze Soloveitchik's and Leibowitz's philosophies of *halakhah* in terms of their self-sufficiency, definitions of *halakhah*, and political implications. I then survey the discussion among Plaskow, Adler, and Ross with attention both to their disagreements and to their collective development of a tradition of Jewish feminist theological and legal reflection. I conclude by reflecting on the significance of attempts, which are found in each wave, to re-erect in the modern world "plausibility structures" that can support halakhic practice.

Halakhah in Theology: Cohen, Buber, and Rosenzweig

The Enlightenment critique of Judaism focuses on its purported legalism, which it contrasts with a true religion derived from Protestant Christianity. According to this critique, Jewish law is inconsistent with reason, autonomy, and morality, and its observance renders Jews unfit for citizenship. While the source of the depiction of Judaism that underlies this critique is Benedict Spinoza's *Theological-Political Treatise*, in which Mosaic Law is described as the obsolete legal system of the ancient Hebrew commonwealth,[3] the fullest expression of the critique is found in Kant's *Religion within the Boundaries of Mere Reason*. For Kant, true religion is the religion of reason, which only prescribes universal moral duties.[4] Though their authority for the individual must derive from her own autonomous reason and will, such duties are represented as commanded by God in revelation. This representation enables the formation of a church, the purpose of which is to support individuals' efforts toward moral perfection. A church stands under the sovereignty of God because only God can ascertain whether an individual performs an action simply because it is her moral duty. In contrast, in a state the legality of an action depends only on the action's outward conformance to the law's requirements. While a state may use coercion to ensure its citizens' obedience, a church must offer only moral encouragement to its members. Additionally, though there may legitimately be many states, churches must aim for a universal union of all peoples because they all share the same moral purpose.[5] Only for this purpose are statutes, or specifically religious norms, introduced. Statutes do not correspond directly to moral duties; rather, they are the means for promoting moral effort, which is the only true way of pleasing God. Still, they may be misunderstood as directly pleasing God. Such perversions of faith distract individuals from complying with their moral duties, and, even when the statutes happen to overlap with moral duties, an individual performs them heteronomously – to please God – and not autonomously – because they are moral duties.[6]

Taken together, a church and its statutes comprise a historical faith, which may approximate the religion of reason. For Kant, Protestant Christianity is closest to the religion of reason, while Judaism fails to approximate it to the barest extent. Because its

laws only concern external actions, which are particular to Jews and which are supported by the threat of coercion and reward of material benefits, Kant argues, "The *Jewish faith*, as originally established, was only a collection of merely statutory laws supporting a political state."[7] Indeed, Judaism is not a religion at all, for it holds that individuals can be justified before God merely through religious acts of cult – those of *halakhah* – the authority of which only derive from revelation and not reason. Moreover, the Jews view themselves as especially chosen by God for this revelation, causing them to be hostile to others and provoking their hostility in turn.[8]

Kant thus levels a philosophical, moral, and – implicitly – political critique of Judaism focused on its purported legalism. Philosophically, Jewish laws do not derive from universal reason but supposed revelation, and so cannot be willed autonomously. They also do not encourage moral effort; rather, they incite hostility between Jews and non-Jews. Indeed, they are vestiges of a failed polity and thus militate against the inclusion of Jews as citizens into universal, that is, European, societies and states.[9] In sum, Judaism is particularistic political law instead of universal religious faith.

Though Cohen, Buber, and Rosenzweig wrote at the far end of the process of Jewish induction into European politics, society, and culture, they lived in an intellectual context that was shaped by the Enlightenment critique of Judaism.[10] While these German-Jewish thinkers disagree over many things, including the significance of *halakhah* for modern Jews, they thus share a concern with its compatibility with reason, autonomy, and morality as well as its political implications. In addressing these issues, Cohen, Buber, and Rosenzweig engage in a philosophical-theological debate concerning revelation and *halakhah* focused on the latter's identification with either teaching (*Lehre*) and law (*Gesetz*) or commandment (*Gebot*).[11]

Cohen applies the distinction between teaching and law, on the one hand, and commandment, on the other, to *halakhah* in his *Religion of Reason out of the Sources of Judaism*, which, as indicated by its title, is a rejoinder to Kant's critique of Judaism in a Kantian mode. Indeed, Cohen was both a founder of neo-Kantianism, the nineteenth-century intellectual return to Kantian philosophy, and an active public intellectual on behalf of the Jewish community. Like Kant, Cohen philosophically interprets a historical faith in order to develop a religion of reason. Yet, he differs from Kant, first, in using Judaism as the historical faith out of which to develop this religion of reason and, second,

in recognizing a greater role for historical development in their relation.[12] Still, Cohen's aim is not to offer a historically accurate picture of Judaism according to the standards of positivism, but to identify its original intellectual insight and then to interpret the history of Judaism in view of it. Also like Kant, he uses this method of idealization to ascertain the contribution of religion to morality while ensuring that it does not undermine the autonomy of morality by grounding moral duties in God's command. In contrast to Kant, Cohen insists on both a more robust notion of revelation and an independent contribution of religion to human culture. His discussion thus proceeds on two tracks: determining the contribution of religion to morality and its independent contribution to human culture.[13]

At the head of these tracks stands the insight that Cohen attributes to Judaism: the uniqueness of God. This idea establishes a correlation between God and God's others. A technical term for Cohen, correlation means that two notions are related insofar as one of them both constitutes and transcends the other. The former, the ideal, serves as the hypothesized foundation and normative standard for the latter, the real; yet the ideal always transcends the real.[14] An interpretation of monotheism, the uniqueness of God means that God both transcends and constitutes all natural beings and moral achievements.[15] Most relevant for the contributions of religion to morality and human culture, God's uniqueness transcends and constitutes both universal humanity and the individual self. Cohen writes, "From the unique God, the view of Judaism is directed to one mankind, and, in the same way to each individual man in his own uniqueness."[16] The idea of a God beyond any particular human group creates the morally significant ideal of a universal humanity. The idea of a forgiving God likewise creates the culturally significant ideal of the atoning, particular self. While the state mediates the creation of universal humanity, the particular self is created in the context of a particular religious congregation.[17] Thus, in contrast to Kant's reduction of religion to an adjunct of universal morality and corresponding rejection of particularistic faiths, Cohen claims that Judaism, in its idea of the unique God, supports universality in morality and introduces particularity in religion.

While Kant reduced revelation to a mode of representation as divine commands of moral duties that are legislated by moral reason and must be willed autonomously, Cohen claims that revelation and reason, especially moral reason, are correlative concepts.

Revelation both transcends and constitutes moral reason by serving as its hypothesized foundation and normative standard.[18] In fact, Cohen argues that this notion of revelation better articulates the Kantian position that morality combines both freedom and duty.[19] Further, because revelation correlates with moral reason, its content exclusively concerns human action, including purely moral rules as well as social and political structures. Indeed, revelation and divine law are identical. Thus, just as revelation transcends and constitutes human moral reason, Cohen maintains, "God's law does not contradict the autonomy of the moral will."[20]

In agreement with Kant, then, Cohen contends that religion is primarily comprised of moral duties. But in contrast to him, Cohen highlights Judaism's world historical role in establishing this truth: "the unique God … gives commandments that are valid as laws for all men: the worship of God is tied to obedience [to them]; they are meant first for the chosen people, then through them for messianic mankind … The commandment is an isolated order; the law is intended to be valid as the foundational law of the moral world."[21] Cohen thus contrasts the temporally and socially bound commandments of polytheistic gods to the universal and timeless moral laws of Jewish monotheism. In fact, the latter are so detached from the context of their introduction that they are better described as "teaching."[22]

Though Cohen is aware that classical *halakhah* contains norms that do not correspond to universal moral duties and that even seem to violate them, he claims to detect a tendency in the Jewish tradition in which morally objectionable as well as merely ritual practices are discarded or modified. Eventually, "The law is moral law, or an aid to the moral law."[23] Pursuant to the correlation between God and humanity, the telos of *halakhah* is universal moral law. Morality thus also serves as standard for the evaluation of Jewish law.[24] Nevertheless, prior to the advent of the messianic age, it must retain some particular, ritual norms for the purpose of isolating the Jewish people, for they must be separate from other peoples in order to preserve the idea of the unique God.[25] Indeed for this purpose, "isolation is indispensible to Judaism."[26]

Cohen thus accepts the premises of the Enlightenment critique of Judaism and aims to answer its charges. In interpreting revelation as the correlation between God and reason, especially moral reason, he shows how *halakhah*, understood as law and teaching, is consistent with reason, autonomy, and morality. Likewise, through the idea

of the unique God, he argues for the legitimacy of Jewish religious congregations and some of the particularistic Jewish laws within the context of a universalistic state.

Buber's response to the Enlightenment critique of Judaism is less direct and more ambivalent. Like Cohen, he identifies Jewish law with the teaching of Judaism; however, he distinguishes between Jewish teaching and law, on the one hand, and Judaism's soul, on the other. He describes his own position on the former as not antinomian, "but neither is it entirely nomistic."[27] *Halakhah* is a form of Jewish religion, which is but one expression of Jewish religiosity. Explicating the contrast between religiosity and religion, he writes: "Religiosity is [the individual's] longing to establish a living communion with the unconditioned, his will to realize the unconditioned through his action, transposing it into the world of man. Religion is the sum total of the customs and teachings articulated and formulated by the religiosity of a certain epoch in a people's life."[28] Religiosity is expressed in deeds, which then become entrenched as the customs that comprise religion. This creates the possibility of antagonism between religiosity and religion, in which religion's customs suppress the possibility of new communions with the unconditioned and novel, unconditioned actions.[29] Such antagonism lies at the center of Buber's misgivings about Jewish law, which can be appreciated through an examination of his notion of revelation.

In his masterwork *I and Thou*, Buber describes the satisfaction of the longing to establish a communion with the unconditioned as revelation. In contrast to Cohen's philosophical conception of revelation as correlation, for Buber revelation is an existential relationship to the Eternal Thou. The latter is not an ideal, as Cohen maintains, but the absolute encountered as subject. In this relationship, the individual does not receive any content, but only the sense of the reciprocity of the relationship, the confirmation of inexpressible meaning, and the charge to verify that meaning in reality through deeds.[30] Buber elsewhere focuses on the transformation that occurs in the individual through revelation: Just as the individual encounters the unconditioned, his response must be unconditioned. Just as the God that he encounters is unified, in the individual's decision to act he must unify the divisions in himself and enact this unification in the world. He must be certain that this is the act that he must do in response, and, in doing it, he must demonstrate that everything worldly can be spiritualized, which Buber describes as actualizing "freedom in God."[31]

Like Cohen, Buber establishes an interpretation of monotheism as the insight of Judaism and relates it to God and the individual. However, while Cohen claims that the unique God correlates with both universal moral humanity and the particular religious self, Buber maintains that the unified God relates to the individual certain in his decision and deed. These positions have different implications for reason, autonomy, and morality. In contrast to Cohen's insistence on the moral significance of religion, Buber insists that the religious act is "falsified if it is viewed as merely an ethical act."[32] Like revelation, the religiosity of a decision and its corresponding deed is not determined by its content, but by whether they are taken and performed with certitude.[33] Buber's focus on the manner instead of the content of the decision and act can be viewed as a radicalization of autonomy. As described, both Kant and Cohen maintain that reason, autonomy, and morality correspond, while they differ over whether all of these are compatible with Jewish law. Buber severs the connections between reason and morality, on the one hand, and autonomy, on the other; yet, he still agrees with Kant, against Cohen, regarding the opposition between Jewish law and such amoral and arational autonomy.

Buber draws the consequences of his views of religiosity, revelation, and autonomy for Jewish law in "Heruth: On Youth and Religion." There he claims that engagement with Judaism is beneficial for Jews seeking to express their religiosity; however, he rejects the claim that they must accept Judaism as either teaching or law. He argues that the universal proclivity for religiosity requires stabilization through engagement in a particular tradition in the context of a community. Judaism is uniquely suited for this task, he claims, because of the purity and completeness of religiosity within it. Still, one must not be enthralled by the past forms of Jewish religion.[34] As opposed to nineteenth- and early twentieth-century attempts, like those of Cohen and others, to identify the teaching of Judaism with determinate content, Buber describes it as "a gigantic process, still uncompleted, of spiritual creativity and creative response to the unconditional."[35] Jewish youth must immerse themselves in all its expressions in search of materials that will aid them in their cultivation of religiosity, which will ultimately yield new contributions to it. While Buber advocates the learning of Jewish texts so long as it involves personal and creative engagement, he is less sanguine about suggestions for Jewish observance. Drawing on the criterion of religiosity, he claims that such observance is only legitimate

for a naïve believer certain that this is what God commanded him. But, Buber argues, "no one familiar with the new religious consciousness of a new youth … will think it could contain the belief in a one-time revelation."[36] For them, who do not possess the certainty of such revelation, observance of Jewish law is a profanation of religiosity.

In marked contrast to Cohen, then, Buber simultaneously rejects many of the premises of the Enlightenment critique of Judaism but agrees with its rejection of Jewish law. Indeed, he adopts its strategy of contrasting Jewish legalism with true religion. This is mainly the result of accepting, in a radicalized form, the criticism of Jewish law as antithetical to autonomy. Kant had claimed that true religion must be reasonable and moral, and that Jewish law is neither; Buber claims that true religion must be creative and personal, and that Jewish law is neither. Yet, while Kant wholly identifies Judaism with legalism, Buber salvages what he takes to be authentic Jewish religiosity from it. However, in a further twist, after having rejected Jewish law, which for Kant expressed the political nature of Judaism and which for Cohen preserved the Jews as a religious congregation within the non-Jewish state, Buber reasserts the political dimension of Judaism. This disagreement between Cohen and Buber is again a manifestation of different relations to the premises of the Enlightenment critique. Cohen accepts its political premise of universalism and argued for the instrumental value of the Jewish people as a religious congregation that preserves the idea of the uniqueness of God.[37] Buber, in contrast, argues for the intrinsic value of the Jewish people and advocated Zionism as a means of facilitating its full cultural expression.[38]

Rosenzweig developed his position on *halakhah* and revelation in dialogue with Cohen's and Buber's views. In fact, his thematic statement on it, "The Builders," is a direct response to Buber. However, by focusing on his deployment of the terms "teaching," "law," and "commandment," it can also be read as a response to Cohen. In effect, Rosenzweig reaches back to Cohen's discussion and revives the option he had specifically dismissed – *halakhah* as commandment – in order to correct Buber's rejection of Jewish observance. Still, when Rosenzweig's broader thought is considered, it is evident that he also preserves a role for *halakhah* as law that brings him close to Cohen.

Rosenzweig agrees with Buber concerning the mistake of solely understanding Judaism as law. Indeed, he, more than Buber, savages attempts like those of Samson

Raphael Hirsch (1808–1888) that provide what he calls a "pseudo-juristic theory of its power to obligate" as a foundation for observance.[39] Consonant with Buber's focus on unification, he also condemns such legalistic conceptions of *halakhah* as bifurcating Jewish life into a small Jewish space of prohibition and a non-Jewish realm of the merely permitted.[40] But Rosenzweig takes Buber to task for treating Jewish teaching and Jewish law differently. Just as there is a way of understanding Jewish texts as containing determinate teaching as well as a way of personally and creatively learning them, there is a way of obeying Jewish norms as prescribed law as well as a way of personally and creatively practicing them. The aim of the latter is for the individual to practice *halakhah* because he feels that it is a commandment specifically addressed to him. When an individual is able to do this, law is converted into commandment. Rosenzweig writes, "Law must again become commandment which seeks to be transformed into deed at the very moment it is heard. It must regain that living reality in which all great Jewish periods have sensed the guarantee for its eternity."[41] The temporality of commandment, the relation between the moment and eternity, is discussed below; for now the focus is on its relationality. Paul Franks has suggested that the contrast between law and commandment is that between an impersonal and a relational imperative.[42] Rosenzweig thus claims that an individual may reappropriate the impersonal laws of *halakhah* as commandments addressed to him from God, which he simply must oblige through his actions because of his relationship to God.

However, whether a halakhic norm can be experienced in this manner will vary among individuals. The individual's practice will therefore be personal. Still, just as an individual can find out which Jewish texts allow him to encounter the unconditioned only by first learning them, an individual can find out which norms he is able to experience and perform unconditionally only by first practicing them. Such practice will creatively expand the domain of *halakhah*. It will no longer comprise prohibitions, outside of which is what is permitted in the non-Jewish world, but will comprise all of Jewish life. *Halakhah* will no longer be experienced as wholly negative but will "allow an experience of freedom."[43]

"The Builders" launched a correspondence between Rosenzweig and Buber concerning *halakhah* centered on the relations among commandment, law, and revelation. While Buber insisted that "though man is a law-receiver, God is not a law-

giver," Rosenzweig responded that, for him too, "God is not a law-giver. But he commands."[44] Thus to understand Rosenzweig's view on *halakhah*, his notion of revelation and its relations to commandment and law must be examined. Indeed, though "The Builders" is his best-known text about *halakhah*, in correspondence he described it as an occasional article addressed to "hyphenated Jews," showing them a way to "return" to Judaism. His "theory of the law," in contrast, is contained in his masterwork *The Star of Redemption*, where he provides accounts of *halakhah* as commandment as well as law and teaching.[45] In the former, he discusses its origin in revelation and explains its relations to reason, autonomy, and morality. In the latter, he situates it within a theology that has political implications.

For Rosenzweig, as indicated, the distinction between commandment and law can be articulated in terms of both relationality and temporality. A commandment is a relational obligation that occurs in the present.[46] The primary commandment is given in revelation by God to the individual. God calls the individual by name, particularizing him as a self, and then commands him: "Love me!" This commandment is a "pure present." Unlike laws, it neither relies on preexisting authority nor establishes an enduring structure. It is, instead, unanticipated yet anticipates immediate obedience. God may demand the individual's love because he loves the individual. This commandment is thus also an expression of God's love. The individual responds by confessing his sin, his not having lived in a manner appropriate to his being loved by God, and by praying for the coming of the Kingdom of God, the future communion of humanity with God.[47] When he emerges from this revelatory experience, the individual translates his prayer into efforts to fulfill the commandment to love his neighbor: "Love for God must be externalized in love for the neighbor."[48] Indeed, only because he has been exposed to God's love can the individual love his neighbor at all. Love of God and love of the neighbor are thus internally connected. But they are also connected to the other commandments. Love of God is "the highest of the commandments … the sense and essence of all the commandments," and love of the neighbor is "the embodiment of all the commandments."[49] By being grounded in revelatory love of God and directed to redemptive love of the neighbor, halakhic laws are transformed into commandments.

Rosenzweig thus agrees with Buber, against Cohen, in understanding revelation as a relationship between God and the individual instead of an intellectual correlation. Yet he

is closer to Cohen than to Buber in his description of the process and content of revelation. Rosenzweig incorporates Cohen's view of the development of the particular self through atonement into his account of revelation. Moreover, while Buber rejects the identification of revelation and religious deeds with morality, Cohen and Rosenzweig connect revelation and its commandments with morality. In fact, Cohen anticipated Rosenzweig in claiming that "[a]ll deeds of lovingkindness are recompense … for God's love to man."[50]

Also like Cohen, Rosenzweig argues that revelation and commandment better articulate the connection between duty and freedom in Kantian morality. He maintains that only the presupposition of God's love distinguishes the commandment to love the neighbor from a strictly moral duty. Still, instead of negating the moral action as Kant would argue, this presupposition enables it. The Kantian requirement that moral duties be autonomously willed renders them contentless and uncertain. Since the individual must abstract from all incentives to act morally, all that is left for the will is the form of universality itself. Any maxim that satisfies it is moral. In contrast, the presupposition of God's love orients the will, without determining it, to the contentful commandment to love the neighbor.[51] Elsewhere Rosenzweig approvingly cites another writer for correcting the antithesis of autonomy and heteronomy with the distinction between command and law.[52] When an action is performed as a relational and present command as opposed to an impersonal and timeless law, it expresses the individual's positively enabled freedom.

However, Rosenzweig embeds this account of *halakhah* as commandment within a theology that recognizes a legitimate role for *halakhah* as law and teaching. The overall aim of *The Star of Redemption* is to offer a representation of "the All" but from the perspective of the finite individual as partially depicted in both Judaism and Christianity. According to Rosenzweig, while the Jewish people as a community of blood attain eternal life outside of temporality, Christianity as individualistic faith is an eternal way through temporality.[53] These different relations to eternity and temporality are expressed in different types of customs and laws, which Rosenzweig describes using the metaphor of different types of rivers. Customs and laws generally are "what is transmitted from yesterday by force of habit and what is fixed for tomorrow," in which "a people lives its day."[54] A people are alive as long as their customs and laws are constantly changing, "as

long as the river of life goes on actively flowing in a people."[55] The constant change of custom and law is thus an index of a people's movement through time. But the Jewish people forsake temporality in favor of eternal life. Their law is consequently "Holy Law," in which "[c]ustom and law, having become non-augmentable and unchangeable, flow into the one basin of that which is valid now and forever; a unique form of life … fills the moment and makes it eternal."[56] Rosenzweig does not deny that *halakhah* has changed throughout history but claims that such changes are never perceived by Jews as conscious adaptations to the times. Indeed, he maintains, "Since teaching of the Holy Law – for the appellation Torah comprises the two, teaching and law in one – therefore lifts the people out of all temporality and historical relevance of life, it removes its power over time."[57] The form of *halakhah* – understood here as teaching and law – expresses the eternal life of the Jewish people. This eternity is also expressed in the content of the law, for the cycle of the Jewish holidays depicts creation (the past), revelation (the present), and redemption (the future).[58]

The Christian holidays, in contrast, depict only creation and revelation because Christians have not yet attained eternity but are on the eternal way through temporality. For Christians, redemption is depicted only in the secular holidays of the state, which is an attempt to attain eternity in time.[59] State law attempts to impose stability on the constant change of custom and law: "the river must be stemmed, dammed up into a lake."[60] But the success of these efforts is only ever temporary, "soon rushing life is already again flowing onward over the solid fixed Tablets."[61] Nonetheless, because the state is such an attempt, it must be denied to the Jewish people who already possess eternity outside of temporality. Rosenzweig, like Cohen, rules out Zionism.[62] Instead of state law, *halakhah* establishes a "world of law," in which redemption has already been attained: "The Law – for, regarded as world, it is law and not what it is as content of Revelation and demand on the individual: commandment – the Law … makes this world and the world to come indistinguishable."[63] As compared to the relational commandment delivered in the present of revelation, the impersonal and eternal law joins together past, present, and future.

Rosenzweig thus also develops a position on *halakhah* and revelation in response to the Enlightenment's philosophical, moral, and political critique of Judaism. This position

is developed in dialogue with Cohen and Buber concerning the proper categorization of *halakhah* either as law and teaching or as commandment. Cohen and Buber both identified it with law and teaching; however, because of their different views on revelation, they drew opposite conclusions about it. Cohen understands revelation as an intellectual correlation between God and moral reason, and so it is identical with *halakhah* as moral law and teaching. Buber understands revelation as an existential relationship between the human being and the Eternal Thou, and so it cannot contain any contentful teaching or law like *halakhah*. In contrast, Rosenzweig recognizes roles for *halakhah* both as commandment and as law and teaching. Rejecting the rationalistic premises of the Enlightenment critique of Judaism, he agrees with Buber, against Cohen, that revelation is an existential relationship. However, unlike Buber, Rosenzweig maintains that a present and relational commandment issues from such revelation. Indeed, answering the criticism of *halakhah* as heteronomous and immoral, he agrees with Cohen, against Buber, about the consistency of such a commandment with autonomy and morality. The commandment to love God orients the will, without determining it, to love the neighbor, which is the embodiment of all other commandments. Lastly, through his understanding of *halakhah* as law and teaching, Rosenzweig also answers the political criticism of it. Like Cohen, but unlike Buber, he retains *halakhah* but now construed as the practice of a religious congregation within the context of a universalistic state.

Philosophy of *Halakhah*: Soloveitchik and Leibowitz

The next wave of constructive intellectual engagement with *halakhah* was led by Soloveitchik and Leibowitz. Writing after the Holocaust had shaken the faith of many in the ideals of the Enlightenment, they did not focus on its critique of Judaism. Instead, they reacted to the views of their liberal German-Jewish predecessors. Most broadly, while Cohen, Buber, and Rosenzweig proposed philosophical theologies of Judaism that each sought to account for *halakhah*, Soloveitchik and Leibowitz insisted that *halakhah* be foundational for Jewish thought. Yet, despite this shared commitment to the self-sufficiency of *halakhah*, they each developed independent and contrasting philosophical frameworks, comprising different positions on reason, autonomy, and morality, to support their philosophies of *halakhah*. Moreover, Soloveitchik and Leibowitz defined *halakhah* itself differently, a difference which has political implications.

The early writings of Soloveitchik are preoccupied with the relation between the two intellectual traditions in which he was educated: the Brisk school of Jewish learning, which stresses conceptual analysis of rabbinic texts, and neo-Kantian philosophy.[64] Two of his most influential works, *The Halakhic Mind: An Essay on Jewish Tradition and Modern Thought* and *Halakhic Man*, appropriate neo-Kantian philosophy in order to assert the centrality of *halakhah* for Jewish thought and life. Though the two works differ in how they do this, drawing on them both allows a reconstruction of Soloveitchik's philosophy of *halakhah*.

Halakhic Mind builds on Soloveitchik's critique of Cohen's thought in his dissertation in order to offer a philosophical argument for developing Jewish thought out of the sources of *halakhah*.[65] It is Soloveitchik's prolegomenon to any future Jewish philosophy, which is meant as a corrective to previous approaches.[66] He writes, "Since the time of the great medieval philosophers, Jewish philosophical thought has expressed itself only sporadically and then in a fragmentary manner, and this largely upon premises which were more non-Jewish than Jewish."[67] He identifies Cohen as the most recent example of this trend of "inauthentic" Jewish thought since the dominant characteristics of his work are "idealistic Kantian and not Jewish."[68] This is a consequence, Soloveitchik claims, of not beginning with the only objective source for Jewish thought: *halakhah*. Indeed, in a counter to Cohen's work, he writes, "Out of the sources of

Halakhah, a new world view awaits formulation."[69] As evident by Soloveitchik's use of the phrase "sources of *halakhah*," it is clear that he means halakhic norms as expressed in rabbinic texts as opposed to halakhic practices themselves. Drawing on the methods of the Brisk school, though also extending it, he advocates analysis of these texts in order to unearth the basic concepts that underlie them, for example their notions of time or the self.

Though Soloveitchik thus insists that *halakhah* be foundational for Jewish thought, he also develops an independent philosophical framework to support that claim. Joining together realist trends in phenomenology and neo-Kantian philosophy of science, he argues that religion offers cognition of reality; that the content of this cognition expresses, or objectifies, itself as religious norms;[70] and that only by analysis of these norms is the content of such cognition accessible.[71] He then claims, "*Halakhah* is the objectifying instrument of our religious consciousness … Rabbinic legalism, so derided by theologians, is nothing but an exact method of objectification."[72] Jewish religious consciousness cognizes reality and expresses the content of this cognition in halakhic norms. Halakhic norms thus contain rational content; but this content can only be accessed through analysis of the norms themselves. Indeed, pursuant to a neo-Kantian philosophy of culture that recognizes distinct cultural spheres, Soloveitchik argues that efforts to directly access religious cognition risks trespassing on other spheres, like morality, and reducing religion to them.[73] Religion, including *halakhah*, is independent of morality, and this independence must be respected in Jewish thought.

In *Halakhic Man*, Soloveitchik takes a different approach to assert the centrality of *halakhah*. Instead of philosophical arguments, he uses the rhetoric of neo-Kantianism to offer an interpretation of how *halakhah* is experienced in the life of the virtuoso rabbinic scholar. Still, here too he stresses the rationality of *halakhah*, and adds that it encourages a form of autonomy and promotes morality. Soloveitchik claims that, for his protagonist, "*[h]alakhah* has a fixed a priori relationship to the whole of reality in all its fine and detailed particulars … All halakhic concepts are a priori, and it is through them that halakhic man looks at the world."[74] He experiences the world through the categories of *halakhah*, which he comprehends through immersion in rabbinic learning. For halakhic man, "The foundation of foundations and pillar of halakhic thought is not the practical

ruling but the determination of the theoretical *halakhah*."[75] Indeed, Soloveitchik stresses the creativity of theoretical *halakhah*. His only mention of revelation is in order to indicate that it not only allows but encourages creative intellectual expression: "Halakhic man received the Torah from Sinai not as a simple recipient but as a creator of worlds, as partner with the Almighty in the act of creation. The power of creative interpretation … is the very foundation of the received tradition."[76] In addition, *halakhah* charges the individual with the creation of his own unique personality through its concepts of repentance, providence, and prophecy.[77] Soloveitchik thus suggests that *halakhah* stimulates individual creativity, which can be understood as a form of autonomy. Moreover, while still resisting the identification of *halakhah* with morality, he indicates that when the halakhic man does turn from theoretical determination to practical decision making, the imposition of *halakhah* on the world results in righteousness and loving-kindness.[78]

Despite this indication of the moral consequences of the realization of *halakhah* in the world, Soloveitchik's philosophy of *halakhah*, with its focus on individual halakhic learning, is decidedly apolitical. Nevertheless, as Leora Batnitzky has argued, there are political consequences of such apolitical approaches to law.[79] In effect, Soloveitchik provides an alternative way of experiencing the world and acting within it for Jews living in a society and polity that is not governed by *halakhah*. He thus re-erects the "plausibility structures" that previously enabled halakhic observance, but now in an internalized and privatized form. The halakhic man may live in his own halakhic world, but this is because he is a member of a secularized state, which he acknowledges as legitimate and which allows him this difference.

In contrast, Leibowitz insists on the direct political relevance of *halakhah*, which he correspondingly identifies with halakhic practice. Indeed, the only programmatic statement of his philosophy of *halakhah* is found in the aptly titled essay, "Religious Praxis: The Meaning of *Halakhah*." Like Soloveitchik, he argues that *halakhah* is foundational for Jewish thought. In fact, the form of *halakhah* is the only essential feature of Judaism. Despite change of particular halakhic norms, what is constant is "the recognition of a system of precepts as binding," and thus, "this system of norms is constitutive of Judaism."[80] Every Jewish theology, in contrast, fails to distinguish

Judaism from other religions and has been the subject of disagreement by Jews, thus indicating their inherent subjectivity. Indeed, Leibowitz directly rejects Cohen's identification of Judaism with monotheism and morality.[81] He instead claims, "Within Judaism, faith is a superstructure rising above the Mitzvoth."[82] This faith, or the meaning of halakhic practice, is simply service of God. Halakhic practice and service of God are co-constituting in that service of God can be embodied only in halakhic practice and, in turn, halakhic practice can only mean service of God.[83]

Nevertheless, Leibowitz too develops an independent philosophical framework, comprising positions on reason, autonomy, and morality, in order to support this philosophy of *halakhah*. Drawing on Kantian philosophy, he holds that the significance of an action is determined exclusively by the intention with which it is done and that, consequently, the intention to serve God is necessary for the religious significance of halakhic practice.[84] However, he departs from Kant in two ways: First, Leibowitz opposes service of God to morality, identifying the latter with service of man and describing it as "an atheistic category *par excellence*."[85] Second, he identifies both service of God and service of man, or religion and morality, as values that must be chosen in complete freedom. Reason can neither determine which value to choose nor adjudicate between them.[86] Like Buber, Leibowitz radicalizes the notion of autonomy and thereby severs the links among reason, autonomy, and morality. Service of God through halakhic practice is therefore consistent with such amoral and arational autonomy. In fact, Leibowitz sometimes presses this claim further and, glossing a talmudic text, argues that only one who engages in halakhic practice is autonomous because only he is able to transcend the bonds of nature.[87] However, this is not because of the supernatural origin of *halakhah* in revelation, to which Leibowitz denies any normative significance.[88] Rather, because he agrees with Kant that autonomy means freedom from determination by external and internal nature, he argues that only service of God, who is beyond all knowledge, through halakhic practice, which serves no human need, allows one to attain true autonomy.

These same features of Leibowitz's philosophy of *halakhah* also account for its political significance. For him, precisely because of its negative theocentrism, halakhic practice presents a challenge to all other claims of ultimate value, including those of the state. Indeed, though Leibowitz remained a Zionist throughout his life, the significance he

attributed to the state of Israel shifted over time. In its formative years, he pushed for the development of a constitutional framework according to *halakhah*. Zionism, for him then, represented the opportunity to fully realize service of God by releasing *halakhah* from the limited compass allowed by exilic existence to include all areas of modern life.[89] He eventually concluded, however, that the state represented a threat to service of God because it instrumentalized Judaism while pursuing its own political interests. Cognizant of the evil that may be done when the state is sanctified in this way, he argued that halakhic practices "demarcate a realm of the sacred in human life and are a constant reminder that anything outside that realm lacks sanctity and is unworthy of religious adoration."[90] He thus advocated for the separation of religion and state in Israel, for, only if differentiated, could *halakhah* represent an alternative order.

Despite these differences between the political implications of Soloveitchik's and Leibowitz's respective philosophies of *halakhah*, they have similarly conservative consequences for practical halakhic change. While Cohen, for example, could maintain that morality is the standard for Jewish law, by insisting that *halakhah* be foundational for Jewish thought, Soloveitchik and Leibowitz deny any external standard for the assessment of its norms. This is especially apparent in their responses to the feminist critique that *halakhah* is discriminatory against women in denying them equality of opportunity for roles of religious authority or participation in religious rituals. Soloveitchik rejected arguments in favor of female ordination and described the differential treatment of men and women in *halakhah* as stemming from "ontological principles."[91] Leibowitz struggled mightily with the issue. He acknowledged halakhic differentiation of men and women in most domains as valid on the basis of his position that the only rationale for halakhic practice is service of God while introducing the notion of "meta-*halakhah*" to argue that they should be treated equally in matters of leadership and education for that is necessary for the survival of *halakhah* in the current, equalitarian age.[92] However, this distinction is not evidently consistent with the rest of his thought. In any case, both Soloveitchik's dogmatism and Leibowitz's inconsistency failed to satisfy many Jews troubled by the gender inequality enshrined in classical *halakhah*.

Feminist Theologies and Legal Theories: Plaskow, Adler, and Ross

Indeed, in the latter third of the twentieth century, Plaskow deepened the feminist critique of *halakhah* from practical issues of inequality to a radical criticism of its theological foundations and instigated a continuing discussion concerning the compatibility of feminism and *halakhah*. Later Jewish feminists built on her work even as they shifted focus: Adler returned to law but now on the level of legal theory. Ross, in contrast, moved from legal theory back to theology. This feminist discussion concerning *halakhah* thus recapitulates and extends the movement of the previous waves, moving from theology to law and back again. Despite this methodological difference as well as their substantive disagreements about the compatibility of feminism and *halakhah*, Plaskow, Adler, and Ross can still be seen as collectively developing a tradition of Jewish feminist theological and legal reflection.

Plaskow inaugurated a profound feminist critique of *halakhah* in her aptly titled essay, "The Right Question is Theological." Dismissing piecemeal reform of halakhic norms so as to render women equal to men and drawing on the thought of Simone de Beauvoir, she argues that "[u]nderlying specific *halakhot*, and *outlasting their amelioration or rejection*, is an assumption of women's Otherness far more basic than the laws in which it finds expression."[93] *Halakhah* was created by men and thus assumes men as its primary normative subjects; it only encompasses women insofar as they are objects of male concern. Further, the Otherness of women in *halakhah* derives from, as well as supports, the androcentrism of Jewish conceptions of God.[94] In her influential *Standing Again at Sinai*, Plaskow pushes this critique of *halakhah* deeper and presents her positive theological proposals. She adverts to God's directive to the Israelite men to separate from women in preparation for the revelation at Sinai as an indication of the exclusion of women's experience in Judaism. Women are excluded from the Jewish people and are not even present at the revelation of the Torah.[95] Efforts must therefore be made to recover Jewish women's experience in order to develop a feminist Judaism, including revised notions of God, Torah, and Israel.

However, in addition to the recognition that reform of *halakhah* does not remove the roots of sexism in Judaism, Plaskow encourages theological as opposed to halakhic

innovation because she has misgivings about the legal form of *halakhah* itself. She acknowledges that asking whether "law is a female form" both essentializes women and incorrectly implies that law as such is dispensable for society. Nevertheless, she marshals evidence from developmental studies and observations from contemporary feminist religious groups in order to argue for the primacy of relationships over rules and open-form over formalism for women. This militates against the suggestion that even a radically revised notion of *halakhah* could be acceptable for modern Jewish women, for, according to her, *halakhah* comprises formal rules, which may obstruct interpersonal and even covenantal relationships and, in their necessary generality, ignore the situation of the individual person.[96] Still, Plaskow acknowledges the ambiguity of this analysis and suggests in passing that "[p]erhaps what distinguishes feminist Judaism from traditional rabbinic Judaism is not so much the absence of law in the former as the conception of rule-making as a shared communal process."[97] Despite this hint, Plaskow remains skeptical about the prospects of a feminist *halakhah* and insists that the discussion shift to theology.

Adler, in contrast, almost completely ignores theology and returns to *halakhah* but now on the level of legal theory. Indeed, she dismisses feminist rejections of *halakhah*, partially as a result of having a more expansive definition of it. Instead of identifying it simply with law and understanding the latter as formal rules, she claims, "A *halakhah* is a communal praxis grounded in Jewish stories," and, "a praxis," in turn, "is a holistic embodiment in action at a particular time of the values and commitments inherent in a particular story."[98] *Halakhah* cannot be reduced to a single system of formal rules or be exclusively identified with classical or contemporary Orthodox practice; rather, a *halakhah* is any way Jewish people live out in practice the values and beliefs that derive from the narratives of their tradition. Viewed in this manner, a *halakhah* is indispensable for Jewish life. The reclamation and expansion of the term "*halakhah*" for such communal praxis by liberal and feminist Jews is significant for two reasons: For liberal Jews in general, it offers the potential to bring unity to the sense of fragmentation in modern Jewish life, in which many Jewish practices were appropriated by the state, discarded as non-western, and rejected as inconsistent with the notion of private individuality.[99] For feminist Jews, rejecting the notion of *halakhah* would be a

repudiation of the classical tradition and Jewish men; reclaiming it, in contrast, expresses solidarity with them even after their feminist critique.[100]

In leveling that critique, Adler rejects both classical and liberal approaches to *halakhah*. The former is a "methodolatrous system," for commitment to established categories and processes becomes a false god. In practice, this means that "when women advance topics that do not affect preestablished legal concerns, the system either rejects them … or attempts to restate them in distortive and androcentric terms…"[101] The latter is merely reactive to classical *halakhah*. Following Plaskow, Adler argues that it attempts to repair women's inequality in classical *halakhah* but leaves the system basically intact. In particular, it maintains the hierarchical relation between a rabbinic elite and an obedient community.[102]

Adler proposes instead a proactive approach to *halakhah*, which she draws from the work of Robert Cover. According to him, law is generated by *nomos*, which is "a universe of meanings, values, and rules, embedded in stories."[103] Law-making, in turn, is not reducible to the formal procedures of experts but involves the narrative reimagining of these stories by communities who then live out these meanings, values, and rules in practice. Still, even when understood as generated by *nomos*, law has two modes with different degrees of flexibility. The paidaic or world-generating mode creates a new and unified *nomos* for a community out of shared norms and stories. It is creative but unstable; eventually subsets of the community develop differing interpretations of the *nomos* and establish their own nomic worlds. The imperial or world-maintaining mode stabilizes the *nomos* through institutions and coercion, yet allows a plurality of nomic worlds so long as they coordinate. Day-to-day law-making involves constructing a bridge from imperial law to paidaic law through the new interpretations that communities give of it and their commitment to act on those interpretations.[104]

On this legal theoretical basis, Adler diagnoses the contemporary problem with *halakhah* as a "failure of this equilibrium, in the unmediated gap between the impoverished imperial world that we inhabit and the richer and more vital world that could be."[105] New, feminist interpretations of the Jewish *nomos* are needed as well as a community committed to live out those interpretations as a *halakhah*. She identifies several related features that characterize such feminist interpretations: First, narrative is explicitly employed as a tool to criticize established law and to advance alternatives.

Second, context is appreciated in the application of laws to unique situations and particular individuals, thus offsetting the necessary generality of law. Third, instead of a single normative legal subject, variation among individuals is recognized as legitimate. Fourth, in order to ensure that law is responsive to this variation, first-order legal discourse is supplemented by "metadiscourse," which is "a communal discourse in which neither primary goods and values nor assumptions of legal methodologies [are] closed off from discussion."[106] Such reflection prevents the development of any privileged legal elite dedicated to a methodolatry that excludes the concerns and needs of others.[107] Thus, despite disagreeing with Plaskow's theological orientation and skepticism about feminist *halakhah*, Adler develops her suggestion that feminist law is a shared communal process. Indeed, Adler appreciates Cover's image of law as bridge precisely because it replaces the traditional hierarchical or vertical relationship between God and Israel in revelation and a rabbinic elite and community in law-making with a horizontal orientation that is consonant with her identification of the community as the source of halakhic authority.[108]

Ross further develops this suggestion for feminist *halakhah* but, in the process, both returns to theological reflection and reinstates elements of legal and theological verticality. While she describes "Adler's plan for concentrating upon community as a primary source of halakhic development" as possessing "promise," she objects to her presentation of the "community … as the sole arbiter in the establishment of legal meaning."[109] Drawing on the hermeneutic theories of Stanley Fish and Hans-Georg Gadamer, Ross argues that determinations of legal meaning are inevitably constrained by readers' biases, which are instituted by their interpretive community and tradition, and that such social and political constraints enable rather than distort inquiry. Applied to *halakhah*, more effort must be made to articulate feminist concerns and proposals in terms recognizable to the existing halakhic establishment, community, and tradition. For this reason, Ross claims, the modern Orthodox feminist community is uniquely situated to be an agent of feminist halakhic change.[110] In practice they must recruit the consensus of rabbinic experts by continuing to solicit their opinions, must persuade the broader community of individuals committed to *halakhah* of the viability of feminist *halakhah* by living an observant and feminist life, and must accept the tradition's framing of the possible by retaining traditional notions even while transforming them.[111] In particular, though leveling feminist

criticism of existing *halakhah* and consciously working for halakhic change, Jewish feminists must retain "appeal to a dimension of transcendence."[112] Indeed, Ross argues that the lack of such an appeal is the greatest problem with Adler's proposal, for "[c]ommunity (unlike God) does not demand total devotion."[113]

An account of *halakhah*'s transcendence, or its origin in God's command, that is compatible with feminist legal theory, then, is necessary. However, Ross claims that in exposing the pervasive male bias even in Scripture itself, the deepest level of the feminist critique of *halakhah* raises a general question about the possibility of revelation: "Because language itself is shaped by the cultural context in which it is formulated, and because it must of necessity be bound to a particular standpoint, is a divine and eternally valid message at all possible?"[114] In response, she offers a cumulativist account of revelation that recognizes both the revelatory status of feminism and the foundational status of patriarchy. Cumulativist revelation affirms revelation at Sinai but insists that it only discloses its full significance within history. This ever-increasing significance is expressed in rabbinic interpretation, the validity of which as God's will is ultimately determined by its acceptance in practice by Jews committed to *halakhah*. While such interpretation may seem to contradict the original revelation and its earlier expressions, it never actually replaces it.[115] The original revelation "remains as the primary cultural-linguistic filter through which these new deviations are heard and understood."[116] Consequently, if they are ultimately endorsed by the Jewish community that is committed to *halakhah*, feminist interpretations of *halakhah* will be shown to be expressions of revelation.[117] Nevertheless, the patriarchy evident in Scripture and its earlier interpretations will not simply be rejected as relics of primitive beliefs. They will be recognized as possessing authority and as "defining the absolute, rock-bottom parameters of Jewish belief and practice."[118] Feminist *halakhah* must therefore negotiate these texts and interpretations instead of simply discarding them.

While Ross, following Adler, thus concentrates on developing a feminist legal theory for *halakhah*, consonant with Plaskow, she maintains that the most profound question is theological and thus develops a new notion of revelation. Adler and Plaskow would likely reject her feminist legal theory of *halakhah* and her feminist theology of revelation as remaining overly wedded to patriarchal elements of the Jewish tradition. Still, Ross directly builds on their work. Her feminist theory of *halakhah* picks up on Plaskow's

passing insight, as developed by Adler, that feminist law is a shared communal process. Her feminist theology of revelation, in turn, answers Plaskow's insistence on theological reflection and fills in a lacuna in Adler's legal theory. In this Ross represents the last movement in the transition from theology to law and back again.

Conclusion: *Halakhah* as "Lifeworld"

Constructive intellectual engagement with *halakhah* continues into the twenty-first century largely because many Jews continue to observe it, despite its loss of both the political frameworks that made it mandatory and the social and cultural structures that made it plausible or even self-evident. As modern subjects, such Jews voluntarily choose to observe it and try to reconcile this religious choice with their other commitments that stem from the diverse social, cultural, and political spheres that they also inhabit. From that perspective, the most sophisticated modern attempts to support halakhic practice involve the effort, against the fragmentation that is a symptom of modernity, to recreate holistic "lifeworlds" in which *halakhah* once again simply makes sense to the individual. Such efforts are found in each of the waves of intellectual engagement surveyed: Rosenzweig's notion of the world of law, in which the created and redeemed worlds are one, certainly contrasts with Buber's rejection of obligation, but it also differs from Cohen's retention of *halakhah* for a religious congregation within a non-Jewish polity. And though the halakhic world of Soloveitchik's protagonist is individualized and privatized in contrast to Leibowitz's aim to create an alternative order centered on service of God, the contentless austerity of the latter only accentuates the naked secularity of the world, while the former attempts to clothe it with the raiment of *halakhah*. Even more comprehensive than either, Adler's notion of a *halakhah* as a unified praxis derived from an all-encompassing *nomos* is aimed directly at combating the impoverishing divisions among the many spheres of modern Jewish life. Indeed, perhaps this indicates that the distinction between theology and law is itself a symptom of the diremptions of modernity, which any truly constructive modern engagement with *halakhah* must overcome. Whether this is possible without succumbing to romanticism for premodern forms of Judaism remains to be seen.

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I thank Leora F. Batnitzky, Shira Billet, Sam Brody, and Paul W. Franks for their suggestions and comments on earlier drafts of this chapter.

[1] For the notion of "plausibility structures," see Berger, *The Sacred Canopy*; for its application to modern Judaism, see Eisen, *Rethinking Modern Judaism*, pp. 61–66.

[2] In charting how *halakhah* was variously interpreted in philosophical-theological categories, legal categories, or both in modernity as well as the political implications of these interpretations, I follow Batnitzky's arguments in two recent articles: "From Politics to Law" and "Hans Kelsen and Hermann Cohen."

[3] Spinoza, *Theological-Political Treatise*, pp. 35–70.

[4] Kant, *Religion within the Boundaries of Mere Reason*, p. 164.

[5] ***Ibid.***, pp. 109–12.

[6] ***Ibid.***, pp. 164–74.

[7] ***Ibid.***, p. 130.

[8] ***Ibid.***, pp. 131–32.

[9] For a discussion of the political implications of *Religion within the Boundaries of Mere Reason* for Jewish emancipation, see Hess, *Germans, Jews, and the Claims of Modernity*, pp. 156–57; for a more explicit statement by Kant on Jewish law and emancipation, see Kant, "The Conflict of the Faculties," pp. 274–76.

[10] While Kant provides the more immediate background, see Yardeni, "La Vision des Juifs et du Judaisme dans L'Oeuvre de Pierre Bayle"; Arkush, *Moses Mendelssohn*, pp. 133–65; and Mitchell, *Voltaire's Jews*, pp. 3–9, for discussions of the long-lasting influence of Spinoza's view of Judaism. Indeed, Moses Mendelssohn (1729–1786), the formative figure of German Jewry, largely accepted Spinoza's characterization of *halakhah* as particularistic law even while suppressing its political dimension in order to render it compatible with citizenship.

[11] While it is perhaps more appropriate to use the term "Jewish law" rather than *halakhah* when discussing the views of Cohen, Buber, and Rosenzweig, I often use *halakhah* in order to more easily contrast understandings of it as "law and teaching" or "commandment." Rosenzweig (see *Philosophical and Theological Writings*, p. 71) traces the distinction between law and commandment, in the sense at issue in this debate, to the Christian theologian Christoph Schrempf; see *Die Christliche Weltanschauung*. I thank Franks for directing me to this important connection. My concern here, however, is less with the historical issue of who introduced the distinction to Jewish thought, but rather with the way in which it serves as an organizing scheme for the views of Cohen, Buber, and Rosenzweig on *halakhah* and revelation.

[12] Cohen also differs from Kant in making law the center of ethics as opposed to its opposite in his *Ethik des reinen Willens*. For discussions of the relations among ethics, law, and religion in Cohen, see Gibbs, "Jurisprudence" and Hollander, "Love-of-Neighbor."

[13] Cohen, *Religion of Reason*, pp. 1–34.

[14] ***Ibid.***, p. 86; for a thorough discussion of correlation in the context of Cohen's broader philosophy, see Poma, *The Critical Philosophy of Hermann Cohen*, pp. 171–98.

[15] Cohen, *Religion of Reason*, pp. 35–49.

[16] ***Ibid.***, p. 33.

[17] ***Ibid.***, pp. 14–15.

[18] *Ibid.*, pp. 71–84.

[19] *Ibid.*, p. 345; see also Cohen, *Reason and Hope*, pp. 179–80.

[20] Cohen, *Religion of Reason*, p. 339.

[21] *Ibid.*, p. 338; translation slightly modified in view of Cohen, *Die Religion der Vernunft*, pp. 398–99.

[22] Cohen, *Religion of Reason*, p. 338.

[23] *Ibid.*, p. 343.

[24] On the relation between Cohen's approach to Jewish law and that of Maimonides, see Kohler, "Finding God's Purpose."

[25] Cohen, *Religion of Reason*, pp. 353–70.

[26] *Ibid.*, pp. 366–67.

[27] Buber, "Two Foci of the Jewish Soul," p. 107.

[28] Buber, *On Judaism*, p. 80.

[29] *Ibid.*, pp. 79–81.

[30] Buber, *I and Thou*, pp. 157–60.

[31] Buber, *On Judaism*, pp. 83–92.

[32] *Ibid.*, p. 83.

[33] *Ibid.*, p. 87.

[34] *Ibid.*, pp. 149–60.

[35] *Ibid.*, p. 164.

[36] *Ibid.*, p. 166.

[37] See Cohen, *Religion of Reason*, p. 362; and, in dialogue with Buber, see Cohen, *Reason and Hope*, pp. 164–71.

[38] Buber, "Concepts and Reality," pp. 263–67.

[39] Rosenzweig, *On Jewish Learning*, p. 80.

[40] *Ibid.*, pp. 82–83.

[41] *Ibid.*, p. 85.

[42] Franks, "The Commandment of Joy."

[43] Rosenzweig, *On Jewish Learning*, pp. 83–87.

[44] *Ibid.*, pp. 109–18.

[45] Rosenzweig, *Franz Rosenzweig*, pp. 134–35.

[46] Rosenzweig, *The Star of Redemption*, p. 169.

[47] *Ibid.*, pp. 187–200.

[48] *Ibid.*, p. 230.

[49] *Ibid.*, pp. 190, 221.

[50] Cohen, *Religion of Reason*, p. 349.

[51] Rosenzweig, *The Star of Redemption*, pp. 230–31.

[52] Rosenzweig, *Philosophical and Theological Writings*, p. 71.

[53] Rosenzweig, *The Star of Redemption*, pp. 317–18, 357–66.

[54] *Ibid.*, p. 322.

[55] *Ibid.*

[56] *Ibid.*

[57] *Ibid.*, p. 323.

[58] *Ibid.*, pp. 327–47.

[59] *Ibid.*, pp. 374–95.

[60] *Ibid.*, p. 352.

[61] *Ibid.*

[62] *Ibid.*, pp. 318–19.

[63] *Ibid.*, p. 428.

[64] On the Brisk school and its method, see Solomon, *Analytic Movement* and Saiman, "Legal Theology."

[65] Solowiejczyk, "The Pure Thought."

[66] Kaplan, "Rabbi Joseph B. Soloveitchik's Philosophy of Halakha."

[67] Soloveitchik, *The Halakhic Mind*, p. 101.

[68] *Ibid.*

[69] *Ibid.*, p. 102.

[70] See the discussion of nominalism vs. realism in Chapter 3 of the current volume.

[71] Soloveitchik, *The Halakhic Mind*, pp. 8–81.

[72] *Ibid.*, p. 85.

[73] *Ibid.*, pp. 88–91.

[74] Soloveitchik, *Halakhic Man*, p. 23.

[75] ***Ibid.***, p. 24.

[76] ***Ibid.***, p. 81.

[77] ***Ibid.***, pp. 99–137.

[78] ***Ibid.***, p. 94.

[79] Batnitzky, "From Politics to Law."

[80] Leibowitz, "Religious Praxis," pp. 3–4.

[81] ***Ibid.***, p. 6.

[82] ***Ibid.***

[83] ***Ibid.***, pp. 7–8.

[84] Leibowitz, *Faith, History, and Values*, pp. 63, 126–27.

[85] Leibowitz, "Religious Praxis," p. 18.

[86] Leibowitz, *Discourses on Science and Values*, pp. 72–78.

[87] Leibowitz, "Religious Praxis," pp. 21–23.

[88] Leibowitz, *Faith, History, and Values*, pp. 154–55.

[89] See, for example, Leibowitz, *Torah and Commandments*, pp. 135–53.

[90] Leibowitz, "Religious Praxis," p. 25.

[91] Cited in Hartman, *The God Who Hates Lies*, p. 149. For the ontological realism of Qumran vs. the nominalism of the talmudic rabbis, see Chapter 3 of the current volume.

[92] Leibowitz, "The Status of Women."

[93] Plaskow, "The Right Question Is Theological," p. 224.

[94] *Ibid.*, pp. 224–28.

[95] Plaskow, *Standing Again at Sinai*, pp. 25–27.

[96] *Ibid.*, pp. 61–74.

[97] *Ibid.*, p. 71.

[98] Adler, *Engendering Judaism*, pp. 25–26.

[99] *Ibid.*, p. 26.

[100] *Ibid.*, p. 45.

[101] *Ibid.*, pp. 28–29.

[102] *Ibid.*, p. 34.

[103] *Ibid.*; Cover articulated this legal theory in "Nomos and Narrative."

[104] Adler, *Engendering Judaism*, pp. 34–37.

[105] *Ibid.*, p. 35.

[106] *Ibid.*, p. 43.

[107] *Ibid.*, pp. 37–44.

[108] *Ibid.*, p. 37.

[109] Ross, *Expanding the Palace*, pp. 155–56.

[110] See Sufrin, "Telling Stories" for a discussion of whose narratives Adler and Ross respectively privilege.

[111] Ross, *Expanding the Palace*, pp. 168–78.

[112] ***Ibid.***, p. 172.

[113] ***Ibid.***, p. 161.

[114] ***Ibid.***, p. 186.

[115] ***Ibid.***, pp. 197–98.

[116] ***Ibid.***, p. 198.

[117] ***Ibid.***, p. 205.

[118] ***Ibid.***, p. 207.

Part III

◈

Judaism and the Secular Jewish State

11

Judaism and Jewish Law in Pre-State Palestine

Amihai Radzyner

Jewish Law in Palestine under Ottoman Rule and the Attitude toward Foreign Law

A discussion of Judaism and Jewish law in Palestine during the pre-state period must address two fundamental points. First, Palestine was not an autonomous unit within the Ottoman Empire but a district within it. As such, no separate law was practiced in Palestine, and the law in the Ottoman Empire was also customary in Palestine. Moreover, in the Ottoman Empire Jews often lived in many communities that were small and marginal relative to other communities across the empire.[1] This point is important for our discussion because often the main decisors who influenced Jewish law in Palestine lived in communities abroad, and the attitude that developed in Palestine toward judicial and legal institutions was affected by what happened in those communities, which operated within the same legal system. Therefore, it is difficult to disconnect the debate in Palestine from the discussion that developed in various communities outside it, across the empire.

Second, the 400-year period of Ottoman rule in the country must be divided, from the legal point of view, into two periods, which were affected by processes occurring throughout the empire. The first period extends from the beginning of the Ottoman conquest to approximately 1839. During this period Islamic law was practiced throughout the empire, with a certain degree of judicial autonomy granted to minority communities, including the Jews, especially in family law, and under somewhat different conditions in the field of civil law as well. The second period extends from 1839 to the end of Ottoman rule in the country (1918). During this period of reform, referred to as the *Tanzimât*, a comprehensive reorganization of the judicial system of the empire took place, both in the field of legislation (with the creation of modern codes in the civil and criminal areas) and in the courts. In the course of the reform of the courts power was transferred from the religious courts to the newly constituted civil (*Nizamiye*) courts, greatly reducing the areas of litigation left to the rabbinical courts.[2] Furthermore, in the course of the second half of the nineteenth century, dramatic changes occurred in the composition of the Jewish community in Palestine, and the increase in the percentage of Ashkenazi Jews among the immigrants affected the Jewish legal system.

The First Period

Jewish Courts: Internal and External Conflicts

Jewish courts in the Ottoman Empire enjoyed relatively broad autonomy as a result of the *millet* system that was customary in the empire. Rabbinical courts were able to litigate, in addition to family law, in civil matters, and impose penalties to some extent. Almost every community had a rabbinical court, and in large communities there was more than one such court.[3] In some places, side by side with the court operated by the city rabbi there were courts operated by three prominent citizens, that is, individuals without significant halakhic standing. Naturally, conflicts arose between these courts, the issue being one of precedence. It is not surprising that according to halakhic authorities, a court consisting of judges who are competent in the *halakhah* takes precedence over a court of lay judges.[4] For example, R. Joseph di Trani (*Maharit*), a sage from Safed in the sixteenth century, wrote that a court of three notables, one of whom is learned and familiar with the *halakhah*, cannot challenge the verdict of the court of the city rabbi if it ruled differently.[5] It is clear from this opinion that the judge who has the status of rabbi and halakhic knowledge is preferable to a judge who lacks such qualifications. In Jerusalem as well, the sages sought to preserve the supremacy of the halakhic courts over the court of the secular leadership.[6]

Jewish communities in the Ottoman Empire were often composed of members of various ethnic groups. Eventually each ethnic group (*Kahal*) established its own court, which at times caused friction between the courts. The decentralized nature of Jewish law, which lacks a supreme authority accepted by all Jews, resulted in the development of different customs in different communities. Because of this, in the sixteenth century, in several key communities, including Safed and Jerusalem, the institution of the "city rabbinical judge" (*dayyan ha-'ir*) was established, which was perceived to be above the communal courts and could thus rule in the case of conflict between them. It is possible that because of the decentralization of the judicial system in the Jewish communities in Palestine, especially in Jerusalem, its status among Jews of the Diaspora was not particularly high, despite the fact that the court in Jerusalem, the most important and holy city for the Jewish people, might be expected to enjoy a privileged status.[7]

Occasionally, we find attempts by veteran courts to prevent the establishment of a new court. For example, in 1760 several rabbis in Jerusalem tried to establish a new rabbinical court. In response, under the leadership of the Chief Rabbi, Rabbi Raphael Meiuhas Bachar Shmuel, the existing court was convened and decreed that no private courts were to be established, and that violators could be handed over to the authorities. At that time, however, at least three other courts were operating in Jerusalem.[8]

As noted, the jurisdiction granted by the authorities to the Jewish courts was quite broad, as we can learn from the many discussions in the responsa literature originating in the Ottoman Empire in matters of *Hoshen Mishpat* (civil law), especially compared with the restricted jurisdiction in these matters among Ashkenazi Jews in the eighteenth and nineteenth centuries.[9] Nevertheless, the rabbinical courts were to a large extent subject to the authority of the foreign ruler. One striking manifestation of this was the fact that the rabbinical judges in Palestine needed the approval of the qadi to be appointed to their positions, especially if they dealt with matters of marriage, and to this end they were also required to pay taxes to the authorities. A judge who did not receive permission from the authorities was punished by them, as happened to David ibn (Abi) Zimra (*Radbaz*), one of the greatest sages of the sixteenth century.[10]

The authorities also intervened in the activities of the courts, primarily in two circumstances. First, there were instances in which Jews informed on the courts when they exceeded the jurisdiction granted to them by the authorities. Second, there were cases when the courts turned to the authorities when it was necessary to deal with Jews who disobeyed the court. The court was limited in the imposition of certain sanctions, such as expulsion from the city, and had to turn to the Sharia court and ask it to carry out the sentence.[11] Jewish sources indicate that the courts knew the Islamic law and learned how to engage the Islamic courts to carry out their judgments or to litigate matters concerning Jews in cases in which the rabbinical courts were not able to do so for various reasons. Consequently, the halakhic prohibition on turning to the courts of the gentiles (*Arkaot shel Goyim*) did not apply.[12]

Jews Approaching Alien Courts

Through the ages, starting from the time of the Tannaim to the present day, halakhic sages have struggled against the phenomenon of Jews approaching alien judicial institutions. Recourse to foreign courts was perceived as the violation of a strict religious prohibition (see Chapter 4 of the current volume) and injurious to the most important national symbol of the Jewish people: its legal system.[13] Nevertheless, recourse to the civil courts in the Ottoman Empire in general and in Palestine in particular was not uncommon.[14] There are various reasons for such recourse, including a lack of trust in the power of the Jewish court to enforce its rulings on the litigants, or the claimant's assumption that Islamic law leans in his favor more than Jewish law does.[15] Naturally, halakhic sages in Palestine tried to fight this phenomenon, as did their colleagues elsewhere, but it seems that in many cases they failed.[16] For example, in Jerusalem a regulation prohibited recourse to the civil courts and imposed a penalty of lashing and a ban on those who did so. But there is no trace of this regulation ever having been implemented,[17] and the authorities punished severely rabbinical judges who tried to prevent Jews from approaching the Islamic courts.[18] A more interesting way of dealing with recourse to the alien courts was to admit as far as possible the Islamic law into the Jewish courts, so that litigants would agree to appear in the Jewish court of law and not in the Sharia court if Islamic law was in their favor.[19]

Various arguments were used by the sages of the time to prevent Jews from resorting to alien courts. The main reason was naturally the argument that Jewish law is superior to the laws of the nations and that in the Jewish court of law one can achieve a more equitable verdict than in Islamic courts. For this reason, R. Moses ben Joseph di Trani (*Mabit*) of Safed insisted that a compromise reached by Jewish mediators is preferable to a verdict of the Islamic court. Another important reason was the desire to preserve the power of the Jewish court and of the community, indeed the status of halakhic law. Clearly, in many areas Islamic law differs substantively from Jewish law, and it imposed severe sanctions on Jews who were convicted, even if according to Torah law they would not have been convicted.[20]

Attitude toward Ottoman Law

Aryeh Shmuelevitz has shown that the sages of the empire, including those of Palestine, had good knowledge of the Ottoman legal system and were able to distinguish between its religious and secular portions.[21] They also engaged in many discussions about Jewish law's ability to absorb gentile legal norms via the halakhic mechanism of "custom" (*minhag*) and of "the law of the land is the law" (*dina demalkhuta dina*).[22] In some cases the enactment of an ordinance was inspired by Islamic law out of fear that without these ordinances Jews might prefer to turn to the Islamic courts. For example, in Palestine and elsewhere an ordinance was enacted that allowed daughters to be named as heirs under certain conditions, in order to prevent them from taking inheritance claims to the Islamic courts.[23]

In the responsa literature of the sages of Palestine and Egypt, there are many sources that show regard for a portion of the procedures of the Islamic courts and for their reliability, particularly with respect to the protocol of the court, but we also find allegations of corruption and bribery regarding Muslim judges.[24]

The Second Period

Changes in the Status of Jewish Courts: Internal and External Factors

As noted above, during the nineteenth century, especially its second half, two dramatic processes occurred that had a profound effect on the halakhic judicial system in Palestine.

The first process consisted of legal reforms conducted in the empire as a whole, starting in 1839. The legal reform process had two main effects: on one hand, the establishment of civil courts in Palestine in 1864 meant that many judicial areas were removed from the jurisdiction of the religious courts.[25] Rabbinical courts sustained even greater injury than Islamic courts, which enjoyed a higher status, and in various areas (especially laws of inheritance, guardianship, and consecration) Jews were forced to litigate in the Sharia court.[26] From that time onward, rabbinical courts could not litigate matters other than those related to family law, and the most common area in halakhic litigation, that of civil law (*dine mamonot*), was removed from their authority. The reform struck a severe blow to the position of *halakhah* in the Jewish community and to the status of rabbinical courts. On the other hand, the legal reform process also strengthened the status of the rabbinate in Palestine. The Ottoman rulers sought to formalize the status of the Jewish leadership in various communities in the empire, and for the first time, the Sephardic Chief Rabbi of Jerusalem was awarded the title of *Hacham Bashi*, which granted him broad powers and made him the official representative of the Jews of Jerusalem before the authorities. It is especially important to note the fact that the court headed by the *Hacham Bashi* achieved the status of an official court of sorts, and matters relating to the laws of marriage and divorce were under his jurisdiction. This court contained outstanding rabbinical judges and acquired a high status in Sephardic halakhic circles.[27]

The second process that took place in the second half of the nineteenth century was an internal Jewish one and ran counter to the trend of strengthening the official rabbinical court. With increasing immigration of Ashkenazi Jews to Palestine, friction arose between them and the Sephardic court, which had recently become the main rabbinical court, as other ethnic courts had ceased to exist for various reasons. In some cases Ashkenazi Jews refused to accept the authority of the Sephardic court. The ethnic character of

Jewish law, and the resulting lack of uniformity in the legal area, was manifest here in practice. Although in principle it was clear that from the point of view of the authorities the Ashkenazi Jews were subject to the official, Sephardic court, Ashkenazi Jews fought to create their own court and succeeded in establishing one in 1841. Later the Ashkenazi community was further divided, when the Ḥasidim established their own rabbinical court. The split attests to the weakness of the Ashkenazi court, which never received official recognition on the part of the authorities. As a result, the status of halakhic jurisdiction declined dramatically, and in many instances Jews refused to obey the summons and decrees of the rabbinical courts.[28]

Attitude toward the New Ottoman Laws

The empire replaced Sharia law in the criminal and civil areas with new state laws. What was the attitude of halakhic sages concerning the new civil law, an area that according to Jewish law should be litigated according to *halakhah*, and which until recently had been under the jurisdiction of rabbinical courts when the litigants were Jews? It appears that the most influential civil law, which was the subject of intense halakhic debate among the sages in Palestine, was the Ottoman Land Law of 1858.[29] The sages were concerned mostly with the requirement of the law according to which the transfer of ownership of real property must be carried out by using books of the land registry bureau (*tabu*), which is not required by the *halakhah*. Questions arose about the fate of land purchased according to the property rules of the *halakhah* but not according to state law.[30] As shown in detail by Zvi Zohar, there was no agreement between the rabbis of the empire, especially those in Syria, that the *halakhah* should recognize the new method of property ownership. According to many of them, the real estate law did not have *dina de-malkhuta* status, being contrary to the halakhic way of ownership. It was even perceived as being related to the prohibition against resorting to alien courts, because until 1858 the Sharia courts were in charge of land registration, and some halakhic decisors tended not to distinguish between the Sharia courts and the land registry bureaus established after the enactment of the law.[31]

By contrast, in Palestine there was consensus on this question, and the sages appear to have indisputably accepted the new law as *dina de-malkhuta*, which attests to the

recognition of its advantages over the methods of halakhic ownership of property.[32] For example, the official rabbinical court in Jerusalem determined around the year 1890 that at that time registration with the *tabu* bureau was mandatory and that one could not purchase land in any other way.[33] At the end of the nineteenth century, similar opinions were expressed by Chief Rabbi, R. Yaacov Shaul Elyashar[34] and by the rabbi of Hebron, R. Haim Rahamim Franko,[35] indicating that the practice in all rabbinical courts in Palestine was to determine that the person registered as the owner of the land was the owner, even if he did not carry out the purchase according to halakhic rules, and even if he did not have possession of the land according to the halakhic rules of evidence.

As shown by Zvi Zohar,[36] at the end of the nineteenth century, in their debate with Syrian scholars, the sages of Palestine adopted an approach that validated the Ottoman laws and institutions in other civil matters as well. Thus, they did not contest the validity of legal bills drafted not according to *halakhah* and not in rabbinical court.

We can summarize and conclude that on the eve of the British occupation there was a significant decline in the status of halakhic law among the Jewish population, certainly when compared to the situation prior to the mid-nineteenth century. Jewish judicial institutions were weak and divided, their jurisdiction was reduced, and halakhic civil arrangements gave way to arrangements based on modern Ottoman law.

The Period of the British Mandate: The Creation of *Mishpat Ivri* and Institutionalization of the *Halakhah*

Unlike the Ottoman period, when it was arguably difficult to separate Palestine from other regions as far as the role of Jewish law was concerned, under the British Mandate such a distinction was created. During this period, which is much shorter than its precursor, two revolutionary and unprecedented processes occurred in Palestine, more significant perhaps than any other development Jewish law has undergone: the secularization of Jewish law and the establishment of rabbinical courts that operate under the aegis of state law. The effects of these processes are felt in the state of Israel to this day.

These two processes share a common factor, which is the creation of a commitment to Jewish law that does not derive from a religious conviction. Throughout the generations, the law was perceived as an integral part of Judaism, and there was no doubt about its religious nature. Even if in various contexts a distinction was made between the "religious" and "legal" portions of the *halakhah*,[37] ultimately the commitment of Jewish individuals and communities to Jewish law and jurisdiction was based primarily on religious belief. This is especially the case in view of the fact that Jewish law is rich in religious norms that do not exist in other legal systems, and certainly not in secular ones.

The two processes that occurred in Mandatory Palestine enabled Jewish citizens to convert their religious commitment to Jewish law into a secular commitment, whether cultural-national or legal-civil.

Mishpat Ivri ("Hebrew Law")

The Mishpat Ivri Society

The term *Mishpat Ivri* (Hebrew law, as opposed to *halakhah* or Jewish law) is intrinsically bound up with the Zionist movement and Palestine.[38] First, the field of *Mishpat Ivri* as a distinct research discipline, originated in an era of decisive historical developments heralding the Zionist vision of the establishment of a national home for the Jewish people in Palestine. According to scholars of Jewish law who were active in the formative stages of its research, one of the salient characteristics of a state and a people is their national law. They contended, therefore, that the legal system of the nascent Jewish state should be based on the national law of the Jewish people, i.e., *Mishpat Ivri*, a system of law that would be adapted and prepared by its researchers to suit the needs of a modern state, such as the Jewish state about to be established.[39]

The connection between activities in the field of *Mishpat Ivri* and Mandatory Palestine has yet another dimension. Research in *Mishpat Ivri* was conducted primarily in Palestine. The central body involved in the initial stages of this research, the Mishpat Ivri [lit. Hebrew law] Society,[40] was established in Moscow at the end of December 1917, but its activities were discontinued soon after its establishment because of the interference of the Soviet authorities and the persecution of some of its members. Indeed, some Society members left Russia at the end of the second and the beginning of the third decade of the twentieth century. These members immigrated to Palestine, where they joined the Mishpat Ivri Society established in Jerusalem at the end of 1920, which subsequently opened additional branches in Tel Aviv and in Haifa. At the time of its establishment in Moscow, it was already clear to the founders that "our Society is only the path leading to a scientific juridical institution that will ultimately be established in Jerusalem when the borders are opened" and that its primary aspiration was to "establish in Jerusalem, at the center of our national life, a scholarly institute for the research and revival of Jewish law, which will unite all Jewish scholars steeped in the law, from all over the world."

The desire that Palestine be the center of the activities of the Society derived primarily from the fact that the Society regarded research into Jewish law as having a practical orientation, aimed at restoring Jewish law as the foundation of state law in the

soon-to-be-established Jewish state in Palestine. But another factor is relevant in this context, which points to an even deeper connection between the substance of Jewish law and the physical territory of Palestine. At least in the early stages of the Society, some of its members, perhaps the most active ones, maintained that it was only in *Eretz Israel* that authentic Jewish law could develop. This required giving precedence to halakhic legal sources that originated in the Land of Israel over sources originating elsewhere. Soon Palestine was recognized as the world center of research in the field even by those active in the field abroad, a recognition that remains to this day.

As noted, an important innovation that occurred in Palestine at this time was the secularization of Jewish law and the replacement of religious motives for fidelity to the law with national-cultural motives. Nevertheless, some supporters of the revival of Jewish law were members of the religious camp. When they spoke of revival, they referred to the use of classic halakhic tools from a position of religious commitment. This led to intense clashes with the secular position, which represented a real innovation, and ultimately to the collapse of the Society.[41]

Secularization of the Halakhah

Unquestionably, the term *Mishpat Ivri* (Hebrew law) is a modern innovation, and essentially a secular one. But many regard the term *Mishpat Ivri* as synonymous with the legal system of the *halakhah*, notwithstanding the novelty of the term. Those who coined the term, however, did not intend it to be used synonymously with *halakah*. To understand the meaning of a term, we must examine its appearance and first usage. Assaf Likhovski has shown that the term *Mishpat Ivri* was chosen with the intention to distinguish its substance from the traditional term *halakhah*, including that portion of *halakhah* that deals primarily with civil and public law (*Ḥoshen Mishpat*) as opposed to religious and family law. That *Mishpat Ivri* is a new and secular creation[42] can be seen by examining the article in which, to the best of my knowledge, the term was used for the first time in the twentieth century, making it a landmark in the history of the research in this field. The article, published in 1910 by Shmuel Eisenstadt, one of the founders of the Mishpat Ivri Society, contains the following concluding remarks:

> *Mishpat Ivri* reveals its full depth and breadth out of the confusion of the Talmud and demands its redemption from the chains of time and the rust of generations. It demands elucidation and modern illumination. It demands a new Hebrew attire, to appear in all its splendor to its people, and it demands an academic scientific apparel so that it can appear in the pantheons of human knowledge.[43]

In other words, *Mishpat Ivri* is a creation based on the past and rooted in it, but donning modern, Hebraic vestments. In Eisenstadt's view, it should not be confused with a simple acceptance of existing *halakhah*, and he distinguishes between the "spirit" of the *halakhah* and its specific details. *Mishpat Ivri* is a scientific, practically oriented research project that anticipates the creation of a new legal system, based on traditional *halakhah* but not bound by it. The same idea resurfaces in Eisenstadt's other writings, as well as in the works of his ideological colleagues in Palestine during the second and third decades of the twentieth century.

Shmuel Eisenstadt staunchly advocated the substantive comparative research method, especially comparing Jewish and Roman law, as the appropriate path for the creation of the new system known as *Mishpat Ivri*. His conception of *Mishpat Ivri* as a modern, scientific, national, and secular creation was embraced by those who helped establish the Mishpat Ivri Society. This movement and most of its members regarded substantive comparison with other legal systems, including the adoption of arrangements absent from extant Jewish law, as an indispensable tool for realizing their goal of creating a *Mishpat Ivri* that would serve the needs of a modern, secular Jewish state.[44]

The call for a comparative examination of *Mishpat Ivri* with other legal systems presupposes an additional substantive claim: The founders of the Mishpat Ivri Society insisted that just as the law had to be separated from religion in order to transform it into a human legal system like all other systems, it must similarly be distinguished from morality. This requirement appears already in the founding document of the Mishpat Ivri Society in Moscow and reappears in the writings of its members, who claim that the renascence of *Mishpat Ivri* demands that the overly broad place offered to morality in Jewish law, primarily during the period of exile, be narrowed.[45] In their view, this was the only way for *Mishpat Ivri* to become a legal system that efficiently regulates objective social relations between persons and institutions, rather than a system that

operates exclusively to guide personal choices in private relationships. Appreciable portions of Jewish law derive from the realm of morality, and on a practical level their binding status depends on a person's conscience, good will, or fear of God. In the view of Mishpat Ivri Society members, these moral obligations should not be transferred to the area of law, which deals with efficient earthly enforcement and punishment.[46] As noted, this secular concept, in all its aspects, encountered strong opposition on the part of rabbis and religious jurists who also supported the revival of Jewish law, but following the methods of traditional *halakhah* and committed to its religious nature and divine source.[47]

Two key practical outcomes resulted from the new secular enterprise of *Mishpat Ivri*, although their scale was relatively small. The first was the "Jewish Magistrate's Court" (*Mishpat haShalom haIvri*). This body was an attempt to create a "Hebrew" judicial system that would hear conflicts between members of the Jewish community in Palestine. The declared legal method of this system was based on an attempt to create a synthesis between legal arrangements as they exist in classical Jewish *halakhah* on one hand, and the needs of the time and modern legal conceptions on the other. The fundamental assumptions of the organization were similar to those described above: at present it is not possible to make use of the *halakhah* in practical law, and it is necessary to select from it only the arrangements that are appropriate for our time and combine them with arrangements originating outside the *halakhah*. This combination would serve as the foundation of a new legal codex. The Jewish Magistrate's Court operated in several communities in Palestine, mostly in the 1920s and 1930s, and began to decline in the last decade of the British Mandate, having naturally encountered strong resistance from various religious groups.[48]

The second practical effect of the idea of a secular *Mishpat Ivri* was on legislation in the state of Israel. In the explanatory notes of various laws enacted in Israel since the establishment of the state, we can find the argument that some of the arrangements provided by the law were derived from the Jewish *halakhah*, even if only partially.[49] The calls for a selective recourse to the *halakhah* as a legislative source in the Jewish state originate, as we have seen, in the ideas of the Mishpat Ivri Society, and these calls were heard throughout the years of the British Mandate and in the early years of the state of Israel. Nevertheless, in-depth examination of the laws reveals that the influence of

halakhah on Israeli legislation is quite negligible, and certainly much smaller than it is commonly thought to be.[50]

Official Rabbinical Jurisdiction and Institutionalization of the Laws of Marriage and Divorce in Secular Law

As noted above, rabbinical courts in Palestine existed throughout the Ottoman period, and until the mid-nineteenth century litigation generally took place in religious courts. The secularization of part of the legal system in the nineteenth century did not improve the situation of the Jewish courts, and their jurisdictions became quite limited, as was their ability to enforce their verdicts. Moreover, even in family law, the main area litigated by the Jewish courts throughout this period, Jews did not refrain from turning to Sharia courts, although the phenomenon was not common.[51]

A significant change occurred after the British occupation, and especially in 1921–1922. During these years the British authorities transformed the rabbinical court into an official judicial institution; its authority was enshrined in state law, and in the areas over which it was granted jurisdiction its status was that of a state court. From that moment on, Jewish citizens of Palestine in many areas of family law were subject to the verdicts of the rabbinical court and could not turn to other judicial institutions, religious or secular. Citizens also had to abide by the rulings of the rabbinical court just as they obeyed any other court of law.

In 1921, the British authorities established the Chief Rabbinate of Palestine, an organization whose main function was to serve as a supreme judicial institution in charge of the rabbinical courts across the country, and to function also as a court of appeals. The establishment of this institution was a significant innovation in the world of *halakhah* in general and in Palestine in particular, because the *halakhah* does not recognize the existence of a court of appeals, at least not in the accepted legal sense of this term. Indeed, this innovation, together with the legal institutionalization of the rabbinical courts (which weakened the unofficial rabbinical courts and removed their ability to enforce their rulings), resulted in a great deal of outrage in ultra-Orthodox circles, particularly in Jerusalem. Eventually, it resulted in a rift that remains to this day between extreme ultra-Orthodox circles on one hand and the rabbinate and the other official religious institutions of the state on the other.[52]

In 1922, the British Mandatory government enacted its most important piece of legislation, the Palestine Order in Council, which created the legal system to be practiced in Palestine. Among other functions, it determined the authority of the courts of the various religious communities living in the country. Article 53 established the authority of the rabbinical courts and decreed that in several areas, particularly in matters of marriage and divorce, the rabbinical courts exercised exclusive jurisdiction over the Jewish citizens of Palestine. The institutionalization of the rabbinical court within the secular state law was a great innovation in the world of *halakhah* and had two main consequences for the *halakhah*[53] and for the role it plays in the lives of Jews living in the Land of Israel to this day.

First, the British legislation adopted by the newly formed state of Israel incorporated the *halakhah* into state law. Since then, Jews in the Land of Israel can marry and divorce only according to Jewish law in its Orthodox form. Unlike other countries where Jews reside, in Israel the decision whether to marry and divorce according to *halakhah* is not granted to the couple but is imposed on them by the secular law of the state. This has created a genuine and significant distinction between the *halakhah* of Jews living in Israel and the *halakhah* of those living elsewhere. Whereas the role of the *halakhah* in the lives of the latter is voluntary as far as the state is concerned, in Israel the situation is completely different, at least with regard to family law. The British legislation created a situation in which observance of Jewish law is not the result of a religious commitment, or even the national or cultural awareness of the citizens. Naturally, this situation sparked a fierce debate already in the days of the British Mandate, and especially after the establishment of the state. Most rabbis and religious groups (and various secular actors) in the country enthusiastically supported the British decision because it prevented the establishment of a civil system for marriage and divorce arrangements, which in their opinion would create serious halakhic problems and a rift between Jews, who might not be able to marry each other. Nevertheless and by contrast, over the years, there has been increasing criticism, especially from the secular camp, of religious coercion and of the fact that in a secular world people should not be subjected to religious arrangements against their will, especially given the fact that the *halakhah* is not egalitarian as far as gender is concerned. Even in religious circles some opposed making the *halakhah* binding by virtue of secular law, not only based on liberal arguments, but also because observing

the *halakhah* without religious commitment may be said to be nonsensical, and enforcing the *halakhah* by an external authority secularizes it and transforms it into a factor without religious significance.[54]

The second momentous consequence of the British move represents the flip side of the coin to some extent. The *halakhah* "gained" citizens who became subject to its authority, but a heavy price was paid for this gain. In their early years under the British Mandate, the official rabbinical courts had to cope with various demands made by the British authorities, inconsistent with accepted halakhic norms. The first confrontation involved the demand that the rabbinical courts establish an appellate instance. The founder of the Chief Rabbinate and the first Ashkenazi Chief Rabbi, R. Abraham I. Kook, gave in to this demand despite ultra-Orthodox opposition. R. Kook, and his successors, R. Isaac Halevi Herzog and R. Benzion Ouziel, struggled against additional British demands that required changing traditional halakhic procedures and adapting them to modern judicial norms. They eventually gave in to these demands because the authorities warned that the powers that had been granted to the rabbinical courts by law were contingent upon their leaders' willingness to adopt these procedural reforms.[55]

The interference of the British authorities in the operation of the rabbinical courts went beyond procedural matters. The mere fact that the law specified the areas in which rabbinical courts could adjudicate, "matters of marriage and divorce," excluded from their jurisdiction most of the legal issues that rabbinical courts everywhere had adjudicated since time immemorial, namely, civil law cases (although, as noted above, the rabbinical courts were already limited in these areas at the end of the Ottoman era). These matters were deemed to be within the jurisdiction of the rabbinical courts only if both sides agreed to accept their authority, in other words, agreed to adjudicate their matter in accordance with the arbitration law of the state, which, however, allowed the civil courts to interfere with the arbitrator's ruling. Moreover, the rabbinical courts were not given exclusive jurisdiction over many of the issues related to family law unless both parties agreed to accept their authority. The state of Israel inherited this situation, and from the point of view of the rabbinical courts made things worse. According to many rabbinical judges, it is halakhically problematic for a divorce proceeding to be conducted in parallel by a rabbinical and a civil court, as the two represent different legal systems.

Because divorce proceedings are not under the exclusive jurisdiction of the rabbinical courts, they are not necessarily conducted entirely in accordance with Jewish law.

It is not only legislation that has restricted the jurisdiction of the rabbinical courts. Already during the British Mandate, the Supreme Court, in its capacity as a High Court of Justice, has handed down various rulings that narrowed the powers of the rabbinical courts and directed them to act contrary to what they perceived as binding *halakhah*.

According to many rabbinical judges, intervention of the civil court in the rulings of the rabbinical court, and certainly the subordination of the rabbinical judge to the secular judge, cause a severe halakhic problem, even greater than that of subordinating the rabbinical court to the law enacted by the legislature. Over the years some of the rabbinical courts in the country have developed an ambivalent attitude toward the fact that they operate by virtue of the secular law. On one hand, they resist any attempt to change their official status or cancel their monopoly over the marriage and divorce of Jews in Israel. On the other hand, they deny that their authority derives from the secular law and are trying to see themselves as institutions that continue the tradition of religious law practiced by Jews throughout the ages, a tradition originating in the word of God. As a result, there have been numerous conflicts between various rabbinical judges and the Mandatory and Israeli judicial systems. There have also been several attempts to circumvent the orders and provisions of the secular law in order to implement the halakhic arrangement that the legislature and the Supreme Court have rejected.[56]

Furthermore, turning the *halakhah* and the rabbinical courts into official institutions of a secular legal system has resulted in the adoption of extra-halakhic legal principles even where there has been no such coercion on the part of the secular authorities of the state. An example is the writing of reasoned court rulings and their publication, requirements that the *halakhah* does not impose, at least not in most cases in which rulings are issued. Undoubtedly, this practice is due to the fact that this is how Mandatory courts used to act.[57]

During the period of the British Mandate, two of the most dramatic changes in the history of Jewish law occurred as the result of external legal influences: the secularization of Jewish law and the establishment of rabbinical courts operating under the aegis of state law. These changes reflect a specifically modern and western distinction between religion on the one hand and politics on the other. This distinction and its attendant conception of

religion as non-coercive morality and of politics as a coercively enforced legal order failed to capture the political and legal character of Jewish religion as well as the religious character of Jewish law, engendering a series of tensions apparent in the contemporary state of Israel.

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[1] Shaw, *Ottoman Empire*, pp. 37–40.

[2] About the *Tanzimât* and the *Nizamiye* courts in general, see Rubin, *Ottoman*; Türkone, "Tanzimat." On the influence of the *Tanzimât* in Palestine and on the Jews,

see Ma'oz, *Ottoman*; Shaw, *Millet*, pp. 459–62.

[3] Bornstein-Makovetsky, "The Structure," pp. 79ff.; Bornstein-Makovetsky, "The Jewish Communal Leadership," pp. 173ff.; Rozen, *The Jewish Community*, pp. 156–67.

[4] For details about the relations between these courts, see Bornstein-Makovetsky, "The Structure," pp. 143–52.

[5] *Responsa of Maharit*, vol. 2, Ḥoshen Mishpat sec. 11.

[6] Rozen, *The Jewish Community*, pp. 159–60.

[7] ***Ibid.***, pp. 165–66.

[8] Barnai, *The Jews in Palestine*, pp. 130–35.

[9] Elon, *Jewish Law*, pp. 1584–85.

[10] Rozen, *The Jewish Community*, p. 156.

[11] ***Ibid.***, p. 162.

[12] Shmuelevitz, *Ottoman*, pp. 40, 67, 73–80. See further the discussion in Chapter 4 of the current volume.

[13] On the prohibition of turning to civil courts and the halakhic struggle against using alien courts over the years, see Elon, *Jewish Law*, pp. 13–18; Brand, *Non-Jewish*.

[14] A comprehensive documentation of Jews resorting to the Islamic court in Jerusalem all through the Ottoman Empire period, since the sixteenth century until the end of the nineteenth century, is found in the volumes of Cohen and Ben-Shimon-Pikali, *Jews in the Muslim Religious Court* series of books. Compare the situation in premodern Europe, as discussed in Chapter 6 of the current volume.

[15] Shmuelevitz, *Ottoman*, pp. 66–68.

[16] See, for example, R. Yosef Caro, *Responsa Avkath Rochel*, sec. 192; *Responsa of Maharit*, vol. 2, Ḥoshen Mishpat sec. 106. Shmuelevitz (*Ottoman*, pp. 65–68) argues that in some areas most of the claims filed by Jews were to alien courts. He shows that even in matters of marriage and divorce the Jews did not hesitate to turn to alien courts. See ***ibid.***, p. 72.

[17] Rozen, *The Jewish Community*, pp. 164–65.

[18] Shmuelevitz, *Ottoman*, p. 43.

[19] ***Ibid.***, p. 39.

[20] ***Ibid.***, pp. 68–73.

[21] ***Ibid.***, pp. 34–40.

[22] See the discussion in Chapters 4, 5, and 10 of the current volume.

[23] Shmuelevitz, *Ottoman*, p. 69.

[24] ***Ibid.***, pp. 50–54.

[25] See the sources listed above in **note 2**.

[26] Radzyner, "Rabbi Ouziel," p. 154 n. 94.

[27] Barnai, "The Status," pp. 56ff.; Westreich, "Judicial Autonomy"; Westreich, "The Official Rabbinical Court."

[28] Kaniel, "The Jewish Courts"; Friedman, "On the Structure"; Westreich, "The Official Rabbinical Court," pp. 251–56.

[29] About the law and its influence in the empire in general and in Palestine in particular, see Gerber, *The Social Origins*, pp. 67ff.

[30] For a broad discussion regarding the attitude of halakhic decisors about registration as a method of purchase of real estate, see Kleinman, *Methods*, pp. 211–41. The

author shows that not all the later decisors in Palestine accepted the position of the nineteenth-century Palestinian sages, presented below.

[31] Zohar, *Tradition*, pp. 152–73.

[32] See R. Shlomo Eliezer Alfandari, *Responsa Saba Kadisha*, Yoreh Deah, end of sec. 22, who determined that all the decisors agreed that property ownership by means of the *tabu* was required by virtue of *dina de-malkhuta*, and any other ownership of real estate was not applicable.

[33] See the letter of the court in R. Yitzhak Abulafia, *Responsa Pnei Yitzhak*, vol. 5, p. 137d. Other rabbis in Palestine held similar opinions. See Zohar, *Tradition*, p. 162.

[34] In his *Responsa Olat Ish*, Hoshen Mishpat sec. 2.

[35] In his correspondence with R. Elyashar, ***ibid.***, and also in his *Responsa Shaarei Rahamim*, vol. 2, Even HaEzer sec. 20.

[36] Zohar, *Tradition*, pp. 180–81.

[37] Elon, *Jewish Law*, pp. 122–41.

[38] ***Ibid.***, pp. 1588–91; Likhovski, "The Invention."

[39] For the sources related to this and the next two paragraphs, see Radzyner, "London," pp. 82–87.

[40] The common translation "Jewish Law Society" is misleading and is avoided here.

[41] Radzyner, "The Dilemma."

[42] Likhovski, "The invention," pp. 348–57; Radzyner, "*Mishpat Ivri*."

[43] Eisenstadt, "Le-Korot," p. 30.

[44] Compare the discussion in Chapter 4 of the current volume.

[45] Compare the discussion of *halakhah* and morality in Chapter 3 of the current volume.

[46] For details about the research method mentioned here, see Radzyner, "Between Scholar."

[47] Radzyner, "Between Scholar"; Radzyner, "The Dilemma."

[48] About the Jewish Magistrate's Court and the conflicts it created, see Shamir, *The Colonies*.

[49] For a review of such laws, see Elon, *Jewish Law*, pp. 1627–720.

[50] Radzyner and Friedman, "Haim Cohn"; Radzyner, "*Mishpat Ivri*."

[51] Shmuelevitz, *Ottoman*, p. 67. See also Sharia verdicts concerning conflicts between Jews in the area of family law in all the volumes of Cohen and Ben-Shimon-Pikali, *Jews in the Muslim Religious Court*.

[52] Radzyner, "Rabbi Ouziel," pp. 132–36.

[53] A similar reality existed in the twentieth century in North African countries under French rule, where Jewish courts also received official status by virtue of law.

[54] Englard, "Problem"; Leibowitz, *Judaism*, pp. 174–84. See further Chapter 7 of the current volume.

[55] Radzyner, "Takkanot Ha-Diyun"; Radzyner, "Sidrei Ha-Mishpatim."

[56] For an elaboration of the above, including the latest court rulings, see Radzyner, "Problematic"; Radzyner, "Annulment."

[57] Shochetman, "Obligation," pp. 352–61.

12

Judaism, Jewish Law, and the Jewish State in Israel

Arye Edrei

The relationship between religion and state in Israel is fundamentally different from that found in western democracies. In this chapter, we will examine the place of Jewish tradition in the Israeli legal system. We will try to understand the rationales, the underlying principles and the historical factors – deriving from the Jewish tradition, from the Zionist idea and enterprise, and from the cultural and political dynamics of the region – that have contributed to this relationship. In that context, we will also look at changes and developments that have transpired since the establishment of the state in 1948.

Religious norms find expression in the Israeli legal system in three primary contexts: (1) Religious services are provided and sponsored by the state; (2) Specific laws that are religious in origin, and are adopted by the state, but are given national, rather than religious, significance; and (3) Areas of law – mainly marriage and divorce – in which religious law is the state law, and religious courts function as state courts. We will try to understand the phenomena by focusing on a number of representative examples.

In the first section, we will look at the underlying ideological, historical, and political dynamics that prevent Israel from adopting the western model of the separation of church and state.[1] In the second section, we will deal with the three manifestations of the Israeli approach outlined above: religious services provided by the state; norms originating in the Jewish tradition that have been adopted as the law of the state, with a focus on *Shabbat* laws (third section) and the place of Jewish law within the legal system of the state (fourth section); and in the final section, the more complex issue, matters of personal status, in which religious law is incorporated by the state. In each section, we will also examine the changes that have taken place throughout the history of the state, along with the causes and impact of these changes.

The Historical and Conceptual Background

In exploring the connection between Judaism, *halakhah*, and the state of Israel, we should keep in mind that the idea of a Jewish state and its realization in the middle of the twentieth century were not just an attempt to find a safe haven for the Jewish people, but also, and perhaps primarily, the result of a process of change in the Jewish community throughout the nineteenth century that included a search for a redefinition of the very concept of Jewish identity in the modern reality. External political developments – e.g., granting civil rights to Jews (emancipation) – and internal dynamics – e.g., the *Haskalah* (Enlightenment) movement – brought about far-reaching changes in the character of the traditional Jewish community.[2] The sharp boundaries between the Jewish community and the surrounding population were blurred, and religion and *halakhah* lost their centrality in defining both individual and collective Jewish identity. The search for a new definition of individual and collective Jewish identity led to the development of a variety of new Jewish religious and intellectual movements throughout the nineteenth century.[3] Some religious movements, imbued with the spirit of emancipation, sought to reform religious practice while adopting a religiously defined identity and abandoning or dulling the national component of Jewish identity.[4] In contrast, the nationalist movements that arose subsequently toward the end of the nineteenth century, ultimately leading to the establishment of the state of Israel sought to return to a Jewish nationalist self-perception by separating Jewish nationalism as much as possible from Jewish religion and *halakhah*. Orthodoxy reacted resolutely to the religious reform movements, firmly opposing any changes in the religion and insisting on the centrality of strict halakhic observance in the definition of Jewish identity.[5] However, when the Jewish nationalist movements appeared on the stage, Orthodoxy became confused and divided. Some saw the nationalist idea as a proper fulfillment of traditional Judaism and agreed to cooperate in the enterprise in spite of the secularism of the movement. Others vociferously refused collaboration with the secular Zionists and focused on preserving the traditional community. Many of these movements that developed at the end of the nineteenth century and the beginning of the twentieth century had an impact on the development of religion–state relations in Israel.

Traditionally, Judaism viewed itself as a national religion in which adopting the religion requires belonging to the people, and belonging to the people necessarily means

accepting the religion. The religion is binding on the entire community but does not aspire to expand beyond its own boundaries. The revolution of modern Jewish nationalism that underlies the state of Israel and its constitutional documents was the desire to challenge the linkage and the traditional balance between these two components of Jewish identity – the religion and the collective – and at the same time, to espouse a commitment to the continuity of particularistic Jewish existence. The fact that religion and *halakhah* were central to the essence of Jewish communal identity in the Middle Ages and provided the context for all Jewish spiritual and cultural creativity made it difficult to promote a break with religion and religious law while simultaneously espousing continuity. In addition, the western concept of separation of church and state is based on the Christian antinomian approach that fostered the aphorism "unto Caesar what is Caesar's, and unto God what is God's." In contrast, the *halakhah* was designed to govern all areas of life. These radically different views made it significantly difficult to replicate the western model in a Jewish national state.

After a century of search and struggle, Ḥibbat Zion, the first international Jewish national movement (1884), became the first venue in which secular and religious Jews succeeded in working cooperatively under the same roof toward a common goal. In spite of the tension and contentiousness between the secular and the religious in the Zionist movement and in the state of Israel throughout the twentieth century, this cooperation has been sustained. Both sides were interested in and welcomed the establishment, and subsequently the preservation, of a Jewish state. Nevertheless, the significant differences in the meaning granted by the two sides to this objective – a state that fulfills the *halakhah* in its entirety, or a Jewish national entity devoid of traditional Jewish frameworks – must not be underestimated. While it was clear to both sides that the concept of a Jewish state incorporated an obligatory connection to the Jewish past, they differed on the nature and degree of this connection, as well as the desired methods for fostering its attainment. Finding the appropriate balance was the subject of ideological and practical controversies throughout the years of the struggle for a state and has remained one of the stormiest public controversies to this day.[6]

Thus, the radical definition of separation of church and state accepted in the United States, or even the western European formulation, cannot be adopted in Israel for two reasons – first, the imminent connection between religion and nationalism in Judaism,

and second, the aspiration of the religious and the secular to live cooperatively, given the realization that a state completely devoid of religion would lose its meaning for the religious contingent.

The Declaration of Independence of Israel, and subsequently the basic laws adopted in 1992, define Israel as a "Jewish State." Often, the granting of a Jewish character to public life in Israel or the furtherance of Jewish culture find expression in the enforcement of norms that originated in the Jewish religion. In other words, religious norms are enforced in the public domain not as religious norms, but rather as a reflection of national identity. The Israeli Supreme Court has accepted the Jewish character of the state as a constitutional given and thus has also accepted what it calls the unique "Israeli version of separation" – "*hafrada nusah Yisrael.*"[7] Yet although this is accepted, the court is diligent in trying to mark reasonable boundaries and to stabilize the tension between Israel being a "Jewish state" and a "democratic state."[8] The same is true in Israeli society in general. In spite of the broad agreement on the principle, Israeli society is divided over how to balance between the Jewish character and democratic nature of the state. In the political sphere, this issue is central to election campaigns, party platforms, and coalition agreements. It is discussed at length in the Knesset and the government, and it is often at the heart of Supreme Court deliberations.[9] A significant percentage of the Supreme Court constitutional decisions throughout the years have related to this area, a fact that often places the court at the center of the ideological controversy. In addition, it has been a significant factor in challenges to the status of the Supreme Court in Israeli society in recent decades.

Agreements and compromises arrived at on these issues cannot always be analyzed rationally. They often reflect historical and ideological, and at times even emotional, considerations. Some compromises are political, e.g., "the cost" for participation in the coalition or, from a broader perspective, the price for partnership in the national enterprise, as mentioned previously. Sometimes, however, compromises represent a balanced middle ground that is acceptable to all of the sides – e.g., willingly adopting a norm that derives from the religion, with a lack of agreement over whether the law has religious meaning or represents a national symbol. These different interpretations often lead to a controversy, at times stormy, regarding the appropriate scope and boundaries of

the norm, but this disagreement does not necessarily reflect opposition to the norm itself. A good example of this dynamic is the public observance of *Shabbat*, as discussed below.

Scholars hold that Arend Lijphart's "consensus democracy" model best describes the agreements in the area of religion and state in Israel, at least in the early decades of the state.[10] This model functioned in the pre-state Jewish settlement society in all areas, but it continued to function in the area of religion and state after the establishment of the state.[11] The question of whether this model accurately describes the situation today is a point of controversy. Consensus democracy is employed when a society recognizes a deep divide that could potentially cause a split and aspires to prevent a schism. The approach is characterized by reluctance to adopt absolute declarative rulings, and to search instead for pragmatic solutions, compromises, and mediated settlements. In a consensus democracy, the majority restrains itself from using its power against the minority, and the two sides recognize the red lines of the opposing side and refrain from crossing them. The inclusion of the national religious party in the governing coalition during the early decades of the state, in spite of the fact that the majority party did not need their participation, is an excellent example of the use of consensus democracy in the area of religion and state in Israel. Similarly, the decision of the first Knesset not to draft a constitution was motivated also by a desire to spare the young state the angst inherent in issues of religion and state. The subject was left for partial solutions, compromises, negotiations, and less declarative symbolic legislation than a constitution.

It was apparently Zerach Warhaftig, one of the leaders of the National Religious Party and a prominent political activist of the time, who suggested maintaining the pre-state agreements on religion and state after the establishment of the state.[12] The pre-state "status quo" included agreements regarding the organization of the rabbinate and local religious councils, the reliance on Jewish law in matters of marriage and divorce, the autonomy of the various streams vis-à-vis education, and the public observance of *Shabbat* and *kashrut* within specific parameters. Preserving non-sovereign community agreements in a period of sovereignty, despite the potential for alternative legislative decisions, was motivated by a desire to prevent a schism in the society.[13]

The term "status quo" is widely used in the religion–state discourse, usually referring to the letter sent in 1947 by Ben-Gurion to the leadership of Agudat Yisrael, the Orthodox non-Zionist group, on behalf of the Jewish Agency.[14] The letter dealt with four

subjects: *Shabbat, kashrut*, personal status laws, and education. Scholars have shown that despite the common perception, the letter in reality said very little, as its formulation was vague and non-committal. With regard to personal status, the letter does acknowledge the importance and seriousness of this topic – "lest the House of Israel be divided in two" – but it does not promise anything. With regard to the other three subjects, it simply ensures the freedom of a religious Jew to observe his lifestyle.[15] It seems that the letter was designed to provide an ideological basis for cooperation between the non-Zionist religious and secular Zionist groups, which was a mutual interest at this point in time. The leaders of Agudat Yisrael viewed Ben-Gurion's letter as the requisite minimum that would enable them to collaborate with the secular Zionists, which was critical for them in light of the desperate condition of the Holocaust survivors languishing in displaced persons camps. It is also possible that the function of the letter was to reassure the ultra-Orthodox Jews that the socialist regime destined to arise in the state of Israel would not be similar to the socialist regime in Russia that persecuted religion.

A document that did have significance in establishing the "status quo" in matters of religion was the "Law and Administration Ordinance," the first law that was passed by the young state. The law was designed to prevent a governmental vacuum, and to grant authority to the temporary institutions of the state. The law did not relate directly to the issue of religion and state, but it did establish continuity with the substantive laws and judicial institutions of the British Mandate. This fact indirectly resolved two important issues that had been significantly debated in advance of the declaration of the state. One was that the Jewish legal system would have no official status in Israeli law, a decision which was not self-evident prior to the establishment of the state. The second was granting exclusive jurisdiction in areas of personal status to religious courts, which was also not self-evident in pre-state Jewish society. In both instances, continuity was not required, but once established, it was very difficult to change.[16]

In recent decades, the Supreme Court has tended to reinterpret some of the previously accepted norms that originated in the religion.[17] Instead of justifying the norms as expressions of Jewish national culture, it now justifies them based on the obligation to protect individual religious sensitivities. In other words, the court contends that such norms are valid not because of the "Jewishness" of the state, but rather by

virtue of its democratic nature, which ensures individual liberties, including the prohibition of offending the religious sensitivities of individual citizens. An excellent example of this change in approach can be seen in the evolution of the prohibition of raising pigs and selling pork products in Israel. Food that is not *kosher* according to Jewish law is permitted by Israeli law in both the private and the public domains (as opposed to the state institutions). Nevertheless, a variety of limitations have been placed on raising and selling pork products in Israel. In 1957, a law was passed authorizing local councils to prohibit commerce in pork products in their jurisdictions. Subsequently, most of the councils adopted such laws. In 1962, the Knesset passed a law that prohibited raising pigs in Israel. These laws were not based on the halakhic prohibition, but rather on the recognition of the unique symbolic status of pork in the Jewish tradition, history, and collective consciousness, a perspective that was even shared by secular Zionist leaders.[18] It is significant that the legislation enjoyed support from both religious and secular legislators – although not an absolute consensus – based on the transference of this traditional norm from the religious realm to the national domain. Christian areas, primarily in the Galilee, were specifically excluded from the legislation. In the mid-1980s, however, a magistrates court (the lower court) ruled that the prohibition of selling pork products in Israel infringed on "freedom of commerce" and could therefore only be maintained based on concern for offending religious sensitivities. This allowed it to be enforced only in areas where a majority of the population would be offended by such activities. According to this new interpretation, the role of the law is not to promote national values, but to defend the rights of its religious citizens. The attorney general chose not to challenge this new definition in the Supreme Court and established it as the new policy for law enforcement.[19]

State Support for Religious Services

A significant aspect of the unique relationship between religion and state in Israel is the fact that religious services are provided by the state. This approach developed in light of the desire for collaboration between the religious and secular communities since the beginning of the Zionist enterprise, as we saw in the previous section. In the conceptual framework of Israeli democracy, the justification for the approach is that religious services are viewed as a basic human need, like welfare and culture, that is therefore demanded by freedom of religion and should be provided by the state. Thus, the Chief Rabbis of Israel as well as rabbis of cities and settlements are state funded by law. Their specific areas of authority are also established by the legislature. For example, the Chief Rabbis of Israel are authorized by the law to give their opinions on halakhic matters, to try to draw the public toward the values and commandments of the Torah, to supervise *kashrut*, etc. Religious councils throughout the state provide religious services including burial, *kashrut* supervision, and the funding of synagogues and other religious institutions and events.

One of the results of the fact that the rabbinate is funded by the state is that it is subject – as any other governmental agency – to the supervision of the High Court of Justice, which is a source of much tension. While the religious authorities feel entitled to absolute autonomy, the Supreme Court demands that they be subject to governmental norms that are fundamental principles of Israeli law. While the Court declares that it does not intervene in halakhic decisions, the justices are not prepared to blindly accept that everything that the rabbis say in the name of *halakhah* is indeed a halakhic issue. Thus, the Court does in effect draw the boundaries of halakhic considerations and limit the rabbinate from implementing some decisions that they claim to be halakhic.

This dynamic can be demonstrated by the case of Ilana Raskin, a belly dancer who turned to the Supreme Court claiming that the hall in which she regularly performed stopped hiring her because the rabbis had made discontinuing her performances a condition of the kosher certification of the hall. The rabbinate, authorized by law to certify *kashrut*, claimed that it has the right to demand that there be no performances that counter the spirit of the religion and the *halakhah* in establishments under its supervision. The Court ruled that in this instance the rabbinate went beyond its authority, which is

limited to the hard core of the *kashrut* laws. In essence, the Court inserted itself into the halakhic discourse, establishing the parameters of the *halakhah* and delegitimizing other parameters claimed by the rabbis to be halakhic. The Court wished to ensure that rabbinic authority desiring to avert fraudulent *kashrut* would not attempt to control behavior governed by other halakhic norms. Formally, the Court defended the dancer's rights, and perhaps the rights of the hall that wanted to have kosher certification. In reality, the Court also wished to protect a large percentage of the public that is interested in eating kosher food from a stringent rabbinate that was trying by means of *kashrut* supervision to govern other religious norms or values.[20]

The Court recognizes the place and importance of religion in Israeli society, but holds that for that reason the rabbinate must serve the needs of a broad population and cannot be allowed to deny some of their religious needs by imposing additional stringencies. In essence, the Court recognizes that the *halakhah* is pluralistic and manifests a culture of controversy with a range of opinions. This pluralism requires the rabbinate in many instances to adopt the lenient position, as reflected in the words of Justice Bach:

> You [the rabbis] cannot forget that there are a variety of groups within the population with different tastes, practices, and traditions to which they are accustomed […] Many of these want to include the kind of dance that is the claimant's expertise in their family celebrations, and nevertheless want to make sure that the food served to them and their guests meets the required standards of *kashrut*.[21]

The case of Mrs. Shakdiel, who petitioned against the ruling of the Chief Rabbinate that a woman cannot serve on a religious council, which we will discuss at length later on, is another interesting case in point. The Supreme Court investigated the halakhic issue in depth and ruled that the rabbinate must adopt a moderate position, which exists as a minority opinion in halakhic literature, and allow a woman to take on a position of leadership. The Court was sending a message to the rabbinate that there is a price to being a government rabbinate, including a requirement of moderation. A private rabbi has the prerogative to withhold *kashrut* supervision from an establishment that does not

function within the spirit of his standards, or to refrain from employing a woman in an institution for which he is responsible. However, one who serves on behalf of the state is subject to the laws of the state and must balance his authority with its legal principles.

It seems that the Court wants the rabbinate to comprehend what it sometimes has failed to understand on its own – that when it wishes to extend its authority over a broad-based population with a variety of levels of religious observance, it cannot impose the most stringent norms. Rather, the rabbinate must find a reasonable balance and allow individuals to take upon themselves the level of stringency that they desire.

Shabbat

Shabbat is a striking and interesting example that demonstrates the aforementioned phenomenon of a norm that has its origin as a religious norm but is adopted in Israeli law by virtue of its national significance. The parameters for implementation are established by the desire to find the maximal point of consensus of the population at large. There is a broad consensus that *Shabbat* should be the official rest day in Israel. Many of the ideologues of secular Zionism viewed *Shabbat* as an important component of Jewish culture and national Jewish identity. For example, Aḥad Ha'am, the most prominent ideologue of cultural Zionism, wrote in 1898 in his article entitled "*Shabbat* and Zionism," the following:

> We see great men, secular scholars who are far removed from religious belief and freely admit that they do not keep *Shabbat* or any other religious laws, but nevertheless vehemently defend *Shabbat* as a **historical institution of the whole nation** […]
>
> Anyone who feels in his heart a true bond with the life of the nation throughout the generations, simply will not be able to imagine the Jewish People without "*Shabbat Malketa*" ("Shabbat the Queen" in Aramaic). It can be said without exaggeration that more than the Jewish people have kept *Shabbat, Shabbat* has kept **them**.[22]

Similarly, Moshe Sneh, a liberal secular political activist, wrote the following comments in 1944 in light of the decision to restrict public transportation on *Shabbat*:

> The ordinance … is not designed to limit personal freedom, but rather to preserve the concept of rest on *Shabbat*, which is the common heritage of both the *haredi* [religious] and the secular societies.[23]

In 1932, the Assembly of Representatives, the supreme national body that had been established in 1920 and recognized by the mandatory government as the official representative of the Jews in Palestine, decided to require *Shabbat* observance in all local councils. In 1935, the World Zionist Congress adopted a decision that *Shabbat* should be observed in all national institutions. Consistent with this attitude, there has been a

consensus in Israel since its inception that state institutions – including the educational system, the army, and all government agencies – observe *Shabbat*. However, the law extended the prohibition into the private sector as well by establishing that the weekly rest day for Jews is *Shabbat* and prohibiting the employment of a worker on his rest day. The Supreme Court validated the legislation even though it limits "freedom of commerce," a fundamental right explicitly embedded in the basic laws of the state. In the words of Israeli Constitutional Law, the law befits the values of the state as Jewish and democratic, and does not undermine the appropriate balance.

> The rest day for Jews on *Shabbat* realizes the values of the state as a Jewish and democratic state. These two values are integrated in this law in perfect harmony … *Shabbat* is no less a national value than it is a religious one. "*Shabbat* is the most brilliant creation of the Jewish spirit," wrote Chaim Nachman Bialik. And Aḥad Ha'am wrote: "Anyone who feels in his heart a true bond with the life of the nation throughout the generations, simply will not be able to imagine the Jewish People without *Shabbat* the Queen."[24]

In the view of the Court, the adoption of a religious norm is legitimate when, in spite of its religious content, it represents a national value, contributes to the Jewish character of the state, and meets the criteria of reasonability and proportionality.

Nevertheless, it should be noted that the state law actually says very little about public *Shabbat* observance. It simply establishes that *Shabbat* and the Jewish holidays are the official rest days and that it is therefore prohibited to employ a Jew on those days in the absence of a special permit.[25] Non-Jews, on the other hand, have the right to maintain a day of rest on their respective sabbaths and holidays. Beyond that, no national *Shabbat* law forbidding commerce or labor in the private or public domain was ever enacted. Those issues were referred to the municipal and regional councils for local legislation, a phenomenon that characterizes consensus democracy, as we have seen. Yet, in spite of the consensus that we discussed previously, the battles over the status of *Shabbat* in Israeli society have been among the most vociferous public debates throughout the history of the state. The appropriate boundary between the protection of individual rights and the establishment of the Jewish character of the state in the public

domain is the heart of this debate. While everyone agrees that no limitations should be placed on the private domain, and generally on the individual in the public domain as well, establishing the proper parameters for the public domain is quite complex. For example, is it appropriate that there be no public transportation or that recreational areas and private stores be closed on *Shabbat*? Furthermore, how does the characterization of the *Shabbat* law as a national symbol rather than a religious observance influence the way that we interpret the law? For example, should we permit public activity when performing it on *Shabbat* might significantly decrease its cost or disruptive effects, such as fixing the roads when they are relatively empty? Should we place greater *Shabbat* limitations on the heads of state because of their representative role? There is no doubt that the intensity of the discourse regarding *Shabbat* in Israel is due to the fact that it relates to one of the most important symbols of the Jewish identity of the state and to one of the most significant historic symbols of Jewish law. As mentioned, *Shabbat* legislation specifically excludes non-Jews, an exception that was clearly designed to protect their religious freedom by allowing them to refrain from work on their own sabbath. Yet, the very exemption of non-Jews sharpens the anomaly that while this norm was defined as a national symbol, its source is in the religious realm, demonstrating the ambiguity of the boundary between the national and the religious.

Mishpat Ivri and the Legal System of the State

What is the role of the Jewish legal tradition in Israeli law? A large percentage of Jewish literature throughout the generations relates to discussions on civil and public law in part because the traditional Jewish curriculum focused on talmudic tractates that deal with such legal issues, and in part because of the judicial autonomy enjoyed by Jewish communities until the end of the eighteenth century. The prominence of civil and public law in Jewish legal tradition was the basis for the promotion of Jewish law as "national law" in the ideological writings of the Jewish national movement, which began in 1918, in light of the Balfour Declaration, with the establishment of the "Mishpat Ivri" (lit: Hebrew law)[26] Society in Russia. The introduction to the first pamphlet of the society stated:

> It is self evident that this law … must be "native born" and not foreign growth … must pass through the channels of our nation's creative processes to take on the national form consistent with the needs and temperament of the people. Our new national life … makes it necessary to grapple with political and civil problems of legal nature. Thus, it is the obligation of the scholarly literature in the field of Jewish Law to establish the necessary foundation and prepare the soil for authentically Jewish legal creativity … We therefore will particularly examine the law in its Jewish national form, as it has developed during the thousands of years of our people's existence.[27]

These ideas are rooted in the historical school of law, which was influenced by contemporary German Romanticism, one of its important proponents being Friedrich Carl von Savigny. At the same time, these words reflect the ideas of Spiritual and Cultural Zionism, which viewed Jewish cultural revival as the main objective of Zionism. In the words of Aḥad Ha'am, the goal of Zionism was "not just a state for the Jews, but a truly Jewish state."[28]

Separating the law from its religious context – i.e., separating the civil and public legal sections of Jewish law from its religious and ritual components – was defined already at the inception of the *Mishpat Ivri* movement as one of its objectives. The new term *Mishpat Ivri* was thus in itself a revolutionary concept that reflected a desire to view the civil and public legal sections of *halakhah* as an expression of national values.

This is an additional example of the process of creating a new Jewish identity that draws on the Jewish religious heritage but grants it new secular-national meaning.

This line of thinking played a significant role in the legal discourse prior to the establishment of the state and in its first decades. A significant expression of this approach can be found in the words of Justice Agranat in a 1954 Supreme Court decision applying Jewish law to a couple married in a civil ceremony outside of Israel, not because it is their religious law, but because it is their national law. He explained as follows:

> It seems superfluous to explain what should be by now clear to everyone – the Jews, even after being exiled from their land, never became a religious sect in their own eyes, and never stopped being in their own perception a nation among the nations … carrying with it its cultural riches, its national possessions – among them Jewish law – in all of its Diasporas throughout its period of exile. Indeed, during the long period that the Jews were forced to be enclosed behind the ghetto walls, Jewish law took on a more stark religious nature. Nevertheless, it never ceased because of that to serve as the national law of the Jewish people, even after that wall was breached.[29]

In the continuation of his comments, Agranat quoted Aḥad Ha'am's article "The Ember of the Fathers" (*Gaḥelet Avot*), which viewed the *Shulḥan Arukh* as the book that was "suitable for the spirit of our people, consistent with its spirit and needs in those generations." The significance of these words is accentuated by the fact that they were rendered by a secular judge within the field of family law, and by the great significance given to the citation from Aḥad Ha'am in this context. Indeed, these comments reflect the spirit that prevailed in the early days of the state, when the Court and the law played a role in building the nation. This building would be constructed with a link to the past, but as a national heritage rather than a religious one.

The Mishpat Ivri Society in the 1920s to 1940s wanted to create a new legal system free of commitment to religious norms, free to choose what was deemed appropriate and correct from the halakhic literature, authorized to adopt laws from external systems, and empowered to legislate new laws. The activism advocated by the Mishpat Ivri Society was perceived by it as part of Zionist activism – revolutionary, yet promoting continuity – breathing new life into Judaism and rehabilitating it from its exile-induced atrophy.[30]

In the legal council that prepared legislation for the future state, there was a broad coalition in favor of making a place for *Mishpat Ivri*. Incidental factors and distractions led to the fact that the "Law and Administration Ordinance" did not relate to *Mishpat Ivri*.[31] Nevertheless, in the 1950s, in consideration of the public's expectation, the Department of Justice attempted to base proposed laws on *Mishpat Ivri*.[32] During this period, the use of *Mishpat Ivri*, although not required, was also warmly accepted by the Supreme Court. Moshe Zilberg, one of the prominent justices in the first generation of the Supreme Court, a product of the Lithuanian Talmudic academies who was not only an astute jurist but also a Judaic scholar and a proponent of Cultural Zionism stood out for his creative use of *Mishpat Ivri*. He promoted the adoption of *Mishpat Ivri* in instances where the law requires interpretation, where the interpretation based on *Mishpat Ivri* is consistent with the law, and where it befits the time and the place. His rulings are fascinating examples of the potential relevance of talmudic sources in the modern reality, and the potential for *halakhah* to contribute to Israeli law. Thus, for example, he made use of talmudic law in order to nullify or limit the British rule that disallowed claims based on an illegal contract, a rule that he considered unjust because it gave an advantage to the one who had breached the contract.[33] In another instance dealing with an immoral stipulation in a contract, Zilberg related to the criteria for determining what might be considered moral or immoral: "We must respond based on our own moral perspective."[34] In this ruling, he extended *Mishpat Ivri* to include the ethical values of Jewish tradition as a basis for providing content for an existing legal norm.

In 1980, the Foundations of Law Act established as follows: "Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace **in Jewish heritage** (*'moreshet yisrael'*)." With this law, the legislature nullified the obligation to turn to British law as specified in article 46 of the King's Order-in-Council. Relative to the pre-state period and the early years of the state, the ambiguous compromise formulation of the act reflects a distancing from the content of *Mishpat Ivri*. Yet at the same time, it reflects a desire to incorporate symbols from Jewish culture. Indeed, when the law was presented in the Knesset, the chairman of the Constitution, Law, and Justice Committee stated: "This law does not have exaggerated significance in its practical judicial applications, but it has great symbolic significance."[35]

The readiness of the Supreme Court to make use of this law was even more limited than the limited nature of the law itself. In the 1950s and 1960s, referring to *Mishpat Ivri* was an ideal, but this law was passed at a time when the judges were striving for independence and freedom from any imposed commitments.[36]

Menachem Elon, a noted professor of *Mishpat Ivri*, was appointed to the Supreme Court in the late 1970s. From its inception, the Court traditionally included an expert in *Mishpat Ivri*. Justice Elon saw the Foundations of Law Act as a "basic law whose place is at the 'eastern wall' of the judicial system of the state."[37] He interpreted the expression *moreshet yisrael* as "*Mishpat Ivri*" and interpreted the Act as creating an imperative to utilize the latter broadly. Elon's struggles for the use of *Mishpat Ivri* in the Supreme Court began before the enactment of the Foundations of Law Act. He claimed that the intent of the Israeli legislature is that all statutes be interpreted according to *Mishpat Ivri*. Thus, for example, Elon stated in one of his rulings:

> *Mishpat Ivri* served in the past as well as today as "part of the cultural riches … the national law of the Jews." It makes sense that the inspiration for the interpretation of the legal system of the Jewish state come first and foremost from its national legal system, which is its legal cultural background.[38]

While Elon's arguments would have been widely accepted in Zilberg's day (the 1950s and 1960s), they were vociferously opposed in the 1980s. Justice Aharon Barak, who later became a dominant Chief Justice, stood on the front line of the opposition to Elon. Barak believed in the independence of the law and the judges, and sought to strengthen the power of the Court. Restricting the judges to a binding method of interpretation was certainly not consistent with his spirit. Barak promoted an interpretation of the Foundations of Law Act that essentially excluded *Mishpat Ivri* from the Court's deliberations. The stormy controversy in court between Justices Barak and Elon throughout the 1980s spawned a great deal of scholarly literature. In an interesting article, Ḥanina ben Menachem utilized the distinction between an "obligation to obey" and an "obligation to consult" to argue that the Foundations of Law Act did not obligate the Court to adopt *Mishpat Ivri*, as Elon claimed, but rather to consult it and consider its position before ruling. This moderate interpretation prevents the possibility of imposing

norms from *Mishpat Ivri* that are not consistent with the spirit of Israeli law.[39] The Court failed to consider this reasonable interpretation because it was embroiled in this stormy controversy. Rather, it adopted Barak's radical position, and in reality the law became a dead letter in the Israeli law books. Studies reveal, paradoxically, a reduction in reliance on *Mishpat Ivri* after the passage of the Foundations of Law Act compared to the period preceding it. The opposition to *Mishpat Ivri* led to the cessation of the tradition of maintaining a seat on the Supreme Court for an expert in *Mishpat Ivri*. After Elon's retirement, the tradition developed of maintaining a seat for a religious justice who would represent the perspective of the religious community. Thus, the approach of the Court changed from ensuring a *Mishpat Ivri* voice among the justices, to maintaining a voice for the religious community.

Opposition to *Mishpat Ivri* was based on a variety of rationales and took on a different character in different periods. Some wanted to separate themselves from *Mishpat Ivri*, or even to eliminate any connection to its legacy, because they thought that it reflected "exile" (*galut*) values or that it was an archaic law that was not suitable for modern society. Others saw it, as it views itself, as religious law that did not allow for the separation of the subject matter of *Mishpat Ivri* from the religion and its values. There were also those who were concerned that the authority over *Mishpat Ivri* would ultimately be transferred to the rabbis. This last view arose in the 1940s and 1950s, but was no longer relevant in the 1980s. There is, however, some similarity between this view and the concern of the judges about Justice Elon's promotion of commitment to *Mishpat Ivri* – i.e., the concern that the authority for Israeli law would be transferred to *Mishpat Ivri*. The judges' lack of knowledge of *Mishpat Ivri* was certainly a factor in its decline as well, but it seems that the opposition to *Mishpat Ivri* should be viewed, at least partially, as reflecting the growing aspiration in Israeli society, primarily among the elite, to adopt a universalistic worldview in place of the particularistic Jewish culture – i.e., to move from the "Jewish state" toward the "democratic state."

Justice Elon's endeavors during his active years on the Supreme Court are extensive and a significant contribution from the internal perspective of *Mishpat Ivri*. Many of his rulings – whether he was with the majority or wrote a dissenting opinion – are classical examples of halakhic innovation and, in particular, demonstrations of how *halakhah* can

function in a modern reality. An excellent example of this phenomenon is the case of Leah Shakdiel mentioned above. Mrs. Shakdiel wanted to serve on the local religious council but was denied the ability to do so because the Council of the Chief Rabbinate prohibited women from serving on that body. The rabbinate apparently held that the Court had no jurisdiction in this case because the case involved a halakhic issue. Justice Elon embarked on a study of the *halakhah* and concluded that while the position of the rabbinate represented the majority opinion of the classical halakhic authorities, there are alternative opinions that should be considered and, in the contemporary Israeli reality, should be adopted. The fact that the Court undertook an in-depth study of the halakhic sources and ruled contrary to the ruling of the rabbinate is quite significant. It demonstrates that in the relationship between *Mishpat Ivri* and Israeli law, the impact can be two-directional – not only can *Mishpat Ivri* affect Israeli law, but the Court's deliberations on the level of implementation reveal ways in which the *halakhah* can and should deal with modern issues and realities. Justice Elon's ruling – like the rulings of Justice Zilberg and others – can be viewed as reflecting specific positions within a halakhic discourse. Thus, the elimination of *Mishpat Ivri* from Supreme Court deliberations not only has an impact on Israeli legal rulings, but is also a blow to the creativity of the halakhic corpus in dealing with contemporary issues.

An interesting perspective on this issue was expressed by Justice Englard. The question at stake was whether in a breach of contract case, a litigant can claim compensation for loss of anticipated earnings, a question that had not previously been addressed in Israeli law. Englard turned to the Talmud and found that it imposes religious-moral sanctions for breaking a promise. After explaining the nature of such sanctions, and concluding that they could not be imposed by a civil court of the state, he stated:

> One might ask whether it is proper within the context of incorporating *Mishpat Ivri* for the civil court of the state to extend the halakhic solution by imposing a legal sanction in place of the moral sanction imposed by the religious court.

Englard suggests the possibility of abstracting the moral principal embedded in the Jewish law – i.e., that it is improper to break one's promise – and concretizing it in a civil

sanction – i.e., forcing the offender to fulfill his promise or pay the other side compensation for lost anticipated income, a sanction that does not exist in the existing religious law. Englard continued:

> This extension of Jewish law by a civil court could lead to an interesting outcome. It is possible that the ruling issued by the civil court – based on an idea taken from Jewish law – be recognized by the Jewish court as a custom or as the law of the land which is binding also within the context of the religious court itself.[40]

Justice Englard's opinion is particularly interesting in light of his earlier position as a professor of law in which he opposed the Court's use of *Mishpat Ivri*, viewing it as secularizing a sacred norm. Yet after he was appointed to the Supreme Court, Englard made use of *Mishpat Ivri* in many of his rulings. Not only that, but in the aforementioned ruling, he claimed that the ruling could have an impact on the development of *halakhah* itself, although only if the ruling were to be considered and adopted by the rabbinic courts. In contrast, Justice Elon held – although he was never prepared to explicitly admit it – that his opinion as a scholar of *Mishpat Ivri* should be considered as a valid opinion in the internal halakhic discourse.

Our argument that the elimination of *Mishpat Ivri* from Supreme Court deliberations was also a blow to the *halakhah* itself can be seen in another context as well. The accepted practice in Israel for decades, with the approval of the Supreme Court, was that the rabbinic courts can have jurisdiction even in areas where they were not granted it by law, if both sides of the litigation agree to grant it authority. In such instances, the rabbinic court serves as a mediator, in accordance with the Israeli law of mediation. Recently, however, the Court invalidated this practice and established that the rabbinic courts are state institutions, and as such they can be granted authority only by explicit law and not by the litigants. Thus, the Court prohibited the rabbinic courts from judging civil matters even when the two sides explicitly agree to the practice.[41] Justice Tzvi Tal, in a dissenting opinion, argued that the rabbinic courts are a direct continuation of the courts of Jewish communities throughout the ages, and that the state granted them additional authority to judge on its behalf in specific matters that it conferred to them:

> The legislature made use of an existing system, the rabbinic courts, and granted it exclusive governmental judicial authority in matters of marriage and divorce of Jews in Israel. … [In these areas] the rabbinical court serves as a governmental agency and an official organ of the state. Did this in any way take away or detract from it any power that it had previously?![42]

We might say that prior to this ruling everyone viewed the rabbinic courts as institutions of Jewish tradition that were *also* granted jurisdiction by the state. Funding traditional Jewish courts and enabling interested parties to litigate in them had been understood as an expression of the Jewish character of the state. After this change, however, the status of the rabbinic court was confined to that of an institution of the state that exists only by virtue of the authority-conferring state. One of the outcomes of this ruling has been the proliferation of private rabbinic courts that serve the needs of those who wish to litigate according to Torah law.[43] However, this phenomenon is beyond the scope of this article.

Family Laws

The complexity of family law and matters of personal status in Israel should be understood in light of the legal history of the region during Ottoman rule and subsequently the British Mandate, and in light of the importance of these matters in Jewish tradition.[44] Ottoman law granted authority to the Moslem courts, which were the courts of the state, on issues of the personal status of Moslems. Courts of other religious communities, including the Jews, were also granted judicial authority over their constituents in some matters, primarily in marriage and divorce. Understanding the sensitivity inherent in this issue, the British authorities refrained from trampling on the feelings and culture of their subjects and from legislating a unified law for the region, and thus preserved the jurisdiction of the religious courts. Ambiguities – such as what law applies to foreign residents, people with dual citizenship, people with more than one religion, atheists, etc. – were consequences of this approach. As mentioned, the Israeli legislature embraced the existing situation. In 1953, the Knesset enacted the Rabbinical Courts Jurisdiction Law, establishing that marriage and divorce of Jews in Israel would be exclusively according to Torah law, and under the judicial authority of the rabbinic courts. The fact that the Israeli legislature maintained pre-state practices in this most important area was not obvious. In the pre-state era, it was the subject of a heated public debate. While pressures of time and circumstances were part of the reason for maintaining the status quo, the main reason was that many appreciated the sensitivity of the issue and the fact that for some it was a "red line." David Ben-Gurion himself married in a civil ceremony and avoided a religious marriage, yet, as we saw, he acknowledged in the "status quo letter" that this issue had the potential to "divide the house of Israel."

Some changes in the laws relating to personal status issues were implemented by the Israeli legislature over the course of the years – such as laws relating to adoption, inheritance, and guardianship – yet in the crucial areas of marriage and divorce, the law remained the same. Thus, there is no civil marriage in Israel, and marriage and divorce are governed by religious law and rabbinic courts. This is the most complex and difficult issue regarding religion and state in Israel today, as it is the cause of difficulties in everyday life. For example, a person with no religious affiliation cannot marry in Israel,

intermarriage between people with different religions is impossible, and it goes without saying that a person who ideologically opposes religious law has no recourse. These issues became more pronounced following the wave of immigration from the former Soviet Union in the 1990s, since many immigrants were not Jewish. A minor change was introduced in 2010 when the legislature passed the "Partnership Covenant Law," which allows for a civil union, but only in a case where both sides have no religion. The accepted practical "solution" for couples who cannot marry in Israel is marriage in Mexico or Cyprus, countries that allow marriage to non-citizens. The advantage of Cyprus is its proximity to Israel, while the advantage of Mexico is that the marriage can be done by proxy without the couple being present. The status of these marriages in Israeli law has never been conclusively determined in spite of the many years that this practice has been employed. Recently, the Supreme Court approved a decision of the rabbinic court establishing that these marriages have halakhic validity when both of the partners are Jewish, which grants jurisdiction to the rabbinic courts in the event of divorce.

The exclusive jurisdiction of Jewish law in family law creates serious problems of inequality, especially in the laws of divorce, a fact that comes into conflict with the democratic aspirations of the legislature. Jewish divorces are not equal, as they depend on an act of divorce, which is the granting of a writ of divorce (*get*) by the man of his own free will and volition. A court ruling that a couple must divorce does not dissolve the marriage, but simply obligates the man to effect a divorce. When a man refuses to obey the rule, the rabbinic court often hesitates to impose sanctions, lest it be construed as compulsion, which invalidates the divorce. The lack of equality also finds expression in the fact that the halakhic impact for a man who cohabits with another spouse is much more lenient than for a woman who cohabits with more than one man. Cumulatively, this gives the man a disproportionate power in the pre-divorce negotiations and in the implementation of the divorce, and the court is relatively powerless to deal with extreme cases of recalcitrance. In 1995, the Israeli legislature empowered the rabbinic courts to impose sanctions on non-compliant husbands, such as preventing them from leaving the country, obtaining a passport or a driver's license, or receiving specific benefits and stipends to which they are entitled by law, and it even gave the rabbinic court the power to order long-term imprisonment. Yet, concerned for the severe consequences associated

with an invalid *get*, rabbinic courts make little use of this coercive power and adopt the more stringent halakhic opinions forbidding pressure on the husband. In extreme cases in which the husband refuses to give a *get*, the wife is thrown into distress as she is separated from her husband but unable to remarry, a halakhic status called *agunah.* This problem is one of the most difficult and painful in Jewish law, both in Israel and the Diaspora. The traditional communal social means of enforcement are lacking in the modern Jewish community, and Jewish law has not yet adapted itself to this reality.

The legal situation vis-à-vis property matters related to marriage is particularly interesting and complicated as the legislature has granted parallel jurisdiction to the civil and the rabbinic courts. The actual jurisdiction in a specific case is granted by the court that establishes jurisdiction first. A monetary claim can be brought to the religious court only if it is incorporated within a divorce proceeding, but it can be brought before a civil court in any case. This complex judicial reality leads to a "race for jurisdiction," battles, and tension between the court systems. With regard to the substantive law in matters of division of property between the spouses, the legislature, with the authorization of the Supreme Court, enacted an equal division of property between spouses and applied it to both rabbinic and civil courts. In other words, the legislature left juridical authority in the hands of the religious courts, but intervened with regard to the substantive law, establishing that the rabbinic courts must rule according to the laws of the state rather than according to the *halakhah.*[45] Of course, if the rabbinic court ignores a particular law that was imposed upon it, it is subject to judicial review by the Supreme Court. Needless to say, many of the rabbinic judges view this reality as extremely problematic from a halakhic perspective.[46]

Let us explain the aforementioned "race for jurisdiction" and its importance. The religious courts have the authority to judge property issues related to divorce only if they are incorporated in the divorce proceedings, and as long as the civil court has not established prior jurisdiction. If one side submitted a division of property claim to a civil court before the divorce process was initiated, then the civil court has acquired exclusive authority in the case and the rabbinic court is prevented from judging the monetary elements of the case. Conversely, if one side initiates divorce proceedings in the rabbinic court and includes a claim regarding division of property, the rabbinic court has acquired the authority in the case. Even though the two systems ostensibly employ the same

substantive law – division of property goes according to the civil law in both systems, and maintenance according to the religious law in both systems – there is in actuality great significance to the forum in which the case is heard, since the law is subject to different interpretations and methods of implementation in the different court systems. It is generally considered that the wife has better standing in the civil court while the man's standing is better in the rabbinic court. For this reason, each one "races" to establish authority within the system that is most favorable to him or her. This has led to an open battle that reflects ideological competition and attempts on the part of both systems to extend their respective parameters of authority. The battle for jurisdiction is conducted by both legal systems through rulings and legal interpretations of the substantive law and of the law that grants jurisdiction.

In general, one could say that the Supreme Court has effected a gradual process of transferal of authority from the rabbinic courts to the civil courts, which has weakened the rabbinic courts and at times turned them simply into coordinators of divorce writs (*gittin*). For example, in a radical decision, the Supreme Court established that once the divorce process has been concluded, the jurisdiction of the rabbinic court terminates, even when all property issues were judged in that court. In other words, any future issues that arise regarding the interpretation or enforcement of the divorce agreement that was negotiated and approved by the rabbinic court no longer fall within its authority. The Supreme Court applies this limitation even if the agreement stipulates that any future issue should be determined by the rabbinic court.[47] As a result of these rulings, divorce agreements signed in the rabbinic court are at times challenged immediately after the giving of the *get* in a civil court, which in many instances nullifies or changes them. Thus, for example, the civil court may change the child support payments or child custody agreed upon in the rabbinic court.

Such Supreme Court rulings have seriously reduced the standing of the rabbinic courts and have engendered a militant response. The only tactic available to rabbinic courts in the struggle for the restoration of their reduced authority is to expand the issues that can be defined as "matters of marriage and divorce" that everyone agrees is within their exclusive jurisdiction. This approach often leads to particularly stringent halakhic rulings. For example, in the aforementioned case of property agreements that are subsequently overturned by civil courts, the rabbinic courts at times fight back by

nullifying the *get* retroactively, arguing that it was concluded "in error," based on the mistaken assumption that the agreement would be honored. In reality, this response is not acceptable to all of the rabbinic judges, but it is a phenomenon in some of the rabbinic courts and is based on a valid halakhic criterion that was generally not utilized in the past because of its stringency.[48]

Another example of this dynamic is that the civil courts in recent years have imposed sanctions on husbands who delay granting a *get*, awarding compensation to the wife. The rabbinic courts have viewed this new process as well as a challenge to its authority to coordinate all of the tools of pressure and enforcement over the husband. In response, the rabbinic courts have begun to challenge the validity of a *get* given under the threat of financial sanctions, claiming that it might in reality be a *get* given under compulsion, which is invalid.

The great sensitivity inherent in this area of law discouraged the legislature from introducing a coherent legal solution, knowing that any solutions that it might propose would lead to a political storm and social schism. It therefore left the situation confused and incoherent, leaving a vacuum for the Supreme Court to enter. The Court adopted an aggressive one-sided approach, apparently supported by a majority in Israeli society, that led to a deterioration of the standing and authority of the rabbinic courts. The rabbinic courts are motivated not only by a struggle for authority, but by a genuine concern for the integrity of Jewish marriage and divorce in Israel and the potential for a "division of the house of Israel," already recognized by Ben-Gurion in his "status quo letter" of 1947. Yet even in the religious community in Israel, there is a feeling that the rabbinate has failed to search seriously for solutions to difficult contemporary moral issues that would be accepted by the Israeli society at large. Many believe that in order to preserve the proper balance between religion and state and to maintain the exclusive authority of Jewish marriage and divorce in Israel, the rabbinate, as representatives and spokesmen of the *halakhah*, must establish a normative moral halakhic system that can deal with the challenges of modern reality, especially within the context of Jewish sovereignty.

Epilogue

The dilemma of defining Jewish identity in the modern world reverberates strongly in the debates over the relationship between religion and state in the state of Israel. Two essential questions have shaped this discourse. One relates to identifying the criteria and parameters for defining Jewish identity in a secular reality. The second relates to the challenge of shaping and defining Jewish identity within a sovereign Jewish state and a majority Jewish society. These two phenomena – secularism and a sovereign Jewish majority – are relatively new and have therefore constituted a significant challenge in developing the Jewish community within the state of Israel and beyond it. These two essential questions shape the discussion of the underlying issue that is at the heart of this chapter: What elements of the Jewish religious tradition can and should be part of the legal system of the state of Israel? This question is quite complex and confusing in light of the following additional contributing factors. There is a general consensus that the state of Israel is a democratic state, which is thus inherently committed to maintaining the requisite level of human rights. At the same time, there is also a general consensus that the state of Israel aspires to foster a harmonious co-existence among different groups of Jews – some more traditional and some less – in the hope that they all view the state as a place that instills meaning in their own Jewish identity. In addition, it seems that the age-old Zionist controversy over whether the state of Israel should be a state for the Jews or a "Jewish state" has effectively been resolved through the adoption of an approach that combines the two, viewing the state of Israel at one and the same time as a place that is responsible for the security of every Jew, but also responsible for the enrichment and development of Jewish culture. These dilemmas and the attempts to balance between the various stakeholders come to expression in many areas of Israeli life. In actual fact, life in Israel reflects a fascinating discourse on the essence of modern Jewish identity, and even an awareness of the existence of competing definitions of Jewish identity in the modern period that must find a common language in the state of Israel. The question of the relationship between religion and state is one of the prominent and complex arenas in which this quest for balance has taken place and continues to take place. In this chapter, we have demonstrated the complexity of the process by touching briefly upon some of the relevant questions facing the Israeli legal system, and the way in which they have

been dealt with and evolved since the establishment of the state until the present day. We have seen that the development of a coherent Israeli model of religion and state is still a work in progress.

While, as we have seen, the primary forum for the discourse on religion and state has been in Israeli state institutions and its political domain – including deliberations of the Knesset, the government, and the courts – it has, in fact, taken place in the internal world of the *halakhah* as well. There are in effect two Orthodox camps in Israel that ostensibly are dedicated to the same halakhic system and the same *Shulḥan Arukh*, but have significantly different visions of how the *halakhah* should relate to the modern world. The *Haredi* camp aspires to fulfill the *halakhah* as has been done for generations and sees no essential difference between the modern Israeli reality and Jewish existence in all other times and places. On the other hand, the Religious Zionist camp claims that there has been an essential change in reality that demands halakhic innovation and development. Since, according to this view, the *halakhah* that developed in the Diaspora to govern a minority separatist community is not equipped to address this new reality, it must develop approaches to addressing the needs of a sovereign Jewish state with a Jewish majority that is not governed by *halakhah* but wishes to maintain a Jewish character. In other words, it views the halakhic approach to state issues also as a work in progress. Thus, according to this perspective, the *halakhah* must be part of the Israeli discourse on the rules of warfare, the relationship to international law, medical ethics, the conduct of a judicial system, etc. Facing a reality in which many people who live as Jews and view themselves as Jews do not observe the commandments, the *halakhah* must also develop a model for relations between observant and nonobservant Jews. Furthermore, the basic democratic principles of individual civil rights and human rights must find expression in the halakhic discourse rather than being in confrontation with it. Such questions were not a concern of the *halakhah* in the past, not only because the deliberations were in the premodern period, but primarily because the Jewish community was an isolated minority community that had no authority or responsibility for these areas of life. In Israel, these issues exist not just on the ideological halakhic level but on the practical level as well. Prominent halakhic authorities throughout the twentieth century who identified with the Zionist idea and the state of Israel have produced innovative halakhic works relating to the relationship between Judaism, *halakhah*, and

the state of Israel. These include rabbis Avraham Yishak Kook, Yitshak Herzog, Benzion Meir Hai Uziel, Isser Yehudah Unterman, Shlomo Goren, Shaul Yisraeli, and Ovadiah Yosef. Their works are impressive but fall beyond the scope of this chapter.

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[1] As noted in Chapter 7 of the current volume, the very dichotomy of religion and state, or church and state, implies a bifurcation foreign to biblical and Jewish conceptions of religious law.

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[2] See Chapters 6 and 7 of the current volume.

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[3] See Chapters 8, 9, and 10 of the current volume.

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[4] The integration of Jews in the local community of west and central European countries is discussed in Katz, *Out of the Ghetto*.

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[5] For further discussion on the separation between Jewish orthodoxy and the reform movement in Hungary and Germany in the nineteenth century, and the important leaders of the orthodoxy, Hatam Sofer and Rabbi Samson Raphael Hirsch, see Ferziger, *Exclusion and Hierarchy*.

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[6] For further discussion, see Luz, *Parallels Meet*; Ravitzky, *Messianism, Zionism, and Jewish Religious Radicalism*.

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[7] HCJ 3972/93 *Mitral* v. *Prime Minister* [1993] IsrSC 47 (5) 485, p. 506.

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[8] See, for example, HCJ 5026/04 *Design 22* v. *Rosenzweig* [2005] IsrSC 60 (1) 38, p. 54. In this case, the court discussed a claim raised by a furniture store that the prohibition to employ Jews on Shabbat is not constitutional. Denying the claim, the court stated that "the constitutional interpreter should make an interpretational effort to create completeness and harmony between the values of Israel as a Jewish state and as a democratic state" (my translation, AE).

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[9] In their recent book on religion and state in Israel, Statman and Sapir discuss controversial issues in Israel such as enlistment of the *Haredi* (religious) sector to the

military and whether the state should force religious schools to teach core subjects. See Statman and Sapir, *State and Religion in Israel*.

[10] See Don-Yehiya, *The Politics of Accommodation.*

[11] See Horowitz and Lissak, *The Origins of the Israeli Polity*, pp. 211–13.

[12] See Warhaftig, *A Constitution for Israel*, pp. 34–36.

[13] See Cohen, "Religion and State," pp. 227–43.

[14] Ben-Gurion's approach to these matters is discussed in greater detail in Chapter 14 of the current volume.

[15] See Friedman, "The Chronicle of the Status-Quo," pp. 47–80; Harris, "Absent-Minded Misses and Historical Opportunities," pp. 21–55.

[16] See Harris, "Absent-Minded Misses and Historical Opportunities," pp. 21–55.

[17] For a more detailed discussion of the status quo agreement and some of the cases briefly mentioned here, see Chapter 13 of the current volume.

[18] Barak-Erez, *Outlawed Pigs*.

[19] On the prohibition of pigs and pork, see further Chapter 13 of the current volume.

[20] One should note that the Court intervenes only in some of the rabbinic decisions, while a clear pattern is not always apparent. For example, in a similar case, the Court accepted the claim of the rabbinic council that refused to conduct a wedding ceremony in a restaurant that did not hold a kashrut certificate. The Court explained that the couple can easily find another place for their wedding, while for the rabbi it would be a great offence. The comparison between the cases demonstrates how the court tries to find the appropriate balance between defending the broad public and respecting the rabbinic authority. HCJ 6111/94 *Ha-vaad le-Shomrei Masoret* v. *the Rabbinic Council* [1995] IsrSC 49 (5) 9.

[21] HCJ 465/89 *Raskin* v. *Jerusalem Religious Council* [1990] IsrSC 44 (2) 673.

[22] Ahad Ha'am, "*Shabbat* and Zionism," pp. 286–87.

[23] Sneh, *Writings*, vol. II, p. 283.

[24] HCJ 10687/02 *Handyman* v. *State of Israel* [2003] IsrSC 57 (3) 1, p. 5.

[25] In light of the ambiguity of the law, few attempts were made in the public sphere to reach a compromise between secular and observant Jews regarding *Shabbat* and other issues concerning state and religion in Israel. The most significant one is the Gavison-Medan covenant, written by Ruth Gavison, a leading law professor and Rabbi Yaacov Medan, a well-respected leader of the orthodox community. Professor Gavison interestingly explains that there is a cultural and national basis for enforcing certain restrictions on *Shabbat*, such as restriction in employment, cultural events, and transportation. See the main points and principles of the Gavison-Medan covenant: http://en.idi.org.il/media/1353278/GavisonMedanCompact-MainPrinciples.pdf.

[26] The term *Mishpat Ivri* is often translated as "Jewish law," but this translation is misleading. It actually refers to the parts of Jewish law that deal with matters typically treated by western legal systems.

[27] Elon, *Jewish Law, History, Sources, Principals*, p. 1590.

[28] Ahad Ha'am, "The Jewish State and the Jewish Problem," pp. 135–40.

[29] HCJ 191/51 *Skornik* v. *Skornik* [1954] IsrSC 8, 141, pp. 175–76.

[30] Likhovski, *Law and Identity in Mandate Palestine*, pp. 128–32.

[31] Harris, "Absent-Minded Misses and Historical Opportunities."

[32] Radzyner and Freidman, "The Israeli Legislator and Hebrew Law."

[33] HCJ 110/53 *Jacobs* v. *Kartoz* [1951] IsrSC 9, 1401.

[34] HCJ 461/62 *Zim* v. *Maziar* [1963] IsrSC 17 (2) 1319, p. 1332.

[35] Knesset Record, July 23, 1980. Can be seen at the Knesset website: http://fs.knesset.gov.il/%5C9%5CPlenum%5C9_ptm_253844.pdf, 4025 (in Hebrew).

[36] In his book discussing the 1992 constitutional revolution in Israel, Sapir describes broadly the measures taken by the judges of the Supreme Court, and especially by Chief Justice Aharon Barak, in order to enhance the Supreme Court's independence. See Sapir, *Constitutional Revolution in Israel*.

[37] HCJ 40/80 *Kenig* v. *Cohen* [1982] IsrSC 30 (3) 701, p. 742. Jews pray toward Jerusalem, usually located, relatively, in the east. Therefore, the ark and the Torah scroll are located in the eastern wall of the synagogue. For the same reason, it is common that the rabbis and the significant figures of the community sit on that side, near the ark. The phrase "eastern wall" describes, metaphorically, the most important place.

[38] HCJ 13/80 *Handles v. Kupat-Am* [1981] IsrSC 35 (2) 785, p. 794.

[39] Ben-Menachem, "The Foundations of Law Act."

[40] HCJ 6370/00 *Kal Binyan* v. *A.R.M.* [2002] IsrSC 56 (3) 289, p. 310.

[41] HCJ 8638/03 *Amir* v. *Supreme Rabbinic Court of Appeals* [2006] IsrSC 61 (1) 259.

[42] HCJ 3269/95 *Katz* v. *Rabbinic Court* [1996] IsrSC 50 (4) 590, p. 618.

[43] See Ḥofri-Winogradow, "A Plurality of Discontent."

[44] For full details, see Chapter 11 of the current volume.

[45] Spouses Property Relations Act, 1973; HCJ 1000/92 *Bavli* v. *Rabbinic Court* [1994] IsrSC 48 (2) 221.

[46] Sherman, "Laws of Partnership."

[47] HCJ 8638/03 *Amir* v. *Supreme Rabbinic Court of Appeals* [2006] IsrSC 61 (1) 259.

[48] Radzyner, “From Lvov to Tel-Aviv,” pp. 155–231.

13

What Does It Mean for a State to Be Jewish?

Daphne Barak-Erez

Introduction

Israel is defined in its Declaration of Independence as a "Jewish" state. More specifically, the declaration announces "the establishment of a Jewish state in Eretz-Israel, to be known as the State of Israel."[1] In addition, Israel's basic laws, intended to form the basis of the future Israeli constitution,[2] define Israel as a "Jewish and democratic state."[3] Educating in the light of this ideal is even mentioned as one of the goals of public education in Israel.[4] Against this background, how should the aspiration to establish a Jewish state be understood?

Over the years, various answers have been proposed to this question. This chapter aims not only to reflect these answers, but also to transcend the tendency to define the debate as either a controversy between religious and non-religious Jews or a controversy between Jews and Arabs.

In general, three main understandings of this challenge may be concisely described as "material," "religious," and "cultural." This chapter will present these understandings and then focus on the cultural understanding of the Jewish state, which has been relatively less explored.

It is important to stress that from the earliest stages of its independence the aspiration to establish Israel as a Jewish state has been accompanied by another equally essential and foundational ambition – to secure the state's democratic nature. This commitment to democratic values is implicit in the specific provision in the Declaration of Independence for general elections soon after the state's establishment, as well as in its statements regarding the protection of basic rights irrespective of religion, race, or sex. In addition, as already stated, Israel's basic laws specifically mention this dual commitment by defining Israel as a "Jewish and democratic" state. Accordingly, the following analysis of competing understandings concerning how the "Jewish" component of Israel's self-definition should be interpreted does not imply that it is the only important element in the "Jewish and democratic" formula. On the contrary, Israel's commitment to preserving its Jewish identity goes hand in hand with its commitment to its democratic nature.[5] However, defining each of these elements – "Jewish" and "democratic" – is a necessary precondition for addressing the challenge of how best to integrate or balance them.

Three Understandings of a Jewish State

The aspiration to establish and maintain a Jewish state may be understood in different ways. At the outset, the three main understandings of this aspiration should be outlined – material, religious, and cultural.

The material understanding of the notion of a Jewish state is characterized by a desire to maintain a state with a sustainable Jewish majority, as part of the fulfillment of the right of the Jewish people, as a nation, to self-determination. It identifies the "Jewish" state with the concept of the "State of the Jews," using the famous title of Herzl's book.[6] It also reflects the UN Resolution upon the end of the British Mandate in Palestine, and the establishment of two states in the territory – Jewish and Arab.[7] The meaning of this understanding of the Jewish state is relatively clear on the descriptive level: since its establishment Israel has always had a Jewish majority and has served as a major immigration destination for Jews from all over the world.[8] However, it may raise questions regarding its legal implementation. One example is the Law of Return,[9] which guarantees to every Jew the right to immigrate to Israel and to be "automatically" eligible for citizenship (alongside ordinary citizenship law which establishes a route of naturalization on a universal basis). The historical justification for this law originates from the moral duty to secure a homeland for every Jew who may be persecuted, especially after the Holocaust. However, it also indirectly strengthens the Jewish majority in the country (as one of the components of Israeli immigration law, alongside the Citizenship Law, 1952, that sets general criteria for naturalization).

The religious understanding of the Jewish state idea focuses on the adoption of Jewish religious norms and their incorporation into the legal system of the state. Here as well, one can imagine several alternative models regarding the scope of the adoption of religious norms even among those who support this vision (which does not reflect the hegemonic view). These vary from the aspiration of the ultra-Orthodox group to establish a Jewish theocracy to relatively more moderate schemes that aspire to adopt at least some religious norms as part of the legal system, as can be exemplified by the legislation which applies religious law to matters of marriage and divorce.[10]

The cultural understanding of the aspiration to shape the identity of Israel as a Jewish state focuses on the ideal that Israel will celebrate and nourish Jewish culture

(whilst maintaining a commitment to guarantee the ability of minority groups to protect and express their culture), as explained below in more detail.

In practice, these three perspectives can take various forms and appear in several combinations. For example, the definition of Israel as a Jewish nation-state is significantly connected to both the material understanding of the Jewish state (which emphasizes the aspiration to have a national majority) and the cultural understanding (which focuses on the aspiration to emphasize the national culture).[11] In fact, when the Supreme Court addressed the Jewish characteristics of Israel it referred to both the aspiration to secure a Jewish majority and several aspects of Jewish culture, such as the Hebrew language, the choice of state symbols, the national holidays, and the days of rest.[12]

As already indicated, the "cultural" understanding of the Jewish state will be the focus of this chapter. Whereas the main challenges of the "material" and "religious" models lie in striking a balance between the "Jewishness" of the state and its "democratic" aspiration, the "cultural" model requires a preliminary inward analysis of the definition of "Jewish" culture,[13] and even more so of what it means for the law to nourish that culture.

The cultural meaning of the idea of a Jewish state poses different challenges when it is evaluated from the perspective of the relationship between the Jewish majority and the Arab minority and when it is evaluated (alternatively) from the perspective of the religious-secular tension within the Jewish group. From the perspective of the Arab minority, the hegemony of Jewish culture, and even more so of Jewish symbols, poses the problem of potential alienation. In contrast, when examining the issue from the perspective of the controversy over the role of religion in Israel, the problem revolves around the extent to which the cultural understanding of the Jewish state incorporates religious customs, given the proximity of Jewish culture to the Jewish religion.

The Cultural Understanding of the "Jewish" State from an Intergroup Perspective: Defining the Official Language and State Symbols

The main dilemma raised by the cultural understanding of the "Jewish" state from the perspective of the relationship between the Jewish majority and the Arab minority is the potential alienation of the minority. The status of the Hebrew language and the use of Jewish traditional symbols as state emblems serve as two useful examples for the celebration of Jewish culture in the Israeli public domain.

Fighting for the daily use of Hebrew as the spoken language of the Jewish people has become an important nation-building issue after 2,000 years of Diaspora life in which Hebrew was used mainly for religious purposes as the language of Scripture.[14] Accordingly, Hebrew is currently the main formal language, used not only in everyday life, but also by the government, schools, and universities. [15] The central place of the Hebrew language in Israeli life is certainly one expression of the identity of Israel as a Jewish state.[16] Indeed, as in other contexts, the democratic component of the state's definition secures the protection given to other languages, including Arabic, the other officially recognized language in the country.[17]

Another expression of the Jewish identity of Israel is found in the choice of state symbols and the national anthem. The Israeli flag is modeled after the Jewish prayer shawl (Talit) and carries the Star of David (another ancient Jewish symbol). The state emblem consists of Jewish traditional symbols – the Menorah and olive leaves. The national anthem, Ha-Tikvah (The Hope) is a song that served as the hymn of the Zionist movement and specifically mentions the longing of Jews during the 2,000 years of Diaspora life to come back to their homeland in Zion.[18]

These are unambiguous expressions of Israel's identification as a Jewish state. Clearly, they do not pose difficulties within the Jewish group because they are not "religious" in the narrow sense: rather they lean upon Jewish heritage in the broad sense. However, some of them, such as the national anthem (which refers expressly to the "Jewish soul") are sometimes criticized, mainly but not only by the Arab minority, for disproportionately emphasizing the Jewish component of Israel over the democratic one. The controversy is deeply felt on both sides, since the Jewish majority is emotionally

attached to these symbols, whilst others argue that they have an alienating effect on non-Jews. For the purposes of this analysis, the controversy is only mentioned, and not resolved. From the perspective of the cultural understanding of the Jewish state, it is enough to state that Jewish symbols in the public sphere are a manifestation of this understanding. At the same time, the democratic perspective might propose mitigating initiatives, such as introducing the use of symbols from other cultures, alongside the current ones.

The Cultural Understanding of the "Jewish" State from the Intragroup Perspective: Jewish Religion as Part of Jewish Culture

The main dilemma raised by the cultural understanding of the "Jewish" state within the Jewish group itself is different. Here the question is to what extent Jewish culture should be understood through the lens of Jewish religious dictates. This question is important because throughout the years of the Diaspora, the cultural life of Jewish communities was centered on the Jewish religion. Therefore, although it is clear that the concept of Jewish culture is not identical to Jewish religious doctrine, the question remains: how much weight should be given to religious dictates and customs in defining Jewish culture and accordingly in the laws that express that culture.[19]

The distinction between cultural heritage and religion in the narrow sense is already highlighted in Israel's Declaration of Independence. The declaration includes the promise that the state of Israel "will be based on freedom, justice and peace as envisaged by the prophets of Israel." The reference to the values of the prophets of Israel in contrast to the Torah and its formal dictates clearly implies an understanding of Jewish culture that diverges from religion in the narrow sense.

A similar distinction is expressed by the Foundations of Law Act, 1980.[20] Section 1 of this law, which defines the sources of the law that should guide the Israeli courts, states that "where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage."[21] Thus, when the Israeli Knesset aspired to build a bridge between the lsraeli legal system and Judaism, it chose, once again, to make reference to the values ingrained in the Jewish heritage in a broader sense. Soon after the passage of the Foundations of Law Act, the question of how to interpret it was debated in the case law of the Israeli Supreme Court. Justice Elon regarded the aforementioned statutory formula as an authorization to refer to halakhic Jewish doctrine, not only for the purpose of solving new legal questions but also for the purpose of interpretive guidance. Justice Barak opposed this view and regarded the law as implying only very general reference to the humanistic values of Jewish heritage.[22] In fact, a middle ground can be traced between these opposing views – one that does not

interpret Jewish heritage as identical to Jewish law, and yet gives weight to the fact that the law does not refer to humanistic values in the abstract. Such a middle ground may leave the door open to inspiration from specific norms found in traditional Jewish texts. An interesting example of such a middle ground can be found in the "Lo Ta'amod al Dam Re'akha" Law, 1998, a law that recognizes the active duty to rescue one's fellow person when he or she is subjected to life-threatening danger, despite the absence of former acquaintance or interaction. Based on the biblical dictate "neither shalt thou stand [idly] by the blood of thy neighbour" (Lev 19:6), this law is a secular manifestation of a duty which exists in Jewish law. However, although the law is inspired by this religious dictate it does not import the religious norm wholesale. Similarly, Jewish heritage can serve as a source of inspiration for the development of other norms. For example, the religious dictates on caring for the weak members of society (such as widows, orphans, and foreigners) as well as the lessons of the prophets regarding the duty to secure social justice are potential sources for the revitalization of social rights in the Israeli legal system.

Another example can be drawn from the commitment of the public education system in Israel to the teaching of Jewish national heritage. The legal expression of this vision is found in section 2(4) of the State Education Law, which states that public education should include the teaching of the Torah of Israel, the history of the Jewish people, Jewish heritage and Jewish tradition (alongside the commitment to universal values and the teaching of disciplines of knowledge). Here, once again, the reference to traditional Jewish texts poses a challenge – can these texts be taught in a way that recognizes their status as a cherished part of the national heritage from a cultural perspective, without addressing them as binding from a religious perspective?

In practice, the curriculum in the "general" public schools, which do not belong to the "religious" section of the public education system,[23] includes Bible classes and also incorporates, to varying degrees, classes on Jewish thought. The contents of these classes are usually focused on sources which deal with historical events or teachings of moral behavior that might equally be justified with no reference to religious faith. It is worth noting that the teaching of the Bible as part of national heritage generally enjoys wide support also among fervent secularists.[24]

Defining the right approach for teaching concepts and texts originally developed in a

religious context poses a constant challenge for the Israeli education system. Indeed, there is also a growing public interest in the study of Jewish texts from a secular-cultural perspective outside the public education system. However, in the context of public education, the need to draw the line between a cultural, national perspective on the Bible and a religious perspective also has legal aspects. From time to time, the scope and manner of addressing Jewish tradition in the general public schools is debated in the public sphere, but so far the matter has not been formally litigated.[25]

The question of the scope of the influence of religious norms is illustrated here by three case studies – regarding the status of *Shabbat*; the status of *kashrut* prohibitions (concentrating on the specific case of pig-related prohibitions); and the conditions under which the Law of Return applies.

First Case Study: *Shabbat*

The observance of *Shabbat*, the seventh day of the week, as a holy day of rest, is certainly one of the features most identified with Jewish culture. A well-known expression of the special status of *Shabbat* was given by Aḥad Ha'am, one of the ideologues of modern non-religious Zionism, who stated that: "more than the people of Israel have preserved Shabbat, Shabbat has preserved them."[26] However, traditionally, *Shabbat* was not only an abstract cultural idea of a day of rest. It was understood to dictate a detailed set of religious rules and customs. Accordingly, what should be the role of *Shabbat* in Israeli law? What should be the level of abstraction (or detail) of the incorporation of *Shabbat* into Israeli legislation?

Soon after the establishment of the state, *Shabbat* was adopted as its official day of rest.[27] Accordingly, Israeli law states that *Shabbat* will be the day of rest for Jewish employees (whereas employees of other religious affiliations are entitled to a day of rest according to the custom of their religions).[28] The law prohibits employing a person on his or her day of rest, but recognizes several exceptions to this prohibition, regarding emergency functions, etc.

In general, the choice of *Shabbat* as the main day of rest in the country (subject to the exceptions made for minority groups) is not considered controversial. However, there is a clear difference between the secular understanding of a day of rest and the Jewish religious understanding of this concept. The Jewish doctrine regarding *Shabbat* observance includes many prohibitions not implied by a secular understanding of rest, including prohibitions on driving, lighting a fire, using various payment methods, and initiating electricity devices that were not pre-planned to function before the beginning of *Shabbat*. To what extent should these specific norms be incorporated into Israel's legal system? This, rather than its symbolic acceptance as the official day of rest for public authorities and schools, is the focus of the controversy around the status of *Shabbat*.

The first example in this context is that of transportation during the day of *Shabbat*. From a religious perspective, driving is prohibited during *Shabbat*. The compromise accepted since the early days of the state was to adopt a policy of not operating public transportation on *Shabbat*, whilst not disallowing other forms of transportation (private vehicles, taxis, etc.).[29] This compromise tried to capture the balance that had existed

prior to the establishment of the state, thus leaving the door open even for public transportation in those relatively limited areas where it had operated during *Shabbat* prior to the establishment of the state (as in the municipality of Haifa, which is characterized by a mixed population of Arabs and Jews and by a relatively significant secular majority within the Jewish group). In fact, the significance of this compromise has changed over the years due to the growing use of private cars as a result of the rise in standards of living in Israel. The increase in the numbers of private vehicles operating on *Shabbat* has led to intensified conflicts over religious demands to close roads for cars during *Shabbat*, as exemplified by the controversy over driving on the Bar-Ilan road in Jerusalem during prayer time in *Shabbat*. The struggle over the regulation of traffic on this road became a symbolic issue for both the ultra-Orthodox population and the secular majority.[30] A completely different perspective on the same issue argues that the failure to provide public transportation services on *Shabbat* has become a burden carried disproportionately by disempowered people – those who do not own cars and also cannot afford alternative forms of transportation such as taxis.

The second example regards cultural events, entertainment, and commercial activities. From a religious perspective, the vast majority of these activities are prohibited during *Shabbat*. However, many of these activities are heavily related to modern concepts of rest and leisure. In general, these matters were traditionally regulated on the municipal level by local by-laws which allowed for diversity and differences among municipalities but did not resolve controversies within heterogeneous municipalities. In other words, when the municipality is predominantly secular or religious, by-laws which enable or prohibit *Shabbat* activities respectively are usually accepted with popular support. However, in many cases – and especially in big cities – municipalities are populated by both religious and secular people, and as a consequence the opening of businesses on *Shabbat* tends to cause outrage among many of their religious residents. At the same time, many secular people object to limitations imposed on the opening of businesses (arguing that the decision to open or close should be left to individual business owners).

The social tension surrounding this issue is especially dominant when changes in popular perceptions lead to the alteration of old compromises. This occurred in the "*Shabbat* battles" surrounding the operation of the "Heichal" movie theater in Petah

Tikvah during the 1980s.[31] Over the years, individuals interested in promoting the opening of businesses on *Shabbat* have argued against the validity of by-laws which limit commercial activities during *Shabbat*.[32] The courts have been relatively open to these arguments, especially since these by-laws were not based originally on express authorization in primary legislation. Later on, the Municipal Corporations Ordinance was amended in a way that authorized municipalities to promulgate by-laws limiting *Shabbat* activities.[33] Since the introduction of this amendment, by-laws limiting the opening of businesses on *Shabbat* could not have been regarded *ultra vires*.

Another development has been the preference of some municipalities, the prime example being Tel Aviv, to refrain (or partially refrain) from enforcing by-laws limiting the opening of businesses on *Shabbat* (and hence to allow, in practice, businesses to operate on Saturdays). This policy, as problematic as it may be from a legalistic point of view, has enabled these municipalities to continue expressing their symbolic support for the special traits of *Shabbat* whilst accommodating their practices to public demands. However, this policy was regarded as illegal by the Supreme Court in its decision regarding a petition submitted by owners of grocery stores in Tel Aviv against the mild enforcement of limiting by-laws through fines only. Such weak enforcement made the operation of big stores possible and thus adversely affected mainly owners of little shops.[34] The Supreme Court accepted the petition based on legal principles which mandate sincere enforcement of by-laws.[35] The result of this decision has been that municipalities must express their policy regarding the opening of their businesses on *Shabbat* in their by-laws and will be precluded from passively undermining this policy without openly changing it. As a result, the municipality of Tel Aviv tried to enact a new by-law that would have reflected its liberal approach to the opening of businesses in Tel-Aviv. However, the proposed by-law was not approved by the Minister of the Interior. The debate on this issue and the litigation surrounding it are therefore still relevant and ongoing.

In general, controversies over the legal regulation of secular activities on *Shabbat* are often considered examples of the relationship between state and religion.[36] However, they should, in fact, also be understood as reflecting an ongoing debate regarding the level of recognition that should be given to traditional customs of *Shabbat* from a cultural

perspective. At least partially, this understanding is expressed in decisions of the Israeli Supreme Court that dismissed challenges made to the legislation prohibiting employment of Jews on *Shabbat*. In addition to mentioning the social value of a day of rest from work, the Court insisted on the fact that *Shabbat* is an important part of Jewish heritage.[37] At the same time, the intensity of the controversies in this area indicates growing gaps between religious and secular-cultural understandings of the Jewish tradition of *Shabbat*. Moreover, a non-religious cultural understanding of Jewish tradition can inspire new models for regulating the public aspects of *Shabbat*, for example by distinguishing between hard-core business activities on the one hand and leisure and cultural activities on the other hand, with a tendency to regulate the latter in a more lenient manner.[38]

Second Case Study: *Kashrut* and Pig-Related Prohibitions

The second example to be discussed is the cultural role of Jewish dietary prohibitions. The *kashrut* system as a whole is a central component of the Jewish religion. However, several aspects of it are sometimes characterized as linked to Jewish culture. For the present purposes, the following analysis addresses a very specific aspect of Jewish dietary laws – the prohibition on eating pork – considered a "key symbol" in Jewish culture.[39]

The abomination of pigs in Jewish culture is an ancient and deeply entrenched tradition. The prohibition of pigs originates in the Bible but has gained significance later on, when it was used as a tool for persecuting Jews in the Greco-Roman world as well as in Christian Europe. For centuries, stories about the self-sacrifice and devotion of Jews who refused to abide orders to eat pork have served as educational examples. The anthropologist Mary Douglas considered these persecutions during the reign of Antiochus Epiphanes, the Hellenistic king, a turning point that bestowed upon the pig its special symbolic status in Jewish culture. Referring to these persecutions, she states: "So it was he, by his action, who forced into prominence the rule concerning pork as the critical symbol of group allegiance."[40] The significance of the Jews' revulsion from pigs persisted in Christian Europe, where it gained a special status in anti-Semitic tradition.[41]

Initiatives to introduce prohibitions on pig breeding and pork trading into Israeli law began in the early days of the state. After the Supreme Court invalidated the use of existing administrative powers to promote this ideological cause without express statutory authorization (for instance, by refusing to grant business licenses),[42] legislation became necessary (from the perspective of the supporters of these prohibitions). The Israeli Knesset first chose to authorize local municipalities to prohibit trade in pork within their limits.[43] In 1962, however, public sentiment on this matter combined with political pressure led to the enactment of another law which prohibited pig breeding in the whole of Israel, subject to narrow exceptions made for an area populated mainly by Christians, for research purposes and for zoos.[44]

After the Israeli Knesset passed these laws on pig-raising and pork trading, prospects for petitions in this matter were limited for many years, since due to the lack of a formal written constitution at the time, Israel followed the tradition of legislative

sovereignty. Therefore, although the Israeli Supreme Court had intervened in administrative decisions aimed at limiting pig-related activities when they were not backed by legislation,[45] no room was left for any significant decision making in this area, besides the interpretation of the relevant legislation.[46]

The 1990s marked the beginning of a renewed discourse and of new challenges made to the old compromise. The legal development which enabled this change was the enactment in 1992 of two new basic laws on human rights – Basic Law: Freedom of Occupation, and Basic Law: Human Dignity and Liberty, often described as a "constitutional revolution."[47] Pig prohibitions, therefore, were potential targets of petitions based on the new basic laws. The two basic laws did not expressly protect freedom of religion, since the aspiration to ensure this freedom through a basic law failed to mobilize sufficient political support due to the religious parties' political power. However, they included other relevant provisions that potentially threatened the future of pig prohibitions in Israeli law, such as the constitutional guarantee of freedom of occupation. Indeed, the new Basic Law: Freedom of Occupation, which had seemed politically "harmless" when originally enacted, was soon revealed to be directly relevant to the restrictions on pork trading and thus became controversial. Two other developments that were relevant to the reemergence of the pig controversy during the 1990s were the large waves of immigration from the former USSR of people who were detached from Jewish traditions (including the traditional revulsion evoked by pigs) and the flourishing of sectarian politics and conflicts between religious and secular parties.

Controversies regarding pork-trading prohibitions in the municipal arena eventually reached the Israeli Supreme Court when several municipalities, usually after enacting new by-laws on this matter, began to invest further resources in enforcement. This tendency was especially characteristic of cities and towns with a relatively large population of immigrants whose presence influenced the local trade in pork.

The decision on these petitions, known as the *Solodkin* case,[48] presented an opportunity to evaluate the role of the traditional prohibition in shaping Israeli law. The decision, written by Chief Justice Barak, begins by outlining the purpose of the Special Enablement Law as understood by the court: to protect the feelings of Jews who perceive the pig as a symbol of ritual impurity and of the persecutions suffered by the Jewish people, to protect individual liberties by setting limitations on the administrative

power to regulate pork trade, and to enable a nuanced regulation of this matter according to the local characteristics of each community. Resting on this theoretical framework, the decision illustrates its application to a hypothetical municipality that includes three neighborhoods: one in which most residents would be offended by the sale of pork, one in which most residents are interested in purchasing pork, and one with a heterogeneous population divided on this issue. The decision emphasizes that the Special Enablement Law does not mandate one rule for the municipality's entire area and includes the option of limiting the by-law's scope to specific sections within its area of jurisdiction. The ruling then proceeds to outline a model analysis for each of these hypothetical neighborhoods. In the first neighborhood, populated by a vast majority opposing the idea of pork sales, a ban on pork trading would be considered proportionate and therefore legal. The decision assumes that the prohibition would infringe the liberties of minority residents interested in purchasing pork in this neighborhood as well as those of butchers interested in selling it. However, according to the decision, this infringement would be justified considering the weight that should be given to the feelings of the majority, and assuming that pork could indeed be purchased nearby. By contrast, in the second hypothetical neighborhood where a significant majority opposes limitations on the sale of pork, applying a by-law prohibiting the sale of pork would be disproportionate and therefore illegal. On this basis, the decision then proceeds to evaluate the third hypothetical neighborhood where mixed population lives in an area that cannot be divided into smaller and relatively homogenous sections. According to the Court, decisions on this count may vary. The decision does recognize the possibility that applying a municipal by-law prohibiting pork sale might be legal in such neighborhoods but only on condition that pork is made reasonably accessible, be it at the outskirts of the neighborhood or in a nearby one.

As a result of this reasoning, even after the *Solodkin* case it is possible to enact by-laws limiting pork trade. However, the decision implies a considerable retreat from the perception of pig-related prohibitions as reflecting a facet in Jewish culture around which the majority of Israelis are united. In contrast, the decision addresses these prohibitions as reflecting a sensitivity held solely by religious and traditional Jews – a sensitivity that has to be respected, but does not reflect a symbolic consensus. It is worth noting that in practice the *Solodkin* decision did not lead to amendments of the relevant by-laws in the

vast majority of municipalities – in a manner reminiscent of the tendency of municipalities to only partially enforce by-laws limiting the opening of businesses on *Shabbat*.[49]

Third Case Study: Defining a Jew for the Purposes of the Law of Return

The Law of Return was mentioned earlier in relation to the material understanding of the Jewish state – a state with a large Jewish population. However, it is also a fascinating example of the diverse cultural and religious notions involved in the definition of a "Jewish" state. The Law of Return guarantees a nondiscretionary naturalization right to "every Jew." Accordingly, the question raised in practice and in case law alike was "Who is a Jew?" and more concretely – to what extent will the answer to this question use the traditional religious criteria (which consist of two possibilities – birth to a Jewish mother or conversion according to religious rules). [50]

The first decision of the Israeli Supreme Court on this question was the *Rufeisen* case[51] which dealt with the peculiar life story of "Brother Daniel." "Brother Daniel" was born Oswald Rufeisen in 1922 in Poland to a Jewish family. During World War II, whilst being hidden in monasteries, he embraced the Catholic faith and converted to Christianity. Rufeisen had become a devout Catholic and even decided to become a Carmelite monk, yet he retained a strong attachment to his Jewish ancestry and therefore desired not only to reside in Israel, but to do so by exercising his right as a Jew based on the Law of Return. His fight was symbolic, since it was clear that the Government of Israel would let him enter the country and reside in it, based on ordinary immigration and citizenship law. At the same time it was also symbolically important for the Israeli government which did not want to recognize Rufeisen as a Jew. Rufeisen brought a petition to the Israeli Supreme Court presiding in its capacity as the High Court of Justice. The decision of the Court in the *Rufeisen* case was quite intriguing. Formally speaking, Rufeisen could qualify as a Jew, following even the strictest religious standards. He was born to a Jewish mother and his conversion did not change that, since according to the Jewish religious view being Jewish is an immutable trait and an interminable obligation. In other words, Brother Daniel's case dealt with an individual who was a Jew from a religious perspective (even the Orthodox one) yet not Jewish according to common cultural ideas. Eventually, the Israeli Supreme Court dismissed his petition. The majority decision, written by Justice Silberg, explained that despite meeting the religious criteria, Rufeisen did not meet the popular understanding of Jewishness. Accordingly, in the circumstances of the case, the Court adopted a secular-based criterion for its decision

(at least for the purpose of disqualifying the petitioner from being recognized as a Jew). The minority opinion, written by Justice Cohn, offered another view based on the subjective conviction of the person.

The next constitutive precedent in this area was the *Shalit* case.[52] In this case, the question "Who is a Jew?" concerned the children of a Jewish father and a non-Jewish mother. The mother did not convert to Judaism, but did not practice any other religion. The couple lived in Israel and raised their children as Jews from a social and cultural perspective, and correspondingly identified them as Jews. Since the family resided in Israel, there was no question of immigration rights, and the children were granted Israeli citizenship because one of their parents was Israeli (based on ordinary citizenship law). However, since the Israeli registry also mentions the "nationality" of individuals, the Shalit family's request that their children be identified as Jews was denied. The Shalits brought the case to the Israeli Supreme Court, which had to face once again the "Who is a Jew?" question. As in the *Rufeisen* case, the Court was divided on this issue. This time, the petition was accepted based on a minimal majority of five to four. In sharp contrast to the *Rufeisen* case, however, the majority adopted the subjective test according to which the government has to respect the subjective conviction of the person himself (as long as it is sincere) regarding his identity. Among the dissenting justices, there were essentially two views. Two justices refrained from intervening in the decision without taking a stand on the merits of the controversy. The other two justices supported the same result because they thought that Israeli law should follow the old Jewish tradition in this matter, and therefore should adhere to the matrilineal criterion.

Soon after the *Shalit* decision, the Law of Return was amended by the inclusion of a formal definition of the term "Jew." This definition reflects a choice to accept the hegemony of the old religious Orthodox standard, but subject to adjustments. The term "Jew" is currently defined as "a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion." This definition adopted the religious standard based on the matrilineal test and incorporated the option of following a religious conversion process, but in addition took into account the objection found in the *Rufeisen* case, based on popular understandings, of the notion of "non-Jewish Jews." On the pragmatic level, alongside this Orthodox-inspired narrow definition, and as part of the political compromise, the amendment to the Law of Return also

included a new provision which broadened the scope of the law and awarded return rights to people who do not qualify as "Jews" but come from Jewish ancestry. More specifically, according to the amendment, the right of return is awarded to a person who has a Jewish parent or even a Jewish grandparent (although he or she does not qualify as a "Jew" according to the statutory definition). Thus, for symbolic purposes, the definition of the legal term "Jew" abides by traditional religious standards, but for practical purposes the law remains inclusive and may have become even more inclusive due to its amendment.

The amendment of the Law of Return did not resolve all the questions that the Law of Return raises regarding the definition of "Jewish" from a cultural perspective. First, it is clear that even more than in the past the law applies to people who are Jews, or even relatives of Jews, even if they have no connection to Jewish culture and Jewish life. This is a necessary result of the fact that the main goal of the law is not cultural, as already explained. Second, the amendment did not clarify what kind of conversion will qualify as valid for the purposes of the Law of Return. Usually, the controversies in this area concern the differences between the various religious movements within Judaism today (Orthodox, Conservative, and Reform). However, they also have a cultural component if one takes into consideration that some non-Orthodox views tend to regard conversion also as a cultural choice.[53]

Jewish Culture in the Law and Beyond

This analysis has focused on the law as a central power contributing to the expression of Jewish culture in the public domain in Israel, based on the view that law should be studied in its social and cultural context. However, Jewish culture and even Jewish symbols derive their status in the Israeli public domain not only from their legal regulation. In fact, in some areas, it is the lack of legal regulation or its partial nature that allows for the expression of Jewish culture in the public domain. The most notable example in this regard is the special nature of Yom Kippur, the holiest day in the Jewish religion and accordingly a day that is very much associated with Jewish group identity. Yom Kippur does not have special protection in the legal system of Israel. Formally speaking, it is regulated as all other Jewish holidays which enjoy the status of "*Shabbat*." However, in practice, the vast majority of Jews in Israel choose to avoid driving in cars. In addition, all the businesses based in Jewish areas are strictly closed. The result is a special day in which the country "stops" from its ordinary life (subject to the activity of emergency services). In addition to this example, which is extraordinary in the way that it marks Israel as a Jewish state, there are other instances that are worth noting such as the centrality of Hebrew literature, the growing popularity of the study of Jewish ancient texts (not for religious purposes), the custom of circumcision (practiced by the vast majority of the Jewish population), and more.

From a different perspective, it is worth noting that the pressures of globalization also pose new challenges to the weight given to Jewish culture. For example, academic institutions in Israel face pressures to introduce more English teaching classes in a way that will accommodate the aspiration to be attractive to foreign students. The issue of working during *Shabbat* or in Jewish holidays is currently considered also in the face of the need to compete with foreign actors and to cooperate with foreign firms.

Conclusion

The definition of Israel as a "Jewish" state poses a challenge for those who understand Jewishness in cultural rather than religious terms, since the Jewish religion has been a major focus of Jewish culture for generations. Defining the Jewish nature of the state is further complicated by the fact that Jewishness is only one element of the formula "Jewish and democratic." This chapter has analyzed several dilemmas arising from the attempt to define the Jewish state in cultural terms without attempting to resolve them. Addressing them will remain part of the lively debate taking place in Israeli society.

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[1] Declaration of Establishment of the State of Israel (1948).

[2] See Barak-Erez, "From an Unwritten"; also Sapir, Barak-Erez, and Barak, *Israeli Constitutional Law*.

[3] Basic Law: Freedom of Occupation (section 2) and Basic Law: Human Dignity and Liberty (section 1) state that their purpose is to protect human rights "in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state." In addition, Basic Law: The Knesset (section 7A) precludes a candidates' list from participating in elections "if its objects and actions, expressly or by implication" negate "the existence of the State of Israel as a Jewish and democratic state" (alongside other disqualification causes – "incitement to racism" and "the support for armed struggle by a hostile state or a terrorist organization against the State of Israel"). In general, the introduction of the "Jewish and democratic" formula into the basic laws has contributed to the enhanced interest in the concept of the Jewish state since the 1990s.

[4] State Education Law, 1953 (hereafter: State Education Law), section 2(2). It is worth noting that the definition of the goals of public education is very inclusive and encompasses (in other subsections of section 2), in addition, also universal humanistic values, and the promotion of the culture of minority groups.

[5] This is the consensus view reflected in the basic laws. It is challenged from time to time by those who argue for eradicating the definition of Israel as a Jewish state altogether and declaring it "a state of all its citizens" as well as by those who argue for a definition of Israel that prioritizes the "Jewish" over the "democratic" component, especially by narrowing the democratic commitment to the procedural aspects of the electoral system. See also *infra* **note 11**.

[6] Herzl, *Der Judenstaat*.

[7] UN Resolution 181, November 29, 1947.

[8] The Jewish population constitutes around 80 percent of the citizens.

[9] Law of Return, 1950.

[10] Rabbinical Courts (Marriage and Divorce) Law, 1953. Outside the realm of marriage and divorce, family law is regulated by secular legislation. In fact, however, this legislation is sometimes influenced by religious considerations, such as the limitation on family relatives to act as surrogate mothers, due to religious concerns regarding the legitimacy of the child in such circumstances. See Barak-Erez, "Reproductive Rights." The introduction of religious norms (or religiously inspired norms) into the Israeli public sphere has been the result of political pressures and historical compromises, usually referred to as the "Status Quo" agreement. See Friedman, "Chronicle," p. 47; Liebman and Don-Yehiya, *Religion and Politics*, pp. 31–34; Barak-Erez, "Law and Religion." See also the discussion in Chapter 12 of the current volume.

[11] Many scholars focus their writings on the challenge of creating a Jewish nation-state that will also qualify with the democratic requirement. See, e.g., Gavison, "Can Israel," p. 70; Gans, *A Just Zionism*.

[12] In HCJ 6698/95 *Kaadan* v. *Israel Land Administration*, 54 (1) PD 285 (2000), which accepted a petition against the possibility of establishing localities open for Jews only, Chief Justice Barak emphasized the cultural traits of the Jewish state and negated the idea of including in this definition discrimination in favor of Jews. According to Barak: "From these values – each separately and from their amalgamation – several conclusions arise. Hebrew, for instance, is necessarily the principal language of the State, and its primary holidays will reflect the national renewal of the Jewish nation. Jewish heritage constitutes a central component of Israel's religious and cultural heritage, and a number of other conclusions are implicit, but need not be expanded upon at present. However, the values of the State of Israel as a Jewish and democratic state do not, by any means, suggest that the State will discriminate between its citizens. Both Jews and non-Jews are citizens with equal rights and duties in the State

of Israel" (at p. 285). Decisions that dealt with attempts to disqualify political parties for arguably negating references to the aspiration to maintain a Jewish majority. See: CE 11280/02 *Elections Committee for the Sixteenth Knesset* v. *MK Tibi*, 57(4) PD 1, 22 (2004) (Chief Justice Barak) and CE 9255/12 *Election Committee for the Nineteen Knesset* v. *MK Zoabi*, para. 20 (August 20, 2013) (Chief Justice Grunis). It is interesting to note that in his separate concurring opinion Justice Joubran, Arab by origin, stated that the evaluation of parties' and candidates' policy should center on the question of whether they "recognize the group right of the Jewish people to express their national and cultural identity in the State of Israel" (***ibid.***, at para. 3).

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[13] Indeed, currently, there are also controversies among the various Jewish movements concerning the interpretation of the dictates of the Jewish religion. However, the challenge of defining Jewish culture is a much newer one.

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[14] This achievement was the result of a long culture war that involved harsh social sanctions taken against Jews who wanted to adhere to the use of other languages, and especially Yiddish, the language of European Jews for centuries.

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[15] Originally, section 82 of the Palestine Order in Council, 1922, enacted in the days of the British Mandate, recognized three languages – English, Arabic, and Hebrew – as formal languages. After the establishment of Israel, only Hebrew and Arabic remained formal languages. In practice, however, Hebrew has a priority as the language used in the ordinary course of events.

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[16] Soon after independence, the establishment of the Academy of the Hebrew Language was declared in the presence of the first Prime Minister David Ben-Gurion. Its activities were later enacted in the Supreme Institute of the Hebrew Language Law, 1953. In addition, section 5(a) of the Citizenship Law states that one of the conditions for obtaining Israeli citizenship is "some knowledge of the Hebrew language." This condition does not apply to Jewish newcomers, who receive their Israeli citizenship based on the Law of Return.

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[17] De facto, Hebrew is the dominant language, as the language of the majority. However, Arabic is the main language in public schools that are attended by Arab pupils. In addition, the Israeli Supreme Court ordered the use of Arabic alongside Hebrew in several settings. The most important example for this is HCJ 4112/99

Adallah v. *The Municipality of Tel-Aviv-Jaffa*, 56 (5) PD 393 (2002) which ordered that public signs in municipalities inhabited also by Arab citizens (the so-called "mixed" municipalities) be in both languages. See also: CA 4926/08 *Nashef Vail* v. *Government Authority for Water and Sewage* (October 9, 2013) recognizing the duty to publish statutory notices to the public also in Arabic. It is worth noting that in a later stage the state of Israel established the Academy of the Arabic Language in Israel by enacting the Supreme Institute of the Arabic Language Law, 2007.

[18] The Flag and Emblem Law, 1949.

[19] In the formative years of Israel, when David Ben-Gurion, the first prime minister, developed his ideology of "statism," an ideology which went hand in hand with creating national symbols and national traditions, Jewish tradition served as a source of inspiration for several symbols and customs. See Liebman and Don-Yehiya, *Civil Religion in Israel*.

[20] See Chapter 12 of the current volume.

[21] It is worth noting that the word "Israel" in the term "Israel's heritage" is identical to "Jewish."

[22] FH 13/80 *Hendels* v. *Kupat Am Bank Ltd* 35 (2) PD 785 (1981); FH 40/80 *Kenig* v. *Cohen*, 36 (3) PD 701 (1982).

[23] It is worth noting that the state education system in Israel contains a religious division that regulates the activity of public schools defined as religious, and accordingly teaches the Jewish religion as a binding doctrine. Parents are free to choose whether to send their children to a general non-religious state school or to a religious state school (alongside the option of sending them to religious schools outside the state education system).

[24] The strong connection to the Bible as an important national text was supported by David Ben-Gurion, the first prime minister of Israel under whom the State Education Law was enacted.

[25] In contrast, a matter that has been litigated is the willingness of the state to exempt religious schools, which are not part of the public school system, from teaching "core

curriculum" covering mainly basic knowledge of math, English and civics. See Unique Cultural Education Institutions, 2008. This law was challenged but the petition against it dismissed in a majority decision of the Court. See HCJ 3752/10 *Rubinstein* v. *The Knesset* (September 17, 2014).

[26] Ahad Ha'am, "*Shabbat* and Zionism," p. 139. See Chapter 12 of the current volume.

[27] Law and Order Ordinance, 1948.

[28] Employment and Rest Law, 1951.

[29] In a similar manner, El-Al, the main Israeli aviation company, does not operate flights on Saturdays and other Jewish holidays.

[30] HCJ 5016/96 *Horev* v. *Minister of Transportation*, 51 (4) PD 1 (1997).

[31] Gutking-Golan, "The Heikhal Cinema Issue," p. 67.

[32] See Cr. F. (Jerusalem) 3471/87 *State of Israel* v. *Kaplan*, 1988 (2) PM 265 (1988).

[33] Municipal Corporations Ordinance Amendment (No. 40) Law, 1990 which inserted Section 264A into the Municipal Corporations Ordinance [New Version].

[34] In fact, this petition was motivated mainly by socio-economic considerations that are relevant also for addressing the social meaning of *Shabbat* (as distinguished from both its religious and cultural meanings).

[35] APA 2469/12 *Bermer* v. *Municipality of Tel-Aviv* (June 25, 2013).

[36] See *supra* **note 10**.

[37] HCJ 5026/04 *Design 22* v. *Rozenzweig* [2005] IsrSC 60(1) PD 38.

[38] This distinction is already embedded in various by-laws enacted by municipalities that set more lenient rules regarding restaurants, cafes, and cultural activities, in contrast to stores.

[39] Ortner, "On Key Symbols," p. 1338.

[40] Douglas, *Natural Symbols*, p. 40. For more details, see Barak-Erez, *Outlawed*, chapter 2.

[41] Fabre-Vassas, *The Singular Beast*.

[42] HCJ 194/54 *Axel* v. *the Mayor, Councilors and Residents of Netanya*, 8 PD 1524 (1955).

[43] Local Authorities (Special Enablement) Law, 1956 (hereinafter: Special Enablement Law).

[44] Pig-Raising Prohibition Law, 1962.

[45] See also: HCJ 98,105/54 *Lazarovitz* v. *Food Controller*, 10 PD 40 (1956); HCJ 72/55 *Fridi* v. *Municipality of Tel Aviv*, 10 PD 734 (1956).

[46] See, for instance: HCJ 163/57 *Lubin* v. *Municipality of Tel Aviv-Jaffa*, 12 PD 1041 (1958); FH 13/58 *Municipality of Tel Aviv-Jaffa* v. *Lubin*, 13 PD 118 (1959).

[47] The use of this term was promoted by Aharon Barak, who later became the Chief Justice of the Israeli Supreme Court. See Barak, "The Constitutional Revolution," p. 9 [Hebrew]. See further the discussion in Chapter 14 of the current volume.

[48] HCJ 953/01 *Solodkin* v. *Municipality of Beth Shemesh*, 58 (5) PD 595 (2004).

[49] See the text accompanying *supra* **notes 34**–**35**. In fact, here the incentive of municipalities to refrain from amending their by-laws was intensified due to the holding in the *Solodkin* decision that sweeping by-laws prohibiting the sale of pork should not be enforced until they are reevaluated vis-à-vis the standards set by the court.

[50] See also the discussion in Chapter 14 of the current volume.

[51] HCJ 72/62 *Rufeisen* v. *Minister of Interior*, 16 PD 2428 (1962).

[52] HCJ 58/68 *Shalit* v. *Minister of Interior*, 23 (2) PD 477 (1970).

[53] For further discussion, see Barak-Erez, “Who Is a Jew,” p. 143.

14

Fault Lines

Patricia J. Woods

In the last quarter of the twentieth century, social groups in Israel turned to the judicial arm of the state in an effort to force the state to change its laws and policies on religious personal status law. The present chapter asks why one crucial social group in the religious law debates in Israel, the women's movement, turned to litigation in the High Court in the early and mid-1980s and argues that the phenomenon is best analyzed in terms of the changing relationship between state and society in Israel throughout the 1970s, 1980s, and 1990s.

By the close of the twentieth century, the state had become one of the major subjects of political studies in the United States, and for good reason: the state – and particularly the nation-state – had become "the dominant form for organizing political power" throughout the world.[1] It is not a surprise that political scientists should focus on the state in their political analyses, nor that social groups should direct many of their efforts at social and political change to the state. What is, perhaps, a surprise is that more political scientists have not directed their attention to the bottom-up aspects of the nexus between state and society visible in states' and scholars' concerns with legitimacy,[2] the lobbying of social groups,[3] and in the last several decades, a growing movement toward litigation as a social group strategy for social and political change.[4]

This chapter begins with the model of state–society relations developed by Migdal and others.[5] In this model, the state should be viewed as neither unitary nor all-powerful. Although the twentieth-century state sought to control a vast spectrum of personal and public institutions and behavior,[6] the limited nature of the state is an important insight offered by the state–society model.[7] Certainly, many factors exist that limit the powers of a state, including international influence or status,[8] internal battles between political officials,[9] or struggles among major political structures such as the military.[10] The state–society model suggests that the interaction between the state and society offers a

more universal key to understanding politics across a spectrum of specific empirical circumstances.[11] The Israeli women's movement's initial motivation for turning to the judiciary cannot be explained in terms of any one factor. Rather, five major components came together to lead the women's movement to the High Court. These include structural constraints, individual action, cross-national models for effecting political change, new activism of the Israeli High Court in some areas of individual rights, and the ideological appeal of the Court as a source and protector of higher ideals independent of political trends (i.e., natural law and individual rights law). In analyzing the women's movement and the High Court, a symbiotic relationship emerges that appears to explain other important and perplexing questions that come out of the religious law debates in Israel. Namely, why did the High Court, in the late 1980s, begin to challenge rabbinical court (Jewish religious court) jurisdiction despite the tendency of the former to avoid highly charged political issues? The relationship of mutual support that emerged between the High Court and the women's movement (among others) goes a long way toward answering both of these questions.

Before setting into the history of the interactions of the women's movement with the High Court over religious personal status law, the first section briefly outlines the roots and jurisdictional questions in religious personal status law in Israel. The second section is a discussion of the role of the women's movement in the battle over jurisdiction of personal status questions in the Israeli courts. The third section sets this empirical case in terms of larger theoretical issues of independence of the judiciary and judicial power. And throughout, I suggest a model of mutual support between the women's movement and the High Court. I do not argue that the actions of either group were directed in any way by the other. Rather, both the women's movement and the High Court derived benefit from the other's actions. This relation cannot be construed as directly causing specific behaviors or decisions of the other. Rather, it is a symbiotic relationship of mutual indirect influence stemming from common interests and common gain.

Jurisdiction of Personal Status

In Israel, as in many countries in the Middle East, personal status law, or family law, is governed by the laws of official religious communities. In Israel, there are fourteen different official religious communities with fourteen different legal jurisdictions. Citizens are registered in the Ministry of Interior as either Jewish, Muslim, Druze, Bahai, Greek Orthodox, etc. Whatever their personal association or lack thereof with one of these religions, for most matters of family law, and notably all matters of marriage and divorce, citizens have no alternative but to go through the religious courts. Citizens have freedom of religion in the sense that one's religious rights are guaranteed within these fourteen different communities. However, there is no freedom to choose not to participate in one's official religion when it comes to family law.

This situation has raised questions among Israelis in general and among scholars in particular about democracy and freedom of religion in Israel. One question is: How can a small minority, the Jewish Orthodox establishment, continue to control family law when the state and the people are secular? Does this not run counter to a representative democracy? The second question, raised less often, is whether public opinion should have any bearing on freedom of religion as an individual right.[12] One premise behind this question is the assumption that public opinion in Israel is, indeed, against the current status quo on religious law. However, some evidence suggests that public opinion on religion and the state is more complex and tends toward an acceptance of the current status quo.

Origins and Maintenance of Rabbinical Jurisdiction: Identification of Israel with the Jewish Religion qua Religion

Religious jurisdiction over personal status law is the product of a bargain made by the early Zionist leaders with the existing Orthodox community (*Yishuv*) in Palestine of the 1940s. During the British Mandate, the Yishuv was the official representative of the Jewish community to the Mandate authorities in Palestine. In an apparent concern for unity and legitimacy, in 1947 the socialist, secular, Zionist leader David Ben-Gurion made a bargain with the Yishuv leaders. He committed the future state of Israel to:

> (1) the establishment of Sabbath (Saturday) as the legal day of rest for the Jews and for state institutions; (2) the observance of the Jewish dietary laws (*kashrut*) in all state institutions; (3) the continuation of rabbinical control over matters of personal status for Jews; and (4) the establishment of a religious school network, subject to minimal secular requirements set by the State.[13]

In return, Ben-Gurion was assured Yishuv support for the new state.[14]

In later years, Ben-Gurion explained his conciliatory agreement with the Orthodox establishment in terms of the importance of the Jewish character of the state, the need for the support of the Orthodox community to gain legitimacy within Israel and abroad, and the need to include the Orthodox within the state rather than allowing them to become an opposition force.[15] For Ben-Gurion, the paramount concerns were the unity of the people and the integrity of the state, all under a common religious-cultural banner. In a series of interviews with Moshe Pearlman in 1964, Ben-Gurion expressed a deep spirituality connected with the Jewish people. His understanding of God was highly abstract, "a being, intangible, indefinable, even unimaginable, but something infinitely superior to all we know and are capable of conceiving."[16] Ben-Gurion expressed his spirituality as closely connected with the Jewish religion and the Jewish people. "The twin idea of the Messianic vision informs the whole of Jewish history and the Jewish faith. It is the core of the religious, moral and national consciousness of the Jewish people."[17] For Ben-Gurion, the Jewish religion and people were always connected to "national and territorial themes."[18] It was the contribution of Zionism to offer a new, territorial mode of Jewish expression as an alternative to traditional Judaism.[19]

In arguing against groups he called "religious zealots," such as the Natorei Karta, Ben-Gurion held Zionism up as the new religious and cultural alternative with a "revolutionary approach to Jewish salvation."[20] Salvation now lay in a state for the Jews rather than traditional forms of religiosity. Ben-Gurion's approach to Orthodox Jews, even those who broke the law in the service of their religion, illustrates some of the tensions in his own thinking about the relationship between Judaism the religion and Judaism the state, the Orthodox community, and the new secular community:

> Why then do we not deal with them as we should any other lawbreaker? For one thing, it is always more difficult when acts are prompted by a deep religious belief. They are not common lawbreakers. For another, they represent a world most of us came from, a world we knew as infants, the world of our grandfathers – they have the same beliefs, the same outlook, the same dress, the same beards; they look like our grandfathers. How can you slap your grandfather into jail, even if he throws stones at you? Moreover, they claim that they are upholding the same tenets for which our forebears were prepared to give their lives.[21]

At the same time, Ben-Gurion personally favored a relationship between religion and state closer to the model of the United States:

> Unfortunately we could not keep religion completely out of politics, for religious parties existed, as a hangover from the pre-State Zionist Congresses. I am sorry about this, for I feel, and I used to tell this to my religious party colleagues, that they should do what they can to spread their religious beliefs through the accepted channels in most (although not all) democratic States – through the synagogue, parochial schools, religious youth movements, newspapers and magazines, lectures and so on.[22]

However, on top of religious-cultural considerations, the institutional constraints of coalition politics were always a concern. Ben-Gurion's desire to maintain unity with religious communities overrode his personal, highly abstract form of spirituality in which religion and the state should remain separate:[23]

> I have spoken of the religious parties in the coalition. They are Zionist, completely identified with the national interests of the State, thoroughly responsible. But on religious issues, they are in agreement with some of the demands of Natorei Karta. They too would like to see traffic halted on the Sabbath, although they are opposed to its being forced on the public by violence. However, they would find it hard to remain as partners in a government that took strong action against a group that fought, even illegally, for Sabbath observance.[24]

When it came to religious family law, however, another factor was equally important: "I did not consider questions of personal status to be a first priority."[25]

Many explanations of the continuing existence of religious law in Israel have focused on the side of the state, analyzing the role of political coalitions in Israel's proportional electoral system. As Ben-Gurion made clear in his interviews with Moshe Pearlman, including religious parties in the state coalition(s) was a high priority for him. By the 1960s, however, he saw the proportional system as problematic.[26] Scholars have pointed to the constraints that the proportional electoral system puts on coherent governing in Israel. In his work on the crystallization of the Israeli state, Migdal notes:

> The proportional electoral system made it less likely that any party could achieve an absolute majority, thus increasing the chances of small religious parties to become integral parts of government coalitions. The continuing presence of these parties in Israel's cabinets has cut deeply into the unity of purpose of the state and the ability of the central leadership to apply many aspects of its conception of the state during the period of state crystallization.[27]

The proportional electoral system seems to be the most important institutional explanation – at the level of the state – of continuing religious jurisdiction over personal status law in Israel. Some surveys suggest another important factor located within Israeli society. Namely, the majority of the public is not, as many have assumed, against the connection between the Orthodox establishment and the state in Israel. In fact, there is important evidence of a conceptual and practical link between the Jewish state and the Jewish religion as Orthodox Judaism for most Israelis.

For most of the history of the state, Israelis and others have thought of Israel as a secular state with a largely secular population and a religious minority. These conceptions were supported by popular surveys that asked Israelis to identify themselves as either religious or secular. In common parlance in Modern spoken Hebrew, however, the word "religious" (דתי) means Orthodox, or even ultra-Orthodox. Thus, a methodological problem inherent in the surveys led to a skewed vision of the religiosity of the Israeli public as bi-polar. Moreover, the Guttman Institute saw a potential conflict between the apparent secular-religious divide and some of their own work on religiosity per se going back to the 1960s.

Dati (דתי) in direct translation means "religious" in Hebrew. However, in spoken Hebrew for many decades, דתי is slang for Orthodox and ultra-Orthodox Jews. *Datiim* (דתיים), plural of "religious," means Orthodox and ultra-Orthodox Jews in direct translation in modern Hebrew. In fact, the term "Orthodox Jews" is usually translated into Hebrew as *Yehudim Ḥaredim* (יהודים חרדים), or "Haredi Jews." Thus, there is a blurring of the lines in common Hebrew slang between Orthodox and ultra-Orthodox communities, so that all of the above fall into the broad, imprecise category of *datiim* דתיים, or "religious" (pl.), in modern slang. This is not only slang for some people, but for the whole population. Thus, the Guttman Report argued that basing survey questions on the simple binary terms, "religious" (דתי) and "secular" (*ḥiloni* חילוני), did a disservice to the reality of Israeli Jewish religious identity and religious practices. It biased the results of previous surveys in favor of presenting the Jewish Israeli population as secular, when in fact it is a population highly practicing of Judaism in an identifiable range of ways.

In 1993, the Guttman Institute conducted a national survey on religiosity formulated in an attempt to avoid the methodological problems noted above. Rather than ask Jewish Israelis to identify themselves in one of two poles, the 1993 survey asked specific questions about practice, religious content attributed to practice, religious identification, and religious attitudes toward the state and the nation of the Jewish people. For most Israelis, the results were quite surprising, and, at the time, controversial.

The Guttman Institute found that only 21 percent of the Jewish Israeli population identified itself as "totally nonobservant," 14 percent as "strictly observant," 24 percent as "observant to a great extent," and 41 percent "somewhat observant." Thus, 65 percent of the Israeli public was at least moderately observant, and another 14 percent

was completely observant, adding up to a shocking 79 percent of the Israeli public that fell within a spectrum of "practicing." The Guttman Institute understood these findings to indicate that, rather than a religious minority and secular majority, Israeli society is made up of a spectrum of belief and practice, with most Jewish Israelis closely connected with the religion in both belief and practice. The institute found that "Israeli Jews are strongly committed to the continuing Jewish character of their society, even while they are selective in the forms of their observance."[28]

The Guttman findings on specific belief and practice are indeed indicative of an overall link in the Jewish Israeli public between Judaism as a religion and the Jewish state. Over 60 percent surveyed "believe completely" that "There is a God"; 55 percent that the Torah was given to Moses on Sinai; just under 50 percent that "the Torah and mitzvot are God's commands," and 21 percent that "a non-observing Jew endangers the Jewish people."[29] Among western respondents, there was an all-or-nothing tendency with regard to religious practice not notable in the Middle Eastern Jewish communities.[30] Observance of the Sabbath was high, even amongst those identifying as "totally nonobservant." "Overall, 77 percent say that marking Shabbat [Sabbath] in some way is a very important or important principle in their lives, including 39 percent of those who consider themselves 'totally nonobservant.'"[31] Nonobservant western groups were more likely to observe these rituals without attributing to them a religious content.[32] But perhaps most significantly, an overwhelming 95 percent of respondents answered that the establishment of Israel "influences" or "influences a lot" their feeling that they "are part of the Jewish people."[33]

My own observations from anecdotal experience and from interviews suggested to me that in Israel Judaism is defined in public and private discourse as (current) Orthodox Judaism. The Guttman Report confirms this observation. Regarding religion and the state, almost half of the population believed it should be "a concern of the government that public life comply with Jewish religious tradition." While 49 percent were critical of the status quo on religion and the state, 33 percent of those believed public life should be more religious (16% of the total sample).[34] Of those surveyed, 51 percent supported the current arrangement of religion and the state, meaning that 67 percent of Israelis preferred the status quo on religion and state, or wanted *more* religion in public life. Over 80 percent responded that their own life-cycle rituals (birth, marriage, death, etc.) should

have a "Jewish character." Only 4–7 percent felt religious life-cycle rituals were not important.[35] At the same time, specific questions about making civil marriage possible resulted in a more complex picture: 44 percent responded "no" or "definitely no" to civil marriage; 39 percent answered "yes" or "definitely yes"; only 17 percent wavered, answering "perhaps yes" or "perhaps no."[36] It is important to note here that the current status quo on religion and the state in Israel is in fact Orthodox rabbinical jurisdiction of personal status law. With the exception of autonomy inside the religious education system (applied only to religious communities, not to the public at large), the religious bureaucracy has been willing to be more flexible on other areas included under the original 1947 agreement between Ben-Gurion and the Yishuv. It should be noted, for example, that religious officials have not tried to enforce religious education on the public at large. And they have been relatively more flexible on issues of Sabbath observance and Kosher Law observance outside the borders of their own communities, socially and geographically. There have, however, been conflicts over these issues when the wider public is seen as invading those social and geographical boundaries.

For secular activists (who, in the Guttman Report, would fall under "totally nonobservant" and "somewhat observant"), the question over religious law in Israel has been, how can the Orthodox maintain this power in a secular and democratically elected state? This question, of course, is predicated on the assumption that the population of Israel is indeed secular. The Guttman Report indicates quite clearly that the population at large is mostly "traditional,"[37] identifies strongly with Judaism as Orthodox Judaism, and identifies strongly with the need for Judaism to be expressed in and protected by the state. In a representative democracy, the most obvious answer to why this ostensibly strange policy or law is allowed to remain is that the population basically supports it. Despite the previous conceptions of scholars and of many Israelis,[38] there is no real paradox in the existence of religious personal status law from the perspective of Israeli society. True, a sizable minority does not support it (33%), and some even approve of civil marriage to some extent (39%). However, the majority of the public supports the existing arrangement of religion and the state (51%), and some would like to see religion expanded in the public arena (16%), for a total of 67 percent of the Jewish population either supporting the existing relationship between religion and state, or preferring more religion in the public sphere.

Courts and Personal Status Law

The civil courts in Israel are separated into three different levels: magistrate (trial) courts, district appeals courts, and the Supreme Court. The Supreme Court in turn functions both as the highest court of appeal for trial cases, and as the High Court of Justice. The Supreme Court hears regular appeals based on falsified evidence, evidence that was never presented, or if another person has been convicted of the crime in question. As the High Court, it decides whether lower courts have acted within their jurisdiction, within the parameters of natural justice, or in other "exceptional cases" where it sees fit to intervene in the interest of justice.[39] Next to the civil courts, there exist three other complete court systems in Israel: religious, military, and labor courts. Each of these also includes trial and appellate levels. Cases can, under certain conditions, be appealed from these separate tribunals to the civil district courts, the Supreme Court, or the High Court of Justice. In the case of rabbinical court decisions, cases can only be appealed on grounds of lack of appropriate jurisdiction, or lack of a reasonable opportunity to appeal within the religious court system. Thus, cases appealed from the rabbinical court often go to the High Court (lack of jurisdiction triggers hearing in the High Court, whereas normal appeals go to the Supreme Court). This is significant because many cases, when appealed, go directly to the High Court, which is the judicial body that hears constitutional-type questions (Israel has no written constitution but does have a long constitutional tradition within jurisprudence).[40] The fact of moving directly to the High Court (Israel's constitutional body) due, often, to jurisdictional questions in religious law cases has had important implications for the jurisdictional questions inherent in many of the tensions between the High Court and the rabbinical courts.

The religious courts are founded on a principle of differential (particular) law by religious community; the civil courts, on the principle of universal law. The fundamental conflict between the two systems is highlighted by the Israeli Declaration of Independence and the 1992 Basic Law on Human Dignity and Freedom, which outline a political and legal system based on universal citizenship and law: "The State of Israel … will uphold the full social and political equality of all its citizens, without distinction of religion, race, or sex."[41] Religious law clashes with these principles of universal law on at least two levels: (1) the religious Personal Status Laws themselves vary by community,

with fourteen completely separate legal jurisdictions by official religious community; (2) within each community the laws vary by gender as well, in effect creating twenty-eight different bodies of Personal Status Law within the same state, most of which entail fewer legal rights and a lower legal status for women. This chapter focuses on the High Court and the rabbinical court, within the Jewish community, because it is here that the political decisions are largely made. The conflict between the Jewish religious court and the High Court of the Jewish state highlights the internal social and political battle within the Jewish sector of Israeli society over the appropriate place in the Jewish state of universal law versus communal religious law.[42] The existence of two fundamentally different legal schools – one based on general law to apply universally to all citizens equally, and one based on religious law differentiated by community and by gender – presented Israel with an inchoate conflict. Understated for many years, it was a conflict waiting to happen between the two extreme ends of the Israeli religious-political spectrum, each with their own perceived sources of higher law.

Although away from a heated public forum, debates over religious law continued after the initial conciliation between Ben-Gurion and the Yishuv in 1947. The sites of these debates have varied. In the state-building years of the 1950s and 1960s, the discussion took place mainly in the legislature (Shifman, "Family Law"), under the auspices of the extremely strong parties.[43] During that time the High Court did make some decisions regarding what would count as personal status law and thus be under the jurisdiction of the rabbinical court. This includes the 1951 *Kutik* v. *Wolfson*[44] decision that paternity is to be decided in civil courts. However, overall, the High Court was not a significant player in the decisions over defining personal status law. Rather, legislation was implemented on adoption (1960), guardianship (1962), succession (1965), and dissolution of marriage (1969). Each of these laws followed in the spirit of halakhic norms (i.e., norms of Jewish religious law) with the exception of the dissolution of marriage law, which allowed people from mixed marriages a means of civil divorce.

Then, in 1969–1970, Benjamin Shalit asked the Israeli High Court to force the Ministry of the Interior to register his children as Jewish. Shalit's wife, the children's mother, was not Jewish. But, Shalit contended, the Jewish religious law (*halakhah*) for deciding Jewishness, by which a child is Jewish if his/her mother is Jewish, should not be the law of the land in an ostensibly secular, civil state. The case caused an uproar in

Israel, both in political circles and in society at large. Termed the "Who Is a Jew?" case,[45] *Shalit* v. *the Minster of the Interior*[46] highlighted many of the inconsistencies that had previously lain under the surface of the new Israeli state. How could Israel be both a modern, secular, civil state and be the Jewish state? If Israel was "the Jewish state," then who gets to define who is a Jew? If the Orthodox have a complete monopoly within the Rabbinate and the state's rabbinical courts, then what about immigrants or natives who are from the Reform or Conservative movements? These questions foreshadowed equally difficult problems that would arise in later decades: What about Jews from Ethiopia who had never been in contact with Rabbinical Judaism and thus could not possibly follow Orthodox rabbinic practice? Were they – whose Judaism was closer to Israelite Judaism than Rabbinical Judaism – Jews? What about immigrants from the former Soviet Union, many of whom did not practice at all, either by ideological choice or by state enforcement? These questions cannot be discussed further in this chapter. All of these questions mark, however, the depth and breadth of social unease with the inherent contradictions in Israel's political structure and institutions. The 79 percent of Israelis who fall within the spectrum of the designation "religious" may agree, generally speaking, on a necessary connection between the Jewish religion and the Jewish state. But agreement does not go further. And ease does not go with it.

Shalit foreshadowed a deep internal conflict in Israel that would remain suppressed for many years, but which would reemerge in the late 1980s in full force. In the landmark case, the High Court decided in favor of Shalit. In explicit, ideological language that appealed to principles of natural law, the High Court asserted that the religious law defining Jewishness had no place in the laws of the civil state. The High Court decision was dramatic enough. The drama was heightened still further when the Knesset overturned the High Court decision with legislation within three weeks.[47] The High Court took this symbolic slap on the wrist and refrained from challenging the Orthodox establishment or the rabbinical courts for nearly twenty years. The conflict was suppressed, but the lines became more and more clearly drawn as Israeli social groups became increasingly politicized and polarized during that period.[48]

The High Court in Context

In the early 1970s the Israeli High Court took for itself the right of judicial review. Since that time, according to Hofnung, judicial review has become an important consideration in legislative and administrative decision making in Israel.[49] Beginning in the 1970s and 1980s, the Israeli High Court took a more activist stand in areas of individual rights outside the purview of the religious courts.[50] Corollary to this new activism was a change from a formalistic approach to law in the Court's early years to one based on the principles of natural justice.[51] One scholar of Israeli law called this change a "judicial revolution" as early as 1990.[52]

And yet, despite this activism, between the founding of the state and 1987, only in the *Shalit* case did the High Court challenge rabbinical authority. After this one attempt, the High Court refrained from challenging rabbinical court jurisdiction until 1987, at which point an open and heated conflict erupted between the courts. From 1987 to 2000, the High Court challenged rabbinical court authority, making explicit decisions that attempted to undermine the status quo on jurisdiction of personal status issues. Since 2002, these challenges seem to be on a decline. Why did the High Court make explicit jurisdictional challenges to rabbinical court authority between 1987–2000, having avoided conflict before, and appearing to do so since?

Why did it take so long for the inherent conflict of principles between universalized civil law and religious communal law to express itself in the courts? On the other hand, given the High Court's categorization of religious law as off-limits and as a purely political issue more appropriate for representative politicians, a better question may be, why did the High Court challenge rabbinical court authority at all?

The Women"s Movement and Contemporary Judicial Changes

The battle lines between the secular and religious models of law were institutionalized, in some ways, through the Declaration of Independence and the basic laws,[53] which define the responsibilities of the branches of government. Although open conflict was largely avoided until the late 1980s, tensions between the fundamental principles of universal civil law versus communal religious law were simmering below the surface within the state, and within two extreme poles of society. The histories of the women's movement and the High Court existed side by side for many years with little if any overlap. In the religious law debates, the judicial branch of the state and a tiny movement of grassroots women found an intersection of interests that led to mutual gain and, ultimately, to mutual support.

The women's movement in Israel began before the establishment of the state.[54] It was part of the "first wave" of twentieth-century women's movements in the world.[55] In one of the few systematic analyses of the political history of the Israeli women's movement, Yael Yishai suggests that the movement has developed with a continuous tension between loyalty to the nation versus loyalty to the particular needs of women.[56] In the early years, the Israeli women's movement was dominated by "establishment associations" coming out of the state apparatus (including national parties). The best-known associations included Na'amat (part of the national union, the Histadrut) and the Women's International Zionist Organization (WIZO). Both of these organizations, until at least the late 1980s and early 1990s, consistently favored the national cause over that of women. Although there was a short-lived women's party in 1949 that did in fact push gender equality, the party was extremely small and lasted only one year. Na'amat and WIZO, in contrast, emphasized women's traditional roles in the family rather than asserting revolutionary demands for legal, political, or social equality.[57]

Established in 1970, the second wave of the Israeli women's movement actively sought to influence the state through lobbying, court cases, and grassroots work. The women's movement immediately sought access to the state, with one of the movement's founders joining Shulamit Aloni's party, Citizens Rights Movement. From January 1974 – February 1977, a member of the women's movement sat as a Member of Knesset.[58]

Thus the second wave movement, initially, gained direct access to the state. However, the movement's representative was always considered a radical outsider by those in the Knesset.[59] And by 1977, women's organizations within the women's movement were no longer fielding candidates to political office, a trend that would last to the present. The second wave of the women's movement went against the model of the first wave of the women's movement by avoiding joining the state. In this way, the second wave also avoided being appropriated by the state in ways that its predecesors in the first wave had been, according to some scholars.[60] State appropriation of women's movements has been a notable problem for women's movements from the Middle East to Asia to Europe.[61]

Since 1984, the Israel Women's Network (IWN) has maintained a permanent lobbyist in Knesset, and a number of Knesset members are or were members of the women's movement. The movement has used these ties in an attempt to influence state policy on a range of women's issues, including religious law, and particularly marriage and divorce law. The women's movement began its political work on religious law in 1984 and 1985 with lobbying, conferences with leading rabbinical authorities, and legal advising. Despite lobbying efforts, and despite their attempts to negotiate with rabbinical authorities and politicians, the most politically effective women's organizations (grassroots and voluntary organizations) have succeeded in gaining access to the state without that access leading them to refrain from challenging what Yishai calls "fundamental social norms."[62]

The Second Wave: The Formative Years, 1970–1984

The second wave of the Israeli women's movement was established in Haifa in 1970 by Marcia Freedman and Judy Hill, both American-born Israelis, and both junior faculty at Haifa University,[63] together with two Haifa-born sisters with roots pre-dating the establishment of the state, and whose grandmother was the famous first-wave Pioneer feminist, Ada Maimon. The movement quickly spread within Haifa University, and then to Tel Aviv, to become predominantly peopled by Israeli-born, *sabra*[64] women. The Haifa group focused on consciousness-raising and opened up a women's bookstore that became a women's center. Separate women's organizations emerged quickly in Jerusalem and Tel Aviv, followed by other cities. In 1974, Freedman was elected to the Knesset on the Citizens Rights Movement platform. There was talk of starting a women's party, but it never materialized. In these early years, the young, very small, women's movement focused on issues of domestic violence, working in the Knesset for legislative reform, and lobbying the Haifa police department to enforce the laws that did exist. It successfully advocated legislative changes as early as 1972. By 1977, the Haifa group opened the first battered women's shelter in Israel with municipal funding from the city. By 1983, women's shelters had been established in Herzliya, Jerusalem, and Ashdod (IWN archives).

During this same period, the High Court ruled on the *Shalit* case (1969–1970). As already discussed, after that case the High Court maintained the status quo on religious law. For example, in one 1983 case, a divorced man from the United States and an Israeli woman decided to get married. However, his divorce papers from the United States were not forthcoming, so the Rabbinate asked to delay the wedding. Instead, the couple married in a private ceremony. Ultimately they divorced, and in this case, the man appealed a lower court decision requiring him to pay alimony. He argued that he should not have to pay because theirs was not a legal marriage ceremony in Israel. She entered a counter-appeal, but he won the case, as well as 10,000 NIS in lawyers' fees (a hefty sum for the average Israeli). This case highlights the High Court's support of a status quo in which there was no legal option for non-religious marriage conducted on Israeli ground,[65] and there was no way out except through religious courts. (Increasing numbers of Israelis have "unofficial" marriage ceremonies inside Israel, which are not then registered with

the state; more still fly to other countries to marry if their marriage is one barred by traditional religious law, e.g., inter-religious marriage, etc. Marriages conducted legally in a jurisdiction outside of Israel are registered as marriages with the Ministry of the Interior.) In this case, the woman had the legal burdens of marriage but not the legal rights (such as alimony) that are usually granted in a marriage and divorce. Rabbinical authorities in Israel tend to err on the side of caution and *accept* the validity of marriages that they have or would have otherwise barred when it comes to requiring a religious divorce. However, the rights that adhere to marriage (such as alimony) may not pertain if one of the parties willfully avoided a rabbinical court decision, as in this case. The human tragedy of this situation is repeated in many cases across the country.

New Activism, 1984–1987

The Israel–Lebanon War, saw broad public criticism of the state's military-security policy on a level never before seen in the history of the state.[66] This broad base of peace mobilization included sizable numbers of women. Parents Against Silence, despite its name, was mainly made up of women who were unwilling silently to see their children go to an unsupported war.[67] This nation-wide peace mobilization brought many women into contact with each other and with the women's movement. Peace mobilization provided the women's movement with a new source for recruitment.

The Israel Women's Network (IWN) was founded in 1984 by Alice Shalvi. The IWN immediately installed a lobbyist in the Knesset. In 1986, lawyer and professor Frances Raday established the IWN's legal center. Raday herself litigated several cases involving women's legal status in the business world, both as a private lawyer and as director of the IWN's legal center (including cases involving sexual harassment, equal employment rights, equal retirement age, etc.). On issues that were not related to religious law, litigation and legislative lobbying were successful quickly and decidedly, creating an increasing sense of delight and efficacy in the women's movement. According to Raday, however, when it came to issues of religious law, the women's movement came up against a wall:

> In other words, everything else we got through almost like butter. I mean, we did have to work hard on it, but things went through fairly easily on all the economic issues, and on violence in the family, and on amending the rape laws, and on a whole series of things the reforms went through quite easily. We got very good decisions from the Supreme Court on equality for women. And when it comes to religion and law, full stop.[68]

The High Court's continued support of the status quo on religious law is evident in the 1985 case in which the High Court decided that civil courts do not have any jurisdiction over alimony in Muslim divorce cases. This decision maintained the traditional legal authority of the Muslims courts, but it actually went against the long-existing norm that the financial and custodial aspects of divorce cases can be taken to

civil courts. The High Court decision in 1985 established that this latter legal norm – which is understood to assist women – applies to the Jewish population only.

The Women in Black Years (The Intifada Years), 1987–1993

With the onset of the Intifada, public protest of Israeli military policy reached a new high. Again, the women's movement benefited from this peace mobilization. Women in Black began their weekly curb-side silent vigils two months after the first Palestinian uprisings. The group had the minimal platform of objection to the military occupation's policies on responding to the uprisings. This platform was, of course, somewhat limiting, but in other ways it was very broad. It did not require any litmus test on security issues, the Arab-Israeli conflict in general, or gender issues. This breadth allowed a broad spectrum of women to participate. Their participation, in turn, brought them into contact with each other and with the women's movement. The movement capitalized on the renewed peace mobilization, adopting the same "non-political" stance for the first time. Most groups had never specifically required a political litmus test, but the early movement members were decidedly leftist, generally secular humanist, and had correspondingly leftist positions on security and gender. Now the movement sent out a clear call for participation based on specific small areas of interest to each activist, rather than a larger political platform. Thus, women of differing political stances on security and gender began to work together on issues such as Mizrahi neighborhood education; consciousness-raising for women in Arab towns; information lines; counseling to women with legal problems; lobbying, and of particular interest, lobbying on issues of marriage and divorce. This specialization to specific interest areas was very important to the expansion of the activist roster.

Several important High Court cases emerged during this period. In the 1987 *Shas* case, the High Court decided that non-Orthodox conversion outside Israel would stand for the purposes of immigration. The *Shas*[69] case marked the beginning of a tenacious jurisdictional conflict between the High Court and the rabbinical court. In 1988, Leah Shakdiel won the right to sit on the local religious council in Tel Aviv-Yaffa, in a case sponsored in part by Na'amat. [70] Meanwhile, the case of the Women of the Wall was presented to the High Court, in which a group of Orthodox women petitioned for the right to pray as a group at the Western Wall.[71] This was the first in a series of cases regarding the rights of the Women of the Wall to pray, using rituals often traditionally limited to men, at the Western Wall of the Temple Mount. The High Court has typically

supported the rights of the Women of the Wall. On a variety of issues relating to religious law, the Court established a position in favor of principles of universal law as against those of communal religious law. The women's movement experienced real litigation successes in the 1980s and especially in the 1990s; these successes gave it momentum to move forward with its political demands despite some setbacks.

Broad Success on Women's Legal Status, 1993–1995

By 1993, the women's movement had gained momentum with its expanded membership, and its legislative and judicial successes. In 1993, the International Coalition for Agunah Rights (ICAR) was established to deal with women waiting for divorce (*agunot* and *mesuravot get*),[72] which is the main concern of the women's movement vis-à-vis religious law. In its first year, ICAR met with a committee of leading rabbis to try to find a solution to the problem. The next year, the committee recommended five *halakhicly* acceptable remedies, of which only pre-nuptial agreements were approved by the rabbinical courts.[73] In 1995, ICAR and the women's movement at large saw two major legal successes: the establishment of the Sanctions Law; and, after negotiations with the Directorate General of the Rabbinical Courts and others, the institutionalization of the Family Court (known in Hebrew as the Shalom Court). The Family Court can hear the economic questions arising from divorce, inheritance, and other religious cases (although it has limited itself to the Jewish population, so non-Jewish women are in a more difficult legal situation). It gave a regular institutional forum for the right that had already existed, that is to bring economic questions to the civil courts. The Sanctions Law allowed the rabbinical court to use civil punishments against recalcitrant husbands. Immediately after its enactment, a group of men sued to have it apply to women as well; they won. The Sanctions Law has been used more extensively in some legal districts than in others. In the years immediately after its passage, the Northern district around Haifa implemented the law the most often, although it was actively used in all districts.

During the 1993–1995 period, the women's movement saw the height of its successes in challenging the status quo on religious law. In 1994, a marriage between Jew and non-Jew in the Brazilian consulate was upheld by the High Court. [74] Cases such as the 1994 *Bavli* case also show the Court's continuing insistence on universal law above communal religious law.[75] In *Bavli*, the High Court decided that civil laws on property rights must be used in the rabbinical courts in deciding division of property in divorce cases. The rabbinical court has maintained that it does not have to abide by this decision.

The Women's Movement: Context and Conclusions

In the early part of the 2000s, several important cases on the legitimacy of non-Orthodox conversion for adopted children and on lesbian women's maternal rights under the law were established in the High Court of Justice. Reform conversions continue to be a contested issue in Israel to the present. Much of the focus of religious-secular tensions has moved away from broad questions of women's rights at the national level to questions centering on Orthodox men's rights to Yeshiva education rather than military service; and Orthodox women's rights to sit where they want on buses within Orthodox neighborhoods. The debate, and legal conflict, between 1987 and 2000 centered on gender equality broadly construed for the non-Orthodox (formerly known as "secular") populations, as well as questions regarding non-Orthodox conversion not discussed in this chapter. Since 2002, the conflict has begun to center, instead, on Orthodox communities themselves.

We know from work on state–society relations in Israel that the establishment and growth of political activity in the women's movement is in keeping with trends in Israeli society throughout the 1970s and 1980s. Scholars have shown that before the 1970s, Israel was run by a strong, party-dominated state with little input from independent social groups.[76] However, through the 1970s and 1980s, social groups making specific political demands on the state mushroomed, leading to a polarization in society so deep that Migdal has argued it might threaten the state's ability to rule.[77] Interestingly, in outlining the development, expansion, and polarization of a politicized society in Israel through the 1970s and 1980s, most literature on state–society relations and civil society in Israel has been remarkably quiet on the women's movement. A few works in English have begun to detail the activities of the women's movement. Mayer, Emmett, Kanaaneh, and others have written about the effects of the Israeli-Palestinian conflict on Palestinian and Israeli women and their political mobilization.[78] Sharoni has focused on the masculinization and militarization of Israeli society through its long history of wars.[79] Raday touches on the women's movement in her work on women's status in Israeli society and law.[80] Yishai's work on women's political participation in Israel focused on party- and state-related women's associations.[81] There are a number of works in English on women's movement pioneering women in the pre-state years, or collections that address both pre-state and

post-state periods.[82] Hanna Herzog has contributed an important work on women's mobilization to political office around the country.[83] And there is fascinating work, worthy of note although not on the women's movement per se, on gender issues surrounding gender and reproduction in Israel, as well as gender and nationalism in that context.[84] However, there remains a significant amount of work to be done on women's mobilization and women's movement mobilization in Israel.

Legal mobilization in the Israeli women's movement has been part of its political development and its growing political influence, despite the small membership numbers noted by Yishai.[85] Why did the movement turn to litigation? First, the structural factors are twofold. Success in the legislature has been traced to the level of popular support for an issue. If popular pressure, either nationally or internationally, could not be brought to bear on the Knesset, another alternative was needed. The existence of the judicial branch made it a potential resource. The Court's increasing emphasis on natural law made it a more likely alternative than the Knesset to enforce the changes the women's movement sought. These respective roles of the legislature and the judiciary are a function of the institutionalized structure of the political system in Israel.

Second, individuals played a large part in this process. Lawyer and scholar Frances Raday was the first to bring suit to the High Court over equal pay and job opportunity. She later established the Israel Women's Network Legal Center in 1984 (today she is a member of the United Nations Human Rights Council Working Group on Discrimination Against Women). As an attorney with an interest in civil rights, born in England and aware of the civil rights struggles there and in the United States, Raday turned to the courts because law was her profession and her model for enacting political change. Third, women in the Israeli women's movement in general were aware of cross-national models emphasizing litigation as part of an effective strategy for political change. They were familiar with the lobbying and litigation techniques used by the US and British women's movements, as well as the revolutionary civil rights gains that had occurred through litigation in the United States. The fact that a few of the key leaders in the second wave were of American, British or German origin (Freedman, Raday, Shalvi) in this immigrant-based country probably heightened the movement's awareness of these cross-national models.

Fourth, with the High Court's changed position on issues of individual rights in the 1970s and 1980s, there appeared to be a strong possibility for change through litigation. And fifth, turning to the High Court marked an ideological support for the idea that the job of the court is to protect individual rights and principles of natural law independent of any influence by mass opinion, or ephemeral political trends. The women's movement gained publicity, a sense of efficacy, and some court cases in its favor as a result of its litigation efforts.

In turn, and probably unwittingly at first, the women's movement provided support for the High Court. In initiating litigation as part of a larger strategy to enact political change, the women's movement provided, very simply, a demand for the court's services. As has been shown in other cases, increasing demand for court decisions enhances judicial power.[86] Moreover, the women's movement at large provided a new constituency that favored a change in the status quo on religious law. While this constituency did not direct court action, the two parties appear to have had overlapping interests in challenging the status quo on religious law. The existence of a pressure group to make such changes made it clear that the High Court was not alone in this effort. And, significantly, the demands of the women's movement supported the High Court's self-perception that it was ruled by a higher law, independent of ephemeral trends in political opinion.

Larger Issues

A central underlying issue in this analysis are the questions of judicial power and the independence of the judiciary. The Israeli High Court has been part of a major change that has been taking place in the role of the courts around the world. Courts have used principles of natural law to review the legality of administrative and other political decisions; challenge laws; overturn lower court findings; and publish controversial decisions on cases teeming with political content. This process has been called the judicialization of politics, or judicial activism.[87] The judicialization of politics can be defined broadly as the process of courts inserting themselves into political decision making. The judicialization of politics may come through an official expansion of court jurisdiction, or through courts inserting themselves into areas officially outside of judicial purview altogether.[88] In the words of one scholar, "Judicialized politics are politics pursued at least in part through the medium of legal discourse."[89] The Israeli High Court has followed this trend, checking administrative, military, and lower court decisions against the gauge of natural law and individual rights. This chapter has suggested one reason the High Court was able to insert itself into political decision making on religious personal status law: the existence of a social group willing to litigate and push for that change. By using the courts, the women's movement contributed to increasing judicial power.

Judicial power is usually measured relative to the power of the legislature, which in both the civil and common law traditions is understood to be the most powerful branch of government. The legislature is given this status because it is understood to be directly responsible to the people. The independence of the judiciary has been defined as the judiciary's independence in face of residual loyalties from a political appointment or election process.[90] Other definitions focus on judicial independence to decide cases of individual rights without influence from political branches or political trends in society.[91] Still others focus on independence as the need to maintain the separation of powers, whereby the Court should refrain from deciding political questions.[92] In these definitions we see judicial power understood, alternately, either as authoritarian and anti-democratic, because the judiciary is not responsible to the people, or as highly democratic, where

democracy is defined as protecting individual rights without regard to local and temporal political trends.

In the United States, the judicialization of politics began in the nineteenth century with the Supreme Court taking for itself the right of judicial review. That is, the Supreme Court began to review laws and declare them constitutional or not. The American model is based on the idea that any judge in any case has the right to declare a law unconstitutional.[93] In the United States, the process of turning judicial review into a legitimate and accepted form of judicial activity, and an accepted part of democracy, has not been unproblematic in itself. Although the case in which the Supreme Court asserted its right to judicial review occurred in 1803 (*Marbury* v. *Madison*), it was not until the late nineteenth century that judicial review began to be used with regularity. In the New Deal era, it became a regular part of the US political landscape.

By 1945, and particularly since the 1970s and 1980s, the initially American phenomenon of judicial review began to be instituted across Europe and around the world.[94] In Europe, it took the form of constitutional courts, which have the right to review laws, administrative decisions, executive acts, or the decisions of other courts and declare them constitutional or not.[95] Judicial review may, thus, refer to legislative review or administrative review. Judicial review has raised the problem of the court as a limit on popular sovereignty. But according to Shapiro and Stone, "One of the reasons that public judicial-legislative confrontations have been so rare in Europe is that the idea that both human rights and constitutional review are constituent components of modern democracy has been successfully propagated and manipulated by constitutional courts and their supporters."[96] As we have seen, such a consensus has not yet been established in the case of Israel. We have also seen that the Israeli High Court does have supporters who would like to see (and are willing to lobby and litigate for) a strengthened court that has the ability to make lasting decisions on controversial political questions. The women's movement, in larger part, has been one of those supporters.

Lawyers and legal scholars in Israel seem to agree that the High Court has become more active in protecting rights and principles of universal law within Israel through such means as judicial review, and its long-standing authority as last court of appeal. However, scholars disagree strongly as to whether this is an advisable move. The theoretical debate in Israel can be broken roughly into three arguments: (1) Strong Judiciary as

Authoritarian, that is the suggestion that a strong court is fundamentally anti-democratic and political questions should be addressed in the legislature, which is accountable to the people; (2) a Pragmatic Intermediary, which includes arguments that either the judiciary simply cannot effectively answer political questions, or it should not enmesh itself in politics lest it lose public trust; and (3) Judicial Power-Natural Law arguments, which insist that courts are entrusted to protect the rights of the individual from the trespasses of the state, or other citizens. The judiciary, this last argument goes, must be strong, independent, and able to decide political as well as other questions based on general principles of natural law. Courts should not be influenced by popular political trends that would have the state infringe on those fundamental rights.

Strong Judiciary as Authoritarian.

Shamir and others warn that the use of judicial reasonableness and the concept of the rule of law is no more than a tool to enable the High Court to expand its range of power.[97] Ultimately, what others see as the Court's increasing protection of principles of individual rights, Shamir sees as an expansion of judicial power, which is to say, non-democratic state power. For Shamir and others, the state is always at the center of the "sacred triad": "*medina yehudit vedemocratit*," a Jewish democratic state.[98] Likewise, Halperin-Kaddari criticizes the High Court's challenge of the status quo of the jurisdictional boundaries between the civil and religious court systems. Specifically, she views the High Court's imposition of civil property law on the rabbinical courts[99] as an unjustified extension of its authority outside of legal bounds.[100] Both Shamir and Halperin-Kaddari argue that such political decisions should be decided in the legislature, not the courts.

The Pragmatic Intermediary.

In the mid-1970s, in the aftermath of the *Shalit* case, Zemach conducted a study of political questions in the courts. He argues that the lesson of the *Shalit* case – with its landmark decision and equally dramatic legislative overthrow – is that what we now call the judicialization of politics simply does not work. For Zemach, *Shalit* suggests another interesting conclusion. The non-justiciability of a political question is unavoidable, no matter how "judicial" the method by which the Court's decision is arrived at. Political issues cannot be solved by calling them "legal" issues and deciding them judicially.[101]

With the benefit of a longer history of decisions over political questions in the High Court, others do not agree that political decisions are necessarily ineffectual. Nor is an extension of the High Court's power seen as a breach of law. Scholars such as Hofnung, rather, caution that broad use of judicial review may insert the High Court too often into politics. If courts are seen as no more than one institution among many political actors, it may undermine the public's trust in the judiciary as a neutral player, ultimately weakening the courts in general.[102]

Judicial Power-Natural Law.

On the other side of the spectrum, Shifman, one of the foremost scholars on religious law in Israel, registers dismay that the High Court has not been more active – and more successful – in improving women's legal standing in areas of family law (religious law).[103] Such a judicially instituted improvement of women's legal status would require exactly the sort of jurisdictional challenge that Halperin-Kaddari criticizes. Aharon Barak, President of the High Court of Justice from 1995–2006, is probably the best-known proponent of a strengthened High Court, whose very mandate should be to protect human rights. For Barak, the most basic principle of Israel's Basic Laws is the protection of human rights.[104] Interestingly, Barak emphasizes that the human rights-centered Basic Laws that were new in 1992 were enacted by a majority of the Knesset, Israel's parliament. He legitimizes this support for rights by reference to the support of the elected legislature. Thus, Barak does not speak of expanded judicial power per se, but rather the overriding responsibility of courts to protect individual and human rights against any incursions. Shamir, on the other hand, argues that no pure legal decision exists. Any decision derives from a space between law and politics.[105] Appeals to concepts such as judicial reasonableness, rule of law, and the like should be viewed with skepticism and an eye toward the increasing judicial power that is served by the argument. Many legal scholars, however, favor Barak's approach. They tend to lean toward a strengthened judiciary to put it in a better position to protect civil and human rights.[106]

On varying sides of the debate, appeals are made to differing ideals seen as fundamental to Israeli democracy. On the one hand, these are arguments about how to define democracy. On the other hand, they are arguments about how to define Israeli political culture. For Shamir, extending judicial discretion to the "expert" judge undermines the decision-making power of the people. Such an argument appeals to the principle that democratic decision making should inhere in the people and, thus, in the elected legislative branch. For Shamir, political questions should be addressed in the political arena, where the people have influence, not in an expert court. For Barak, democratic decision making means precisely protecting the individual from the rule of the masses, as well as the trespasses of the state. Following his logic, an independent and

powerful judiciary is necessary to oversee the running of the executive and legislature to make sure they do not infringe on the human rights of the people. In short, the mandate of courts is to protect the people from the state and from one another.

What is interesting in the Israeli case is the extent to which the debate over strengthening the court in Israel has been overt. It is a debate about how to fashion (or re-fashion) political-cultural ideals about democracy and the Israeli state. Israel, located somewhere between civil and common law orthodoxies,[107] has been for some time debating the meaning and appropriate structure of its legal system, but also the very ideological roots best to use as the source of that legal system. While laws themselves may be a source of cultural contest in Israel, as in the case of religious law, the debates over the relative power of the judiciary are ideological debates over who really protects whom. Do the people best protect themselves, through their representatives; or are independent "expert" judges in a better position to protect the people from the state and from themselves? The debate over the relative power of the judiciary is an ideological debate about the structure of the Israeli political system itself.

Conclusions

The case of jurisdictional conflict between the High Court and the Rabbinical Court in Israel shows the extent to which courts contribute to political debates and decisions, but also how much they may be influenced or supported by the existence of political constituencies. Scholars have shown the extent to which judicial review and other forms of judicialization of politics can insert the judiciary into the process of political decision making.[108] Some have noted that the increased involvement of courts in political matters may give officials, individuals, and social groups new venues in which to advocate their agendas.[109] What I would like to suggest in the Israeli case is that the High Court was able to renew its drive for principles of universal law after nearly twenty years of avoidance in the case of religious law debates because the political activities of new social groups presented the Court with a constituency that supported such a move by providing: (1) a demand for court decisions; (2) a political constituency; and (3) ideological support for the self-perception of courts as ruled by a higher law (natural law), independent of political trends. The Court was presented with a new opportunity to renew its attempts to instill principles of universal law over those of communal religious law in the Israeli legal system, despite the Court's usual hesitancy at the time to enter into political debates. The Israeli case offers insight into the mutual interactions involved in this process of the judicialization of politics. Not only did the Court involve itself in political decisions through adjudication – the judicialization of politics – but in this same process the Court itself became politicized, influenced at least to some extent by the political activities of social groups, and the political atmosphere in the state and society at large. The politicization of the judiciary appears to be a necessary corollary to the judicialization of politics.

Migdal has argued that political analyses are insufficient if focused on the state as though it were a unitary entity that existed in isolation. States are not only made up of a complex of organizations, they are limited in their capabilities. These limitations come from society:

> If we are to understand the inherent limitations of states we must develop a focus on process, one that starts with the web of relationships between them and their

> societies. At the heart of the modern state's successes and failures, especially its ability to gain obedience, is the nature of its relationship to those it claims to rule.[110]

Migdal calls for the inclusion of a culturalist perspective that will treat society and its meta-narratives with analytical seriousness. He suggests a Geertzian attention to public political drama, symbol systems, and culture as the glue that holds both societies and states together,[111] this despite such divisive internal conflicts as the religious law debates in Israel. Although the religious law debates in Israel are clearly occurring at the political and institutional levels, they are also, as Migdal's work would suggest, at a very basic level debates over what will hold Israeli society together. The state-in-society approach is, I believe, the first best cut to understanding the nature (and the ins and outs, or the processes) of the religious law debates in Israel. While other factors played minor roles at certain moments (such as the desire of the state to gain international approval during the 1975 UN Year of the Woman),[112] primary attention to international influence, economic position, or security would tend to steer the researcher away from the crux of the problem in this and many other political contexts: the relationship between the society and the state. The reverse is not the case. Through an in-depth study of the social groups and individuals involved, the state institutions (and individuals in those institutions), and the interactions between all of these, the scholar will be brought to any international or economic influences, and institutional or personal conflicts affecting the case.

In the case of the legal mobilization of the Israeli women's movement, there developed a relationship of mutual support and mutual gain between the movement and one institution of the state, the High Court. This is not to say that the High Court became the tool of social-political groups, but rather that the High Court is not entirely independent. The women's movement supported the judiciary by demanding its services, presenting the High Court with a constituency in support of a change in the status quo on religious law, and providing ideological support for the High Court's own self-conception as ruled by higher (natural) law. In turn, the High Court supported the women's movement on several levels. As court cases, initially in the area of pay equity, began to be won in the High Court, the women's movement gained a new sense of efficacy. Members began to believe there was a possibility to win cases in the High Court. The movement also gained publicity from legal cases. As has been noted, public opinion has

an important impact on the willingness of the Knesset to develop new legislation. And the women's movement also gained from a strengthened ideology of natural law as higher law to rule over issues of individual rights despite public opinion.

The interests of the women's movement and the High Court overlapped in their desire to see a change on religious law jurisdiction, their desire for a strong court, and their desire for a strong ideology of natural law. While the reasons for advocating each of these positions were different for the two groups, the intersection of interests led to mutual gain, which ultimately led to mutual support. It is not important whether this support was intentional. In the case of the High Court, it most likely was not. The mutual relationship between the High Court and the women's movement probably began without any specific intention on the part of either group. Mutual influence developed as a result of overlapping interests in the context of a political debate in which each found in the other an opportunity to pursue its own broader agenda.

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[1] Migdal, "Researching the State," p. 209.

[2] Weber, *The Theory of Social*, pp. 34, 42.

[3] Tarrow, *Power in Movement*.

[4] McCann, *Rights at Work*.

[5] Migdal, "The State in Society"; Migdal, "The State in Society: An Approach"; Vitalis, *When Capitalists Collide*; Evans, *Embedded Autonomy*; Shue, "State Power"; Hagopian, "Traditional Politics."

[6] Scott, *Seeing Like a State*; Mitchell, "The Limits of the State," pp. 77–96.

[7] Migdal, "Researching the State."

[8] Wallerstein, *The Politics*.

[9] Vitalis, *When Capitalists Collide*.

[10] Geddes, *Politician's Dilemma*.

[11] See, for example, Hagopian's analysis of the social limitations on the Brazilian military state in Hagopian, "Traditional Politics."

[12] On Israeli media discourse following this pattern, see Liebman, "The Media," p. 47.

[13] Edelman, *Courts*, p. 51.

[14] See discussion in Chapter 11 of the current volume.

[15] Pearlman, *Ben Gurion Looks Back*, pp. 218–19.

[16] ***Ibid.***, p. 216.

[17] ***Ibid.***, p. 226.

[18] ***Ibid.***, p. 227.

[19] See the discussion in Chapter 11 of the current volume.

[20] Pearlman, *Ben Gurion Looks Back*, p. 221.

[21] ***Ibid.***

[22] ***Ibid.***, p. 220.

[23] ***Ibid.***, pp. 217–18.

[24] ***Ibid.***, p. 222.

[25] ***Ibid.***, p. 218.

[26] ***Ibid.***, p. 220.

[27] Migdal, *Strong Societies*, p. 19.

[28] Liebman, "The Media," p. 40.

[29] Levy, Levinsohn, and Katz, "Beliefs," p. 25.

[30] ***Ibid.***, p. 8. For a discussion of the interpretive tendencies of Middle Eastern- and European-descended Orthodox communities, see Zohar, "Traditional Flexibility."

[31] Levy *et al.*, "Beliefs," p. 7.

[32] ***Ibid.***, p. 8.

[33] ***Ibid.***, p. 29.

[34] ***Ibid.***, p. 21.

[35] ***Ibid.***, p. 14.

[36] ***Ibid.***, p. 22.

[37] Liebman, "Religion and Modernity."

[38] Liebman, "The Media."

[39] Moaz, "Enforcement," p. 477.

[40] Klein, "A New Era"; Zemach, *Political Questions*; Kretzmer, "Forty Years"; Shifman, "Family Law"; Moaz, "Enforcement"; Shetreet, *Justice in Israel*; Kretzmer, *The Occupation of Justice*; Woods, *Judicial Power*.

[41] Israel Declaration of Independence, 1947.

[42] For the universal-particular tension in other eras, see Chapters 3 and 4 of the current volume.

[43] See a discussion of the strong party state, see Wolffsohn, *Israel*.

[44] HCJ 26/5 *Kutik* v. *Wolfson* 5 PD 1341 (1951).

[45] This case is also discussed in Chapter 13 of the current volume.

[46] HCJ 58/68 *Shalit* v. *the Minister of the Interior et al*., PD 23 (2) 477 (1970).

[47] See Edelman, *Courts*; Shetreet, *Justice in Israel*; and Englard, *Religious Law*.

[48] For discussion of the politicization and polarization of Israeli society in wider context during this period, see Migdal, "Civil Society in Israel"; and Barzilai, *Wars*.

[49] Hofnung, "The Unintended Consequences."

[50] ***Ibid.***; Edelman, *Courts*.

[51] Edelman, "The Judicialization of Politics."

[52] Kretzmer, "Forty Years."

[53] For further discussion of the basic laws, see Chapters 12 and 13 of the current volume.

[54] Bernstein, "Oriental and Ashkenazi Women"; Bernstein, *The Struggle*.

[55] Yishai, *Between the Flag*.

[56] ***Ibid.***

[57] Bernstein, "Oriental and Ashkenazi Women," pp. 67–69.

[58] Freedman, *Exiled*.

[59] ***Ibid.***

[60] Yishai, *Between the Flag*.

[61] See Joseph, "Elite Strategies"; Stetson and Mazur, *Comparative State Feminism*; and Jayawardena, *Feminism and Nationalism*.

[62] Yishai, *Between the Flag*, p. 175.

[63] Freedman, *Exiled*.

[64] *Sabra* is modern Hebrew slang for a person born in Israel.

[65] One of the only conditions in which non-religious marriage is allowed is a "consular" marriage, in which a foreign national is allowed to marry his or her intended spouse at their own consulate in Israel.

[66] Barzilai, *Wars*.

[67] Gillath, "Women against War."

[68] Frances Raday, personal interview, Jerusalem, June 1997.

[69] HCJ 264/87 *Shas* v. *Office of Population Registry*, 43 (2) 727 (1987).

[70] HCJ 153/87 *Shakdiel* v. *The Minister of Religion et al.*, PD 42 (2) 309 (1988).

[71] HCJ 257/89 *Hoffman et al.* v. *The Guardian of the Western Wall*, PD 48 (2) 263 (1994). This was the first in a series of cases regarding the rights of the Women of the Wall.

[72] Women who, under Jewish law, have the right to a divorce but whose husbands refuse to give them a religious divorce paper releasing them from the marriage. The religious divorce paper is called a *get*.

[73] Esther Sivan, personal interview, Israel Women's Network Law Center, Jerusalem, June 1997.

[74] HCJ 1031/93 *Ellen Pessaro (Hava Goldstein)* v. *Minister of Interior*, PD 49 (4) 661 (1994).

[75] HCJ 1000/92 *Bavli* v. *the Supreme Rabbinical Court*, PD 48 (2) 221 (1994).

[76] Wolffsohn, *Israel*.

[77] Migdal, "Civil Society in Israel."

[78] Mayer, "Women and the Israeli Occupation"; Emmett, *Our Sister's Promised Land*; Kanaaneh, *Birthing the Nation*; Rosenwasser, *Voices*; Swirski and Safir, *Calling The Equality Bluff*.

[79] Sharoni, *Gender*.

[80] Raday, "Religion."

[81] Yishai, *Between the Flag*.

[82] Bernstein, *Pioneers*; Kark, Shilo, and Hasan-Rokem, *Jewish Women*; Fuchs, *Israeli Women's Studies*; Fuchs, *Israeli Feminist Scholarship*; see also Marcia Freedman's autobiography, *Exiled*.

[83] Herzog, *Gendering Politics*.

[84] Kahn, *Reproducing the Jews*; Portugese, *Fertility Policy*.

[85] Yishai, *Between the Flag*.

[86] Hendley, *Trying*.

[87] Shapiro and Stone, "The New Constitutional Politics"; see also Vallinder, "The Judicialization of Politics."

[88] Vallinder, "The Judicialization of Politics," p. 91.

[89] Stone, "What Is a Supranational Constitution?" p. 446.

[90] Katzmann, *Courts and Congress*.

[91] Barak, "The Constitutional Revolution."

[92] Shamir, Shitrai, and Elias, "Religion, Feminism, and Professionalism."

[93] Shapiro and Stone, "The New Constitutional Politics," p. 400.

[94] Shapiro and Stone, "The New Constitutional Politics."

[95] Provine, "Courts in the Political Process."

[96] Shapiro and Stone, "The New Constitutional Politics," p. 410.

[97] Shamir *et al.*, "Religion, Feminism, and Professionalism."

[98] ***Ibid.***, p. 7.

[99] HCJ 1000/92 *Bavli* v. *the Supreme Rabbinical Court*, PD 48 (2) 221 (1994).

[100] Halperin-Kaddari, "Thinking Legal Pluralism."

[101] Zemach, *Political Questions*.

[102] Hofnung, "The Unintended Consequences."

[103] Shifman, “Family Law.”

[104] Barak, “The Constitutional Revolution.”

[105] Shamir, “The Politics of Reasonableness,” p. 7.

[106] See, for example, Edelman, *Courts*; Raday, “Religion”; and Lahav, *Judgement in Jerusalem*.

[107] Merryman, *The Civil Law Tradition*.

[108] Vallinder, “The Judicialization of Politics”; Edelman, *Courts*; Hofnung, “The Unintended Consequences”; and Shapiro and Stone, “The New Constitutional Politics.”

[109] Shapiro and Stone, “The New Constitutional Politics”; Hendley, *Trying*; and Shapiro, *Law and Politics*.

[110] Migdal, “Researching the State,” p. 213.

[111] ***Ibid.***

[112] Yishai, *Between the Flag*.

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