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FROM THE PUBLISHER

An international conference on the topic "Genesis and Jewish Law," jointly sponsored by the Boston University School of Law's Institute of Jewish Law, and Harvard Law School's Gruss Chair of Talmudic Civil Law, took place May 18–20, 2003 at Harvard Law School. We decided to include a number of the conference presentations in the *Jewish Law Annual*, and therefore asked participants to submit them as articles for publication. Three of these articles are grouped together in a special section commencing on page 135. We hope our readers will find them of interest.

Neil S. Hecht
The Institute of Jewish Law
Boston University School of Law

PART ONE

The Jewish Law Annual, Vol. XVI

ASHKENAZIM IN SEFARAD: THE ROSH AND THE TUR ON THE CODIFICATION OF JEWISH LAW

JUDAH GALINSKY*

In his monumental work on Jewish law, Menachem Elon, in summing up R. Jacob b. Asher's unique contribution to the history of codification, states the following:

> Thus in this middle way, Jacob b. Asher found the desirable solution to the problem of codifying Jewish law: on the one hand, a categorical and prescriptive statement of the basic legal principle, without attribution of authority or citation of source, and, on the other hand, a presentation of the various opinions of the post-Talmudic authorities on the ramifications of the principle, and his conclusion as to how the law should be definitively declared.[1]

Indeed, R. Jacob b. Asher succeeded in reaching a middle ground between the two approaches to codification of Jewish law: that of the Maimonidean code, the *Mishne Torah*, which is devoid of talmudic sources and divergent opinions, and that of the legal summaries, popular in Ashkenaz, which are organized according to the order of the Talmud and include a variety of halakhic opinions. R. Jacob's originality lies in the fact that his code, constructed in a systemic manner, does not incorporate discussion or references to the relevant talmudic sources, but does include a variety of legal perspectives.

Reading Elon's survey of the codification of Jewish law, one might infer that the composition of R. Jacob's *Turim* was the result of a reasoned process of experimentation, that upon testing and weighing the different alternatives, R. Jacob, the legal scholar, concluded that the mixed model was the best of all possible options. In this study, I will examine the major historical and personal forces that influenced

* Judah Galinsky is a lecturer at the Lander Institute (formerly Touro College) in Jerusalem and has written on topics relating to the halakhic literature of France and Spain in the thirteenth and fourteenth centuries.

1 See M. Elon, *Jewish Law — History, Sources, Principles* (Philadelphia: 1994), vol. 3, 1286.

R. Jacob's decision to structure his work as he did. Foremost among them is, of course, his famous father, the Rosh.

1 *R. Asher b. Jehiel and his Family Arrive in Castile*

In the year 1304, R. Jacob b. Asher emigrated from Germany along with his father, R. Asher b. Jehiel, known as the Rosh (the acronym of Rabbenu Asher), and other family members. In 1305 the family settled in Castile, Spain. At the time, the Rosh was about fifty-five years old, and R. Jacob was in his early thirties.[2] We can surmise that by the time R. Jacob left his homeland, he had become acquainted with the halakhic methodologies of Germany and France, and that in addition, he was well-versed in the law as it was practiced there.[3] Conversely, when he arrived in Spain he was still young enough to be impressed and influenced by the legal culture of his new surroundings.

The legal landscape that greeted the Rosh and his sons upon their arrival in Castile at the beginning of the fourteenth century differed from that to which they had been accustomed in Germany. Briefly, in Castile, serious study of the Talmud and of the supplementary Tosafist glosses was almost non-existent, and the halakha was all but decided according to Maimonides' *Mishne Torah*, and to a lesser extent, the *Halakhot* of Alfasi. Ashkenaz, in contrast, was a Talmud-centric society where study of the Tosafist glosses was widespread and the law was decided by consulting legal summaries that followed the order of the

2 The best biographical sketch of the Rosh remains that of A. Freimann, "Ascher ben Jechiel, sein Leben und Wirken," *Jahrbuch der Jüdisch-Literarischen Gesellschaft* 12 (1918), 237–317. Freimann wrote about the Rosh's family in a separate paper, "Die Ascheriden (1267–1391)," *Jahrbuch der Jüdisch-Literarischen Gesellschaft* 13 (1919/1920), 142–254. The two articles were translated into Hebrew by M. Eldar as *The Rosh and his Descendants* (Hebrew), (Jerusalem: 1986); for corrections to the Freimann account, see I.M. Ta-Shma, "Between East and West: Rabbi Asher b. Yehiel and his son Rabbi Yaaqov," in I. Twersky and J.M. Harris (eds.), *Studies in Medieval Jewish History and Literature III* (Cambridge MA: 2000), 179–196.

3 Consider his brother Judah's lament regarding his lack of training in the French, that is, Tosafist, approach to Talmud study: "I left the German method of study without entering that of France" (I. Abrahams, *Jewish Ethical Wills* (Philadelphia: 1927), vol. 2, 166). A sickly child, Judah was not able to match the weighty study load that his brothers were expected to master.

Talmud (*Ravia, Or Zarua*) or handbooks that included direct references to the talmudic material (*Semag, Semak*).

In Castile, as Isaac Israeli the Younger, an astronomer and student of the Rosh, informs us, the situation was markedly different. In the historical section of his work *Yesod Olam*, on astronomy and the calendar, he wrote of the dominance of the Rambam's *Mishne Torah* among the halakhists of Castile. Writing in the year 1310, five years after the arrival of the Rosh, he described the rapid dissemination of the *Mishne Torah* (composed at the end of the twelfth century), and its acceptance as the authoritative code as early as the beginning of the thirteenth century: "And as soon as the work [of Maimonides] was made public and disseminated throughout the Diaspora, all of Israel agreed to rule in accordance with its dictates on all matters of law, rabbinic ordinances (*gzeirot vetakanot*), and custom."[4]

Assuming that the author's account of the range and instantaneousness of the *Mishne Torah*'s popularity may have been somewhat exaggerated, we can still assume that in fourteenth century Castile, Israeli the Younger's place of residence, the description was quite accurate. It would thus seem that when the Rosh and his family arrived in Toledo, the local rabbis and judges decided the law in accordance with the rulings of the Maimonidean code, the *Mishne Torah*.[5]

Moreover, there does not seem to have been a culture of Talmud study in Castile. In contrast to the curriculum in Ashkenaz and even Catalonia, in northern Spain, in Castile students seem to have spent their time studying the "*Talmud Katan*," that is, the *Halakhot* of Alfasi, the Rif. The source of this information is the *Tzeida Laderekh*, written in the second half of the fourteenth century in Castile by R. Menahem b. Zerah, a student of the Rosh's son Judah. Both in the introduction and in the body of the work, R. Menahem b. Zerah informs us that it was mainly due to the Rosh's efforts that study of the Talmud gained

4 I. Israeli, *Yesod Olam* (Berlin: 1848), part 2, sec. 4, ch. 18, p. 35a. On Israeli's scientific works, see Y.T. Langerman, *The Jews and the Sciences in the Middle Ages* (Aldershot, UK: 1999), 8–9.

5 It would seem that, to large extent, this was the practice in Jewish communities of the East that were under Moslem rule. For sources attesting to this, see my "The *Four Turim* and the Halakhic Literature of 14th Century Spain: Historical, Literary and Halakhic Aspects" (Hebrew), (PhD diss., Bar-Ilan University, Ramat Gan 1999), 23–24, henceforth Galinsky. For additional sources on the situation in Castile, see pp. 42–46, 57–59.

currency in Castile, and that prior to his arrival, most students studied Alfasi's *Halakhot* and little else. In the section of the book that deals with study of the Torah, R. Menahem b. Zerah discusses Maimonides' opinion regarding the prohibition against receiving payment for studying the Torah. In commenting on what the practical significance of this position would be in a country such as Castile, he remarks:

> And in particular in all the land of Sefarad [i.e., Andalusia and Castile], **those who studied Talmud were few in number**, from times past (*mikedem*) **until God awakened the spirit of R. Asher, who came from Ashkenaz**. And [here] he studied and taught and raised many students, he and his sons after him.[6]

In the introduction, R. Menahem b. Zerah makes a similar statement regarding R. Meir Abulafia, who lived in the first half of the thirteenth century: "and during his day, and before that, they studied nothing in this land but the *Halakhot* of R. Alfasi." He comments that "it was through [the Rosh's] efforts that study of the Talmud was strengthened."[7]

We can therefore easily empathize with the Rosh's dismay at the state of the halakha in Toledo. He found a situation where those responsible for halakhic matters had little direct knowledge of the Talmud, and did not regularly engage in its study. The local halakhic authorities and rabbinical court judges made their legal decisions mainly on the basis of a single work, a work that neither included references to the Talmud, nor took into consideration the widely accepted insights of the French Tosafists on the Talmud.

6 Menahem b. Zerah, *Tzeida Laderekh* (Warsaw: 1880), part 1, sec. 4, ch. 21, p. 82a.

7 Ibid., p. 6. And see B. Septimus, *Hispano-Jewish Culture in Transition* (Cambridge MA: 1982), 20. The literary evidence with regard to R. Jonah Gerondi is particularly interesting. After R. Jonah emigrates from Catalonia to Toledo, he seems to teach his students the Rif (hence the commentary known as *Talmidei Rabeinu Yona*) and not the Talmud. In Catalonia, however, he definitely taught the Talmud (as is clear from his own *Aliot Rabeinu Yona*, and *Hidushei Harashba*, by R. Solomon b. Adret, one of his most celebrated students). On R. Jonah and his writings on the Talmud, see I.M. Ta-Shma, *Talmudic Commentary in Europe and North Africa 1200–1400* (Hebrew), (Jerusalem: 2000), 19–28.

2 *R. Asher b. Jehiel's Approach*

The Rosh was faced with a twofold challenge: broadening the curriculum taught in the local yeshivot, and altering the local rabbinate's practices with respect to halakhic decision-making procedures. As already noted, R. Menahem's report mentioned the emphasis placed by the Rosh on study of the Talmud. In the Ashkenazic yeshivot, study of the Talmud encompassed study of the standard text accompanied by Rashi's commentary, as well as the Tosafot, that is, the glosses of the Tosafists. As part of his mission to regenerate Talmud study in Castile, the Rosh took it upon himself to edit a set of authorized Tosafot, known as *Tosfot Harosh* or *Shita Larosh*, which also contained the opinions of his teacher R. Meir of Rothenburg, and those of the sages of Spain, Nachmanides and R. Meir Abulafia.[8] The Rosh's efforts appear to have borne fruit, as the accounts left by R. Menahem and Rosh's sons Judah and Jacob, attest.[9]

In addition, as part of his plan to wean students of the law from their reliance on the Rambam and the Rif, the Rosh composed his *Psakim*, a halakhic work that can be viewed as an alternative to Alfasi's *Halakhot*. Although he structures it around the *Halakhot*, the Rosh is engaged in an ongoing confrontation with the Rif's halakhic rulings. He will generally begin with a quotation from the Rif, but then proceed to suggest an alternate understanding based on the *Tosafot*.[10] This obvious preference, on the part of the Rosh, for the scholars of France

8 See Ta-Shma 2000, n. 2 above.

9 As the Rosh's son R. Judah wrote in his last will and testament, "And it was from God [that the Rosh had to leave Germany], in order to raise many students in the lands of Spain . . . for in these lands there were no accurate commentaries [on the Talmud]" (Abrahams 1927, n. 3 above, 190; as Abrahams's translation was far from accurate, I have substituted my own). In a letter to a friend in Germany, R. Jacob asked him to bring any books that he could to Spain, qualifying his request as follows: "But *Tosafot* you do not have to bring, because we only study the commentary (*shita*) of my father" (S. Assaf, *Sources for the History of Education* (Hebrew), (Jerusalem: 1943), vol.2, 137. I elaborate on the Rosh's impact on Talmud study in Toledo in a separate article, "The Rosh, Ashkenazic decisor in Spain: on his *Tosafot*, his *Psakim*, and his yeshiva" (Hebrew), forthcoming in *Tarbiz*.

10 For a thorough description of the Rosh's approach, see M. Washofsky, "The Rosh and the Rambam: the halakha of Ashkenaz confronts the tradition of Sefarad" (PhD diss., Hebrew Union College, Cincinnati 1987).

and Germany over those of Spain, can be seen in his responsa as well, and is accurately described by the sixteenth century Spanish–Jewish historian Abraham Zacuta in his *Sefer Hayuhasin*.[11] The Rosh himself explains the legal rationale for this preference in his *Psakim*.[12]

It is, however, difficult to ascertain whether these *Psakim* were meant to be a halakhic summary for students who had studied Talmud and *Tosafot* on the subject at hand, or whether they were intended to serve as a halakhic code to be studied independently of the Talmud. Or, to frame the question in terms of the two halakhic works that had the most influence on the Rosh's *Psakim*, did he compose a work similar to the Sefaradic *Halakhot* of Alfasi, or was his work more closely related to that of the Ashkenazic *Avi Haezri* of the Ravia, R. Eliezer b. Joel Halevi of Mainz?[13] In the absence of an introduction to the *Psakim*,

11 Regarding the Rosh's reliance on the scholars of France in his responsa, see Ta-Shma 2000, n. 2 above. Zacuta's description can be found in his *Hayuhasin Hashalem Lerabi Avraham Zackut* (London and Edinburgh: 1857), 223b.

12 *Piskei Harosh*, Sanhedrin 4:6, the *sugya* of *toe bidvar mishna* (error with respect to a clear and settled law), *toe beshikul hadaat* (error as to the weighing of opinions). It is here that the Rosh elaborates on his understanding of the *hilkheta kevatraei* principle, namely, the principle that the law is decided in accordance with the view of the most recent decisors. As the Rosh understands it, this includes the medieval commentators as well. On the general principle and the Rosh's understanding of it, see Elon 1994, n. 1 above, vol. 1, 266–72. For a complete bibliography and a discussion of the relevance of this theoretical debate, see Galinsky, n. 5 above, 47–51. See also S.Z. Havlin's insightful study, "R. Yehiel Ashkenazi and his responsa; an Ashkenazic scholar in the Islamic lands" (Hebrew), *Shalem* 7 (2002), 89 n. 73, 92 n. 5.

13 Much has been written about the relationship between the Rosh and the Rif, both by students of the Rosh themselves (see, e.g., his son R. Jacob's description, which I quote below) and by contemporary scholars (see, e.g., the entry on the Rosh by I.M. Ta-Shma ("Asher b. Yehiel"), in N. Roth (ed.), *Encyclopedia of Medieval Jewish Civilization* (NY: 2003).) Ta-Shma also elaborates on the relationship between the works of the Rosh and the Rif in Ta-Shma 2000, n. 7 above, 83–84. See also D. Zafrani, "Asheri's Methodology in Deciding the Law" (Hebrew), (PhD diss., Tel Aviv University, 1980), 185–210 and his "*Piskei Harosh* — their order, time [of composition] and relationship to [Rosh's] responsa and *Tosafot*" (Hebrew), *Dine Israel* 10/11 (1984), 347–64. In the latter, Zafrani distinguishes, with regard to the Rosh's reliance on the Rif, between the early and later volumes of the *Psakim*. On the Rosh and the Ravia, see Zafrani's dissertation, 117–18, 240–41, where he notes this relationship. Much work

or any reference to this issue in his many responsa, a definitive answer is hard to come by. There are, however, two responsa that do afford us a better understanding of the Rosh's mindset at the time he wrote his masterpiece.

The Rosh's attitude toward the use of halakhic handbooks or codes finds expression in two responsa.[14] In one instance, his view is revealed due to a bothersome correspondent's request that he address himself to an unusual opinion found in the *Semak* of R. Isaac of Corbeil, a thirteenth century French work. After responding to the content of the question, the Rosh allows himself to express his exasperation at judges who adjudicate on the basis of handbooks: "A curse ['*tipah ruhan*'] on those who decide the law on the basis of the books and codes of the great ones, without knowing anything of the Mishnah and Talmud."[15]

The Rosh further explains that, in his opinion, it is impossible to reach a legal decision correctly without referring to the corresponding talmudic material. He argues that over-reliance on such works is a sure recipe for error, which he attributes to two distinct sources. The first is the textual reality: copyists are fallible, "for at times the scribe can err and write 'obligated' instead of 'exempt,' 'prohibited' instead of 'permissible.'" The second is the reader's lack of understanding: "because the reader did not comprehend the author's intent and will come to err." Were the reader to compare his reading and understanding of the handbook or code with the talmudic source material, both these potential pitfalls could be averted.

In the second instance, the Rosh was asked to comment on a decision that a certain R. Matzliah had issued based on his understanding of the *Mishne Torah*. The Rosh, after suggesting that the

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still remains to be done, however, to identify the places where the Rosh uses but does not quote this work by name, and to gauge its overall influence on his *Psakim*. See, e.g., A. Aptowitzer, *Introduction to Sefer Haravia* (Hebrew), (Jerusalem: 1938), 50–51. Aptowitzer correctly assumes that whenever the Rosh quotes his "grandfather" the Raavan, he is actually quoting the Ravia, the Raavan's famous grandson!

14 Much has been written on these responsa; see Elon 1994, n. 1 above, vol. 3, 1226–29, and E. Westreich, "The legal decisions of the Rosh in Spain" (Hebrew) in M. Beer (ed.), *Studies in Halakha and Jewish Thought Presented to . . . Emanuel Rackman* (Jerusalem: 1994), 157–82, to note just two.

15 *Responsa Rosh*, 43:12.

rabbi had misunderstood what Maimonides said, reiterates the aforementioned point:

> And [prone to] error are those who decide the law in accordance with the words of the Rambam, while not being knowledgeable about the Talmud or knowing the source of his words; they err and permit the prohibited and prohibit the permissible.[16]

To emphasize this point, further on in this responsum he relates a conversation he had with a learned man in Barcelona:

> This is what I heard from a great man in Barcelona, who was well versed in three Orders (*sedarim*) [of the Talmud]. He told me, "I am puzzled as to how those who have not studied the Talmud or read the works of Maimonides [nonetheless attempt to] decide the law [in ritual and legal matters] on the basis of those works, believing they understand them properly." And he added, "From my own experience I know that with regard to the three *sedarim* that I have studied, I can understand when I read [Maimonides'] books. However, when I read his works on the laws of Holy Things (*Kodashim*) and Seeds (*Zeraim*) — I cannot understand anything. And I know that this is how it is with them [such rabbis and judges] regarding all of his [Maimonides'] works.

The view expressed by the Rosh in these two responsa is essentially the same. His criticism is not directed at the authors of the halakhic handbooks, but rather, at the rabbis and judges who do not bother to consult the primary talmudic sources before reaching a decision. However, in the second responsum, addressing himself to Maimonides, the Rosh expresses a serious reservation:

> For he [Maimonides] did not do as the other authors did. They brought proofs [for their decisions] and directed [the reader] to the talmudic source of their decisions, thus allowing [the reader] to comprehend the important and the true. **He, however, wrote as though he were a prophet**, **without explanations and without sources**. And all who read [his work] believed that they understood his intent, but this is not so. **For whoever is not attentive to what is [written] in the Talmud cannot truly comprehend [his words], and will [ultimately] fail in deciding the law**.

Clearly, this is no longer a critique aimed at the conduct of decisors, but a critique aimed at Maimonides himself, for facilitating a practice that the Rosh viewed as extremely reprehensible.

16 *Responsa Rosh*, 31:9.

With this in mind, I would suggest that despite certain affinities and similarities between the *Psakim* and Alfasi's *Halakhot*, the Rosh's purpose in writing the *Psakim* was to produce a work not unlike that of the Ravia of Mainz. It was to be a legal summary written so as to assist students in their studies, that is, to clarify and facilitate retention of the practical significance of the talmudic *sugya*. It was also to serve as a useful reference work for learned scholars that would facilitate recollection of the law when the need arose. It seems to me that the Rosh neither expected nor intended that his book be studied independently and used in place of consulting the Talmud itself.

In his last will and testament, his son R. Jacob, author of the *Turim*, describes a program of study that reflects a similar purpose:

> And for every tractate [of the Talmud] that you study, write a short [summary] of the legal decisions [in that tractate]. And [regarding] those law that are mixed in [i.e., found in the tractate but secondary to the main subject discussed], write [them down] in general terms so that you have them handy [i.e., so that they can be readily accessed if needed], and if you have doubts about one of them, you will be able to find it again at another time. [Act thus] and what you study will be clear, you will retain your Torah, and when you read, you will remember.[17]

In my opinion, then, the *Piskei Harosh* was intended mainly for study in the yeshivot of Castile, and was written as an alternative to the *Halakhot* of the Rif, with one crucial difference. Whereas the *Halakhot* served as a "*Talmud Katan*," an abridged Talmud, so to speak, and was studied independently of the Talmud, this was not so with regard to the *Psakim* of the Rosh. The Rosh had instituted in the yeshivot a more comprehensive and demanding curriculum. The students were first to engage in Talmud study along with the Rosh's *Tosafot*, and only subsequently to devote themselves to study of the new "updated Rif" — the *Piskei Harosh*, the summary of the laws that led the talmudic *sugya* to its practical conclusion.[18]

17 See the Hebrew text in Abrahams 1927, n. 3 above, 204. Here too, I have substituted my own translation.

18 I do not believe that the existence of a Rashi-like commentary on the *Psakim* of the Rosh, possibly authored by his son R. Jacob, necessarily contradicts this approach; see n. 19 below. On this commentary, see I.M. Ta-Shma, "Rashi—Rif and Rashi—Rosh" (Hebrew), in Z.A. Steinfeld, *Rashi Studies* (Hebrew), (Ramat-Gan: 1993), 209–220.

In confronting the twofold challenge that he found upon his arrival in Toledo, it would seem that the Rosh chose to tackle the problem of the yeshiva curriculum. This is evident from the fact that as a handbook for the practicing rabbinical court judge, his *Psakim* would have been virtually useless. It was bulky, written in the style of learned essays, arranged in accordance with the structure of the Talmud, and formulated in the language of the Talmud. We can well understand how these features precluded it from being an effective replacement for the concise, highly accessible and easy to use *Mishne Torah*.[19] It might be suggested that perhaps the Rosh was not concerned enough about altering the status quo. But given the Rosh's firm and principled opposition to the exclusive use of handbooks and codes in deciding the halakha, even if these works, for example, the *Semak*, were a product of his own Franco-German world, we must instead conclude that he had resigned himself to his inability to influence the practices of the rabbinical court judges in Castile. Even if the Rosh had recognized the necessity, in Spain, of a handbook or code that could be used for deciding the law,[20] he for one would not have been able to compose it.[21]

The influence of the teachings of the French Tosafists on halakhic decision-making in Castile would have to wait. The Rosh instead chose to focus his energies on producing a new cadre of scholars and rabbis. He may have believed that he could train his students not to feel bound by the code of R. Moses the Spaniard (Maimonides), and confident enough to decide the law in accordance with the Talmud and the teachings of their own master (namely, the Rosh).

3 *Rabbi Jacob b. Asher's Approach*

It is in this context that we must view R. Jacob b. Asher's program of codification. In his *Turim*, to quote from Elon's description, one finds

19 Interestingly, it would seem that his son R. Jacob may have sought to turn his father's book into something more practical and accessible when he composed his abridged version, known as the *Kitzur Piskei Harosh*. The work still followed the order of the Talmud, but was written in Hebrew, and stated only the final halakha without any of the complex argumentation leading up to it.

20 On this point, see text below at n. 24, on the intriguing comments of the Rosh as reported by his student Joseph ibn Nahmias.

21 He would surely have found the thought that his book might be improperly used, that is, used without referring to the talmudic source to ascertain that the point had been correctly understood, too distressing.

"a categorical and prescriptive statement of the basic legal principle, without attribution of authority or citation of source," a goal his father, as we have seen, would never have subscribed to. The *Turim* was a work with more affinities to the codes used in Sefarad than to the summaries of Ashkenaz. It was structured in a logical and practical manner, without direct links to the Talmud. The difference between R. Jacob's approach and that of his father can be readily traced to their rather different life histories. R. Jacob came to Spain at a younger age, and was thus more sensitive to the needs of the community, and therefore strongly motivated to address the needs of the rabbinical community. In addition, having witnessed the developments both during and after his father's lifetime, he was in a position to measure the success of the Rosh's program to educate rabbis and judges not to be dependent on the *Mishne Torah*, and to be more receptive to integrating the *Tosafot* of Ashkenaz with the halakha of Sefarad.

a The Sefardic Element of R. Asher's *Turim*

A close reading of R. Jacob's introduction to the last volume of the *Arbaa Turim*, the *Hoshen Mishpat*, a work devoted to civil law, may reveal R. Jacob's motivation in composing a work that his father would have accepted only reluctantly. At the end of the introduction, he offers the following description of the state of the judiciary:

> There are those who wish to lay down the law, but alas, the cloud of enlightenment does not rest upon them, as they are intellectually incapable of comprehending the law. And there are those upon whom the cloud of enlightenment does rest, but who willfully decide to extinguish their light, due to fear of deciding the law that is outstretched before them. They say, "I will choose the law [to be applied in the case at hand] from one of the legal codes, I will speak through their authority. [In this way] I will benefit, my rod shall lead me."[22]

R. Jacob addresses two distinct groups of judges: the unqualified and those who lack confidence. I cannot be sure as to the identity of the first group. He may have been referring to the longtime Spanish judges and others who did not study in the yeshiva his father established.

22 *Arbaa Turim*, Introduction to Hoshen Mishpat. For the various understandings of the phrase "my rod shall lead me," see Galinsky, n. 5 above, 57 n. 181.

The halakhic knowledge of these judges was derived entirely from reading the *Mishne Torah*, without any encounter with the primary legal source, that is, the talmudic material. It is possible that R. Jacob would refer to such judges as being "intellectually incapable of comprehending the Law," since they lacked basic knowledge of the Talmud. However, it is entirely possible that he was referring to judges who had been appointed by the Spanish monarchs.[23] These political appointees, who were ignorant of the halakha, would be considered unqualified by all.

The identity of the second group is somewhat clearer. These were judges who, in R. Jacob's eyes, were able to decide the law on their own, but chose the safe and easy path of relying on established legal codes. They were, most likely, former students of the Rosh's yeshiva, who their master had hoped would be part of the new generation that would transform and regenerate legal decision-making in Spain. Alas, despite all the knowledge they had gained at the yeshiva, they remained bound to the practices of their predecessors. When they went on to serve as rabbinical court judges or halakhic decisors, they lacked the courage necessary to go beyond the *Mishne Torah* and apply their knowledge of the Talmud, *Tosafot* and *Piskei Harosh*. Instead they chose to remain true to the accepted Sefardic halakhic decision-making practices. It seems, then, that whereas the Rosh succeeded in convincing many young people in the Castilian community to apply themselves to study of the Talmud and the *Tosafot*, his efforts did not have the impact needed to reshape Spanish halakha.

The following account of an exchange between the Rosh and Joseph ibn Nahmias, one of his students, may shed some light on what motivated this group of 'unconfident' judges. Interpreting the saying of Rabban Gamaliel in mAvot 1:16, "Designate for yourself a master (*ase lekha rav*), and do away with your doubts," ibn Nahmias quotes the Rosh:

> And I asked my teacher regarding cases in which the decisors (*poskim*) argue — what should one do in order to extricate oneself from dispute? And he responded: If he has a [legal] tradition from his master, he should act accordingly, and if he does not, he should chose a code from among

23 See H. Beinart, "The Jews in Castile," in H. Beinart (ed.), *The Sephardi Legacy* (Jerusalem: 1992), vol. 1, 38.

[those written by] the great authors, one that he admires, and act in accordance with his decision.[24]

In deciding the law one should follow the teachings of one's master. However, when the teacher's opinion is unknown, in lieu of it one should adopt the view set out in a legal code one has chosen.[25] This, according to Joseph ibn Nahmias, is what R. Gamaliel meant by the saying, "Designate for yourself a master, and do away with your doubts." Hence, for the Rosh, there were three legitimate approaches to arriving at an halakhic decision in the face of conflicting opinions: to decide according to one's own understanding of the halakhic material; to follow the opinion of one's teacher; to adopt a specific code when one's master's opinion was not known. According to the Rosh, what is unacceptable is to reach a decision in an arbitrary fashion, saying, "I will decide whatever I want," at times one way and at times another, without any internal logic or consistency.[26]

It may be that the students who became rabbis and judges after studying at the R. Asher's yeshiva rationalized their disregard of all that the Rosh had taught them on the basis of this advice, which, presumably, became known to his students. They may have argued: did not the Rosh himself teach that one was to choose "a code from among [those written by] the great authors"? They could ignore his

24 אם יש לו קבלה מהרב יעשה כמה שקבל מרבו ואם לאו יבחר חיבור אחד מן המחברים הגדולים, איזה שיישר בעיניו, ויעשה כמותו.

Commentary of R. Joseph b. Joseph ibn Nahmias (Paks, Hungary: 1907), on mAvot, 7a.

25 For another example of the "book" replacing the teacher, see E. Kanarfogel, "Rabbinic authority and the right to open an academy in medieval Ashkenaz," *Michael* 12 (1991), 233–50.

26 See *Piskei Harosh*, Sanhedrin 4:6, where the Rosh sharply criticizes judges who decide the law arbitrarily. To quote, "And when there was an argument between two great scholars, the judge should not say: 'I will decide whatever I want,' and if he does so act, the decision is a false one." Clearly, there is a fundamental distinction between designating a particular code as authoritative in lieu of one's master, and irresponsibly deciding the law in accordance with one's inclination and will at a particular moment in time. See R. E. Wasserman, *Kovetz Shiurim*, vol. 1, Baba Batra, #271–73. On the manner in which R. Judah, son of the Rosh, utilized his father's statement in his battle with the communal leaders, see Galinsky, n. 5 above, 63–67.

clear preference for following the legal tradition of one's teacher, and his equally clear position regarding the *hilkheta kevatraei* principle,[27] since these traditions were far less readily available to them. For the sitting judge, as long as the Rosh's opinions were accessible only in the form of learned essays structured in accordance with the order of Alfasi's *Halakhot*, it was as if they were non-existent.[28]

R. Jacob realized that the strategy his father had chosen to influence Spanish legal practice and introduce the teachings of the French and German halakhists had failed. Apparently, the Rosh had underestimated the power of entrenched habits, the innate conservatism of any legal system, and the fear of modifying established practice and norm. Consequently, R. Jacob understood that without offering an alternative to the code of Maimonides, there was no prospect for any real change. In his introduction to Hoshen Mishpat, following his description of the various kinds of judges, he elaborates:

> I was therefore motivated to compose a work on civil law according to the [*Psakim*] of my father R. Asher, of blessed memory, that are built on the foundation of [the work by] the great master, R. Isaac Alfasi, of blessed memory.[29]

R. Jacob, then, undertook to write a new code based on the work of his father so as to remedy the deficiencies of the Spanish judges who were not well-versed in the Talmud and its commentaries. This new code, updated with the teachings of the Tosafists, and of his father as well, would replace that of Maimonides. For the learned judge, however, the new work would also be useful, serving as an excellent complement to the study of the Talmud and the Rosh. Upon completing

27 See n. 12 above. On the Rosh as a "*batraei*," see Elon 1994, n. 1 above, vol. 3, 1284 and Galinsky, n. 5 above, 54–56. This legal principle, by which the law follows the opinion of the most recent legal authority, in addition to the related laws of "*toe bidvar mishna*," "*toe beshikul hadaat*," should have at least made these students hesitate before deciding to disregard the Rosh's halakhic teachings and the contributions of the Franco-German scholars.

28 This, most probably, was R. Jacob's motivation for composing his abridgement of the *Piskei Harosh*, see n. 19 above.

29 על כן עוררתי ועלתה במחשבתי לחבר ספר במשפטי הדינין על דרך פסקי א"א הראש ז"ל אשר הם בנוים על יסוד הרב הגדול הר"י אלפסי זצ"ל.

study of the primary sources, the student could now turn to their natural extension, a code based on the teachings of the Rosh.[30]

In reading R. Jacob's introduction, we can sense that he was very aware of the difficulties he would encounter in convincing the Spanish judges to accept his code as authoritative. This is not surprising, since many of the judges had not really been direct students of his father.[31] In the remark just quoted, R. Jacob emphasized the fact that his father's *Psakim* was based on the work of the great Spanish sage Alfasi.[32] It is as if he felt the need to allay the fears of the local judges about replacing the venerable *Mishne Torah* of Maimonides — R. Moshe Hasfardi — with a work written by a Jew from Germany. Further along, to reinforce the point, he adds:

> And in the few places where his opinion does not coincide with the opinions of the rest of those who composed codes, such as Maimonides and others, I have included those opinions, the opinion of my father, of blessed memory, and his conclusion (*vehaskamato*), so that the reader can progress quickly. And [the reader] should act in accordance with what he finds in that place, and not veer from it to the right or to the left.[33]

In short, upon reading the introduction, we come away with the following impression: the *Tur* is a code based on the *Psakim* of the

30 For someone studying the talmudic sources, it would have been relatively easy to find the parallel source in the *Turim*, since it was organized in a logical manner and had a table of contents. On the other hand, for someone studying the *Turim* on its own, it would have been much more difficult to find the talmudic source, since a reference to the tractate in question, and the name of the chapter being discussed, is rarely supplied. We will return to this below.

31 Much can be learned about the ratio of learned judges (i.e. students of the Rosh) to unlearned judges (i.e. political appointees and judges who had not studied in the Rosh's yeshiva) in Castile from a comment made by Rabbenu Jerucham in his introduction to the *Meisharim*: "The learned and studious are very few." In explaining the purpose of his work, R. Jerucham emphasizes that for certain judges, even the structure of the Rambam's *Mishne Torah* is too complex, another indication that the level of many judges was quite low. I elaborate on R. Jerucham and his unique work in "Fourteenth-century Spanish halakhic literature and the work of the French exiles R. Aharon and R. Jerucham," forthcoming in *Jewish History*.

32 Compare this reading with that of Elon 1994, n. 1 above, vol. 3, 1284.

33 ובמעט מקומות אשר אין דעתו מושווה עם דעת שאר מחברים כמו הרמב"ם וזולתו אני כותב דעתם ודעת א"א הראש ז"ל והסכמתו למען ירוץ הקורא בו ויעשה ככל אשר ימצא במקום ההוא ולא יסור ממנו ימין ושמאל.

author's father, the Rosh, a recognized scholar and leading halakhic authority who resided in Toledo. The work of the Rosh is itself based primarily on the *Halakhot* of the great Spanish scholar Alfasi. Where his father's opinion differs from the received opinion in Spain, that is, the law as codified by Maimonides, R. Jacob includes both opinions, leaving the final decision to the judge. This impression is not always completely accurate, in particular the claim about the reliance of the Rosh on Alfasi and the silence about the centrality accorded the Tosafists in the work. Nevertheless, it served the purpose of convincing R. Jacob b. Asher's Spanish constituency to accept his *Arbaa Turim*.

Within this context, we can now easily understand the most puzzling feature of the *Turim*, that is, the absence of references to primary sources in the work. This immediately calls to mind the sharp criticism R. Jacob's father directs at the Rambam regarding this very point: "For he did not do as the other authors did. They brought proofs [for their decisions] and directed [the reader] to the talmudic source of their decisions. . . . He, however, wrote as though he were a prophet, without explanations and without sources." How surprising, then, to see his devoted son Jacob following in the Rambam's footsteps in the *Turim*. Only rarely does R. Jacob direct the reader to the talmudic source of the subject he is treating. In fact, as is the case for the Maimonidean code, the task of identifying the *Turim*'s sources was left to the super-commentators, such as Isaac Aboab, Joseph Alashkar, and Joseph Caro.[34]

In contrast, it is worth noting that R. Jerucham b. Meshulam from Provence, a younger contemporary of R. Jacob who had studied with the Rosh for a brief period toward the end of R. Asher's life, seems, with regard to codification, to have been a more faithful student of his master. In the introduction to his book on civil law, the *Meisharim*, R. Jerucham, describing the weakness of the *Mishne Torah*, makes an assertion his teacher would have been proud of: "And even if he [a local judge] has on hand Maimonides' book, which is the shortest of all, without the commentators and the Talmud he may fail to readily understand the meaning."

34 See my "On the circulation of the *Turim* in Spain in the generation before the Expulsion, and an unknown abridgement of *Tur*, Hoshen Mishpat" (Hebrew), *Yeshurun* 12 (2003), 84–102.

Elaborating on the objectives of the work, he emphasizes the importance of citing the talmudic sources:

> In order to ease the burden of students and other [readers], I have come to organize the subject areas of civil law, every subject and its laws separately, **and to mention the talmudic source**, so that the reader, if he so wishes, will find it in that place.

In addition to referring the reader to the talmudic sources, at the end of each section R. Jerucham provides an exact reference to the *Piskei Harosh*, giving the tractate and the clause (*siman*) number,[35] a feature the Rosh's son did not even consider adopting in his own work.

Clearly, in choosing not to give the talmudic source, R. Jacob was making a conscious decision, and it would seem that he did not do so lightly. His introduction to Hoshen Mishpat offers us some insight into his motivations for departing from his father's path. He obviously felt that the success of the *Turim* depended on his convincing those who engaged in the actual implementation of the law, as rabbis and rabbinical court judges, that his work was better and more useful, at the level of practice, than the *Mishne Torah*, the dominant code at that time. To achieve this, he had to pattern his work along the lines of Maimonides' work, which meant adopting its use-oriented and logical structure that did not call for referring to the talmudic sources. He may have suspected that his father would not have been inclined to endorse such an undertaking, but felt this was the price that had to be paid to gain acceptance in a foreign setting that had different customs and practices.

b The Ashkenazic Element of R. Asher's *Turim*

The second element to R. Jacob's legal legacy as described by Elon addresses another aspect of R. Jacob's contribution to legal codification: "presentation of the various opinions of the post-Talmudic authorities on the ramifications of the principle, and his conclusion as to how the law should be definitively declared."

35 This feature is absent from the published version of the *Meisharim*, but does appear in all the medieval manuscripts of the work.

The *Turim* is akin to the *Mishne Torah* in that sources are not cited, but it differs in that various legal opinions are included in the discussions. Even a cursory glance at any of the four books that comprise the *Arbaa Turim* will reveal that not only are the authoritative codes of Spain (*Mishne Torah, Torat Habayit, Sefer Hatrumot*) quoted when they are not in agreement with R. Jacob's (or his father's) views, but numerous minority opinions of the scholars of France and Germany are mentioned as well. In fact, at least in Orah Haim, the extent of the Ashkenazic material far exceeds that of the Spanish.[36] It is plausible that the presentation of various legal opinions was an essential element of R. Jacob's legal writing and not merely a selling point in his attempt to gain acceptance in Castile. Methodological remarks R. Jacob makes in the introductions to the earlier books of the *Turim*, Orah Haim, and Yore Deia, devoted to ritual and religious law, contrast markedly with those made in the introduction to Hoshen Mishpat, quoted above[37]:

> And I do not wish to bring lengthy proofs [i.e. talmudic sources], but rather to convey definitive decisions. However, in those places where different opinions exist, I will cite them and afterwards cite the conclusion of my father, the Rosh, of blessed memory.[38]

In this brief description R. Jacob articulates what was to be his legal legacy with respect to codification: he does not cite talmudic sources, but does adduce various legal opinions. He also informs us that he will usually express his legal decision in a structured fashion, ending the discussion with his father's opinion.[39] This format for articulating his decisions reflects a certain lack of ease with authoritative halakhic decision-making. In resorting to this structural device, instead of boldly stating his conviction, R. Jacob is indicating that he does not intend his code to be a "classic." As has been noted by Ta-Shma, this "halakhic hesitancy" was characteristic of "Western" legal writing in

36 See Galinsky, n. 5 above, part 2, sec. 2, esp. 16–17.

37 See text at n. 33.

38 ואין רצוני להאריך בראיות אלא להביא דברים פסוקים, ובמקום שיש דעות שונות אכתבם ואכתוב אחרי כן מסקנת אדוני אבי הראש ז"ל.

39 For a detailed description of R. Jacob's technique, see Galinsky, n. 5 above, part 2, sec. 3.

Ashkenaz, but not usually associated with codes composed in the Moslem "East" — in Babylonia, north Africa, and Spain.[40]

Apparently, despite the fact that R. Jacob adopted an element of the Maimonidean program, he nevertheless could not accept it wholeheartedly, given its authoritarian nature. Maimonides rarely included alternative opinions in his code, the reader being presented with just one opinion — that of the author. It is easy to understand why this feature is essential for writing a good code, but we also know that the great French and German scholars, both Maimonides' contemporaries and those of later generations, found it deeply unsettling. The Raavad of Posquieres, the great Provencal critic of the *Mishne Torah*, had already complained that Maimonides did not cite dissenting opinions of the Geonim.[41] R. Samson of Sens, the renowned Tosafist of the late twelfth and early thirteenth century, similarly stressed the importance of citing various opinions. In a letter to R. Meir Abulafia, he criticizes Maimonides' methodology harshly:

> Go and learn from the Mishnah, Talmud, Sifra, Sifre, Tosefta — they did not transmit to the next generation merely a collection of laws, but rather wrote down matters (*katva lahem*) concerning the impure and the pure, and opinions of those who permit and those who prohibit. The reasoning behind these opinions was given [to us] by one shepherd, and he who studies them will receive reward. For there are times when later generations reveal things that were hidden from previous generations. And therefore one should hurry to [study] Mishnah and Talmud, for a student may see what his teacher cannot see, his words make his teacher wiser and sharpen his teaching.[42]

40 See Ta-shma 2000, n. 2 above. For more on the difference between the legal culture in Ashkenaz as opposed to Sefarad see his "Introduction to the responsa of the halakhic authorities of France and Germany," in B. Lifshitz and E. Shochetman (eds.), *Digest of the Responsa Literature of Germany, France and Italy* (Jerusalem: 1997), ix–xiv. On Ashkenaz, see also E. Kanarfogel, "Progress and tradition in medieval Ashkenaz," *Jewish History* 14 (2000), 287–315.

41 See the last gloss (*hasaga)* on Rambam's introduction to the *Mishne Torah*.

42 See Kitab al-Rasa'il, *Sefer Igrot Harama*, J. Brill edition (Paris: 1871), 131–32. In addition to the printed edition, which was based on an Oxford MS, I used MS Cambridge Add. 377/2 (IMM, Jewish National and University Library Jerusalem, #16296). See the very similar formulation in the *Commentary Attributed to R. Samson of Sens*, mEduyot 1:5, regarding the Tannaitic and Amoraic periods.

This basic academic humility — the attitude that one's decision is by no means the final word in an ongoing discussion — so pervasive in the yeshivot of France and Germany, was completely at odds with the message that emerged from Maimonides' code.[43] It is therefore not surprising that the Raavad chose to end his famous last gloss on the introduction to the *Mishne Torah* with the terribly sharp, "It can only be an overbearing spirit in him."[44] R. Jacob b. Asher, a great scholar well-versed in the law and lore of Ashkenaz, was indeed keenly aware that a "student may see what his teacher cannot see." He genuinely could not bring himself to ignore the Talmud's primary mode of discourse, namely, adducing a variety of opinions. He understood that any halakhic decision that he or his father reached would not be the final one to be formulated within the unfolding history of the halakha. He therefore decided to include in his work multiple legal perspectives. Though he had refrained from providing references to the talmudic sources, R. Jacob felt bound to preserve the talmudic model of halakhic writing that was so prevalent in Ashkenaz.

Let me summarize. R. Jacob's understanding of the Spanish rabbinate and its judicial leadership led him to conclude that for a legal work to have impact in Spain, it had to be similar to that it was attempting to supersede, namely, the *Mishne Torah*. He shared his father's broader goal of influencing the content of Spanish halakha and updating it with the teachings of Ashkenaz and France, but parted ways with him in regard to the instrument needed to implement the change. He deferred to Spanish legal culture on matters of form, and did away with references to the talmudic sources of the law. He insisted, however, on retaining the pluralistic nature of Ashkenazic halakha, and thus provided a variety of legal opinions, leaving the final decision open to those capable of arguing with his conclusions.

At the beginning of this article, I quoted Menachem Elon's description of R. Jacob's contribution to the history of halakhic codification. I would like to conclude with a similar but somewhat different

43 See *Responsa Rosh*, 55:9 ([Y. Yudlov edition] Jerusalem: 1994, 239a), a rejoinder to R. Israel Israeli, for a clear exposition of this Ashkenazic approach.

44 At the end of the last gloss on the introduction to the *Mishne Torah*. On the translation of the phrase "אין זה אלא כל קבל די רוח יתירא ביה", see I. Twersky, "The beginnings of Mishneh Torah criticism," in A. Altmann (ed.), *Biblical and Other Studies* (Cambridge MA: 1963), 161–83, in particular 171–72.

description, that of R. Abraham Zacuta, the sixteenth-century historian and scientist from Castile and North Africa. Zacuta, after describing the Rosh and his activity, turns his attention to the Rosh's sons, and in particular R. Jacob:

> But the one who was left to take the place of his father . . . was the great R. Jacob, who composed the *Arbaa Turim*, on all the laws observed in these times. It was very useful, for both the learned and unlearned, **[as it was] better organized than all previous [works]**. For who is able to derive the law from his father's books, [which are] written in difficult language, or from Rav Alfas' **or even the Rambam's?** And this wise man was privileged, more than any other [author], as everyone studied from his books. And he wrote his work in the likeness of the Talmud, bringing all the opinions that had been expressed, and [afterwards] the decision of the Rosh, may he be praised.[45]

Suffice it to say that, by the end of the fifteenth century, R. Jacob's *Arbaa Turim* had actually overtaken the *Mishne Torah* as the primary legal text in Castile. Zacuta's claim that **everyone**, learned and unlearned alike, studied from R. Jacob's works, is substantiated by their printing history, by citations in works by other Spanish scholars, and by the various learned commentaries composed to elucidate them.[46] Of most interest to us is his characterization of the *Turim*. In his opinion, R. Jacob's work is better organized and more usefully arranged than all the works that preceded it, including the *Mishne Torah*. On the other hand, its uniqueness lies in the fact that it follows the example of the Talmud in gathering various legal opinions and then concluding with the decision of his father, the Rosh.

Elon and R. Zacuta defined the greatness of R. Jacob's work in its incorporating aspects of the monumental code of Maimonides, the pre-eminent Sefardic authority, yet, in retaining the classic talmudic model of halakhic discourse, differing significantly nonetheless. My objective in this article has been to demonstrate that this unique mix was the result of the historical meeting of Ashkenaz and Sefarad.

45 *Hayuhasin Hashalem*, n. 11 above, 224. I have corrected the text according to MS Oxford 2798 (IMM #16713), 178b.

46 On the relevant history of the printing of the works in question, see my "'And this wise man was privileged, more than any other, as everyone studied from his books' – On the dissemination of the *Four Turim* of Rabbi Jacob b. Asher from the time of its composition until the end of the 15th century" (Hebrew), *Sidra* 19 (2004), 25–45. On fifteenth and sixteenth century Sefardic commentaries on the *Turim*, see Galinsky 2003, n. 34 above.

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EARLY INTERPRETATIONS OF THE BIBLE AND TALMUD AS A REFLECTION OF MEDIEVAL LEGAL REALIA

RON S. KLEINMAN*

1 *Introduction*

Every commentator approaching a given text brings to bear on it a personal store of ideas and attitudes — a personal intellectual cache, so to speak — including, inter alia, basic conceptions, thought patterns developed over many years, and worldviews. This applies not only to ideas and concepts, but also to realia, that is, material culture. This notion encompasses material culture in general, including all aspects of actual, "real" life, in urban and rural settings, at home and in the marketplace: clothing, work tools and eating utensils, buildings, commerce, and so on.[1] The material culture within which he lives is part of the commentator's intellectual cache. As such, it is likely to be reflected in the commentator's interpretations of texts, and even to shape these interpretations to one degree or another. As a result, the commentator will at times portray the reality described by the text as being identical to that of the commentator's own times, which of course is not the case.[2] Such interpretation may make it difficult to understand the text, and may give rise to an interpretation that is not in accord with its intended meaning.

The role played by realia in the interpretation of a text is sometimes obvious, sometimes veiled and imperceptible. The scholar's task is to uncover the material reality underlying the interpretation and comprehend its nature and significance.

* Ron S. Kleinman is a Senior Lecturer at the Law Faculty, Ono Academic College, Israel where he teaches Jewish Law, Torts, and Property Law.

1 On realia in general, and talmudic realia, in particular, see Daniel Sperber, *Material Culture in Eretz-Israel during the Talmudic Period* (Hebrew), (Jerusalem: 1993), 11–23, and the references there cited.

2 Ibid., 15.

This is the case with regard to the interpretation of texts in general, and with regard to the interpretation of the Bible and the Talmud.[3] This study will explore the phenomenon just described, that is, the impact of realia on the interpretation of texts, by examining the commentaries of the "Early Authorities," the *Rishonim*, namely, commentators and decisors (*poskim*) active in Europe and North Africa between the eleventh and fifteenth centuries. A few examples will be considered from the realm of biblical interpretation, after which we will examine a number of different interpretations offered for a particular textual unit (*sugya*) from the Babylonian Talmud. The material context within which the commentators in question put forward their interpretations will be uncovered through interdisciplinary study, drawing on a variety of sources that address diverse aspects of the Middle Ages: Jewish sources of different genres, legal texts, dictionaries, and other historical sources.

2 *Interpretation of biblical passages*

a Esau's sale of his birthright (Gen. 25:29–34)

> Once when Jacob was cooking a stew, Esau came in from the open, famished. And Esau said to Jacob, "Give me some of that red stuff to gulp down, for I am famished."…Jacob said, "Sell me today your birthright."

3 The medieval commentators of France frequently invoked the realia of their own day in interpreting the Bible and the Talmud. See, for example, Moritz Güdemann, *Geschichte des Erziehungswesens und der Cultur der Abendlandischen Juden: Wahrend des Mittelalters und der Neueren Zeit*, 2nd ed. (Amsterdam: 1966; repr. of 1880–1888 ed.), vol. 1, 26–29; Avraham Grossman, *The Early Sages of France* (Hebrew), (Jerusalem: 1995), 322, 381, 528; Y. Nevo, *French Biblical Exegesis: Studies in the Exegetical Methods of Biblical Commentators in Northern France in the Middle Ages* (Hebrew), (Rehovot: 2002), 256–91.

On Rashi, see Jonah Fraenkel, *Rashi's Methodology in his Exegesis of the Babylonian Talmud* (Hebrew), (Jerusalem: 1975), 123 and n. 26; Eleazar Touitou, "The historical background of Rashi's commentary on Genesis 1–5," in Z.A. Steinfeld (ed.), *Rashi Studie*s (Hebrew), (Ramat-Gan: 1993), 97–105; Grossman, *Early Sages*, 207–209, and the sources cited there in nn. 255–56. On R. Samuel b. Meir (Rashbam), see E. Touitou, *Exegesis in Perpetual Motion* (Hebrew), (Ramat-Gan: 2003), 34–45, 134–88; Sara Japhet, "Multi-lingualism; theory and practice in Rashbam's biblical commentaries" (Hebrew), *Language Studies* 8 (2001), 289, esp. 298–301.

> And Esau said, "I am at the point of death, so of what use is my birthright to me?" But Jacob said, "Swear to me today." So he swore to him, and sold his birthright to Jacob. Jacob then gave Esau bread and lentil stew; he ate and drank, and he rose and went away. Thus did Esau spurn the birthright.[4]

Esau comes home, tired and hungry.[5] According to the plain meaning of the text, the meal of bread and lentil stew was intended to assuage Esau's hunger, and Esau received it from Jacob as payment for the specified merchandise — the birthright.[6] However, as we are about to see, some of the Bible commentators who lived in France explained that the eating and drinking had a different purpose: to confirm (*lekayem*) and reinforce (*lehazek*) the transaction (*iska*) of the sale of the birthright. They further state that as payment for the birthright, Jacob gave Esau a large sum of money (this element is not mentioned in the biblical text).[7]

R. Samuel b. Meir (Rashbam) (France, eleventh to twelfth centuries) interprets the biblical passage as follows: " 'Sell me today': that is, immediately . . . for the money that I shall give you, and afterwards **I will give you food as testimony and confirmation**."[8] Similarly, he goes on to say: " 'Sold his birthright': For money. And after that, 'Jacob then gave Esau,' and so on: **as is the custom of men, to confirm the matter**."[9] This explanation is in fact slightly expanded in the margins of MS Vienna 23: "**Such is the practice in sales**, that after the sale has taken place, one goes to eat and drink wine, so that the sale should thereby become public knowledge."[10]

Other French and Provencal commentators offer similar interpretations, among them R. Joseph Kimhi (Provence, twelfth century),

4 Genesis 25:29–34.

5 Verse 30. The word *ayef*, here translated as "famished," might also be translated as "faint," as it can refer to both hunger (or thirst) and fatigue. See Rashbam ad loc., and Ibn Ezra and Hizkuni (R. Hezekiah b. Manoah) on v. 29.

6 Radak (R. David Kimhi) on v. 34.

7 This interpretation was a response to Christian scholars in the context of Jewish–Christian polemics, which received new impetus in the 12th century; see Touitou 2003, n. 3 above, 44–45.

8 Rashbam (D. Rosin edition) on v. 31.

9 Ibid., v. 33.

10 Quoted in Touitou 2003, n. 3 above, 202. While the gloss is anonymous, Touitou (p. 189) attributes the glosses in MS Vienna to the Rashbam himself.

father of the Radak[11]; R. Haim Paltiel (France, second half of thirteenth century)[12]; R. Hezekiah b. Manoah (France, thirteenth century)[13]; and the same interpretation appears in *Hadar Zkeinim* (a collection of Tosafist commentaries on the Torah).[14]

The interpretation of the story of the sale of the birthright put forward by the Rashbam[15] and other French and Provencal commentators reflects the practices of merchants in France, Provence and

11 As quoted by Radak ad loc. (*Torat Haim* edition [Jerusalem: 1987]): "And as to what he gave him, bread and lentil stew, it was so that they would eat together over the sale, to confirm it." Radak himself held a different opinion, see text at n. 6 above.

12 *Commentaries on the Torah by R. Haim Paltiel* (Hebrew), ad loc. (ed. Y.S. Lange [Jerusalem: 1981], 71): "As is the custom of the townspeople to confirm the matter." R. Haim Paltiel, a Tosafist, was a student and colleague of R. Meir b. Barukh of Rothenburg. He studied in France and frequently quoted interpretations by French scholars such as Rashbam, R. Joseph Bekhor Shor, etc., but also maintained contacts with German scholars. See Lange, *Commentaries*, introduction, vii–xiii; idem, "On the identity of Rabbi Haim Paltiel" (Hebrew), *Alei Sefer* 8 (1980), 140–46; E.D. Goldschmidt, *On Jewish Liturgy* (Hebrew), (Jerusalem: 1978), 38–60. There are marked similarities between R. Haim's commentaries and those of *Paaneiah Raza*, whose author probably copied from him; see Lange, Introduction, xi; Aba Zions, "*Paaneiah Raza* by Isaac b. Judah Halevi" (Hebrew), (Ph.D. dissertation, Yeshiva University, 1974), introduction, 10.

13 Hizkuni (Hazzekuni) on v. 34 (ed. C.B. Chavel [Jerusalem: 1982]): "Bread and lentil stew attesting to confirmation of the sale, as is the practice of all those who purchase merchandise." Probably following Rashbam, text at n. 8 above, he cites the verse "and they ate there by the mound," referring to Jacob and Laban.

14 *Hadar Zkeinim* ad loc., s.v. *veyaakov natan* (Jerusalem: 1988, 59): "But the bread and the stew were only to confirm the sale, as is the practice of vendors, and they take from one another and give a *pashut* [a coin of little value] or two for wine." While it is difficult to conclude from this remark who it is that gives the coin, it seems fairly certain that this interpretation reflects a variation of the practice known as *Weinkauf*. This was a custom whereby, in order to conclude a transaction, the purchaser, or both parties to the transaction, gave a symbolic sum of money, with which they bought wine and drank it together, generally along with the witnesses to the transaction. On the different variations of the *Weinkauf* custom, see Ron S. Kleinman, "*Weinkauf* — aspects of merchant customs (*lex mercatoria*) in the Middle Ages: halakha, realia and history" (Hebrew), *Dine Israel* 22 (2003), 221–40.

15 Another passage where Rashbam explains the biblical text as reflecting "merchant custom"(*minhag soharim*) is his commentary on Genesis 44:10.

Germany of the era, that is, the twelfth and thirteenth centuries. As will be shown below, two commentators actually provide the original terminology for the practice of the vendor and the buyer having a drink or meal together at the close of a transaction.

For a better understanding of the meaning of this merchant practice, further study is needed, in the course of which, in addition to the Jewish sources, dictionaries, legal texts, and other historical sources must be consulted. Such sources indicate that in several European countries, including France and Germany, it was indeed the custom to reinforce sales and obligations of various types by holding a banquet, which included drinking alcoholic beverages. The participants were generally the parties to the transaction, together with the witnesses to it. In Germany this mode of acquisition was known as *Weinkauf* or *Leinkauf/Leikauf*, a term meaning literally "purchase [by means of] wine." The source of the term was the banquet with which the merchants would celebrate closing a transaction.[16]

In light of the legal and historical background, let us examine the interpretations two other Early Authorities offered for the biblical story of the sale of the birthright. In his *Paaneiah Raza*, R. Isaac b. Judah Halevi (Sens, France, end of thirteenth century),[17] follows the Rashbam, but the reflection of realia in his explanation is more obvious: " 'Jacob then gave Esau,' and so on: in order to reinforce the acquisition, what in the language of Ashkenaz is called ***Leinkauf***, but for the sale itself he gave him a large sum of money."[18] The reference to the German name for the practice in question, *Leinkauf*, clearly indicates that the intention is not to speak of a practice that was in effect in the biblical period only, but a practice that was prevalent in the commentator's time.

R. Joseph Bekhor Shor, a twelfth-century French Tosafist and student of Rabbenu Tam, also cites this explanation: "Some explain. . . . and [that]

In both cases, in so interpreting the text, he is essentially doing no more than following his declared methodology of interpreting the Bible according to "the way of the land" (realia, *derekh eretz*). See Touitou 2003, n. 3 above, 134–46.

16 See Kleinman 2003, n. 14 above.

17 A Tosafist; his commentary on the Bible quotes copiously from other Tosafists. See Zions 1974, n. 12 above, introduction, 8–17.

18 *Paaneiah Raza*, Toldot, 25:34 (Amsterdam: 1867, 30b); this interpretation is quoted in the name of "R. Moses."

this food was the sale-banquet, which is called ***beuverie***."[19] This passage provides further evidence that it was the custom of the day, in France, for merchants to hold a "sale-banquet" when a transaction closed. Bekhor Shor's commentary preserves the Old French term for the practice, *beuverie*, referring to the drinking of wine at a social gathering.[20] R.J. Bekhor Shor, however, unlike the other French commentators, firmly rejects this interpretation: "And this is false, in my opinion." He apparently preferred the straightforward interpretation of the verses, namely, that the food was payment for the birthright.

b "…they ate there by the mound" (Gen. 31:46)

The merchant custom discussed in the previous section is also reflected, apparently, in the interpretations suggested by the commentators of France and Provence for two other incidents recounted in the Bible. The first is the meal eaten by Jacob and Laban upon their making a covenant (*brit*) in the hill country of Gilead:

> Then Laban spoke up and said to Jacob…."Come, then, let us make a covenant, you and I, that there may be a witness between you and me." Thereupon Jacob took a stone and set it up as a pillar. And Jacob said to his kinsmen, "Gather stones." So they took stones and made a mound; and they ate there by the mound.[21]

The Rashbam compares the meal at the time of the sale of the birthright, which he describes as a "testimony and confirmation," to that partaken of by Jacob and Laban, the objective of which was, likewise, "**to confirm the covenant** between Laban and Jacob."[22] This interpretation was presumably intended to explain the fact that Jacob and Laban dined together. According to the text, the covenant was actually confirmed by means of the mound and the pillar, which served

19 *Commentaries of R. Joseph Bekhor Shor on the Torah* (Hebrew), on v. 34 (ed. Y. Nevo [Jerusalem: 1994]).

20 *Grand Larousse de la langue francaise* (Paris: 1976), vol. 1, 423 (cf. English "beverage"). *Larousse* classifies the word as Old French, first appearing in the 12th century, a perfect match with Bekhor Shor in terms of both place and time.

21 Genesis 31:43–46.

22 He writes this following the passage quoted above at n. 8: "and afterwards I will give you food as testimony and confirmation. In the same way as we find [in the biblical text], 'and they ate there by the mound' **to confirm the covenant** between Laban and Jacob."

as testimony to the covenant.[23] The meal, therefore, would seem to be superfluous, hence Rashbam suggests that its function was to reinforce the covenant.

Similar explanations of the joint meal by the mound are given by Radak (Provence, twelfth to thirteenth century)[24] and R. Hezekiah b. Manoah.[25]

There are, indeed, other places in the Bible where the making of a covenant is accompanied by eating and drinking.[26] Nevertheless, given the interpretations of the scholars of France and Provence that we have

23 See Genesis 31:48–52.

24 Radak ad loc. (*Torat Haim* edition, n. 11 above): "And this meal was **to confirm the covenant**, that they all ate together." In another edition of the Radak's commentary, this sentence is missing (*Commentaries of R. David Kimhi* on the Torah (Hebrew), ed. R.M. Kamelhar [Jerusalem: 1970]).

25 Hizkuni on Genesis 25: 34. It seems probable that his view on this point was influenced by the Rashbam.

26 See, e.g., Genesis 26:28–30, Exodus 24:7–11, Joshua 9:11–15. Sometimes the making of a covenant was accompanied by animal sacrifices; see Genesis 15:9–21 and Jeremiah 34: 18–19. The word "covenant" (*brit*) is also used with regard to such sacrifices (see Lev. 2: 13, 24: 8). Note that the flesh of some sacrifices may be eaten by the owner of the animal, by the priests and by "the altar."

The connection between the institution of the covenant and the act of eating and drinking suggests an interesting interpretation of the biblical account of Moses on Mount Sinai: "And he was there with the Lord forty days and forty nights; **he ate no bread and drank no water**; and he wrote down on the tablets the terms of the covenant, the Ten Commandments" (Exod. 34:28). According to this interpretation, the point of the verse is to highlight the uniqueness of the Sinaitic covenant between God and Israel, and to differentiate it from ordinary covenants, which involve eating and drinking. Nevertheless, it seems that even the covenant at Sinai did involve eating and drinking: "Then he took the record of the **covenant** and read it aloud to the people.... they beheld God, and **they ate and drank**" (Exod. 24: 7, 11). A contemporary scholar, Amos Hakham, explains this verse as follows: "It seems probable that they partook here of the flesh of the well-being offering (*zevah hashelamim*).... It is as if the two parties to the covenant — the representatives of Israel [Aaron, Nadab and Abihu, and seventy elders of Israel; see Exodus 24:9 — RK] and God — "eat" of a single offering and thus finalize the making of the covenant"(*Daat Mikra* edition of Exodus (Jerusalem: 1991), 102; and see Hakham's summary, 107–108). The verse has been explained similarly by Berachyahu Lifshitz, "On surety and the terminology of undertaking" (Hebrew), *Shenaton Hamishpat Haivri* 13 (1988), 202. See also Cornelis Houtman, *Exodus* (*vol. 3: chs. 20–40), Historical Commentary on the Old Testament* (Leuven: 2000), 296; Robert G. Boling, *Joshua: A New Translation with Notes and Commentary*, Anchor Bible, vol. 6 (NY: 1982), 265.

considered, it would appear that their readings reflect not only the customary practices of the biblical period, but also the practices of their own milieu. A "covenant" is a contract that imposes obligations on both parties to the agreement; as we said, European merchants in the Middle Ages would reinforce their contracts by sharing a repast.

c "Do not go up and down as a talebearer among your people" (Lev. 19:16)

The merchant custom of reinforcing and confirming an agreement by sharing a meal is, it seems, also reflected in Rashi's commentary on the Torah.[27] Onkelos translates the difficult verse Leviticus 19:16 using an Aramaic idiom that literally means "to eat *kurtzin*."[28] Rashi explains this as follows:

> Do not eat *kurtzin* . . . And it seems to me that it was their habit to eat some kind of foodstuff in the home of the one to whom their [slanderous] remarks were being conveyed, **as a concluding support for the reality of their words and to establish their veracity**, and [eating] that foodstuff was called eating *kurtzin*, from the language [of the verse] "Winking (*koretz*) his eyes" (Prov. 6:13). For it is the way of all talebearers to wink their eyes and insinuate their slanderous remarks, so that others who may overhear them will not understand.[29]

In his interpretation of the verse, Rashi compares the talebearer (*holekh rakhil*), who goes about from house to house to try and hear slanderous reports, so that he can then relay them to others, to a merchant (*rokhel*), who goes about looking for merchandise. Since the image of the talebearer Rashi had in mind was that of the merchant, it was only natural for him to adduce the merchants' custom commonplace in France at the time — according to which the purpose of the shared meal was to reinforce the obligations of the parties to the transaction — so as to explain that the objective of the talebearer's meal was, likewise, to reinforce the gossip he purveyed.

27 R. Solomon b. Isaac (Troyes, France, 1040–1105).

28 The plural noun *kurtzin* occurs in the extant corpus of Jewish Palestinian Aramaic in this idiom only; see Michael Sokoloff, *A Dictionary of Jewish Palestinian Aramaic of the Byzantine Period* (Ramat-Gan: 1990), 507a.

29 Rashi ad loc. The relevance to Rashi's comments of the custom of drinking upon closing a business deal — which was, as we saw, widespread at the time — was already noted by Güdemann, n. 3 above, vol. 1, 29.

This example, it can be argued, exhibits more far-reaching interpretive creativity than the previous ones. Rashi does not actually say that he knows of such a practice, that is, the practice of talebearers insidiously seeking to corroborate their gossip by way of a shared meal. Granted, he was surely acquainted with the practice of merchants in the France of his day, namely, the practice of confirming transactions and obligations by sharing a meal, and therefore could have assumed that in the past talebearers had behaved in a similar fashion. In the examples we considered previously, however, the commentators explained the text in light of a practice of which they had first-hand knowledge. Rashi, in contrast, inferred from that practice, of which he too was aware, the existence of another practice — from the past, and **not known to him** — which was necessary to explain Onkelos's translation of the verse.

3 *Interpretation of a Talmudic Passage: The* sugya *of* situmta *(bBaba Metzia 74a)*

bBaba Metzia 74a contains the following discussion:

> R. Papi said in Rava's name: The *situmta* gives title (*hai situmta kanya*). With respect to what [does it give title]?
> R. Haviva said: With respect to full title (*lemikneia mamash*). The Rabbis said: With respect to becoming subject to the "He who exacted punishment (*mi shepara*)" curse.
> And the law is that [it is effective only] with respect to becoming subject to the "He who exacted punishment" curse. But where it is customary that it gives full title, it does so [with complete legal validity].

This *sugya*[30] provided the basis for the halakhic authorities' derivation of the legal concept of *kinyan situmta*,[31] which in time came to mean the mode of acquisition used in a certain place by local merchants or the general populace. Both the Early Authorities and the

30 For a comprehensive discussion of this *sugya*, see Kleinman 2000, n. 103 below; idem, "'*Hai situmta kanya*' (BM 74a): interpretation of Rava's statement in light of talmudic realia" (Hebrew), *Sidra* 18 (2003), 103–118; Berachyahu Lifshitz, "*Situmta* — between acquisition and contract" (Hebrew), in *Memorial Volume for Zeev Falk*, forthcoming.

31 The halakhic concept, which is our focus here, should not be conflated with the actual historical situation referred to in Rava's statement. On the historical background, see the works cited in the preceding note.

Later Authorities made use of this concept, and it is still used by contemporary rabbinic authorities to confer halakhic validity on modes of acquisition customary at the present time, but not anchored in the Mishnah and the Talmud.

What was the specific *situmta* of which Rava was speaking? The Early Authorities proposed three different interpretations for the term "*situmta*," and hence, for the entire *sugya*. In what follows these interpretations will be outlined, and we will explore whether, and to what extent, they reflect the realia — the material environment — of the commentators in question.

a Rashi and most Early Authorities (*rishonim*): '*situmta*' means 'seal'

Rashi explains the term as follows:

> *Situmta*: The seal that the shopkeepers inscribe [stamp] on wine-barrels, for they buy many [barrels] at once and put them in the owner's storehouse, and bring them one by one to the shop to sell. And they inscribe them [in order] to know that all those so inscribed have been sold.[32]

The Aramaic word *situmta* indeed means "seal."[33] Accordingly, the Geonim explained the term as referring to a seal or sign that a purchaser stamped on the merchandise to indicate that from that moment on, the marked object(s) belonged to him. At first sight, Rashi's explanation seems to be the same as that of the Geonim. Closer examination, however, reveals a difference. While the Geonim generally mean a seal stamped on the "merchandise" (*mekah*) or on an "object" in general,[34] Rashi brought the specific example of **barrels**.

From Rava's brief statement, it by no means follows necessarily that he was referring specifically to barrels; other types of merchandise

32 Rashi, bBaba Metzia 74a s.v. *situmta*.

33 For the etymology of the word *situmta*, see Kleinman 2003, n. 30 above, sec. 1.

34 See *Sefer Hamiktzoot*, ed. S. Assaf (Jerusalem: 1947), 67, in the name of R. Kimoi Gaon; *Aruch Completum*, ed. A. Kohut (NY: 1955), vol. 6, 37–38, s.v. *sitmeta; Or Zarua*, on Baba Metzia, para. 231, citing the *Arukh* and adding that this was also R. Hananel's interpretation; R. Hai Gaon, *Sefer Hamekah Vehamimkar* (Bnei Brak: 1994), gate 13, ch. 9, p. 198. There is, however, one Geonic source that limits the term to seals impressed on "[jugs of] wheat and barley and [barrels of] wine"; see J.N. Epstein, *Studies in Talmudic Literature and Semitic Languages* (Hebrew), vol. 2, part 1 (Jerusalem: 1988), 355.

might also have been stamped with a seal. There is ample evidence, both from the ancient Near East[35] and from the Mishnah,[36] for the practice of stamping the **sacks** in which goods were transported from place to place. This was done by impressing a seal on soft clay to which the ropes used to close the sack were attached.

There is almost no doubt that Rashi's explanation reflects a commercial practice of his own locale, where it was customary for merchants to buy barrels in the said manner. The practice, also common in several other European countries in the Middle Ages, had its origins in Roman law.[37] Moreover, many residents of Rashi's home district of Champagne made their living from viticulture and the sale of wine.[38] Some scholars maintain that this was also the source of Rashi's livelihood. Indeed, we have evidence that Rashi was knowledgeable about the way barrels were stamped with a seal.[39] Clearly, then, Rashi was familiar with merchant custom in this sector, and his interpretation of the *sugya* of *situmta* reflects this familiarity.

Most of the Early Authorities upheld the view that a *situmta* is a seal stamped on merchandise.[40] In their commentaries, the Provencal scholars R. Abraham b. David (Rabad) (twelfth century), and — probably adopting the Rabad's view — R. Menahem Hameiri (thirteenth–fourteenth century),[41] each adduced two examples to explain the term.

35 K.R. Veenhof, *Aspects of Old Assyrian Trade and its Terminology* (Leiden: 1972), 30–32, 41–44.

36 mShabat 8:5; see also Rashi, bShabat 80b; Maimonides, *Commentary on the Mishnah* ad loc.; mOhalot 17:5.

37 Boaz Cohen, *Jewish and Roman Law* (NY: 1966), vol. 2, 553–54.

38 See Eliezer M. Lifshitz, "Rashi" (Hebrew), in Y.L. Fishman (ed.), *Sefer Rashi* (Jerusalem: 1956), 175; A. Grossman and I. Ta-Shma, "R. Solomon Yitzhaki (Rashi)" (Hebrew), *Encyclopedia Hebraica*, vol. 31, 993.

39 See Grossman 1995, n. 3 above, 132.

40 See, e.g., Maimonides, *Code*, Laws concerning Sales 7:6; R. Abraham b. David (Rabad), *Shita Mekubetzet* on bBaba Metzia 74a; R. Isaiah di Trani, *Piskei Harid* ad loc.; R. Menahem Hameiri, *Beit Habehira* ad loc. (Schlesinger edition, p. 283).

41 Rabad, ibid.: "*Situma* — seal, for instance, if one sold another a barrel of wine or a sack full of fruit, and [the buyer] neither paid nor 'pulled' [actualized the purchase by 'pulling,' *meshikha*], but just closed his barrel or tied his sack, and put his seal thereon"; Meiri, ibid. The similarity of their statements indicates, almost certainly, that the view of the Meiri was based on that of the Rabad. Besides the example of the barrel, they also give an example not given by Rashi — that of a sack. See also text above at n. 35–36.

One example was that already cited by Rashi — the seal stamped on a wine-barrel. Clearly, the merchant custom that was in effect in Troyes in northern France in the eleventh century was also common in twelfth-century Provence in southern France. It was only natural, then, for a commentator to interpret his text in terms of examples familiar to him from his own environment and its realia.

b R. Haim Hakohen: '*situmta*' means 'handshake'

R. Asher b. Yehiel (known as the Rosh), cites, in the name of a certain "Rabbenu Haim," a different explanation of the word "*situmta*": a handshake (*tekiat kaf*). In one of his responsa, the Rosh quotes Rashi's interpretation, but then adds:

> And Rabbe[nu] Haim explained: *pamya*, as the merchants are accustomed: he thrusts the palm of his hand into the palm of his fellow, and this is the conclusion of the transaction. And this is known in the German tongue as *ufshlac*, and this action that is performed is in place of [acquisition by] a kerchief (*sudar*).[42]

"Rabbenu Haim" is R. Haim b. Hananel Hakohen, a twelfth-century Tosafist who lived in Paris.[43] Comparing this quotation with three other places in which it is quoted by the Rosh,[44] we find that the statement "and this is known in the German tongue…" is not R. Haim's, but the Rosh's gloss. There is also another reason for this conclusion: R. Haim, who lived in France, used the French term, whereas the Rosh, who spent most of his life in Germany (from 1250 to 1303, when he was forced to flee to Spain), and moreover, was writing the responsum in reply to a questioner who likewise resided in Germany,[45] would have added the equivalent term in German. I will say more about these terms below.

42 *Responsa Rosh*, 12:3, according to MS Jerusalem. See E.E. Urbach, "The responsa of R. Asher b. Yehiel in manuscript and printed editions" (Hebrew), *Shenaton Hamishpat Haivri* 2 (1975), 9 n. 20.

43 See E.E. Urbach, *The Tosaphists* (Hebrew), 5th ed. (Jerusalem: 1995),124–27.

44 *Piskei Harosh* on Baba Metzia, ch. 5, para. 72; *Tosafot Harosh* on bBaba Metzia 74a; *Responsa Rosh*, 13:20 (Makhon Yerushalayim edition: 13:21, p. 68). The latter source reads: "And Rabbenu **Hananel**…explained…." However, this is probably a copyist's error: the copyist likely mis-rendered the acronym R"H, and the text in fact refers to R. Haim.

45 The query was sent by the Rosh's nephew, R. Moses of Koblenz; see Abraham H. Freimann, *The Rosh and His Descendants* (Hebrew), trans.

R. Haim states that merchants were accustomed to finalize a sale by a handshake or handclasp known as *pamya*, a word derived from the Latin legal term *palmata*,[46] which indeed has that meaning.[47] According to the laws of sale enacted in Montpellier, Provence, in 1204, a contract between two parties could not be concluded without *palmata*.[48] In this merchant custom we find vestiges of the ancient conception that it was necessary that some formal concrete act be performed for a mutual agreement to be valid.[49]

The term is also mentioned in the *Commentary attributed to the Ritva* (R. Yom Tov b. Abraham Ishbili) — a work written in the same period and locale, namely, thirteenth-century Provence.[50] After quoting R. Abraham b. David (Rabad) to the effect that *situmta* is a seal, the author adds: "Another explanation: *situmta* is what is called *palmada*."[51] We can assume that in the local Provencal dialect of the work's author, the word *palmata* was pronounced *palmada*.[52]

The word *pamya* mentioned by R. Haim of Paris is, essentially, a variant derivative form of the Latin *palma*, or, in the Old French spoken

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M. Eldar (Jerusalem: 1986), 53–55. In the responsum the Rosh mentions that "my teacher, the cantor" had shown him something written by the Rosh's master, R. Meir of Rothenburg; this implies that the responsum was written while the Rosh was still in Germany.

46 Latin *palma* (pl. *palmata*) = "palm of the hand"; see *Oxford Latin Dictionary* (NY: 1982), s.v. *palma*.

47 The connection between the remarks in *Piskei Harosh*, n. 44 above, and the term "*palmata*" was pointed out by Shalom Albeck in the *Encyclopedia Judaica* entry for "acquisition." However, Albeck made no reference to the responsum quoted above or to the term *pamya*. See below.

48 As enacted in the *Custom of Montpellier* of 1204, sec. 100. See Jean Brissaud, *A History of French Private Law*, trans. R. Howell (NY: 1968), 491.

49 On the need for a formal act to establish an obligation in ancient law, see Brissaud, ibid.; Rudolf Huebner, *A History of Germanic Private Law*, trans. F.S. Philbrick (NY: 1968), 490ff.

50 The *Commentary attributed to the Ritva* is a 13th century Provencal work of unknown authorship; see R. Alter Halpern, *New Novellae of Ritva on Baba Metzia* (Hebrew), (London: 1962; repr. NY: 1980), introduction, ch. 5.

51 Ibid. on bBaba Metzia 74a.

52 On the Provencal language and the dialects spoken by the Jews of Provence in the Middle Ages, see "Provencal, language and literature" (Hebrew), *Encyclopedia Hebraica*, vol. 28, cols. 105–106 (written by Menahem Baneth). As I learned from Dr. David M. Schaps, the same phenomenon occurs in Spanish: the Latin ending *-ta* always becomes *-da* in Spanish.

in R. Haim's time, ***paumée***, meaning "palm [of the hand]."[53] It is, in fact, known from historical sources that the term *paumée* was used in medieval French law to refer to a handshake, paralleling the usage of the term *palmata*.[54]

As already noted, the Rosh, after quoting R. Haim to the effect that the merchant practice was to close a transaction with a handshake — a practice with which he too was no doubt familiar — added that it was known in German as *ufshlac*. His contemporary, R. Alexander Suslin Hakohen of Frankfurt (thirteenth to fourteenth century), also refers to this practice. He writes in his novellae, on the *sugya* of *situmta*, that in Germany ("in these parts"), the custom was that to effect a sale, "a man thrusts his garment into his fellow's hand"; he notes that it is known as *Ufshlac*.[55] Both authorities are in fact referring to the German term *Aufschlag* — in Middle German[56] *Ufslac*[57] — the literal meaning of which is "striking, impact."

Interestingly, two German dictionaries that adduce medieval historical sources cite several different meanings for the word *Aufschlag*, none of which is "handshake" or any other mode of acquisition.[58] Nevertheless, given the evidence of the Rosh and R. Alexander Suslin Hakohen, both of whom lived in Germany at the end of the thirteenth century and the beginning of the fourteenth, we can affirm that

53 The word was commonly used in France in the late 12th century (the lifetime of R. Haim of Paris); see *Grand Larousse*, n. 20 above, vol. 5, 4092, s.v. *paumée*. The term *pamya* thus probably reflects an old pronunciation of the word; elision of the consonant "L" in words borrowed from the Latin is a known phenomenon in French.

54 See Brissaud, n. 48 above, 495 n. 7; Huebner, n. 49 above, 495.

55 *Haaguda*, Baba Metzia, ch. 5, para. 109.

56 More precisely: this was the spelling in *Mittelhochdeutsch*, Middle High German, the language used in the central and southern part of Germany from around 1200 to 1600.

57 See A. Schirmer, *Wörterbuch der deutschen Kaufmannssprache — Auf geschichtlichen Grundlagen* (Strassburg: 1911), s.v. *aufschlagen*.

58 Among the meanings listed are: increase in price, postponement of payment, taxation. See Schirmer, ibid.; Richard Schröder and Eberhard Freiherr von Künssberg, *Deutsches Rechtswörterbuch* (Weimar: 1914–1932), s.v. *aufschlag*. However, see, in the latter work, the entry *aufschlagen*, to the effect that one meaning of the term was "to strike the table before a judge." However, this sense of the term denoted a criminal offense, not a mode of acquisition. Another historical dictionary does not list the term at all: Matthias Lexer, *Mittelhochdeutsches Handwörterbuch* (Leipzig: 1872).

the word was used at the time in Germany to refer to a method of finalizing a business deal by a handshake or handclasp.[59]

Several different terms were used in medieval Germany for acquisition by handshake, including *Handschlag* (lit. "clasping hands"), *Zuschlag* (lit. "shaking the hands together"[60]), and so on.[61] The term for acquisition by handshake, *Handschlag*, in particular, was very commonly used in medieval German law.[62]

In light of the numerous sources cited earlier, it is difficult to conclude with certainty whether R. Haim himself intended to offer a different **lexicographic** explanation of the word *situmta*, or whether his intention might have been merely to illustrate the meaning of the term by bringing **an example**. That is, perhaps R. Haim too was of the opinion that the word *situmta* meant "seal," and the remarks in question were not intended to set out an alternative meaning for the term, but rather, were intended as an explication of the contexts and practices associated with it. If so, it is for the latter purpose that he would have referred to the prevailing customs of merchants of his own period and region.[63]

The wording of the Rosh's rulings and responsa,[64] however, seems to imply that **he himself** understood R. Haim as indeed intending to offer **another interpretation** of the **term** *situmta*. Recall that the Rosh quoted R. Haim's explanation of the term after Rashi's, as a second, opposing opinion. Only after quoting both authorities did he rule (on

59 This constitutes further corroboration of my thesis (for which I have argued elsewhere; see n. 14 above), that an interdisciplinary study of the sources, combining halakha, realia, philology, and history, is absolutely necessary not only for a better understanding of the halakhic sources, but also for lexicographical research.

60 From the German *zusammen*, "together."

61 On these and other terms, see Lexer, n. 58 above, vol. 1, 1697–98, s.v. *koufslac*, *koufslagen*; J. and W. Grimm, *Deutsches Wörterbuch* (Leipzig: 1877), vol. 4, part 2, 344–45, s.v. *kaufschlag*.

62 Fehr writes that "the *Handschlag* is a well-known pan-German institution," originating in ancient German law. See H. Fehr, "Deutsches Recht und jüdisches Recht," *Zeitschrift der Savigny Stiftung für Rechtsgeschichte*, Germ. Abt., 39 (1918), 317. On "*Handschlag*," see Cohen, n. 37 above, vol. 2, 553–54; Richard Schröder, *Lehrbuch der deutschen Rechtsgeschichte* (Leipzig: 1889), 58–59, 359 nn. 79, 679, 682. I plan to address the topic of the handshake in medieval Jewish and German law in another paper.

63 Similar hesitations about this explanation were expressed by Joshua Falk Katz, *Perisha*, HM 201:1 (at the end).

64 Cited in n. 44 above.

the basis of a ruling by the twelfth-century R. Isaac b. Samuel of Dampierre) that the law in question applied to other modes of acquisition that were commonly used by merchants to make purchases.[65]

Whatever the case may be, R. Haim's explanation of the *sugya* **explicitly** reflects the late twelfth-century French merchant custom of closing a purchase with a handshake. As we saw, this interpretation of the *sugya* was given by other Early Authorities as well. Each of these authorities gives the term for acquisition by handshake in his own local language. Their commentaries thus not only offer an interpretation of the talmudic *sugya*, but also reflect the regional realia of medieval Europe. We can, therefore, draw a definite historical conclusion from these commentaries: the practice of effecting acquisition by means of a handshake was common among merchants in twelfth-century France (R. Haim), thirteenth-century Provence (pseudo-Ritva), and at the end of the thirteenth and beginning of the fourteenth century in Germany (Rosh and R. Alexander Suslin Hakohen). As stated previously, these testimonies by early halakhic authorities are consistent with what is known to us about merchant customs from other historical sources for the said period.

c R. Pinehas Halevi of Barcelona: '*situmta*' means 'giving a coin'

R. Yom Tov b. Abraham Ishbili (Yom Tov of Seville) (Ritva), who lived in Spain from around c. 1250 to 1330, challenges Rashi's explanation of *situmta* as a seal with which a purchaser stamps a barrel he has purchased. For if Rashi's interpretation is correct, on what grounds can R. Haviva assert that *situmta* actually effects title, even in a place where this is not a customary way of making a purchase, though the purchaser has not carried out a formal act of "pulling" (*meshikha*)? That is, he has not carried out the halakhically-mandated physical act that renders the acquisition of the goods valid. In light of this difficulty, the Ritva upholds an interpretation offered by his teacher, R. Aaron Halevi (Rea),[66] in the name of the his older brother R. Pinehas Halevi of

65 That his intention was to give a second definition of the word is also, for the same reason, implied in the passage from the *Commentary attributed to the Ritva*, quoted at n. 50 above.

66 On Aaron Halevi, see I. Ta-Shma, *Talmudic Commentary in Europe and North Africa: Literary History — Part II: 1200–1400* (Hebrew), (Jerusalem: 2000), 66–69.

Barcelona[67]; both lived in Barcelona in the second half of the thirteenth century. The Ritva writes as follows:

> *Situmta* is a kind of coin that has no design on it, and the merchants give it as a token when they buy something. And it is not known whether they give it as money, as if saying "my pledge [the few coins I have given as a pledge] will effect title of everything [all the merchandise]," and this results only in [their] becoming subject to the "He who exacted punishment (*mi shepara*)" [curse][68]; or whether they give it as barter (*halifin*) and thereby effect full title, for since it has no design on it, [the transaction] becomes one of barter [and not monetary payment].[69] And on this the Amoraim held opposed views. And we say [at the end of the *sugya*] that in a place where it is customary [to purchase in this way], it effects title, for [the coin] was surely given with the intention of [carrying out] a barter [transaction].[70]

In R. Pinehas' view, *situmta* is a coin[71] that the purchaser gives the vendor as a token when purchasing goods. The controversy among the Amoraim, which deals with the case of a locale where there is no established custom with regard to this practice, concerns **assessment of the intent** of the merchants: is the coin given as actual payment, so that title is not fully effected, but at most the parties become subject to the curse of *mi shepara* (the view of the Rabbis); or is it given as a token of acquisition through barter, in which case it effects full title (the view of R. Haviva)? The conclusion of the *sugya* is that wherever it is the customary practice to make purchases in this manner, all agree that it is a valid mode of acquisition. On this interpretation, the custom does not confer validity on the said manner of making a purchase as a

67 R. Pinehas taught his younger brother Torah. Israel Ta-Shma identifies him as the author of *Sefer Hahinukh*; see I. Ta-Shma, "The author of *Sefer Hahinukh*" (Hebrew), *Kiryat Sefer* 55 (1980), 787–90. However, this identification has been challenged; see Jacob S. Spiegel, "R. Pinehas Halevi and his *azharot* for the Sabbath preceding Rosh Hashana" (Hebrew), in *Memorial Volume for Rabbi Yitzhak Nissim* (Hebrew), vol. 6 (Jerusalem: 1985), 72–73.

68 See bBaba Metzia 48b, where it is stated that one who gives partial payment, referred to in the Talmud as a "deposit" or "pledge" (*eravon*), for movable property, becomes subject thereby to the curse "He who exacted punishment from the generation of the flood and the generation of the dispersion will exact punishment from one who does not stand by his word."

69 See n. 95 below.

70 Ritva, Baba Metzia, ed. Shilo Raphael (Jerusalem: 1993), 627–28, 74a s.v. *hai situmta kanya*; also quoted in *Shita Mekubetzet* ad loc.

71 Though a blank or planchet — see below.

mode of acquisition in its own right, but rather, merely constitutes a declaration that the coin is given for the purpose of barter, that is, to effect full title.

In sum, R. Pinehas interprets the *sugya* as concerned with the purchase of goods by handing over a coin. It seems, therefore, though he does not say this explicitly, that R. Pinehas' interpretation of the *sugya* reflects **the custom of the merchants of his time**. In other words, he explained the Babylonian term *situmta* — and the entire talmudic *sugya* — in light of the realia of mid-to-late thirteenth-century Barcelona.[72]

Merchants in various countries of medieval Europe, including France, Germany, and Spain, were accustomed to buy merchandise by handing over a symbolic sum of money (a small coin or a few such coins). The coins constituted "earnest money," that is, advance payment for the merchandise, transfer of which to the vendor served to validate the entire transaction.[73] The practice originated in a device used in Roman law for the purpose of reinforcing mutual agreements: *arrha*, meaning a sum of money or an object given by one of the parties to the transaction — generally a sale — to the other as a pledge or as earnest money.[74] In classical Roman law this was only one of several tokens of agreement

72 This conjecture is also made by Boaz Cohen, n. 37 above, 555, but without textual support. On the contrary, Cohen comments that *Las Siete Partidas* (an official codex issued in Castile by King Alfonso X) does not mention earnest money in part V, title VII, which deals with merchants, fairs and markets.

73 See Brissaud 1968, n. 48 above, 492–95; W. Mitchell, *An Essay on the Early History of the Law Merchant* (NY: 1969), 3–5. One authority writes: "After realization of the agreement the *Darangeld* must be returned or deducted [from the price]. In contracts of hired employees, servants and apprentices, it is considered in some places to be a special gift"; see Carl Friedrich von Gerber, *System des deutschen Privatrechts*, 16th ed. (Jena: 1891), 274 n. 4.

74 The standard dictionaries list the Latin word *arrha*, like the Greek word *arabon*, as derived from the Hebrew *eravon*. On the talmudic *eravon* (deposit, pledge) and its parallels in Greek, Roman and German law, see Jacob Neubauer, *The History of Marriage Laws in Bible and Talmud* (Hebrew), (Jerusalem: 1994), 88–101. See also Joseph Perles, *Beitrage zur Geschichte der hebraeischen und aramaeischen Studien* (Munich: 1884), 53; Schröder, n. 62 above, 53; Cohen, n. 37 above, 188 n. 52, 315–17 and n. 202, 555 n. 2; A. Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia: 1953), 367, s.v. *arra* (*arrha*); Brissaud, loc. cit.; W.W. Buckland, *A Text-Book of Roman Law*, 3rd ed. (Cambridge: 1966), 481–82; W.M. Gordon and O.F. Robinson, *The Institutes of Galius* (London: 1988), 342, note to para. 139.

between the parties.[75] Later, however, in Justinian's Codex, it was declared that if the person giving the *arrha* reneged and sought to cancel the transaction, he would forfeit the *arrha*, whereas if the recipient reneged, he would have to give the other person double its value.[76]

Acquisition by way of earnest money was common in German law[77] under a variety of names, such as *Kaufschilling* (literally: purchase with a shilling), *Angeld, Darangabe, Darangeld, Draufgeld, Haftgeld, Handgeld, Treupfennig* (advance payment), and others.[78] The act was also known as *Gottespfennig* (literally: "God's penny") and the like.[79] Some of these terms, as well as others — in German and in Yiddish — designating acquisition by the payment of earnest money, are found in many responsa by Later Authorities.[80]

75 However, failure to give the *arrha* did not invalidate the contract; see Berger, loc. cit.; Brissaud, n. 48 above, 492–93 (Digesta 18.1.35 should be added to the sources listed there, 493 n. 1).

76 Berger, loc. cit.; Brissaud, loc. cit. Cf. *Terumat Hadeshen*, n. 89 below: "For it is in the purchaser's power to renege if he wishes to forfeit the coin that he gave."

77 Gerber, n. 73 above, 273–74; Schröder, n. 62 above, 53, explains the need for earnest money as follows: "The accepted form of contract in German law was barter or purchase. Contracts based on actions such that one of the parties received no consideration were not legally valid. Where there was no material consideration, there had to be some countervailing action, even a lesser one."

78 Schröder, loc. cit. Sources for the *Kaufschilling* as well as the other epithets can be found in the Grimm brothers' dictionary, n. 61 above (I am indebted to Prof. Eric Zimmer for this reference). Expressions such as *Aderauf, Angelt, Deraufgelt, Droifgab, Darangelt, Hantgelt*, became German loanwords in Yiddish, as many responsa by Later Authorities attest; some are cited in n. 80 below. See also Y. Rivkind, *Yidishe Gelt: Jewish Money in Folkways, Cultural History and Folklore* (Yiddish), (NY: 1960), 23, 68–72.

79 See Perles 1884, n. 74 above, 53; Mitchell 1969, n. 73 above, 3; Cohen 1966, n. 37 above, 554 n. 6; Neubauer 1994, n. 74 above, 108 and n. 23; Brissaud 1968, n. 48 above, 494. The reason for this designation was that earnest money was sometimes dedicated to some religious need, so that the transaction would be granted divine protection. And sometimes the money was used to buy wine, which the parties drank together to mark their agreement; see Brissaud, loc. cit.

80 For example: *Droif geld* — R. Ezekiel Landau, *Responsa Noda Biyhuda*, 2nd ed., OH, #58; *Responsa Binyan Tzion*, #16 s.v. *omnam hatikun*; *Hand geld* — R. Akiva Eiger, *Responsa*, #134; *Arukh Hashulhan*, HM 201:2; *Dran geld — Responsa Hatam Sofer*, OH, #106 s.v. *gy"h higiani*; R.M. Panet, *Responsa Shaarei Tzedek*, OH, #70; *Responsa Rav Pealim*, 3, OH, #31, s.v. *od*

A similar practice, whereby acquisition was effected and contract obligations made binding by payment of *arras* coins, that is, earnest money, was recognized in medieval Spain. (It is, in fact, still in use in Spanish contracts.[81] The centuries-old custom of giving *arras* coins — usually thirteen, made of gold or silver — continues to be practiced at Catholic wedding ceremonies in present-day Spain.[82])

Vivid evidence of the practice in Spain may be found in a responsum by R. Isaac b. Sheshet Perfet (Rivash), a fourteenth-century Spanish authority. He quotes a verdict handed down by a Gentile arbitrator, who instructed a husband to renew his *ketuba* obligation to his wife, specifying a certain sum of money. The verdict, written in the Arragonian dialect in Hebrew script, reads as follows: "... que le mande firmar por arras en manera de arras y non más," that is: "... instruct him to sign an *arras* in the manner of the *arras* but not more."[83]

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raiti; Adrof/Adroif — Responsa Yeshuot Malko, YD, #61, s.v. *noam imrotav; Responsa Dvar Yehoshua*, 3, HM, #12, sec. a; *Adran — Responsa Maharsham*, 1, #203, s.v. *mikhtavo higiani*; 5, #37, s.v. *vehen emet*; *Dran — Responsa Shoel Umeishiv*, 1st ed., 2, #39; *Angabe — Responsa Maharsham*, 4, #122, s.v. *uma sheshaal*; *Drangabe — Responsa Naharei Afarsemon*, HM, #18, s.v. *mihu*; *Oifgab — Responsa Ahiezer*, 3, #40, sec. e.

81 Contracts in Spain sometimes state that the *arras* coins are given "as a token of contract," "on account," "as payment and as a sign [of agreement]." Transactions closed in present-day Spain include an advance payment amounting to 5–15% of the value of the property being sold. See A. Otero Varela, *Las arras en el derecho español medieval* (Madrid: 1955); M.E. Alfonso Rodríguez, *Las arras en la contratación* (Barcelona: 1995).

82 In Roman Spain, the *arras* was defined as a donation: *sponsalitia lergitati*. Later, under the Visigoths and in the Middle Ages in general, the *arras* was again defined as a donation: *donatio propter nuptias*. Documents from Toledo, dated 1530, state that one cannot give his wife *arras* of more than 500 *solidi*. The coins, generally called *arras hispanicas*, symbolized the groom's gift to the bride in thanks and recognition for her virginity and for the property the couple would acquire in the future. Today the custom is still practiced at many Catholic weddings (the exception being certain districts of Catalonia). The coins are kept by the groomsmen, that is, young family members who attend the couple during the ceremony, and the bridegroom then gives them to the bride. See J. Martínez Ruiz, "Siete cartas de dote y *arras* del Archivo de la Alhambra 1546–1608," *Revista de dialectología y tradiciones populares* 2 (1966), 41–72; F. Hernández Gil, *Las arras en el derecho de la contratación: en torno al artículo 1454 del Código Civil* (Salamanca: 1958).

83 *Responsa Rivash*, #207. I am indebted to Prof. Moises Orfali for his help in locating the Spanish sources and translating the quotes from the responsum into Hebrew.

The medieval European practice of finalizing a transaction or endorsing various obligations by giving a coin appears in the writings of other Early Authorities as well: Rashi, in his commentary on the Talmud,[84] R. Isaac of Dampierre, as quoted by the Rosh,[85] R. Samson of Sens (France, twelfth to thirteenth century), in a responsum,[86] and R. Solomon b. Abraham Aderet (Rashba), (Spain, 1235–1310),[87] in a responsum sent to Marseille.[88] Later it appears in responsa of two of the greatest halakhic authorities of fifteenth-century Germany: R. Israel Isserlein, author of *Terumat Hadeshen* (1390–1460),[89] and his disciple, R. Moses Halevi Segal (Maharam Mintz), (c. 1415–1483).[90]

84 On bBaba Metzia 48b, where the text reads: "A deposit (*eravon*) — Rav said: It effects title [only] to the extent of the value thereof. R. Johanan ruled: It effects title to the whole purchase." Rashi comments on the meaning of the word *eravon*: "Payment of part of the money, which is known as *eres*," that is, earnest money. See M. Catane, *Recueil des gloses* (Hebrew), (Jerusalem: 1988), 117.

85 *Responsa Rosh*, n. 44 above: "As is the custom that the purchaser gives one coin to the vendor and thereby the merchandise is purchased — always according to the local custom with respect to closing the sale." Also cited in *Piskei Harosh*, n. 44 above, but (as is frequently the case in *Piskei Harosh*) without attribution to R. Isaac.

86 Quoted in *Or Zarua* on Baba Metzia, ch. 5, para. 188; and with slight changes, in *Responsa Maharam of Rothenburg*, Berlin edition, #354 (p. 288) = Prague edition, # 967. The responsum concerns the custom of giving a coin upon concluding a matchmaking agreement, as an act of acquisition relating to the standard fines specified in the matchmaking conditions. For a discussion of this responsum, see my "Merchant Customs," n. 103 below, 272–74.

87 *Responsa Rashba*, part III, #132, concerning someone who gave a vendor a gold dinar to buy land. The Rashba's statement, "if the place is a place where full title is effected by giving that coin. . . ." may imply that in some places the coin was not seen as giving full title; or perhaps the Rashba was not acquainted with the custom in the inquirer's locale.

88 Rashba sent numerous responsa to correspondents in Provence, as attested by the many headings of his responsa (esp. parts III and IV) that specify Provencal place names. On Rashba's encouragement of and contacts with Provencal scholars, see Shlomo H. Pick, "The Jewish Communities of Provence before the Expulsion of 1306" (PhD dissertation, Bar-Ilan University, Ramat-Gan, 1996), 171–74.

89 In a collection of new responsa from *Leket Yosher* and manuscripts, published in *Terumat Hadeshen Hashalem*, ed. S. Avitan (Jerusalem: 1991), #59, p. 476; it will be quoted below.

90 *Responsa Maharam Mintz*, #5 ([Jerusalem: 1991], 16): "Such is the custom of the Gentiles in all places, whoever gives even one penny for the sale gains title even of [something worth] a gold coin." The phrase "for the sale" probably means "on account of the sale." Cf. *Terumat Hadeshen*, quoted below.

We learn from R. Isserlein and the Maharam Mintz that giving the coin served two functions: it was an act of acquisition, finalizing the transaction between purchaser and vendor; and an advance payment toward payment of the full sum involved. The passage in *Terumat Hadeshen* is as follows:

> A Jew who purchased a cow and a goat from a Gentile and did not pull [actualize the purchase by *meshikha*] but only gave one penny (*pashut*) toward the sale . . . and such is the common (*pashut*) custom: to give a Gentile possession in return for a penny.[91] . . . It does not matter here whether he purchased a large quantity of merchandise with a penny or purchased [something worth] a large sum and gave a small part of the payment, such as a penny, as confirmation of the transaction, the balance being paid later.

It will be recalled that R. Pinehas of Barcelona was very likely familiar with the merchant practice of buying goods by giving a coin as earnest money. As stated above, I believe that this practice is reflected in his interpretation of the term *situmta*, for he writes: "the merchants give it as a token when they buy something." However, there is a **significant difference** between the European merchant custom and the custom mentioned in R. Pinehas' interpretation. The coin used by European merchants to finalize a transaction was an ordinary, current coin, not a blank or planchet. As noted above, the coin was generally considered to be advance payment, "on account of" the agreed-upon price, to be paid in full later. I would argue that R. Pinehas' specification of a coin that "**has no design on it**" does not reflect the merchant usage in his lifetime, but reflects the need to harmonize the actual practice and the talmudic laws of acquisition.

This calls for explanation. As understood, at least, by the Early Authorities, the *sugya* of *situmta* is concerned with the methods for acquiring movable property.[92] R. Pinehas explains that acquisition by *situmta* is effected by the purchaser's giving the vendor a coin. Were the

91 Clearly intending a play on words, *pashut* being used both for "penny" and for "common."

92 This is not mentioned explicitly by Rava or the other Amoraim who debate his statement. However, the Geonim and other Early Authorities understood that he was referring specifically to movable rather than landed property. This is discussed at length in Kleinman 2003, n. 30 above, 111–13.

coin involved an ordinary one, this would contradict the laws of acquisition laid down elsewhere in the Talmud.

On the one hand, the present *sugya* would seem to imply that movable property can be acquired by the buyer's giving the vendor a coin. On the other, the Talmud states elsewhere that movables cannot be acquired by giving a coin — neither through "acquisition by money" (*kinyan kesef*)[93] nor through barter (*kinyan halifin*).[94] R. Pinehas therefore emphasized that the *situmta* was not an ordinary, current coin, but a **coin blank**, with no inscription or design. Such a "coin" — basically not a coin at all, but just a piece of metal — could be used for barter: by giving it to the vendor, the movable goods in his possession could be purchased.[95]

If this thesis is correct, R. Pinehas' interpretation of the term *situmta* in Rava's statement is not entirely consistent with either the realia of Babylonia in Rava's time or the realia of medieval Barcelona. His interpretation is the product of two extra-textual factors: the realia of his own time, namely, merchant custom in thirteenth-century Spain, and talmudic law.

It must be kept in mind that we did not receive R. Pinehas' explanation first hand, but from a third party, the Ritva, who himself heard it from his teacher, the Rea. Hence we cannot determine with any certainty whether it was the Ritva's objection to Rashi's explanation that led R. Pinehas, too, to reject it and seek another interpretation. If so, this proves that R. Pinehas' explanation was not given as a **lexicographical** interpretation of the word *situmta* intended as an alternative to Rashi's, and that his rejection of Rashi's explanation was due solely to the halakhic problematics it gave rise to. In other words, R. Pinehas may have intended from the start to explain not the meaning of the notion of *situmta*, but rather the halakhic substance of the *sugya*, that is, the way in which R. Haviva endowed the merchants' mode of acquisition with halakhic validity. The interpretation he put forward reflects,

93 bBaba Metzia 47b.

94 bBaba Metzia 45b.

95 The reason a regular coin cannot be used to effect title by barter is that the significant aspect of a coin is the design stamped on it, which may lose its value if the ruling authorities decide to mint a new coin. See bBaba Metzia 45b and Rashi ad loc., s.v. *mishum*. If the coin lacks a design, this problem does not arise.

in my view, at least to some extent, the prevailing merchant custom of R. Pinehas' time.

It is noteworthy that the controversy among the Early Authorities over the interpretation of the term *situmta* is not merely theoretical. R. Pinehas' interpretation, which was taken up by the Rea and the Ritva, has far-reaching practical implications for the laws of acquisition. On this interpretation, the conclusion to be drawn from the *sugya* of *situmta* is quite limited: the specific practice of giving the vendor a blank coin has legal validity as a mode of acquisition. One cannot, however, draw any conclusion from the *sugya* — as did all the other Early Authorities (followed by the Later Authorities) — regarding a **general principle** of "acquisition by *situmta*,"[96] and in effect there is no such principle in the Talmud. The conclusion that follows from R. Pinehas' interpretation, explicitly articulated by the Ritva, is that no merchant custom that has not been confirmed by a "condition of the townspeople" or by the sages,[97] can be added to the halakhically recognized modes of acquisition.[98]

4 *Conclusion*

Medieval realia, that is, medieval material culture, is reflected in the biblical and talmudic commentaries of the Early Authorities, and not infrequently influenced the interpretations they put forward. This study has attempted to explore this phenomenon by taking a close look at how the Early Authorities interpreted certain biblical passages and a *sugya* from the Babylonian Talmud. Common to all the cases examined is a connection between the interpretations offered, and various merchant practices in medieval Europe.

96 See text at n. 31 above.

97 At the end of his remarks, after the passage quoted above at n. 70, the Ritva states: "There is no need, with respect to this [merchant] custom, for a 'condition of the townspeople,' since it is simply a custom, which does not abrogate the halakha in any way."

98 The Ritva's view was also so understood by R. Shilo Raphael, as he states in the notes in his edition of the *Novellae*, n. 70 above, p. 627 n. 53, and in his introduction, 8–9. Similarly, R. A.J.L. Steinman, *Ayelet Hashahar*, Baba Metzia (Bnei Brak: 1985), 74a s.v. *uveatra*, concludes that according to the Ritva, the law in question had nothing to do with the issue of whether a custom can become a valid mode of acquisition.

Our study has shown that the reflection of realia in the interpretations of the Early Authorities is sometimes manifest, and sometimes veiled. In some instances it is difficult to know with certainty, by reading what a given commentator says, whether the interpretation offered is purely text-driven, or whether it reflects the realia of the author's day. As we have seen, study of historical sources and comments made by other commentators of the same era and locale can sometimes dispel any doubts and confirm the hypothesis that indeed, contemporary realia are reflected in the interpretation in question. On the other hand, there are cases, as we saw, in which the impact of realia is evident and unmistakable. This is the case, for example, when commentators explicitly refer to merchant practices in their local areas, and in fact cite the names for the said practices in the local vernacular.[99]

We also saw that regardless of whether the **reflection** of realia is manifest or veiled, realia **influenced** the interpretations offered by the Early Authorities to different degrees, sometimes varying even within the writings of the same author. From the examples we have examined, we can distinguish three different modalities of influence:

1 In some cases, realia have no influence whatever on the interpretation of the text; the commentator only adduces examples taken from the familiar experiences of his environment in order to **illustrate** the substance of the text.[100] Realia are thus reflected in the interpretation, but have not actually influenced it.
2 In other cases, we find **direct influence** of realia on the interpretation of the text. The commentator projects from the realia of his own environment onto facts and words occurring in the text, instead of explaining these facts and words — etymologically, contextually or in terms of the realia they refer to — in accordance with their original meaning. Here, it is evident that the interpretation does not reflect the realia of the text, but rather, the realia of the commentator's environment.[101]
3 Finally, as against the two categories just described, which constitute two extremes — no influence whatever, save for the purpose of illustration, and direct and total influence — we can

99 See above, Sections 2a, 3b.
100 Rabad and Meiri, see text at n. 41 above.
101 E.g., in the way some French and Provencal commentators interpreted the story of Esau's sale of his birthright; see Section 2a above.

discern a third, intermediate category. For cases that fall into this category, the realia of the commentator's time and place influence his interpretation only partially.[102] In such cases, the commentator's interpretation of the text synthesizes his own realia with various other extra-textual elements.[103]

102 As I have suggested understanding R. Pinehas of Barcelona's interpretation of the *sugya* of *situmta*, see Section 3c above.

103 This article addresses topics discussed in chs. 7 and 8 of my PhD dissertation, "Merchant Customs (*Lex Mercatoria*) relating to Methods of Acquisition in Jewish Law: *Kinyan Situmta*" (Hebrew), (Bar-Ilan University, Ramat-Gan, 2000). The material has been reworked and new sources have been added. In the course of this review of the material, some of my conclusions have changed. I am indebted to Dr. Baruch J. Schwartz for his helpful comments.

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SUICIDE AS AN ACT OF ATONEMENT IN JEWISH LAW

YECHEZKEL LICHTENSHTEIN*

There are a number of prohibitions in the Torah, transgression of which incurs the punishment of death (e.g., idolatry, desecration of the Sabbath, adultery, and so on). The transgressor of these prohibitions is tried by an earthly court that has the authority to convict and execute him, as it is stated in mSanhedrin 1:4: "Cases involving capital punishment [are decided] by twenty three [judges]." Nowhere in the halakhic literature is there a halakhic directive to the effect that a transgressor may inflict harm upon himself, that is, carry out "execution by the court" on himself. Moreover, killing oneself is forbidden by Jewish law and regarded as a prohibited act on a par with murder. Genesis Rabbah 37:13, for example, interprets the verse that prohibits Noahides from shedding blood as follows:

> "But for your own life-blood I will require a reckoning" (Gen. 9:5) — this is to include one who strangles [kills] himself.[1]

Pesikta Rabati, at the beginning of chapter 25, interprets the commandment, "You shall not murder" (Exod. 20:13) as also applying

* Yechezkel Shraga Lichtenshtein is a lecturer in the Department of Talmud at Bar-Ilan University; his research specialty is the development of the halakha.

1 Theodor-Albeck edition, p. 324, explaining that "the word 'strangles' is used because it is a common form of suicide, as it is easier for one to strangle himself than to otherwise slay himself." *Midrash Hagadol* explains it as "one who takes his own life."

to killing oneself:

> "You shall not murder" — you shall not murder yourself,[2] do not make thy blood cry out[3] over thee.[4]

In other words, the "You shall not murder (*lo tirtzah*)" prohibition also includes "You shall not murder yourself (*lo titratzah*)."[5]

The Talmud lists a series of sanctions to be applied to one who commits suicide:

> One who commits suicide — nothing whatever is to be done for him . . . we do not rend our garment or remove our shoes or say a eulogy for him.[6]

The halakhic decisors, both early and later, added further restrictions pertaining to the body of one who committed suicide, and limited the mourning practices to be observed for such a person.[7] The severity with which suicide was viewed is reflected in the oft-quoted adage from the later halakhic literature, "One who takes his own life does not have a share in the world to come."[8] Thus, one who takes his own life

2 The Maharzo (R. Zeev Wolf Einhorn, Vienna, 19th century) explains the Midrash "You shall not murder (*lo tirtzah*) — you shall not murder yourself (*lo titratzah*)" as follows: "Because there is a *dagesh* in the letter *tav* [of '*tirtzah*'], it is as if the word is written with two *tav's*, meaning: you should not be the one murdered by the act of murder."

3 This is the version of the author of *Zera Efraim* in his commentary ad loc. See also *Tora Shleima*, Yitro, p. 101, sec. 330, which confirms this version on the basis of other Midrashim. The Maharzo states there, "the murder is upon you (*rotzeiah alekha*) — you murder your own soul." R. Meir Ish-Shalom, author of *Peirush Meir Ayin*, also leans toward this version.

4 Ish-Shalom edition, 124b.

5 See J.F. Perla on *Sefer Hamitzvot Lerav Saadia Gaon*, part 1, positive commandment 28; S. Lieberman, *Hilkhot Hayerushalmi Larambam*, 21, sec. 400; *Tora Shleima*, n. 3 above. But the *Meir Ayin* and others explain the words of the Midrash differently. On the source of the prohibition against suicide in the rabbinical literature, see Y. Lichtenshtein, "The Prohibition against Suicide — A Halakhic Historical Inquiry" (master's thesis, Bar-Ilan University, 1981), 19–22 (henceforth, Lichtenshtein, *Prohibition*). The inclusion of the prohibition against suicide within the prohibition against murder is mentioned in the writings of Jacob b. Isaac Kirkisani (Abu Yusuf Yaqub), an important 10th century Karaite authority. In his opinion, the "You shall not murder" commandment does not differentiate between one who murders another and one who murders himself. Cf. Lichtenshtein, *Prohibition*, 21 and n. 19.

6 bSemahot 2:1 (Higger edition, 101–02).

7 See Lichtenshtein, *Prohibition*, n. 5 above, 23–32.

8 On the source of this saying, see ibid., 33–36.

in order to atone for his sins is performing an act of atonement by means of a terrible transgression. This position is clearly articulated by R. Moses Sofer in his commentary on the Torah:

> Nothing is done for one who commits suicide, and he is worse than other murderers. For Scripture says, "But for your own life-blood I will require a reckoning" (Gen. 9:5). All one's sins are cleansed at the time of death, but this person sins in his death; by the very thing he intended as atonement, he sins and rebels. Therefore all his iniquities rise up against him.[9]

Contrary to the traditional halakhic position, sources of an aggadic nature in the midrashic literature and the Talmud do intimate that taking one's own life by one's own hand may be permissible as an act of repentance and atoning for one's sins. Various aggadic tales of suicide committed for purposes of atonement and repentance are presented in a manner that reflects sympathy and praise for those who take this path. Perhaps the most striking description of suicide as an act of atonement is found in Genesis Rabbah:

> Yakim of Tzrurot, the son of the sister of R. Yose b. Yoezer of Tzreida, rode by on a horse as R. Yose b. Yoezer, bearing the beam for the gallows, was going forth to be crucified. [Yakim] said to him, "Look at the horse that my master gives me to ride, and look at the horse that thy master gives thee to ride." [R. Yose b. Yoezer] said to him, "If so much is given to those who, like you, provoke Him, how much more shall be given to those who obey His will!" [Yakim] asked, "Has any man been more obedient to His will than you?" [Yose b. Yoezer] replied, "If so much is done to those who are obedient to His will, how much more shall be done to those who provoke Him!" This answer penetrated him like the venom of a snake. He went away and imposed upon himself all four modes of execution by the court — stoning, burning, slaying and strangulation. What did he do? He took a beam and drove it into the earth. He built a fence round it and tied a rope to it. He made a bonfire in front of it and stuck a sword in the midst of it. He hanged himself from the beam, the rope broke and he was strangled; the sword came toward him, the fence collapsed on him, and he was burned. Yose b. Yoezer, becoming drowsed, saw Yakim's bier rising through the air, and said, "This man, by a brief hour, precedes me to the Garden of Eden."[10]

9 *Torat Moshe* (Hatam Sofer), (Jerusalem: 1972), the beginning of Parshat Vayetze. See also *Responsa Hatam Sofer*, YD (Vienna: 1895), #326; Y.M. Tucazinsky, *Gesher Hahayim* (Jerusalem: 1960), vol. 1, ch. 25:1, 269–70.

10 Genesis Rabbah 65:22 (Theodor-Albeck edition, 722–23); cf. *Midrash Tehilim* 11, S. Buber edition (Vilna: 1891), 103–104. The different versions are addressed in the footnotes of the Theodor-Albeck edition.

Yakim of Tzrurot[11] imposed upon himself all four modes of execution by the court[12] in order to atone for his treason and his sins. In response, his uncle, R. Yose b. Yoezer, said, "This man, by a brief hour, precedes me to the Garden of Eden."

R. Hiya bar Ashi, a disciple of Rav, also tried to take his life by his own hand to atone for his sins, as reported in tractate Kidushin:

> Every time R. Hiya bar Ashi fell upon his face, he would say, "May the Merciful One save us from the evil inclination." One day his wife heard him. "Let us see," she reflected, "it is so many years that he has held aloof from me [because of old age — Rashi]: why then should he pray thus? One day, while he was studying in his garden, she adorned herself and repeatedly walked up and down before him. "Who are you?" he demanded. "I am Haruta [a well-known prostitute of that town — Rashi] and have returned today," she replied. He desired her. Said she to him, "Bring me that pomegranate from the uppermost bough." He jumped up, went and brought it to her. When he re-entered his house, his wife was firing the oven, whereupon he went and sat in it. "What means this?" she demanded. He told her what had happened. "It was I," she assured him; but he paid no heed to her until she gave him proof. "Nevertheless," said he, "my intention was evil." That righteous man fasted all his life, until he died thereof.[13]

R. Hiya bar Ashi wanted to burn himself in an oven because he thought he had engaged in relations with a prostitute. Since one who engages in relations with an unmarried prostitute does not incur the punishment of execution by the court, we can deduce from this story that according to R. Hiya b. Ashi, one may take his own life to expiate his sin even for a transgression that does not carry the punishment of execution by the court. Remarks to this effect were also made by the seventeenth-century halakhic authority R. Jacob Reischer Backofen of Prague in *Iyun Yaakov*, his commentary on *Ein Yaakov*:

> From this one may conclude that in such a case, where it is done for the purpose of repentance, it does not fall into the category of taking one's

11 He is Alcimus the High Priest who committed treason at the time of the outbreak of the Hasmonean Revolt; see 1 Maccabees, chs. 7, 9; *Antiquities of the Jews*, Book 12, 386.

12 But 1 Maccabees 9:56 states: "And Alcimus died at that time in great anger," and *Antiquities of the Jews*, Book 12, 413, states: "And when Alcimus the High Priest wanted to destroy the wall of the Temple, which was ancient and had been built by the early prophets, the hand of God was suddenly upon him, and he collapsed silently to the ground. He died in torment a few days later, having officiated in the High Priesthood for four years."

13 bKidushin 81b.

> own life, even if [the repentance] is for a transgression that does not incur the punishment of death. For even if we say that he [R. Hiya b. Ashi] did actually perform an act [with the prostitute], in any case it is implied that she was only an unmarried prostitute. And certainly, according to the meaning in the Talmud, we can say that he did not actually perform any act. Even though the Talmud brings the *baraita* that states, "her husband has annulled them, and the Lord will forgive her" [as if to imply that he did in fact do something], nevertheless, his sin was reflecting on committing a transgression, and the meaning [of the *baraita*] that implies that he sinned [is that he only reflected on sinning], as I have explained.[14]

That is, in R. Jacob Reischer's opinion, one is permitted to take his own life by his own hand as an act of atonement even for a transgression that does not incur execution by the court, and even for merely reflecting on the transgression.[15]

Another case of one who took his own life for the purpose of atonement is found in the story of the suicide of the launderer, following the funeral of R. Judah the Prince [Rabbi], according to the land of Israel versions of the story (jKilayim 9:3 (32b); jKetubot 12:3 (35a); Ecclesiastes Rabbah 7:11 and 9:10). The following, for example, is how the story appears in jKilayim:

> R. Nahman in the name of R. Mena [said], "Miracles were performed on that day. It was Sabbath eve, and all of [the people of] the towns gathered to eulogize [Rabbi]. And they set down [his bier] eighteen times [for this purpose], and they took him down to Beit Shearim. And the day was suspended for them until everyone reached his home, filled up a jug of water and lit the [Sabbath] light. Once the sun set, the cock crowed [indicating that the next morning had already arrived]. The people began to be distressed [and] said, "Perhaps we have desecrated the Sabbath." A heavenly voice went out and said to them, "Whoever did not shirk from eulogizing Rabbi, let him be proclaimed for life in the world to come. Except for the launderer [who was absent when the eulogies were made]." Once [the launderer] heard this, he went up to the roof, threw himself off, and died. A heavenly voice went out and said, "Even the launderer [is proclaimed for life in the world to come]."[16]

14 *Iyun Yaakov* ad loc.

15 He states this explicitly in his *Responsa Shvut Yaakov* (Jerusalem: 1980), part 2, #111; see text at n. 71 below.

16 The launderer appears in the Talmud (bBrakhot 28a; bSanhedrin 38b; bBaba Metzia 83b; bBaba Batra 8a; bNedarim 41a; jBaba Kama 10:11 (7c); jBaba Metzia 2:5 (8c) re Abba Oshaia of Turiya) as a man of mystery, who excels in Torah study and is exceedingly God-fearing. He remembers and calls attention to forgotten matters pertaining to study of the Torah, and in

A miracle occurred, and the sun did not set, so that those who participated in Rabbi's funeral would not refrain from eulogizing him and would still be able to complete their Sabbath preparations before sundown and the onset of the Sabbath. After "the last one of them had done so, the sun set."[17] Then the cock crowed, indicating that the next morning had arrived, to make it understood that the sun's course had not changed, but that they had had light to enable them to eulogize Rabbi in a fitting manner. However, no miracle took place for the launderer, who did not participate in Rabbi's funeral, and he made his Sabbath preparations — "filled up a jug of water and lit the Sabbath light" — after the Sabbath had already begun. The launderer jumped off the roof and died in order to atone for the iniquity of desecrating the Sabbath, and in so doing, he too merited life in the world to come.

As mentioned above, the suicide committed by the launderer in order to atone for his sin is the version of the story appearing in sources from the land of Israel. But the version of the story in the Babylonian Talmud (bKetubot 103b) does not say that Rabbi's funeral took place on Friday, and the delay in the setting of the sun is, obviously, not mentioned. From the version in the Babylonian Talmud, it appears that the launderer jumped off the roof out of sorrow over Rabbi's death and anguish at not having participated in his funeral. As a result, he too was called (*mezuman*) to life in the world to come,[18] just as those who were present at the funeral had been deemed worthy of the world to

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some cases even surrenders his soul so as to carry out his appointed mission. He always remains on the sidelines, as one of the common people, concealing his wisdom and earning his living from manual labor, and not by taking advantage of his erudition in Torah study. It is possible that he purposely chooses labors that people look upon with contempt, as is stated in bKidushin 82a: "He whose business is with women has a bad character, e.g., . . . launderers. . . . Of these, neither a king nor a High Priest may be appointed. What is the reason? Not because they are unfit, but because their occupation is lowly." With regard to the character of the launderer, see also H.E Kolitz, *Rabbenu Hakadosh, The Antecedents of Rabbi Yehuda Hanasi, His Period and High Authority* (Hebrew), (Jerusalem: 1989), 150–52.

17 Ecclesiastes Rabbah 7:11.

18 *Tosafot* on bKetubot ad loc., s.v. *mezuman* states: "Whenever it is stated that a person is called (*mezuman*) to life in the world to come, it means without punishment and without suffering." With regard to this phrase, see also *Maharatz Chajes* (Zolkiew: 1849), Imrei Bina 6:6.

come.[19] However, some commentators interpreted the story as related in the Babylonian Talmud in terms of the version in the Jerusalem Talmud, asserting that the launderer indeed committed suicide to atone for desecration of the Sabbath. Thus, for example, *Shita Mekubetzet* states:

> It is now clear that the launderer committed suicide because he had desecrated the Sabbath and he had not participated in eulogizing Rabbi. Therefore he went up to the roof, fell into the water and died — that is, [he incurred] stoning, the penalty for desecrating the Sabbath. This I heard from R. Kalonymus, of blessed memory, in Jerusalem, may it be rebuilt and re-established.[20]

The Talmud brings two stories of suicide by Romans who wished to atone for their deeds and merit life in the world to come. The first story appears in bTaanit 29a:

> When Turnus Rufus the wicked destroyed the Temple,[21] R. Gamaliel was condemned to death. A high officer came and stood up in the study hall and called out, "The Nose-man is wanted, the Nose-man is wanted." When R. Gamaliel heard this he hid himself. Thereupon the officer went up to him secretly and said, "If I save you, will you bring me into the world to come?" He replied, "Yes." He then asked him, "Will you swear it unto me?" And the latter took an oath. The officer then mounted the roof and threw himself down and died. Now there was a tradition [among the Romans] that when a decree is made and one of their own [leaders] dies, then that decree is annulled. Thereupon a heavenly voice went out and said, "This high officer is called to life in the world to come (*mezuman lehayei haolam haba*)."

The Roman officer jumped off the roof and died in order to save R. Gamaliel, thus atoning for his sins and meriting life in the world to come. The second incident is found in bAvoda Zara 18a, which relates the following story regarding the burning of R. Hanina b. Teradion:

> They found R. Hanina b. Teradion sitting and occupying himself with the Torah, publicly gathering assemblies, and keeping a scroll of the law in his bosom. Straightaway they took hold of him, wrapped him in the scroll

19 See Maharsha ad loc., Hidushei Agadot, s.v. *kol dehavei*; glosses of Mahari Yaavetz ad loc.; *Responsa Shvut Yaakov*, n. 15 above; *Responsa Beit Efraim*, YD (Warsaw: 1884), Laws concerning Mourning #76.

20 On bKetubot ad loc., s.v. *biymama*. The same interpretation was given by the Maharit in his novellae on bKetubot ad loc., s.v. *hahu koves*.

21 In mss: "When Turnus Rufus the wicked destroyed the *ulam* [the hall leading to the interior of the Temple]."

> of the law, placed bundles of branches round him and set them on fire. They then brought tufts of wool, which they had soaked in water, and placed them over his heart, so that he should not expire quickly.... His disciples called out.... "Open then thy mouth so that the fire enter into thee." He replied, "Let He who gave me [my soul] take it away, but no one should injure himself." The executioner then said to him, "Rabbi, if I raise the flame and take away the tufts of wool from over thy heart, will you cause me to enter into the life to come?" "Yes," he replied. "Then swear unto me." He swore unto him. He thereupon raised the flame and removed the tufts of wool from over his heart, and his soul departed speedily. The executioner then jumped and threw himself into the fire. And a heavenly voice went out and said: R. Hanina b. Teradion and the Executioner have been called to life in the world to come. When Rabbi heard it he wept and said: "Some acquire eternal life in one hour, others after many years."[22]

Here, the executioner himself repented and jumped into the fire in order to atone for the murders he had committed, and together with his victim merited life in the world to come.

A further episode of a suicide-like act for purposes of atonement is found in bAvoda Zara 17a:

> Surely it has been taught: It was said of R. Eleazar b. Dordia[23] that he did not leave out any harlot in the world without coming to her. Once, on hearing that there was a certain harlot in one of the towns by the sea who accepted a purse of denarii for her hire, he took a purse of denarii and crossed seven rivers for her sake. As he was with her, she blew forth breath and [a heavenly voice] said: As this blown breath will not return to its place, so will Eleazar b. Dordia never be received in repentance. He thereupon went, sat between two hills and mountains and

22 See S. Lieberman, "On persecution of the Jewish religion" (Hebrew), in S. Lieberman (ed.), *Salo Wittmayer Baron Jubilee Volume on the Occasion of his Eightieth Birthday* (Jerusalem: 1974), Hebrew section, 218–22.

23 The printed editions read: "R. Eleazar b. Dordia." R. Nissim Gaon, in his work *Peirush Yafe Min Hayeshua*, Hirschberg edition (Jerusalem: 1954), 83, maintains that it is "Eleazar b. Dordia" without the title "Rabbi." It also appears without the title "Rabbi" in ms. Munich, *Agadot Hatalmud, Ein Yaakov* (see *Dikdukei Sofrim*, nn. 20–30), *Rabeinu Hananel*, L. Ginzberg, *Ginzei Schechter*, vol. 1 (Newark NJ: 1925), 201, and elsewhere. This version is logical, because Rabbi's cry of wonder at the end of the story, "Those who repent are not only accepted, but they are even called 'Rabbi'!" indicates that before he repented, Eleazar b. Dordia was not referred to by the title "Rabbi." See M. Beer, "On penance of penitents in the Rabbinic literature" (Hebrew), *Zion* 46 (1981), 163–64 and n. 18.

> exclaimed: "O, ye hills and mountains, plead for mercy for me!... Heaven and earth, plead ye for mercy for me!... Sun and moon, plead ye for mercy for me! Said they: How shall we pray for thee? We stand in need of it ourselves.... Said he: "The matter then depends upon me alone!" Having placed his head between his knees,[24] he wept aloud until his soul departed. Then a heavenly voice went out and said: "R. Eleazar b. Dordia is called to life in the world to come!"... Rabbi [on hearing of it] wept and said: "Some acquire eternal life after many years, others in one hour!" Rabbi also said: "Those who repent are not only accepted, but they are even called 'Rabbi'!"[25]

The rich, lecherous Eleazar b. Dordia wept aloud and begged for mercy for his sins until his soul departed. As a result, the title "Rabbi" was conferred on him, and he was called to life in the world to come.[26]

Based on the aggadic literature, it would appear that taking one's own life so as to atone for one's sins is desirable, and it is acceptable to Heaven. Conceivably, one could reject this position with the classic argument: "We are not to draw inferences from Aggada"[27]; "We do not rely on Agadda."[28] But even were it only a matter of interpreting the

24 This pose is also mentioned elsewhere in the Rabbinic literature. In bBerakhot 34b, it appears in the story of R. Hanina b. Dosa, who placed his head between his knees to beg mercy for the son of R. Yohanan b. Zakai; bNida 30b compares the fetus in the womb to "folded writing tablets... its head lies between its knees." Placing one's head between one's knees is an expression of "subjugation and humility, so that the prayer will be better received" (Ralbag, commentary on 1 Kings 18:42, which states that Elijah "crouched on the ground, and put his face between his knees"). See Beer, n. 23 above, n. 19. See also Y. Yinon (P. Fenton), "The head between the knees — a position of meditation" (Hebrew), *Daat*, 32/3 (1994), 19–30. In Yinon's opinion, placing the head between the knees is a mystical act that is frequently mentioned in kabbalistic works. It also became a common posture in Islam.

25 Spanish manuscript version, ed. and intro. Shraga Abramson (NY: 1957).

26 Rashi on bAvoda Zara 18b s.v. *ika* relates another case of suicide. Bruria, the wife of R. Meir, began to boast of her greatness in Torah and wisdom, and mocked the Rabbinic adage that "women are light-minded." R. Meir, for whom the words of the Rabbis were dearer than his body, his soul, and the souls of his family, asked one of his faithful disciples to entice her to sin. He entreated her at length until she finally succumbed to his advances, and he went and told his master. When this became known to her, she strangled herself. R. Meir, out of shame, ran away to Babylonia.

27 A.A. Harkavy, *Teshuvot Hageonim* (Berlin: 1887), #353.

28 B.M. Lewin, *Ozar Hageonim*, vol. 4, tractate Hagiga (Jerusalem: 1938), 60.

Aggada, this is not the prevailing approach in the rabbinical literature with respect to halakhic questions that arise out of the aggadic literature. As R. Haim Hezekiah Medini, author of *Sdei Hemed*, a halakhic authority in the land of Israel in the second half of the nineteenth century, wrote in this regard: "It is certainly incumbent upon us to understand their words wherever they are written, as they are holy."[29]

The contradiction between the inference to be drawn from the aggadic literature and the commonly accepted halakha that it is prohibited to take one's own life is dealt with by a number of decisors and commentators. They reject the license to commit suicide that is inferred from the aggadic stories, in favor of the established halakhic prohibition, arguing that the acts of suicide described in the aggadic literature were not the product of study of the law and punctiliousness in its observance, but rather, spontaneous responses to emotional distress, great sorrow, anguish, and panic. It thus cannot be inferred from these acts that it is permitted to take one's own life in order to atone for one's sins. Thus, for example, R. Samuel Jaffe Ashkenazi, a halakhic authority in Constantinople in the second half of the sixteenth century, asserted the following in his *Yefe Toar* commentary on Genesis Rabbah:

> It would appear that even one who is liable to incur [the punishment of] death is not permitted to take his own life, with no exceptions. "But for your own life-blood I will require a reckoning." And he should leave the matter in God's hands. Thus, so too, what is written in "Perek Hanose" [bKetubot 103b] about the launderer who jumped off the roof, and [what is written] about Eleazar b. Dordia who placed his head between his knees until his soul departed, which is adduced in the first chapter of tractate Avoda Zara — that they merited life in the world to come — these instances are not proof, because perhaps out of their great anguish over their sins they were not meticulous, or they did not know the law, and chose death over life. And they merited the world to come because of the intensity of their atonement, [despite] their error in taking their own lives.[30]

R. Samuel Jaffe Ashkenazi is of the opinion that one may not take his own life to atone for a sin, even if he sinned by committing a transgression incurring the punishment of death, because this too falls

29 *Sdei Hemed*, Peiat Hasade, Rules, "alef," sec. 150 (Lubavitch edition [Brooklyn: 1976], vol. 7, p. 3085).

30 *Yefe Toar* (Fuerth-Fiorda: 1692), on Genesis Rabbah ad loc.

under the prohibition of suicide, and is not exempt from the pentateuchal directive, "But for your own life-blood I will require a reckoning." In his opinion, one may not draw a conclusion from the suicides of Yakim of Tzrurot, the launderer and R. Eleazar b. Dordia, even though their repentance was accepted and they were called to life in the world to come.

A similar position is held by R. Ishmael Hakohen of Modena, who lived in the second half of the eighteenth century. He writes that one cannot adduce the case of the launderer as a proof-text for the permissibility of committing suicide in order to atone for sin.[31] The launderer desecrated the Sabbath unintentionally, and was not in any way liable to punishment by death, as the sun had not yet set and he did not know that the Sabbath had already begun. Thus, his suicide should not be regarded as a worthy act of atonement, but instead as an act performed out of anguish and not out of knowledge of the law. However, since his intentions were good, although the deed was not, he merited life in the world to come. Yakim of Tzrurot as well, out of his grief over his iniquities, was "not meticulous, or did not know the law," and imposed upon himself all four modes of execution by the court. But since his intentions were good, as he sought to repent, he merited the Garden of Eden. In R. Ishmael Hakohen's opinion, R. Hiya b. Ashi's desire to take his life by his own hand should be viewed in the same manner — viz., due to his panic and anguish over having engaged in sexual relations with a prostitute, he failed to be meticulous in observing the law, and sought to burn himself in the oven. For according to the law, he was not liable to be punished by death at all, as he had engaged in sexual relations with a prostitute (*kdeisha mufkeret*), not a married woman. R. Ishmael Hakohen argues that in spite of the profound importance of the precept of repentance, it does not override the prohibition against committing suicide, since a positive commandment does not override a negative injunction that carries the penalties of divine extirpation (*karet*) and death: "Accordingly, here too, the positive commandment to "return to the Lord your God" does not override the negative injunction of suicide, which is graver and carries the penalty of *karet*, as killing oneself is analogous to killing someone else, both of which we derive from the same verse: "But for your own life-blood…." (Gen. 9:5)."[32] In his opinion, one may not, if it endangers his life, inflict

31 *Responsa Zera Emet* (Livorno: 1776), vol. 1, #89.

32 This argument was also put forward by several later Ashkenazic authorities. R. Shimon Sidan, rabbi of Turnov, Bohemia and its environs

torture upon himself, or mortify his body for the purpose of atonement and repentance.[33] Consequently, in his responsum R. Ishmael Hakohen of Modena makes the following determination:

> And I say, the Almighty has forgiven you [for what you have written], because such a thing cannot exist among Israel, and the matter is clear. The *Yefe Toar* expressed it well, [saying] that certainly if someone asks a question in this regard, he must be told that if he commits such an act, he will incur the penalty of death. Also, R. Hanina b. Teradion in bAvoda Zara 18a stated, "let He who gave me [my soul] take it away, but no one should injure himself."

That is to say, one clearly may not take his own life in order to atone for his sins, "because such a thing cannot exist among Israel"; whoever does so incurs the penalty of death.

This severe halakhic attitude to those who commit suicide in order to atone for their sins is based on the fundamental assumption that the halakhic and the aggadic sources are separate realms. While one should indeed take the aggadic literature into consideration, and be able to interpret and comprehend it, halakhic decisions are to be made and grounded solely on the basis of halakhic sources, and not aggadic writings. This approach is already upheld by R. Zeira in the name of Samuel in jPeia 2.6: "Halakhic rulings are not generally to be derived from aggadic statements," and is repeated categorically by the Geonim of Babylon. Thus, for example, Rav Hai Gaon writes as follows:

> Be informed that the aggadic writings are not like traditional law, but rather, everyone expounds them as they see fit, [using locutions] such as

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in the 19th century makes this argument in *Shevet Shimon* (Vienna: 1884), Laws concerning Mourning, sec. 345; and see R.M.D. Vilner, "The rights and authority of the doctor" (Hebrew), in S. Yisraeli (ed.), *Hatora Vehamedina*, 7–8 (1956/1957), 320. More recently, the argument was made in a responsum by R. Ovadia Yosef, *Responsa Yabia Omer*, vol. 2 (Jerusalem: 1957), YD #24:8: "And in my humble opinion, the matter is truly surprising. How can one possibly observe the precept of repentance by means of such a grave transgression as murdering oneself? And the Sages have already said that 'One who takes his own life does not have a share in the world to come.' And there is an entire verse about this, "Say to them: As I live — declares the Lord God — it is not My desire that the wicked shall die, but that the wicked turn from his [evil] ways and live" (Ezek. 33:11)."

33 See also *Responsa Zera Emet* (Livorno: 1786), vol. 2, YD #142.

> "possibly," "maybe one can say." They are not unequivocal, and therefore one does not rely on them.... And these homiletical exegeses are not traditions and they are not even explanations of the law, but are mere tentative suggestions...because it is a rule that one does not rely on Aggada.[34]

This rule of the Babylonian Geonim was accepted by the halakhic authorities of Spain and by many others. But the fundamental significance of this approach — of not relying on Aggada — was not accepted by the early scholars of Ashkenaz:

> Not only do we not find this [attitude to Aggada] in their writings, we do not find that they made any use at all of [talmudic statements rejecting the Aggada], but instead we find that they actually do, in their halakhic deliberations, rely on the Aggada and on their own homiletical exegeses of biblical verses.[35] Sources of an aggadic nature, principally those found in the Babylonian Talmud, were perceived by them as an integral part of the

34 B.M. Lewin, *Otzar Hageonim*, Hagiga, 4 (Jerusalem: 1938), 59–60. See also A.A. Harkavy, *Teshuvot Hageonim* (Berlin: 1887), sec. 9 and sec. 353; *Sefer Haeshkol*, Albeck edition (Jerusalem: 1984), part 1, 158. See also the sources in the *Encyclopedia Talmudit* (Jerusalem: 1959), s.v. *halakha*, 252–53.

During the controversy over the writings of Maimonides around the year 1200, R. Aaron b. Meshulam of Provence wrote as follows to R. Meir Halevi Abulafia (the Rama): "Have you taken note of the learned scholars, heads of the community, chosen in the assembly, pillars and foundations of the Torah, R. Saadia Gaon and R. Hai Gaon of blessed memory, who spoke at length with regard to the resurrection of the dead and the world to come and the end of days? They said that one may not rely on or bring proof from any aggadic writings, or deduce anything from aggadic writings" (Kitab al-Rasa'il, *Sefer Igrot Harama*, J. Brill edition [Paris: 1871], 36). On the other hand, R. Samson b. Abraham of Sens wrote: "And it is unthinkable to say that the words [of the Aggada] should not be taken literally.... Certainly one may not add to the words of the Sages, nor subtract [from them]; the sayings of the wise are like goads, like nails fixed in prodding sticks" (*Sefer Igrot Harama*, 136). And see Berachyahu Lifshitz, "Aggadah and its role in the history of the Oral Law" (Hebrew), *Shenaton Hamishpat Haivri* 22 (2001–2003), 233–328.

35 On this point, see A. Grossman, *The Early Sages of Ashkenaz* (Hebrew), (Jerusalem: 1989), 429–32; idem, "Ties between Ashkenazic Jewry and the Jewry of Eretz Yisrael in the eleventh century" (Hebrew), *Shalem* 3 (1981), 70–73; I. Ta-Shma, "Early Franco-German ritual and custom" (Hebrew), *Sidra* 3 (1987), 85–161; H. Soloveitchik, "Religious law and change: the medieval Ashkenazic example," *AJS Review* 12 (1987), 205–21.

halakhic sources, and constituted an important frame of reference in the halakhic discourse of the scholars of Ashkenaz.[36]

The words of R. Joshua b. Levi in the aforementioned passage from jPeia, namely, "Scripture, the Mishnah, the Talmud and Aggada, and even that which an established scholar will in the future recite in the presence of his master, have the status of law transmitted to Moses at Sinai," left a deep impression on the Ashkenazic world.

Both early and later rabbinical scholars of Ashkenaz did rely on aggadic writings, and permitted the individual to take his own life as atonement for his sins, or at least excluded him from the category of one who commits suicide, for whom "nothing whatever is to be done," and so on. The author of *Noda Biyehuda*, R. Ezekiel Halevi Landau, a great decisor in Prague in the eighteenth century, indeed ruled that halakhic decisions were not generally to be derived from aggadic statements, even if the Talmud does not state the opposite.[37] However, there were many who disagreed with this view, as just noted, including the early scholars of Ashkenaz and other important early and later decisors,[38] as will be discussed below.

Aggadic sources apparently also served as the basis for acts of self-martyrdom during the persecutions of 1096. Various talmudic and midrashic sources clearly allude to the possibility that, during times of persecution, one might take his own life to save himself from forced apostasy or another grave transgression, within the context of upholding

36 A. Grossman, "The origins of *kidush hashem* in early Ashkenaz" (Hebrew), in I. Gafni and A. Ravitzky (eds.), *Sanctity of Life and Martyrdom* (Hebrew), (Jerusalem: 1993), 107.

37 *Responsa Noda Biyehuda*, 2nd ed. (Jerusalem: 1969), YD 161, HM 14: "My mind is not at ease with such rulings, whereby a halakhic ruling is derived from aggadic writings." In his *Responsa Zekher Yeshayahu* (Vilna: 1882), #17, R. Z.I. Jolles writes "We do not draw analogies from aggadic writings, as was written by my elder, the Noda Biyehuda, in *Noda Biyehuda*, 2nd ed., YD 161." And see *Sdei Hemed* (n. 29 above).

38 See Rabbenu Tam, *Sefer Hayashar* (Helek Hateshuvot), sec. 619; *Piskei Harosh Lemasekhet Nedarim*, ch. 9, sec. 2: "And Pharaoh said to Joseph, go and annul your vow…and were it not regarded as halakha, it would not be written in the Talmud"; *Sdei Hemed*, Kuntres Haklalim, "alef," sec. 95–96 (Lubavitch edition, vol. 1, p. 41); Peiat Hasade, Rules, "alef," sec. 39 (Lubavitch edition, vol. 7, p. 2957). See also *Encyclopedia Talmudit*, n. 34 above.

the precept of *kidush hashem* — sanctification of God's name. In their attempts to explain the sacrifices made by their earliest predecessors and by members of their own generation, the Tosafists and their students found it necessary to turn to sources considered primarily aggadic, as there were no halakhic sources for the conduct in question.[39] First

39 In view of this, H. Soloveitchik, in his study of the Tosafists' perception and development of the halakha (n. 35 above), writes that the Tosafists were aware that there was no halakhic justification or basis for the acts of martyrdom of their predecessors, the martyrs of 1096. According to the principles and rules of talmudic law, taking a life in general, and another person's life in particular, is an act of murder, even in situations where the "*yehareg veal yaavor*" principle applies (i.e., even as regards precepts not to be transgressed even on pain of death), and the concern that one might be unable to withstand the test and maintain his convictions changes nothing. On the other hand, the willingness of the Jews of early Ashkenaz to take their lives without hesitation or misgivings, and their instinctive feeling, despite being well-versed in the said halakhic principles, that they were carrying out an absolute religious obligation to their God, calls for an explanation. In Soloveitchik's opinion, "law and logic led men to an emotionally intolerable conclusion, one which denied their deepest feelings and, more significantly, their deepest religious intuitions, and so the law was reinterpreted." Thus, in the generations after these deeds were committed, the Tosafists were plagued by the knowledge that according to the law, both those who took their own lives, and those who took the lives of their children, not only could not be referred to as "*kedoshim*" — holy ones, but it was doubtful whether they could even be buried in the main section of a cemetery, rather than at the far end, by the fence or beyond.

"Such a conclusion," Soloveitchik therefore asserts, "needless to say, was an emotional impossibility, and we need not be surprised if the Franco-German community evolved, in the course of time, a doctrine of the permissibility of voluntary martyrdom, and even one allowing suicide. They did this by scrounging all the canonized and semi-canonized literature for supportive tales and hortatory aggadah, all of dubious legal worth. But by massing them together, Ashkenazic scholars produced, with a few deft twists, a tenable, if not quite persuasive, case for the permissibility of suicide in times of religious persecution." (n. 35 above, 209–10)

Abraham Grossman (n. 36 above, 107–19) disputes this analysis of these acts of martyrdom; see too Grossman, "The cultural and social background of Jewish martyrdom in 1096" (Hebrew), in Y.T Assis et al. (eds.), *Facing the Cross, the Persecutions of 1096 in History and Historiography* (Hebrew), (Jerusalem: 2000), 65–71. He claims that in early Ashkenaz the aggadic literature was accorded considerable importance, being studied in the academies, and viewed by the rabbinical authorities as a sacred and binding halakhic source like any other; it had, he argues, "a profound effect on the shaping of their conceptual world." Therefore, "the acts of suicide committed in the Jewish communities of Ashkenaz in 1096 should

and foremost, they cite the exegesis found in Bereshit Rabbah 34:19,[40] where alongside the exegesis about the prohibition against committing suicide, we find Saul's plan to kill himself definitively excluded from this prohibition. To this they added various cases cited

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not be described as being at odds with the halakha, but rather as acts securely anchored in the spiritual and intellectual world of early Ashkenazic Jewry, including its halakhic sources, and its methods of studying the available sources and traditions." Grossman further argues that the Tosafists would not have turned to aggadic sources to explain the acts of sacrifice of their early predecessors "had they not known and believed that these sources constituted parallel and legitimate material for halakhic decision-making in Ashkenaz. Among those who definitively found [in these sources] permission for the acts of those martyrs was Rabbenu Tam. It is highly doubtful that a sage of the stature of Rabbenu Tam would have granted such permission simply on the basis of the imperative of not casting aspersions on the positions espoused by scholars who had preceded him. Had he harbored any doubts as to their halakhic permissibility, it can be assumed that he would have opposed them openly, for otherwise he would be responsible for causing future generations to commit a heinous sin. This assessment is consonant with his personality and his character traits, as manifested in many and varied sources." Rabbenu Tam never hesitated to fiercely attack customs that he perceived as erroneous. Thus, for example, the following statement is made in the name of Rabbenu Tam: "You wrote that the custom should not be changed because of slander [i.e., so as not to cast aspersions on the deeds and customs of former generations]. This custom would be preemptive purgatory, for if fools practiced this custom, scholars did not, and even a worthy custom does not override halakha, unless the halakha is flimsy." (*Responsa of the Tosaphists* (Hebrew), I. Agus edition [NY: 1954], #11, p. 58)

Israel M. Ta-Shma ("The attitude of medieval German halakhists to aggadic sources: suicide and the killing of others as *kidush hashem*" (Hebrew), in Assis et al., 151–52), discusses the different approaches of Soloveitchik and Grossman, and states:

> Both approaches…recognize the fact that the corpus of aggadic writings and the tales in the Rabbinic literature serve as the underlying basis for recognition of the religious validity of these acts. However, Soloveitchik is of the opinion that this corpus is of dubious legal worth; used solely for manipulation; unconvincing; and unable to confer upon these acts halakhic recognition except after the fact, and only in practice (*lemaase*). Grossman, on the other hand, is of the opinion that this corpus serves as a straightforward, authoritative, and fully valid source conferring on all the acts described above halakhic recognition, inasmuch as they reflect a consummate positive precept, rendering them an a priori obligation; [in this context] there is no difference between suicide and the killing of women and children or any other persons under similar circumstances.

in the Talmud which clearly imply that one is permitted to take his life by his own hand to be saved from a grave transgression. The most famous is that related in bGitin 57b about the four hundred boys and girls who jumped into the sea to save themselves from grave transgression, and thereby merited life in the world to come based on exegesis of the verse, "The Lord said, 'I will retrieve from Bashan, I will retrieve from the depths of the sea' " (Psalms 68:23):

> "I will retrieve from Bashan" — from between the lion's teeth [Bashan is a contraction of the Hebrew words *ben* (between) and *shen* (tooth)]. "I will retrieve from the depths of the sea" — [refers to] those who drown in the sea. Of them it is said, "It is for Your sake that we are slain all day long, that we are regarded as sheep to be slaughtered" (Psalms 44:23).

Another case, also found in bGitin 57b, known as "the woman and her seven sons," describes a woman's suicide coupled with the martyrdom of her sons. It is regarded as a commendable act that is also pleasing to the Almighty, as inferred from the heavenly voice that proclaims "the mother of the sons rejoices (*eim habanim smeiha*)" (Psalms 113:9).

> However, a much more important and fundamental difference between the two positions is how the foundations of the Tosafists' conceptual approach to the question of martyrdom are to be understood. In Soloveitchik's opinion, the Tosafists viewed these acts as contrary to basic halakhic principles, and their acquiescence in these acts derived from their deep identification with their forbears and their view of the earlier generation as an exemplary God-fearing, holy and pure community. Had they not known that the preceding generations had in fact really committed such acts, it would never have occurred to them to permit such a course of action. Grossman, however, is of the opinion that there is no connection between the position of the Tosafists and their own self-image or that of their predecessors. (Parenthetically, it should be noted that in many instances the Tosafists denounced the positions of their predecessors, e.g., the famous words of Rabbenu Tam regarding Rashi's permitting an adhesion to the lobe of the lung: "Whosoever permits [this] errs, and is feeding [the people of] Israel non-kosher food"). In Grossman's opinion, the Tosafists' position stems from a straightforward reading of the aggadic sources in the Talmud and their perception of these sources as being the equivalent of halakhic sources, as neither they nor their martyred predecessors differentiated between the two.
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> See also N. Gutel, "Halakhic and meta-halakhic considerations in the rulings of R. Kook" (Hebrew), (PhD dissertation, Hebrew University of Jerusalem, 2001), 271–76.

40 Theodor-Albeck edition, p. 324.

These sources were available to chroniclers and composers of liturgical hymns (*piyutim*), who also invoke the verses adduced in these sources.[41]

The taking of one's own life to atone for one's sins appears to be linked to acts of self-martyrdom. For just as it is permissible for one to take his life by his own hand, and even to slay the members of his family, in order to prevent forced conversion or being forced to commit another grave transgression, so it is permissible for him to take his own life to atone for a grave transgression already committed. Among the acts of martyrdom described in the *Solomon Bar Simson Chronicle* of the persecutions of 1096, there is the terrible and shocking story of the torments and struggles of a Jew who had become an apostate during the persecutions in Mainz in 1096 and then repented his deed. Isaac, son of David, the communal leader (*parnas*), converted involuntarily in order to save his children. This act, which took place at a time when many Jews were being martyred, led him to despair. His response reflects both newfound religious zeal and profound guilt feelings that he had remained alive. The account reads as follows:

> On the fifth day of the month of Sivan, on the Eve of Shavuot, the two pious ones, Isaac the righteous one, son of R. David the *parnas*, and Uri, son of R. Joseph, acknowledged their Creator and greatly sanctified the Name of their Maker. For on the third day, when the entire community had been wiped out, on that day these two pious men had been saved by being consigned to purgatory, and the enemy had defiled [baptized] them against their will. They therefore accepted upon themselves a fearful death not recorded in any of the admonitions. . . . Thought [Isaac the son of R. David the *parnas*]: "I will repent and be whole of heart with the Lord, God of Israel, until I surrender my soul to Him and fall into His hand. Perhaps He will deal graciously with me so that I may yet be reunited with my companions, and be admitted to their company in the realm of the Great Light. It is revealed and known to He who scrutinizes human hearts that I acquiesced to the enemy's demand only in order to save my children from the sons of iniquity, that they should not be raised in their errant ways, for they are young and cannot distinguish between good and evil."[42]

41 See, for example, *Sefer Hakabala Leavraham ibn Daud Halevi*, G.D. Cohen edition [*Sefer haQabbalah; The Book of Tradition*], (Philadelphia: 1967), 46; A.M. Haberman (ed.), *The Book of the Persecutions of Ashkenaz and Germany* (Hebrew), (Jerusalem: 1945), 34, 56, 78, 102; *Seder Kinot Letisha Beav Keminhag Polin* . . . , E.D. Goldschmidt edition (Jerusalem: 1977), 107.

42 Haberman 1945, n. 41 above, 36–37.

Committed to removing the stigma that he had brought upon himself, Isaac the son of R. David took action:

> He went to his father's house and hired laborers to repair the doors of the house, which had been smashed by the enemy. On the fifth day of Sivan, the eve of Shavuot, when they had finished restoring the doors, he came to his mother and related his intentions to her. He exclaimed to her: "Woe to my mother, to my lady! I have decided to bring a sin-offering to the God of Heaven, so that I may thus find atonement." The mother, upon hearing the words of her God-fearing son, adjured him not to do this thing, for she overflowed with compassion for him, he being the sole survivor of all her loved ones. His saintly wife, Mistress Skolester, had been slain — she was a daughter of Samuel the Great. The mother herself was bedridden because the enemy had inflicted many wounds on her. This son of hers, Isaac, had saved her from death without her having to defile herself, though he himself had been sullied. Isaac the pious, her son, did not understand his mother's pleas and did not listen to her.[43]

His mother's entreaties fell on deaf ears. Isaac, father of two youngsters, scion of a distinguished family, who had lost a saintly wife, made ready to perform his act of atonement on the eve of Shavuot, in the form of a sin-offering: slaughtering an offering, sprinkling its blood, and completely burning its flesh. On the holiday that celebrates the giving of the Torah, Isaac, with all his heart and all his soul, expressed his profound commitment to the Torah that commands one not to convert:

> He came and closed the doors of the house upon himself and his children and his mother from all sides. The pious one then asked his children: "Do you wish to offer yourselves as a sacrifice to our God?" They replied, "Do as you will with us." The righteous one responded and said: "My children, my children, our God is the true God — there is none other." Isaac the righteous one took his two children, his son and his daughter, and led them through the courtyard at midnight and brought them to the synagogue, before the Holy Ark, and there he slaughtered them, in sanctification of the Great Name, to the sublime and lofty God, who commanded us not to leave His pure religion, and to cleave to His holy Torah with all our heart and all our soul. He sprinkled some of their blood on the pillars of the Holy Ark, so as to evoke their memory before the One-and-Only Everlasting King and before the throne of His Glory. He said: "May this blood serve me as atonement for all my sins." The pious one now returned through the courtyard to his father's house and set the house aflame at its four corners, and his mother, who had remained in the house, was

43 Ibid., 37.

> consumed by the fire so as to sanctify the Divine Name. The pious Isaac returned a second time to the synagogue to set it aflame. He kindled the fire at all the doors. The pious one went from corner to corner with his hands spread Heavenward, to his Father in Heaven. He prayed to the Lord from the midst of the flames in a loud and sweet voice. The enemy called out to him through the windows: "Wicked man! Escape the flame! You can still save yourself." They extended to him a pole with which to draw him out of the flames, but the righteous one did not want to grasp it. The blameless, upright, God-fearing man was there consumed by the flames. And his soul is hidden in the portion of the righteous in the Garden of Eden.[44]

The act of atonement of Isaac son of R. David the *parnas* — the slaying of his children, the burning of his father's house and the burning of his mother, the burning of the synagogue and of himself — was painted by the chroniclers in a positive light: the individual who carried out these acts is referred to as "pious," "righteous" and a "blameless, upright, God-fearing man." In other words, this course of action — self-immolation as a sin-offering to God — is depicted as the proper way to atone for a grievous transgression.

The *Solomon Bar Simson Chronicle* relates another incident where someone took his own life to atone for transgressions:

> On the third day [of Tammuz], the enemies of the Lord came to the village of Neuss. . . . There was another pious man there by the name of R. Isaac the Levite. And he was subjected to terrible torture. Seeing him in such pain, they defiled him against his will, for he was utterly insensible as a result of their beatings. And when he regained consciousness, he returned three days later to Cologne. And he entered his house, paused there a while — just an hour — and then went to the Rhine River and drowned himself. Of him and the likes of him is it said: "I will retrieve from Bashan, I will retrieve from the depths of the sea." He floated on the water as far as the village of Neuss, and there the water cast him ashore.[45]

R. Isaac the Levite was baptized against his will, "for he was utterly insensible as a result of their beatings." When, three days later, he understood what had transpired, he returned to his home in Cologne, paused there a while, went to the Rhine River, and drowned himself in the river. Perhaps his intention was to have the waters erase the remembrance of the water that had turned him into a Christian. The body of R. Isaac the Levite floated in the Rhine River until it was cast ashore at the village of Neuss alongside the body of R. Samuel son of

44 Haberman 1945, n. 41 above, 37–38.
45 Ibid., 44.

R. Asher, termed "the pious one," who had been killed on the riverbank along with his two sons. The story ends with the words, "and the two pious ones who served God were buried on the bank of the river, together in the sand in one grave. They sanctified the Name of Heaven for all to behold."[46]

The "prescriptions for repentance and atonement" that were common in the writings of the sages of Ashkenaz, in particular, writings by students of R. Judah Hasid and R. Eleazar of Worms, furnish further evidence of the pronounced impact of the aggadic literature on the sanctioning of torture and self-affliction for purposes of atonement and repentance.[47] These "prescriptions" put considerable stress on mortification of the body, the degree of torture being based on "*teshuvat hamishkal*" — commensurate repentance — that is, repentance commensurate with the pleasure gained from the sin, and "*teshuvat hakatuv*" — repentance commensurate with the punishment for that transgression set down in the Bible. The prescribed acts of self-reform, repentance and atonement for very grave transgressions, such as adultery and murder, involved severe mortification of the body by undergoing a series of such harsh practices as rolling oneself in the snow, covering oneself with honey and sitting in a place swarming with bees, and so on.[48] Thus, for example, in his *Sefer Harokeiah*,[49] R. Eleazar of Worms, one of the great scholars of Ashkenaz in the late twelfth century and early thirteenth, and one of the foremost Hasidei Ashkenaz, pietists of Franco-Germany, gives the following repentance prescription for one who has committed adultery, that is, had relations with a married woman:

> "*Teshuvat hakatuv*" — a person who has engaged in sexual relations with a married woman, for which [the Bible imposes] the death penalty, should suffer sorrow as great as death. He should sit in ice or snow for an hour

46 See S. Goldin, *The Ways of Jewish Martyrdom* (Hebrew), (Lod, Israel: 2002), 126–27.

47 In addition to the cases from the aggadic literature presented above, there are additional examples in the Talmud and the Midrash of those who wished terrible suffering upon themselves so as to atone for their misdeeds. These include Nahum Ish Gamzo (bTaanit 21a) and R. Eleazar b. R. Shimon (bBaba Metzia 84b), among others.

48 See J. Elbaum, *Repentance and Self-Flagellation in the Writings of the Sages of Germany and Poland 1348–1648* (Hebrew), (Jerusalem: 1993), 11–17; Ta-Shma 2000, n. 39 above, 152–53.

49 *Sefer Harokeiah Hagadol*, B.S. Shneurson edition (Jerusalem: 1967), 27.

> each day, once or twice. In the hot weather he should sit beside flies or ants or bees, or suffer similar torture as harsh for him as death.[50]

One could perhaps argue that R. Eleazar of Worms recommended these forms of bodily torture only if they did not endanger the sinner's life.[51] However, R. Judah the Pious, R. Eleazar of Worms' teacher, had explicitly stated that this method of atonement should be undertaken even if it might lead to the sinner's death. A responsum by R. Judah the Pious that appears in a number of manuscripts gives the following prescription for repentance for one who has engaged in sexual relations with a Gentile woman:

> And should he sin a second time with a Gentile woman, one may not be lenient with him as [was the case] the first time. If [his penance is undertaken] in summer, he should go to a place crawling with ants, and sit there naked. If [his penance is undertaken] in winter, he should chop a hole in the ice and stay immersed in the water up to his nose. And if he reverts to his evil ways a third time and repents, then the rabbinical scholar should say to him — there is no atonement for you, save that imposed on one who commits adultery. He must go to a place swarming with bees, and they shall eat his flesh. And should he die from these afflictions, how blessed he is, and so too, should he recover and not revert to his evil ways, how blessed he is.

Elsewhere the manuscripts contain a further prescription for repentance:

> If he has committed serious transgressions that incur the punishment of death — for example, if he has sinned with a married woman, making her forbidden to her husband, or had sexual relations with an engaged maiden, or raped the wife of a Kohen, or committed murder — and afterwards he feels remorse, and out of concern about the sins he has sinned, slays himself as repentance, for [the sake of] his Creator, how happy he is, and how good his lot. And he shall merit being in the presence of the righteous and the pious.

50 Also in *Sefer Hasidim*, Wistinetsky edition (Frankfurt am Main: 1924), sec. 19.

51 *Responsa Zera Emet*, n. 31 above, #89 states: "the practice of self-mortification by the repentant with '*teshuvat hamishkal*' and '*teshuvat hakatuv*' is not in the nature of an obligation, but only a good suggestion. . . . It applies only to the case of a person who is capable of bearing it, and not if it leads to mortal danger for the person performing these acts of mortification, which are for the purpose of repentance according to that person's nature. For if there is a danger, then he incurs the death penalty if he acts thus, as it is then a case of taking one's own life." And see the discussion in the text at n. 33 above.

The following is also found in the responsa of R. Judah the Pious with regard to repentance:

> Question: If someone takes his own life because of his sins, has he transgressed [the prohibition derived from] "But for your own life-blood I will require a reckoning" (Gen. 9:5)?
> Reply: It is good for one to take his own life because of his sins, as we have seen with regard to Eleazer b. Dordia, who took his own life because of his sins, and a heavenly voice went out and proclaimed: Happy are you, and so on. We have also seen in Genesis Rabbah that the nephew of R. Yose b. Yoezer imposed upon himself many forms of death, and this was regarded as being a credit to him. And with regard to a certain apostate — he sinned by means of water, and therefore drowned himself in water to atone for it.[52]

These responsa written by R. Judah the Pious are unequivocal, and assert that "how good is his lot" and "it is good" apply to one who tortures himself to death to atone for his sins, and that in doing so he has not transgressed the prohibition against suicide. Yet clearly, the prohibition against inflicting harm, either on oneself or on someone else, is a grave biblical prohibition; how much more so is this the case with respect to serious bodily harm that puts one in real mortal danger. Just as one is forbidden to take his own life, so he is forbidden to knowingly endanger his life. R. Judah the Pious regards this as a grave prohibition, as stated in *Sefer Hasidim*:

> "But for your own life-blood I will require a reckoning." Should one die while sinning, or involve himself in a brawl that ends in his being killed, he will have to account for the fact that he caused his own death. And if he walked in a dangerous place, such as on ice, and fell in and died, or in a dilapidated ruin, or if he quarrels with someone who is violent or a murderer, and angers him, or he insults him and angers him — all these will have to account for bringing about their own deaths. One who quarrels with someone [evil] whose hour is propitious [i.e., for whom things are going well], or quarrels with a sorcerer or sorceress . . . or if those who are few in number fight with those who are stronger and outnumber them, Scripture teaches us: "But for your own life-blood I will require a reckoning."

52 In both Elbaum, n. 48 above, 14, n. 13, and S. Spitzer, "Responsa of R. Judah the Pious on matters of repentance" (Hebrew), in Y. Buksbaum (ed.), *Memorial Volume for R. Samuel Baruch Verner* (Hebrew), (Jerusalem: 2002), 200–02; and "Responsa on prescriptions for repentance" (Hebrew), in S.A. Stern (ed.), *Sefer Meorot Harishonim* (Jerusalem: 2002), vol. 1, 100.

R. Judah the Pious further writes: "One who is attacked by violent men and robbers who wish to steal his money. If he is able to escape, and knows for certain that he is not capable of fighting them, and says, since they are taking my money, why should I continue living? Or if the blood-avenger runs after a murderer who is stronger than he, and [the blood-avenger] is killed — they transgress [the prohibition derived from the verse], "But for your own life-blood I will require a reckoning." The same applies to one who enters his burning home to save his money and the fire is blazing."[53] R. Judah the Pious also states:

> If one journeys afar to learn, and the journey is dangerous because of the many highwaymen along the way, and they rob or kill or capture or torture him until the communities ransom him, about this it is written, "Sometimes a good man perishes in spite of his goodness" (Eccl. 7:15). He should have waited a while, until the danger was over, and not caused himself to be killed.... One may not say in a place of danger that "those sent on pious missions will meet no evil," because this rule does not apply in a place of danger. About this it is written, "It is time to act for the Lord, for they have violated Your teaching" (Psalms 119:126). We see from these writings that one who endangers himself will have to account for his deeds, because he caused his own death, and transgressed the prohibition against suicide — "But for your own life-blood I will require a reckoning." However, if he tortures himself and endangers his life in order to atone for his sins, not only does he not transgress the prohibition against suicide, but "how good is his lot."[54]

According to Baer, the prescriptions for repentance, which were not uncommon in the pietistic circles of Ashkenaz, "are not ancient tradition given at Sinai, nor talmudic halakha, but an innovation which the Jews adopted as a result of Christian influence."[55] The question then arises of how an outstanding halakhist of the stature of R. Eleazar of Worms could prescribe harsh acts of self-affliction that might lead to death. And how could his teacher, "the great R. Judah the Pious" teach that "it is good for one to take his own life because of his sins" and that "this was regarded as being a credit to him"? The halakha maintains

53 *Seder Hasidim*, sec. 165.

54 Ibid., sec. 771.

55 I. Baer, "The sociolinguistic orientation of *Sefer Hasidim*" (Hebrew), *Zion* 3 (1938), 18–20, trans. in *Binah* 2 (1989); see also Y.A. Dinari, *The Rabbis of Germany and Austria at the Close of the Middle Ages, Their Conceptions and Halacha-Writings* (Hebrew), (Jerusalem: 1984), 86, n. 73; E.E. Urbach, *The Tosafists* (Hebrew), (Jerusalem: 1986), 393–94; H. Soloveitchik, "Three themes in the *Sefer Hasidim*," *AJS Review* 1 (1976), 320, near n. 25.

that life has supreme value and is in no way optional. It is a well-known halakhic principle that "one is more stringent in matters involving danger than in matters involving prohibitions." Yet as we saw, the author of *Sefer Harokeiah* and his teacher, R. Judah the Pious, called, in their prescriptions for repentance, for the aforementioned harsh measures to be applied whenever appropriate, deeming such penitence a fundamental religious requirement made of all Jews. How do we reconcile these facts? Could the stance of R. Eleazar, the author of *Sefer Harokeiah*, be attributed to his having observed and adopted these measures from his Christian surroundings? There is no question that a deep impression was made on the early Ashkenazic authorities by the aggadic passages in the Talmud and the Midrash recounting acts committed in the said spirit, and that they inferred from these passages that, under certain circumstances, self-mortification of the body that could lead to death is not only permissible, but even desirable and commendable before Heaven.

The somewhat later *Pirkei Rabbi Eliezer* and *Seder Eliyahu Rabbah* are replete with recommendations for mortification and harsh self-affliction for the penitent. Thus, for example, we find the following in *Pirkei Rabbi Eliezer*, ch. 20, with regard to Adam:

> On the first day, Adam entered the waters of the Upper Gihon until the waters reached up to his neck, and he fasted seven weeks of days until his body became like a sieve. Adam said before the Holy One, blessed be He: Sovereign of all worlds! Remove, I pray Thee, my sins from me and accept my repentance, and all generations will learn that repentance is a reality and that Thou dost accept the repentance of the penitent. What did the Holy One, blessed be He, do? He put forth His right hand, and accepted his repentance, and took away from him his sin.[56]

These later Midrashim, as well, were regarded in Ashkenaz as an integral part of the corpus of midrashic writings, and served to reinforce Ashkenazic approval of such acts of atonement.[57] It thus may well be the case that self-punishment to the point of death is another example of an early tradition from the land of Israel that had a significant influence on Ashkenazic customs.[58] The great veneration with

56 Cf. bEruvin 18b; bAvoda Zara 8a; Books of Adam and Eve, Apocrypha and Pseudepigrapha, A. Kahana edition, vol. 1 (Jerusalem: 1971), 8:2–9:3, 6–7. See M. Beer, n. 23 above, 159–81.

57 Ta-Shma 2000, n. 39 above.

58 See Grossman 1981, n. 35 above, 57–92 and earlier references there; Ta-Shma's review of Grossman's *The Early Sages of Ashkenaz* (Hebrew),

which such acts are regarded in the aggadic literature was the direct source that led the aforementioned rabbinical authorities of Ashkenaz to view these practices as authentic and halakhically-endorsed conduct. When acts of this type gained currency and came to be commonplace in the surrounding Christian society, the pietists and great scholars of Ashkenaz drew an a fortiori inference (*kal vahomer*). Because they made no distinction whatsoever between the classic halakhic sources and explicit aggadic sources that attested to norms approved by the Sages, they took the aggadic recommendation and applied it in practice in the context of their own society. The laws of repentance found in *Sefer Harokeiah* and *Sefer Hasidim*, as well as in the responsa based on these works, which were written in the same spirit, found their way into the corpus of halakhic literature of later generations.[59]

There is a further case, in which R. Judah the Pious instructs his students to proceed to a place of danger, where they risked death, in order to atone for their sins. It is alluded to in the work *Sefer Mitzvot Katan* by R. Isaac of Corbeil: "The episode of the disciples who went to a wedding, pronounced the Divine Name and were saved from murderers. He enjoined them to return and they were slain."[60]

Kiryat Sefer 56 (Hebrew), (1981), 344–52; Ta-Shma, *Early Franco-German Ritual and Custom* (Hebrew), (Jerusalem: 1992), index, 355, s.v. *eretz yisrael, hashpaata al minhag ashkenaz*; R. Bonfil, "Between Eretz Israel and Babylonia"(Hebrew), *Shalem* 5 (1987), 1–30; A. Grossman, "When did the hegemony of Eretz Israel cease in Italy?" (Hebrew), in E. Fleischer et al. (eds), *Masat Moshe: Studies in Jewish and Islamic Culture Presented to Moshe Gil* (Hebrew), (Tel Aviv: 1998), 143–57.

59 See *Responsa Mahari Bruna*, M. Hershler edition (Jerusalem: 1960), #226, 266; S. Spitzer, "Genuzot," *Moriah* 9: 7–8 (1980), 3 (a responsum by Mahari Bruna); *Responsa Maharam Mintz*, J.S. Domb edition (Jerusalem: 1992), #25, 75, 79, 93; *Responsa Mahari Weil*, J.S. Domb edition, #12, 123, 147; *Responsa Terumat Hadeshen*, S. Avitan edition (Jerusalem: 1991), #198, Pesakim Ukhtavim, #55, 60–62; *Responsa Maharshal* (Lublin: 1575), #28; *Responsa Rema*, A. Ziv edition (Jerusalem: 1972), #37; *Responsa Manhir Einei Hakhamim Lamaharam Milublin* (Venice: 1618), #43–45; *Responsa Masat Binyamin Lerabi Binyamin Aharon Solnik* (Cracow: 1633), #26; *Responsa Yefe Nof Lerabi Yitzhak Mazya*, A. Berger edition (Jerusalem: 1986), OH #110; *Vayehal Moshe Lerabi Yehuda Aharon Moshe Altschuler* (Prague: 1613), part 2, Torat Haasham, #394, #433 and others. See Dinari 1984, n. 55 above, 86–92; Elbaum, n. 48 above, 18–88.

60 Commandment 3, *Sefer Mitzvot Katan of Zurich*, Har-Shoshanim edition (Jerusalem: 1981), 51.

R. Judah the Pious's students were on their way to a wedding and were confronted by murderers. They overcame the murderers by pronouncing the Divine Name. R. Judah the Pious enjoined them to atone for their sins and return to the place of their encounter with the murderers, without again mentioning the Divine Name. His students did as he instructed, and were slain by the murderers. The sin for which the students were to atone is not explicitly identified. Some commentators wrote that they were regarded as tantamount to murderers since, by eluding the murderers initially, they were in effect responsible for the slaying of other Jews:

> Whoever wished to attend the wedding had to pass through a certain town, and all [Jews] who went there were killed. And they came to the town and were not killed because they pronounced the Divine Name. Other Jews saw that they were saved, and thought that the evil decree had surely been rescinded. They too went there, but were slain. That is why they were regarded as murderers.[61]

R. Zemah b. Solomon Duran had a different understanding:

> And my teachers from France, of blessed memory, have already written that they had to pass through a dangerous place, and he [R. Judah the Pious] warned them not to go there. They did not heed him, and were attacked by highwaymen, and were saved by uttering the Divine Name. He told them that if they did not return to that very same dangerous place, without pronouncing the Divine Name, they would have no share in the world to come. They returned there and were slain, as they did not wish to utter the Divine Name. [end of indirect quote] And this was because of the law of "one who utters the Divine Name according to its letters," mentioned in "Perek Helek."

In the opinion of R. Zemah b. Solomon Duran, the sin of R. Judah the Pious's students was their uttering of the Divine Name. In so doing, they transgressed the words of the Mishnah in "Perek Helek," the chapter stating that all Israel have a portion (*helek*) in the world to come. It asserts that among those who have "no share in the world to come" is "one who utters the Divine Name according to its letters."[62]

Whatever the sin of R. Judah the Pious's students, their teacher demanded that they return to the dangerous place and thereby atone for it. They did so, and were murdered by highwaymen, thereby atoning for their sin. Now they did not, indeed, actually take their own

61 Ibid., sec. 6.
62 mSanhedrin 10:1.

lives, but the very act of going to a place fraught with danger, where one was at risk of being murdered by highwaymen, would in itself be considered a grave transgression. However, in this particular case, in returning to the dangerous place they were complying with the demand of their teacher, R. Judah the Pious, and they returned to the dangerous place and were killed by the highwaymen to atone for their sin.

An interesting testimony regarding self-inflicted punishment for a serious sin was preserved in the story of the tragic deed of R. Yom Tov, the son of R. Moses "Abir Haolam" [the Noble], head of the yeshiva in London, and the leading rabbinic authority in late twelfth-century England[63]:

> The story, which takes place in England, is of a learned and very wealthy scholar by the name of R. Yom Tov, of blessed memory, who was studying in a yeshiva. On the eve of Shavuot, he took his belt and hung himself. His father, R. Moses the Pious, did not shed a tear, and studied in his study hall as if nothing bad had befallen him, because he said that his son had inflicted injury on himself. . . . The body was dealt with by servants and by foolish and unfeeling people, and we did not touch it. Only a few scholars carried his coffin together with the servants, and placed it on a wagon [going] to a burial ground in the realm of London. And the rabbi and the entire yeshiva walked behind the coffin. That same night, he came to me in a dream, and I saw him to be much more beautiful than he had been in life. And it also appeared to many others during that night that he had arrived at the Great Light, and he was certain that he would be immediately welcomed into that [Heavenly] world. And the rabbi, of blessed memory, also saw what he saw. And on the 8th day of Sivan [?they went] to London and eulogized him abundantly, on account of the young man's having been pious and God-fearing. I have not seen in any of our communities anyone like him, as he spoke the truth of his heart; and I beheld in him all the qualities of holiness and purity. Later it was found out that he had been stringent in passing judgment on himself, and that some demonic spirit had entered him. . . . He had also related that a demon had been making the sign of the cross before him, and pressed him to commit idolatry. . . . And the nephew of Yose b. Yoezer was also stringent in passing judgment on himself, and hung himself. And he was a scholar, and he died, and a heavenly voice went out and proclaimed that he had a share in the world to come.[64]

This is the story of a young man who is described as very pious and of noble character. He would see a demon dancing in front of him,

63 See Urbach 1986, n. 55 above, 494–99.

64 *Hilkhot Semahot Hashalem* of the Maharam of Rothenberg, Landau edition (Jerusalem: 1976), sec. 89, 104–105. See Grossman 1993, n. 36 above, 126 and n. 55.

holding the image of a cross. In other words, he was assailed by bothersome thoughts about apostasy, and his apprehension over this gave him no peace. As punishment for these troubling thoughts, he sentenced himself to death and committed suicide. The author, Maharam, suggests other forms of penance, in the spirit of the commensurate repentance of the pietists of Ashkenaz whose teachings had gained currency at that time, both in Ashkenaz and elsewhere:

> And it would be better if one were to do acts of repentance in this world, by torture and mortification and flogging, and then worship the Holy One, blessed be He, with all his heart and all his soul. He should engage in being fruitful and multiplying, and if so he will sire worthy and splendid offspring, and his life will be renewed as that of Job, and so on.

Nevertheless, the author determined that the scholar's deed was not suicide, because his act had been carried out for the purpose of atonement, as was that of the nephew of Yose b. Yoezer, who hung himself so as to atone for his sins, and merited life in the world to come.

Another story of self-sacrifice to atone for murder is discussed by R. Jacob Weil, a leading fifteenth century scholar of Ashkenaz. He was asked the following question: should one mourn the murder of someone who kills a Jew and is sentenced to death in accordance with the principle "the law of the land is law" (*dina demalkhuta dina*)?[65] At the end of his reply, R. Jacob Weil writes:

> Furthermore, since he gave himself over to death, as you have written, in that someone had said to him, Go and give up your freedom and give yourself over [to the authorities] so that you will obtain atonement, and he did so. Since he gave himself over to death, so that it would be an atonement for his [transgressions], he has surely received atonement. So too in the story told in Genesis Rabbah of the son of Yose b. Yoezer whose behavior was improper, and who imposed upon himself the four modes of execution by the court. A heavenly voice went out and proclaimed that he was called to life in the world to come.

R. Jacob Weil determines that one should mourn this Jew "who died an irregular death, with great torment, at the hand of Gentiles, which he did not deserve according to the laws of the Torah," and asserts that he is not regarded as one who committed suicide, for whom one does not mourn, for he had given himself over unto death

65 *Responsa Mahari Weil*, #114, n. 59 above, 142–43. The question itself is not provided there, but both the question and the reply are in *Responsa Maharam Mintz*, n. 59 above, #106, and see the editor's note.

to atone for his sin. He cites the aggadic proof-text about the son of Yose b. Yoezer, who imposed upon himself the four modes of execution by the court to atone for his sins, and gained life in the world to come.

It should be noted that R. Jacob Weil demanded that the prescriptions for repentance that had been set down by the pietists of Ashkenaz were to be imposed on sinners. In a responsum, he replies to Zeligman of Ulm with regard to "a married woman who committed adultery," requiring, among other things, that she

> fast 365 consecutive days, and neither eat meat nor drink wine during that entire period [the nights between the days]. . . . During the winter she must immerse herself naked for a quarter hour in cold water or snow, twice weekly, on Mondays and Thursdays. In the summer, she must likewise sit naked in a place swarming with flies or bees or infested by fleas. During the Ten Days of Atonement, she must fast three consecutive days and three consecutive nights, and also after the 10th of Tevet, and also between the 17th of Tammuz and the 9th of Av. . . . After the 365 days, she must fast on Mondays and Thursdays for two or three years, and she may neither eat meat nor drink wine on the night after the fast.[66]

This responsum, which R. Jacob Weil describes as based on the prescriptions for repentance "written down by R. Eleazar, author of *Harokeiah* (Laws concerning Repentance, sec. 1) and R. Judah the Pious (*Sefer Hasidim*, sec. 19)," is indeed harsh. R. Jacob Weil was aware of its harshness, and as this particular woman was "a child of tender years," he recommended that she not be told everything she was required to do all at once, for fear "her mind would be weakened by all the proposed afflictions". Rather, "she should only be told what it is that she is required to do during the first three months, and if she fulfils it properly, then after three months she should be told further what she is required to do, and so on every three months, until an entire year has elapsed." Presumably these afflictions could endanger the life of this adulteress, a child of tender years, "who committed adultery while in a menstrual state, and gave birth to a bastard." And yet, this concern was not taken into account in R. Jacob Weil's reply. Instead, he insisted that the punishment be implemented "with words of appeasement and conciliation, so that she will receive them with love and not cast aside the burden and refuse to repent."[67]

R. Elikum Goetz, a rabbinic authority of Ashkenaz and Poland in the second half of the seventeeth century and head of the rabbinical

66 *Responsa Mahari Weil*, #12, 14–15.

67 See also *Responsa Mahari Weil*, #123 and #147.

court of Hildesheim, also deals with the question of whether one should mourn a pious person who commits suicide. The query reads as follows:

> I was asked with regard to an incident that took place . . . there was a man living there who, after his marriage, went and toiled over the Torah and mortified his body with afflictions and fasting and immersions, and followed the stringent rulings of the decisors. At times he would behave more stringently than the decisors had ruled, and even though a matter may have been permissible by law, he took stringencies upon himself. . . . The substance of the story is as follows: On Thursday he went to immerse himself, and told the woman who lived there that should anyone seek him, he could be found at the ritual bath. He went and stayed there and returned home. On Friday he went to the synagogue. Following the repetition of the Amidah [prayer] he returned home and told his wife to go to the market to shop and prepare for the Sabbath. After some time had passed, she found him lying covered in blood, with a knife in his hand, having slit his throat as is done in ritual slaughter. Some days earlier he had sharpened the knife. When asked why he was sharpening it so much, he replied that he wished to make the knife fit for slaughtering. On the wall he had written that his young students should recite the Kaddish [prayer] for him on the thirtieth day, even if their parents were alive, and on every eve of the New Moon they should visit his grave. A prayer book was found open on the table. They also found the same words written at the ritual bath, and many said that he had wished to drown himself in the water. There is a question of whether to mourn him, and whether or not he is to be regarded as one who has committed suicide.[68]

This scholar, who toiled over the Torah, mortified himself, fasted and immersed himself [for ritual purification] frequently, and was most stringent in observing halakha, this pious individual slaughtered himself with a knife and requested that his students recite the Kaddish for him and visit his grave on the eve of the New Moon. Asked to find a dispensation for granting this request, R. Elikum Goetz gives several reasons as to why, according to the halakha, this pious man is not considered a suicide, and is therefore to be mourned. He states, inter alia, that he should be mourned because presumably he slaughtered himself to atone for a sin he had committed. He writes: "In the matter under discussion, since it is known that he was a pious person, it may be said that he knew he had committed some transgression that incurs the punishment of death. He therefore passed judgment on himself, and this is not regarded as a case of suicide."

68 *Responsa Even Hashoham* (Dyhrenfurth: 1733), #44.

R. Elikum Goetz too, not surprisingly, cites, as a proof-text in support of his argument, the aggadic story of the launderer who jumped off the roof after the funeral of Rabbi to atone for desecrating the Sabbath, and merited life in the world to come. He applies a similar interpretation to the words of bJebamot 78b:

> "And the Lord replied, It is for Saul and his bloody house, for he put some Gibeonites to death" (2 Sam. 21:1). "For Saul" — because he was not eulogized as the law required; "and his bloody house, for he put some Gibeonites to death" — where, indeed, do we learn that Saul put some Gibeonites to death? Rather, because he killed the inhabitants of Nob, the town of priests who supplied the Gibeonites with water and food, Scripture relates to him as if he had killed [the Gibeonites themselves].

What is the background to this discussion? "There was a famine during the reign of David, year after year for three years" (2 Sam. 21:1–2), as a result of the fact that the nation did not properly eulogize King Saul, and also because Doeg the Edomite struck down Nob, the town of priests, at Saul's command (1 Sam. 22:18–19). R. Elikum asks in this regard: King Saul took his own life, and according to law was not to be eulogized. Why, therefore, was the nation punished for not eulogizing Saul properly? In his opinion, the continuation of the verse, "for he put some Gibeonites to death" is the answer to the question: "That is to say that Saul took his life in accordance with the law, as he was liable to be punished by death because of [what he had done to] the Gibeonites. Therefore, as mandated by the law, he took his own life." King Saul is not regarded as having committed suicide, but as having acted as he did in order to atone for killing the inhabitants of the town of priests; therefore he should have been properly eulogized.

The most famous responsum on this subject is, perhaps, that of R. Jacob Reischer Backofen of Prague, written at the beginning of the seventeenth century. He was asked the following question:

> With regard to one who went astray and committed adultery. As penance, he imposed upon himself one of the four judicial modes of execution, and drowned himself in a river, which is the mode of suffocation. Is he regarded as one who committed suicide, or, since he did this deed for the purpose of repentance, is he, perhaps, to be regarded as one who died in his bed?

That is to say, should one who suffocated himself by his own hand by drowning himself in a river so as to atone for transgressing the prohibition against having relations with a married woman, be regarded as one who committed suicide, for whom nothing is to be done? Or,

since he did it as an act of atonement, is he, perhaps, to be regarded as one who died a normal death?[69]

In his reply, R. Jacob Reischer cites the case of R. Hiya b. Ashi, who wanted to burn himself in an oven to atone for desiring to have sexual relations with an unmarried prostitute,[70] in support of his opinion that "for the purpose of repentance he is permitted to actually bring about his death." As a further proof-text to support his position, he brings the story about Yakim of Tzrurot, the nephew of Yose b. Yoezer, who imposed upon himself the four modes of execution by the court to atone for his sins, and merited life in the world to come. R. Jacob Reischer rejects the explanation of this Midrash offered by the author of *Yefe Toar*, who argues that the story may not be cited as proof, and asserts that "since he did it for the purpose of repentance, he is certainly not at all to be regarded as one who committed suicide."[71] Even though R. Jacob Reischer does cite aggadic writings, he maintains that the suicide of the launderer cannot serve as a proof-text, because it appears that he committed suicide out of sorrow that he did not participate in Rabbi's funeral. He writes that, "In general, it cannot be assumed that a suicide is committed as an act of repentance, but where it is known that the deed was done for the purpose of repentance, it certainly is not considered a case of suicide." That is to say, "One who commits suicide — nothing whatever is to be done for him," since there is no assumption that he did so for the purpose of repentance. However, if it is known that a person took his own life as an act of atonement for a sin, "he is not regarded as a case of suicide, and he is called to life in the world to come, for where the repentant stand, the wholly righteous may not stand."

The message that emerges from *Responsa Shvut Yaakov* is that one who takes his own life to atone for his transgressions is not only not regarded as one who committed suicide, but rather, the act is to be praised, as certain things are loftier than even the sanctity of

69 *Responsa Shvut Yaakov*, n. 15 above, part 2, #111.

70 70 bKidushin 81b.

71 *Iyun Yaakov* on *Ein Yaakov*, bKidushin 81b; see text above at nn. 14–15. In addition, R. Jacob Reischer writes in *Responsa Shvut Yaakov*, part 2, #178 as follows: "And if someone were to ask why mention is made of this story (*agada*), since we derive nothing from aggadic sources . . . this is true in a case where the story contradicts logic or a *sugya* in the Talmud. . . . And even an ordinary conversation of a great scholar should be studied, because one may learn an important law from it."

life.[72] R. Jacob Reischer also adopted the prescriptions for repentance appearing in what he refers to as "the earlier writings." In one responsum, he writes: "A woman who went astray, was unfaithful and committed adultery, and gave birth to a daughter who is [thus] a bastard (*mamzeret*)" asked him "to arrange what she should do, what remedies for repentance (*tikunei teshuva*) were in order to turn aside her iniquity so she would gain atonement." In his reply he required, among other things, that she

> fast 365 consecutive days, and neither eat meat nor drink wine during the entire fasting period (the nights).... Between the 17th of Tammuz and the 9th of Av, and during the Ten Days of Repentance, and after the 10th of Tevet, each time she should fast for two consecutive days and two consecutive nights.... Each day of these fast days, she should sit barefoot on the ground in a cold room that was not heated and in which a fire was not lit on that day; she should wear nothing but a nightshirt, and she should roll in the dust on the ground. She should do so for a third of an hour, three times each day, morning, noon and night. During the summer she should sit likewise on the ground, for a third of an hour, three times each day, morning, noon and night, in a place crawling with fleas and flies that will sting her, and she should roll in the dust, as written above.... She should immerse herself in a ritual bath and remain there in water up to her neck for a third of an hour, or sit in a bath of cold water every Sabbath eve.... At the end of 365 days, she should fast only twice a week, on Mondays and Thursdays, and on the fast days she should conduct herself as written above. During the third year, she should fast only once a week, either on Mondays or on Thursdays, also as above. After she has completed all of the above, and is divorced from her first husband and is married to her second husband, she should approach the [local] halakhic authority so that he may instruct her as to what to do and how to conduct herself from then onwards.[73]

R. Jacob Reischer notes that he learned this prescription for repentance from "our earlier eminent halakhic scholars, the Rokeah, the Mahariv [R. Jacob Weil], R. Isaiah of Trani and [the author of] *Responsa Maharam* [our teacher, R. Meir] of blessed memory," and "this is what I ruled was the law to be put into practice." Without doubt, this is a harsh penance which could seriously affect the woman's health, and perhaps even cause her death. This concern was not mentioned at all in R. Jacob

72 See *Responsa Zera Emet*, n. 31 above, #89; S. Shilo, "R. Jacob Reischer, author of *Shvut Yaakov*: the man in his time, for his time — and for our time?" (Hebrew), in M. Benayahu (ed.), *Asufot* 11 (1998), 85.

73 *Responsa Shvut Yaakov*, part 3, #128.

Reischer's responsum; instead he hoped that after these tortures and bodily mortifications, she would remarry and impose upon herself further acts of penance.

R. Jacob b. Zvi Emden, an eighteenth-century rabbinic authority, also addresses the matter of atonement for adultery. In a responsum, he was asked: "Is it prohibited to abort a fetus in the womb of its mother who been promiscuous (*zinta*), whether unmarried or married?" In his reply, he takes issue with the view of R. Yair Bacharach,[74] who prohibited aborting a [fetus that would be born a] bastard (*mamzer*). He writes:

> It seems to me that I would allow it, were I worthy enough, because it appears to me that there is a case for leniency. Since this woman committed adultery, and has blood on her hands, she is now punishable by death according to Torah law, even though it is not within our competence to impose the penalty of death. In any event she is deserving of death by the laws of Heaven, since she acted willfully and knows that she sinned willfully. Although the four forms of execution by the court have been abolished [in practice], the four forms of execution by the court have not been abolished [in principle]. . . . Even in these times, when we do not impose the penalty of death for capital offenses, nevertheless, since she is deserving of death by law — though a bastard who has been born is considered worthy, and one is held accountable for his murder — now, however, he is in the womb of his mother, and had it been within our competence to impose punishment, we would have put both her and the fruit of her womb to death. . . . Thus it seems to me clear that there is no prohibition against destroying the fetus, even though its mother is living, since, in my humble opinion, it is clear that even she herself, while not sentenced to death, inasmuch as that is no longer within our competence, nonetheless would not fall under the category of "But for your own life-blood I will require a reckoning," and she would not be liable to punishment were she to take her own life. In this regard, it is stated in Sifre[75]: "[Perhaps it is permitted], as in the case of Saul." And as a matter of fact, it would be a privilege for her, as several stories in the Talmud and the Midrash can attest (see Midrash Rabbah s.v. *vayarah et reiah begadav*), which tell of the penitents who imposed upon themselves the punishment of death, and they were praised as meriting life in the world to come. (And moreover, we find in the case of the funeral of Rabbi, that the launderer committed suicide out of sorrow that he was not among those who merited performing

74 *Responsa Havot Yair* (Lemberg: 1896), #31.

75 In fact, it is not in Sifre, but in Genesis Rabbah, 34:19, Theodor-Albeck edition, p. 324, alongside the exegesis according to which it is forbidden to take one's own life.

> the commendable act (*mitzva*) [of attending Rabbi's funeral], and this [deed] was regarded as a credit to him. This is most problematic and calls for further study. And surely, as to the fetus inside her, whose blood may be spilled — and she is not punishable for aborting it while it is in her womb — even though this fetus has not sinned, nevertheless Heaven does not have mercy on it. Thus if so, in this case, it is clearly permissible from the outset, and it is perhaps even commendable to so act. . . . It makes no difference whether she had relations with a Jew or with a Gentile, because even though in the case of a Gentile who has relations with a Jewess, the baby is considered worthy, in any event, as she is liable to punishment by death, since she is a married woman, the fetus does not take preference over his mother.

R. Jacob b. Zvi Emden is of the opinion that a married woman who conceived in an adulterous relationship is permitted to abort her bastard fetus, and in so doing, she may perhaps even be credited with having performed a commendable act.[76] In his opinion, "it would even be a privilege" for the woman to take her own life to atone for her adultery. His reply appears to contain an innovation: whereas other rabbinic authorities wrote that, post factum, one should be lenient once the suicide has taken place, R. Emden enjoins the woman from the outset to commit suicide to atone for her iniquity, in line with the cases recounted in the aggadic literature regarding penitents who imposed upon themselves the punishment of execution by the court.

We find another innovation on this subject in a responsum by R. Ephraim Zalman Margaliot of Brody, a leading late eighteenth and early nineteenth century halakhic authority in Poland. In one of his responsa, he discusses at length the subject of one who commits suicide, writing, inter alia, as follows:

> And it may further be said that since he did not state the reason [for his suicide] beforehand, how can we assume that he did it in a spirit of defiance? Perhaps he did it for repentance! If it is done for repentance, it is permissible, as in the Midrash regarding Yakim of Tzreida, who imposed upon himself the four modes of execution by the court. Yose b. Yoezer spied Yakim's bier rising through the air and said, "This man, by a brief

76 On aborting a bastard, see also *Responsa Rav Pealim* (Jerusalem: 1901), part 1, EH #14; part 4, YD # 4; *Responsa Gidulei Tzion* (1910), part 1, #32; *Responsa Mishpetei Uziel* (Tel Aviv: 1964), part 3, HM #47; *Responsa Tzitz Eliezer*, vol. 9 (Jerusalem: 1967), #51, vol. 17 (Jerusalem: 1988), #49; *Responsa Igrot Moshe* (Bnei Brak: 1985), HM 2, #49; *Responsa Meshane Halakhot* (NY: 1983), vol. 10, #303; *Responsa Shevet Levi* (Bnei Brak: 1981), vol. 5, #195; *Shearim Hametzuyanim Bahalakha* (Jerusalem: 1978), 184:7.

> hour, precedes me to the Garden of Eden." Thus, we see that if it is done for repentance, it is permissible. This is what our master R. Jacob Weil wrote [in his remarks on the matter], and he brought proof from that Midrash. Accordingly, as long as he did not say anything, and was found to have taken his own life, and even if it is evident that it is a case of suicide, he is not regarded as one who committed suicide, and so on . . . as he did it out of repentance. . . . In the same way that although a man consecrates a woman on the assumption that he is righteous, [nevertheless], even if he is a completely evil person, she is consecrated, because we say "perhaps he considered repentance," so too in our case, we should say that he must have pondered the fact that he had committed grave sins, and his conscience continued to bother him, and therefore he took his life by his own hand. In this type of case, we may say that it is permissible, as we saw in the Talmud regarding R. Hiya b. Ashi, who thought he had engaged in sexual relations with a prostitute, and found an oven that was lit and sat in it (see bKidushin 81b). . . . Thus, if it is possible to find a reason for the act, then he does not fall into the category of one who committed suicide, and so on. If so, when [is it considered a case of suicide]? When he [who commits the act] says beforehand, "See, I am going up," and we understand from his words that this act is not undertaken out of repentance . . . but because he is choosing the bad and despising the good that the Creator has done for His creatures. In such a case, it is considered suicide.[77]

R. Ephraim Zalman Margaliot maintains that one who takes his own life is not to be regarded as one who commits suicide, for whom "nothing whatever is to be done," since he may have so acted to repent for his sins. In his opinion, it is a case of suicide only if it is clear that the individual in question did not take his life for the purpose of repentance and atonement, but because he despises "the good that the Creator has done for His creatures." This opinion counters that of R. Jacob Reischer, who wrote the very opposite: that only if it is evident that someone took his own life so as to atone for his sins is he not to be regarded as a suicide. But in general, when we do not know someone's reason for committing suicide, he is to be regarded as one who takes his own life, for whom nothing whatever is to be done. R. Ephraim Zalman Margaliot brings proof for his position from *Responsa Even Hashoham*, cited above. However, he is of the opinion that the story of the launderer's suicide does not constitute proof of his stance. He reasons that it is not possible that the launderer jumped off the roof after Rabbi's funeral in order to atone for the sin of desecrating the Sabbath, as he had desecrated the Sabbath unintentionally, which does not incur

77 *Responsa Beit Efraim*, YD (Warsaw: 1884), Laws concerning Mourning, #76.

punishment by death, but only a sin-offering. Rather, the launderer should have "written in his notebook" (that is, taken note of the transgression, with the intent of later expiating it), that "when the Temple is rebuilt I will bring a fattened sin-offering," as did R. Ishmael b. Elisha after he unintentionally adjusted a lamp on the Sabbath.[78] Hence, it seems that "he did so out of sorrow over the death of Rabbi, and thus, he too merited life in the world to come."

The position of the Ashkenazic decisors is also reflected in the words of R. Solomon Kluger, a nineteenth-century Galician authority.[79] He discusses a responsum by the author of *Responsa Besamim Rosh*, who ruled that it is permissible for one to take his own life if he suffers misfortune, torment, or abject poverty,[80] basing this stance on the Midrash (Lamentations Rabbah 1.51) about Zedekiah, king of Judah, "who should have hurled himself against a wall and died rather than witness the slaughter of his sons." R. Solomon Kluger takes issue both with this ruling, and with use of the Midrash about Zedekiah to support it, arguing that "we do not learn the law from midrashic exegesis (*drash*) and Aggada." In his opinion, Zedekiah was permitted to take his own life "because he realized that his iniquity was so great that the Temple was destroyed because of him. Therefore, he should have acted in this way as a means of repentance, as did R. Eleazer b. Dordia and the brother-in-law of R. Yose, who were, unquestionably, holy men." In other words, one may take his own life in order to atone for grave iniquities he has

78 bShabat 12b.

79 *Responsa Tuv Taam Vadaat*, 3rd ed. (Cracow: 1900), vol. 2, Laws concerning Mourning, #202.

80 R. Solomon Kluger notes that the responsum on suicide found in *Responsa Besamim Rosh* may constitute proof that these responsa were not written by the Rosh (Rabbenu Asher), but falsely attributed to him. As is well known, many have argued that the Rosh did not write *Responsa Besamim Rosh*. One of the most prominent of those who take this view is R. Moses Sofer, who draws the following conclusion from the responsum on suicide: "From this we see that the work *Besamim Rosh* is a forgery" (*Responsa Hatam Sofer*, YD (Vienna: 1895), #326). See also *Pithei Teshuva* on *SA*, YD, 345a; *Sdei Hemed*, Klalei Haposkim, sec. 11, "vav" (Lubavitch edition, vol. 9, supplementary volume, p. 3636); *Responsa Yabia Omer*, n. 32 above, YD, #24, and others. The real author of *Responsa Besamim Rosh* is Saul Berlin (1740–1795) who, according to family tradition, committed suicide as a result of his having been harassed on account of his radical halakhic views. It is conceivable that due to his own tribulations, that is, in anticipation and to justify his later suicide, he permitted the taking of one's own life in his responsum in *Besamim Rosh*.

committed. While he does indeed write that one cannot learn the law from Aggada, he himself brings a proof-text for his position from the aggadic tale of Yakim of Tzrurot, the nephew of R. Yose (in his words, "the brother-in-law of R. Yose"), who imposed on himself the four modes of execution by the court to atone for his sins, and consequently merited entrance into the Garden of Eden. He also cites the Aggada about R. Eleazer b. Dordia, who, out of remorse for his deeds, wept aloud until his soul departed, and merited life in the world to come.

Presumably, the many acts of suicide committed in Ashkenaz at the time of the Crusades, motivated by the supreme value of the sanctification of God's name, led the scholars of Ashkenaz in ensuing generations to be lenient with regard to the prohibition against suicide when carried out for the exalted purpose of repentance and atonement for a grave transgression. The acts of active martyrdom in Ashkenaz, which were much acclaimed in chronicles and in the liturgy, and even received post factum halakhic endorsement, created a halakhic tradition that manifested a positive, or at least forgiving, attitude toward those who took their own lives for the sake of a positive value such as repentance and atonement for grave transgressions.

As mentioned above, the stance of the Sefardic authorities was different. They adopted the position of R. Samuel Jaffe Ashkenazi, author of *Yefe Toar*, a homiletic exegesis of Midrash Rabbah, namely, that one may not take his life by his own hand to atone for his sins, nor adduce aggadic writings in support of, or as a dispensation for, such a deed.[81] Thus, for example, R. Haim Joseph David Azoulay, a leading eighteenth-century Sefardic authority in the land of Israel, asserts: "There is a case for recommending the position of our teacher, R. Samuel Jaffe, and there is logic to his ruling. A thorough study of the

81 See text above near n. 30. However, R. Jacob Ashkenazi, an 18th century Constantinople rabbinic authority, writes in *Kuntres Ruah Yaakov* (Salonika: 1793), sec. 28 (printed in the same volume as *Responsa Lev Simha* by R. Abraham Elineri) that "one is permitted to take his own life when repenting…a transgression that incurs the death penalty," as there is proof for it in the Aggada (from the suicide of the launderer, from the Gentile who took the tufts of wool off the heart of R. Hanina b. Teradion, and from Yakim of Tzrurot, who imposed upon himself all four modes of execution by the court). Other Sefardic decisors have taken a similar position; see *Sdei Hemed*, Aseifat Dinim, Maarekhet Aveilut, sec. 122 (Lubavitch edition, vol. 4, p. 1407); *Responsa Yabia Omer*, n. 80 above (citing *Sefer Ben Yohai* 6:47 and *Sefer Yishrei Lev*). However, as R. Ovadia Yosef notes in *Responsa Yabia Omer*, most of the Sefardic decisors did not concur with this position.

matter will show that he is correct." But he then adds:

> After all has been said and discussed, it appears that even according to the opinion of R. Samuel Jaffe, [committing suicide as an act of atonement] is also included under the biblical rubric, "But for your own life-blood I will require a reckoning." But in any event, the prohibition applies only here [i.e., applies to such a deed before it has been committed], but does not render one [who has committed it] a suicide for whom the laws of mourning are not observed, and so on.[82]

In other words, taking one's life for purposes of atonement and repentance is forbidden according to the Torah, but one who has acted thus is not deemed one who has taken his own life, for whom "nothing whatever is to be done."[83]

It would appear that of all the various positions, the middle-of-the-road halakhic position is that of R. Haim Joseph David Azoulay, and in our own generation, this has been the ruling of the rabbinic authority R. Yehiel Mikhel Tucazinsky of Jerusalem:

> If he killed himself on account of iniquities he had committed, and he mistakenly thought that this would constitute atonement, then even though this too is a criminal offense, and in the future he will have to give an accounting for it, in any event, he too is not regarded as one who has taken his own life.[84]

This halakhic approach maintains that one may not take his own life to atone for his sins, for even though death is the highest form of atonement, taking one's own life is regarded as a grave transgression, and hence in doing so, in the very act of atoning, one sins. On the other hand, one who has nonetheless taken this path of atonement is not to be regarded as one has committed suicide, for whom "nothing whatever is done," and so on.

Thus this halakhic approach constitutes a sort of middle ground between the various opinions, since most of the halakhic authorities of Ashkenaz who cited sources of an aggadic nature as proof-texts in support of the view that suicide for the purpose of atonement and repentance is not prohibited, never intended to permit it a priori, or to instruct a person who had committed a sin that incurs the punishment of death to himself carry out the execution. Rather, their intention was

82 *Birkhei Yosef* (Livorno: 1774), YD 345.

83 A similar halakhic ruling was made by R.Y.M. Hazan in his *Responsa Krakh Shel Romi* (Livorno: 1876), #14.

84 *Gesher Hahayim*, n. 9 above.

to exclude him from the category of "one who takes his own life."[85] On the other hand, even a number of Sefardic halakhic authorities who rejected the aggadic proof-texts and ruled that there is a grave biblical prohibition against suicide for the purpose of atonement and repentance, intended only to rule out this practice as a matter of principle, and on moral grounds. Even in their opinion, however, one who does carry out this act is not regarded, post factum, as one who has committed suicide, for whom "nothing whatever is to be done,"[86] since the tendency of the decisors was to substantially reduce the definition of suicide, as stated by R. Tucazinsky:

> Most of the cases that appear to be suicides, Heaven forbid, should not be adjudged to fall under the category of 'one who takes his own life'; for if it is possible to deem it a murder carried out by someone else, even if that is only remotely plausible, or it can be attributed to the fact that the deceased was not of sound mind at the time, or was confused for some reason, or [if it might be the case that] while struggling with death he felt remorse and regretted his act — we view it leniently and construe him as someone who did not take his own life.[87]

Applying this principle, if one killed himself to atone for his iniquities, we view it leniently, and do not regard him as falling under the category of 'one who takes his own life'. It would thus appear that the dispute between the Ashkenazic and the Sefardic halakhic authorities is relevant only as pertains to the theoretical question of whether a halakhic position may be derived from sources of an aggadic nature, and if so, whether to view in a more positive light one who has taken his life by his own hand so as to atone for his sins, particularly for those sins that are punishable by death.[88]

85 See, e.g., R. Zvi Hirsch b. Azriel, *Beit Lehem Yehuda*, *SA*, YD 345:2; R. Abraham Maskil Leeitan of Minsk, *Yad Avraham*, *SA*, YD 345:2 and others.

86 See, e.g., R. Menahem Azariah Meir Castelnuovo, *Misgeret Hashulhan*, glosses and novellae (Livorno: 1840), *SA*, YD 345:1; *Responsa Yabia Omer*, n. 32 above, and others.

87 One responsist puts it thus: "Because a case that fulfils all the constraints and criteria [lit., statutes and judgments] that must be met to declare it a suicide is a remote and uncommon occurrence of one in 60 or 70 thousand, and this is not an exaggeration, because there are so many onerous criteria involved" (*Responsa Krakh Shel Romi*, n. 83 above). R.Y.Y. Greenwald writes: "Our sages have often sought excuses and reasons to the credit of a presumed suicide, to the point that no true case of suicide can be found" (*Kol-Bo Aveilut* [NY: 1947], 319). See also *Arukh Hashulhan* YD 345:2.

88 *Gesher Hahayim*, n. 9 above, 271.

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THE BURDEN OF THE PAST IN THE EIGHTEENTH CENTURY: AUTHORITY, CUSTOM AND INNOVATION IN THE *PAHAD YITZHAK*

DAVID MALKIEL*

By the eighteenth century, the formative period of Jewish law was a distant memory. Not only had the Babylonian Talmud long since been thoroughly glossed, but even the *Shulhan Arukh* had been cloaked in commentaries and glosses. Yet no legal system is ever complete, because new issues crop up in every generation, as social circumstances change. It is, therefore, incumbent upon those in positions of judicial and legislative authority to issue rulings and formulate rules that address the new challenges. However, because Jewish law is based on oral tradition, supposedly linking the Jews of every generation with Moses at Sinai, the endless evolution of the legal system carries with it an ever-increasing tension between the gravitational pull of tradition and the ineluctable need for innovation. Medieval rabbis gave voice to this anxiety in nervous proclamations of fidelity to the Ancients and laments about "the decline of the generations," as generations became further and further removed from the revelational and traditional sources of knowledge.[1]

Faced with the intellectual and practical halakhic challenges of the day, rabbinical scholars grappled with the problem of the weight of tradition, as they tried to establish whether, when, and to what extent a latter-day decisor may challenge halakhic positions set down by venerated authorities. A number of calls for intellectual freedom have

* David Malkiel is a member of the Department of Jewish History at Bar-Ilan University.

1 bShabat 112b, bEruvin 53a, bRosh Hashana 25b, and medieval interpretations thereof, as well as medieval exegesis of Ecclesiastes 7:10. Cf. W. Jackson Bate, *The Burden of the Past and the English Poet* (London: 1970). See also Menachem Kellner, *Maimonides on the "Decline of the Generations" and the Nature of Rabbinic Authority* (Albany: 1996). On intellectual freedom and the dynamic of criticism and dialogue in medieval rabbinic literature, see also Isadore Twersky, *Rabad of Posquieres: A Twelfth-Century Talmudist*, second ed. (Philadelphia: 1980), xx–xxiv.

come down to us. In the introduction to his critical commentary on the code of Alfasi, Zerahiah Halevi of twelfth-century Lunel asserted the scholar's right — nay, obligation — to differ with his predecessors, however esteemed, in the pursuit of truth, quoting a poetic maxim: "Truth is at variance with Plato, and both are beloved to us, but truth is more beloved."[2] In a more militant declaration of independence, Isaiah b. Mali di Trani ("the Elder"), of thirteenth-century Italy, insisted that he would not hesitate to reject the express words of Joshua the son of Nun if they struck him as wrong. He justified the implicit effrontery of his stance by citing Bernard of Chartres' parable of the dwarf seated on the giant's shoulders, who can therefore see farther.[3] Three centuries

2 Zerahiah Halevi, introduction to *Sefer Hamaor*, in the name of Jonah ibn Jannah. Joseph Kimhi had used this expression before him, in the introduction to his *Sefer Hagalui*; see Israel Ta-Shma, *R. Zerahiah Halevi, Author of "Sefer Hamaor," and Members of his Circle* (Hebrew), (Jerusalem: 1993), 141. Yair Haim Bacharach provides a list of later scholars who cited this dictum: Azariah de Rossi, Menashe b. Israel, Isaac Troki, Shemtov ibn Shemtov, and Moses Alfalas; see *Havot Yair* (Frankfurt a.M.: 1699), #9. He cites it himself in responsum #210. Elia Benamozegh employed the adage with reference to Samuel David Luzzatto; see his *Eimat Mafgia al Ari* (Livorno: 1855), 1, 17a.

3 Isaiah di Trani, *Teshuvot Harid*, ed. Abraham Joseph Wertheimer (Jerusalem: 1967), #1, col. 6–7; #62, col. 301–303; Isadore Twersky, "The contribution of the Italian sages to rabbinic literature," *Italia Judaica* 1 (1983), 393–94. A similar reference to Joshua the son of Nun appears in Moses Taku's *Ktav Tamim*: see *Otzar Nehmad* 3 (1860), 64. On the parable, see Robert K. Merton, *On the Shoulders of Giants: A Shandean Postscript* (NY: 1965). Abraham ibn Ezra used the parable before Isaiah di Trani, and much closer to its chronological point of origin, in his poem "Nedod Hesir Oni." See Avraham Melamed, "On the sources of the grasshopper and giant metaphor in R. Abraham ibn Ezra's 'Nedod Hesir Oni' " (Hebrew), *Jerusalem Studies in Hebrew Literature* (Hebrew), 13 (1992), 95–102. Isaiah di Trani's use of the aphorism inspired its appearance in the works of later authors, including Zedekiah Anau, Abraham Bibago, Judah Hayat, Azariah de Rossi, David Gans, Abraham Azoulay, Isaac de Leon, Yom Tov Lipmann Heller, Pinhas Elijah Hurvitz, Menahem Mendel Lefin and Zadok Hakohen of Lublin. See: Dov Zlotnick, "The commentary of Rabbi Abraham Azulai to the Mishnah," *PAAJR* 40 (1972), 164–68; S.Z. Leiman, "Dwarfs on the shoulders of giants," *Tradition 27* (1993), 90–94; Yaakov Elbaum, "On the sources and history of the aphorism of the dwarf and the giant" (Hebrew), *Sinai* 77 (1975), 287; Hillel Levine, " 'Dwarfs on the shoulders of giants': a case study in the impact of modernization on the social epistemology of Judaism," *Jewish Social Studies* 40 (1978), 63–72; Yaakov Elman, "R. Zadok Hakohen on the history of halakha," *Tradition* 21 (1985), 6–7.

later, the peripatetic Eliezer Ashkenazi articulated a no-less fervent manifesto in favor of intellectual freedom.[4]

Inevitably, independence or autonomy becomes increasingly problematic with the passage of time. As new legal texts are churned out unremittingly, scholars perceive themselves as ever-smaller in stature, and feel increasingly hemmed in and paralyzed by the sheer volume of the literature they must master. In the early modern era, namely, the sixteenth to eighteenth centuries, following the publication of the *Shulhan Arukh*, which after initial resistance, gradually reached an unparalleled level of canonicity, the sense that the legal tradition had crystallized almost completely, leaving little room to maneuver, must have been stifling. By the end of this period, Jewish law had a byzantine complexity. Indeed, in the eighteenth century, the genius of Elijah the Gaon of Vilna was his unique ability and willingness to cut through a millennium of medieval precedent and directly address the talmudic sources.

To further our understanding of this problem, this article examines the *Pahad Yitzhak* of Isaac Lampronti of Ferrara (1679–1756), a physician and a relatively well-known (though little studied) halakhic expert, arguably the most illustrious in the history of Italian Jewry. Lampronti studied medicine at the University of Padua, where he was awarded a doctorate at the age of sixteen. He settled in Ferrara, married, and received rabbinical ordination in 1712. In 1715 Lampronti published a series of three pamphlets on halakhic issues, known as *Bikurei Katzir*

4 Eliezer Ashkenazi: *Maasei Hashem* (Venice: 1582–1583), fol. 169r; H.H. Ben-Sasson, *Social Thought of the Jews of Poland at the Close of the Middle Ages* (Hebrew), (Jerusalem: 1959), 34–38. For phenomenological treatments of the problem of authority, see: Eliezer Berkovits, *Halakha: Its Power and Function* (Hebrew), (Jerusalem: 1981), esp. 156–98; Menachem Elon, *Jewish Law: History, Sources, Principles*, trans. Bernard Auerbach and Melvin J. Sykes (Jerusalem: 1994), vol. 1, 266–72; Moshe Sokol (ed.), *Rabbinic Authority and Personal Autonomy* (Northvale NJ: 1992); Norbert M. Samuelson (ed.), *Reason and Revelation as Authority in Judaism* (Melrose Park PA: 1981); J.J. Schachter (ed.), Rabbinic Authority, *Tradition* 27 (special issue) (1993); Shalom Rosenberg, *Not in Heaven* (Hebrew), (Alon Shvut: 1997); Joel Roth, *The Halakhic Process: A Systematic Analysis* (NY: 1986), 81–133, 153–204; Avi Sagi, "Models of authority and the duty of obedience in halakhic literature," *AJS Review* 20 (1995), 1–24; Yochanan D. Silman, *The Voice Heard at Sinai: Once or Ongoing?* (Hebrew), Jerusalem: 1999. For some of the sources cited below I am indebted to the collection assembled by Avi Sagi in *Not in Heaven* (Hebrew), (Bnei Brak: 1993).

(First Fruits of the Harvest): *Reshit Bikurei Katzir, Tosefet Bikurei Katzir* and *Itur Bikurei Katzir*. His main literary achievement, however, was the *Pahad Yitzhak*, which had already begun to appear in print when Lampronti passed away in 1756.[5]

Lampronti serves as a case study of the ways in which rabbinic scholars of the early modern era confronted the dilemma of authority and autonomy: whether and when they were empowered to depart from legal precedent and follow their own understanding of the sources, and what sorts of justifications they offered for doing so. Hopefully, more investigations of this nature will eventually enable us to situate Lampronti vis-à-vis other early modern decisors in this regard. The present study will shed light on what was possible in his particular historical context.[6]

5 A number of works can serve as sources for Lampronti's biography, but must be used carefully and critically, as they are not subject to independent verification. Hananel Nepi, whose *Toledot Gedolei Yisrael* appeared in 1853, received some information from Lampronti's son, with whom he studied. Leone Reggio, Ferrara's rabbi, whose biographical sketch of Lampronti appeared in 1869 in *Ivri Anokhi*, gleaned information from manuscripts of eulogies for Lampronti delivered by Lampronti's disciples. Benedetto Levi, whose biography of Lampronti was published in 1871, and Abramo Pesaro, whose study of Ferrarese Jewry came out in 1878, found additional information in local archival and literary sources. More recent scholarship has added little, and subject to a search of Ferrara's archives, the only corroboration of these sources is that provided by the *Pahad Yitzhak* itself, in which a few particulars are embedded. For a recent synthesis, see E.E. Urbach, "R. Isaac Lampronti and his *Pahad Yizhak*" (Hebrew), in Moses D. Herr and Yonah Fraenkel (eds.), *Collected Writings in Jewish Studies* (Hebrew), (Jerusalem: 1998), 385–90.

6 In exploring this problem, there is no justification for distinguishing between different areas of Jewish law, such as ritual law and civil law, as the issue is methodological rather than substantive. For the same reason, meta-halakhic as well as halakhic entries must be considered. In addition, it is unnecessary to distinguish between entries of different literary forms, specifically, between encyclopedia articles and responsa. Finally, legal experts often express approbation or censure by inclusion or omission of a particular source; ignoring a bad book can be a very effective critical mechanism. In theory, therefore, it would be important to survey Lampronti's use of the medieval legal sources. However, given the scope of the *Pahad Yitzhak*, a systematic analysis of this nature would be a gargantuan undertaking well beyond the capabilities of any one scholar.

The *Pahad Yitzhak* is an encyclopedia of Jewish law.[7] This, in and of itself, suggests that Lampronti was an innovator, for although works of encyclopedic scope had already been undertaken within the realm of Hebrew literature, such as Abraham Portaleone's *Shiltei Hagiborim*, Lampronti's legal encyclopedia was the first of its kind. The novelty of the genre was not lost on Lampronti's contemporaries. In his preface, Jacob Saraval of Venice declared: "As soon as Lampronti showed me his work, I wanted to print it, for I saw its value, since there has never been anything like it . . . . I was delighted, because something in which the scholars of the nations take pride has appeared among my own people."[8]

But the *Pahad Yitzhak* is no ordinary encyclopedia in the modern sense of the term. *Pahad Yitzhak* entries take almost every form except the carefully formulated overview, including, for example, unpublished responsa, strings of citations, and even wholesale quotations from published legal sources. Moreover, Lampronti's opus does not focus on the concept or principle under discussion, but rather provides any and all references he deems germane. Third, the work is not strictly about Jewish law, but contains articles about terms and expressions from a variety of fields, including biography, history, lexicography, medicine, and science, among others.

The *Pahad Yitzhak* is more accurately described as a database, compiled by Lampronti over decades. This is evident from a glance at the book's autograph manuscript, which consists of 120 volumes of mostly empty pages, alphabetically ordered, with an occasional entry.[9] There is also evidence of the database format in the book's printed version, for Lampronti occasionally went back and corrected entries, as

7 The first volume appeared in Venice in 1750, the second in 1753. In 1756 Lampronti passed away, and subsequent volumes were published haltingly, in various locations. The final volume was only published in 1887. In 1935 a new edition, including the *aleph* — *het* entries from Lampronti's second edition, was published in Tel Aviv, and from 1961–1986 Mossad Ha-Rav Kook produced an annotated edition, integrating the entries from the second edition, but covering only *alef* — *gimel*. In the following references, volumes are numbered in the order in which they were printed.

8 As noted above, in 1715 Lampronti published *Bikurei Katzir*, a three-pamphlet series on Jewish law. This was a pioneering Hebrew periodical, and as such further attests to Lampronti's flair for innovative genres.

9 Paris, Bibliotheque Nationale, Ms. Hebrew 458–577.

attested to by the following remark: "After writing this, I was fortunate enough to buy the book *Kneset Hagdola* on Yore Deia, where I found . . . ."[10]

The form common to numerous entries also supports the characterization of the *Pahad Yitzhak* as an organic database. Many entries contain anecdotes from Lampronti's personal experience to support or clarify the subject. The anecdotes typically appear toward the end of the entries, as they are personal testimonies rather than bibliographic citations. Where there is one anecdote, there are often more, and invariably they are presented in chronological order. This chronological order reflects the book's genesis, as there would be no reason for them to be so ordered other than the fact that they were entered over time, and ultimately printed in the order in which they were entered.[11]

The *Pahad Yitzhak* synthesizes the considerable material that had accumulated in the century and a half since the appearance of the *Shulhan Arukh*. Like Maimonides, Lampronti responded to the threat of information overload by jettisoning the traditional format and producing a new structure. And like the *Mishne Torah*, the *Pahad Yitzhak* served as a vehicle for the popularization of the halakha.[12] Indeed, it is more user-friendly than a code, because the alphabetical format does not even require the user to be familiar with systems of legal classification. Whether or not this was Lampronti's intention, the *Pahad Yitzhak* enabled anyone of his time with a modicum of Jewish education to investigate a topic and identify the pertinent bibliography.

This speaks volumes about the spiritual state of Italian Jewry in the eighteenth century. Although Lampronti described the end of the seventeenth century as an age when Italy "was in the fullness of her Torah,"[13] the suitability of the *Pahad Yitzhak* for lay readers suggests that Italian Jewry was by no means spiritually enervated, but rather enjoyed a vibrant religious life. In Lampronti's society, the general public could be expected not only to participate in religious rites, but also to take an active interest in the study of Jewish law and lore.[14]

10 Vol. 5, Jerusalem 1986, col. 520, s.v. *gargeret bevar avaza*.

11 On the *Pahad Yitzhak* as an evolving work, see vol. 18, Jerusalem 1966, col. 17, s.v. *i shtikato*.

12 On Maimonides' importance for Lampronti, see below.

13 Literally, *keshehaita bemiloa shel tora*. See vol. 6, Livorno 1840, fol. 199r, s.v. *mikve shel rovigo*.

14 The image of Italian–Jewish culture in the seventeenth and eighteenth centuries as stagnant or decadent is problematic. See: David Malkiel,

In addition to the importance of the *Pahad Yitzhak* for the study of Jewish culture in Italy, it offers valuable testimony as to the state of Jewish law in the eighteenth century, toward the end of the pre-modern era. From this perspective, its significance extends beyond Lampronti's lifetime, as it attests to the development of Jewish law in early modern Europe following the publication and general acceptance of the *Shulhan Arukh*.

Authority

As a man of science, Lampronti believed that knowledge must be acquired empirically, rather than by abstract reasoning, and he applied this approach to Jewish law as well as to scientific matters. For Lampronti, the realm of the empirical encompassed both intellectual activity such as halakhic research, and practical matters. In many entries he records the results of his own studies of various objects and issues, and on numerous other occasions he calls upon the reader (addressing him in the second person) to adopt a position on the basis of personal experience, rather than the authority of earlier scholars.[15] His attitude not only reflects Lampronti's intellectual independence from his predecessors, but also supplies a theoretical basis for this independence. Lampronti had other grounds for rejecting slavish acceptance of revered legal doctrines and sources, but the point he emphasizes is the right and capacity of the scholar, of whatever era, to pursue his own quest for truth, with a particular emphasis on empirical verification.[16]

Lampronti did not assume this critical attitude vis-à-vis the Sages of classical antiquity. This is plain from his discussion of a matter

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"The Jewish–Christian debate on the eve of modernity: Joshua Segre of Scandiano and his *Asham Talui," Revue des Etudes Juives* 164 (2005), 157–86. Recent scholarship on the cultural activity of this period includes: Dvora Bregman, *Path of Gold* (Hebrew), (Jerusalem: 1995); idem, *A Bundle of Gold* (Hebrew), (Jerusalem: 1998); David B. Ruderman, *Jewish Thought and Scientific Discovery in Early Modern Europe* (New Haven: 1995).

15 See, e.g., vol. 18, col. 565, s.v. *esh min haeitzim*.

16 On the dilemma facing the decisor when science contradicts Jewish law, see the sources compiled in Hanina Ben-Menahem, Neil Hecht and Shai Wosner (eds.), *Controversy and Dialogue in the Halakhic Sources* (Hebrew), (Boston and Jerusalem: 1993), vol. 2, 967–1070.

related to animal anatomy.[17] First, he cites a statement from Judah Halevi's *Kuzari*, namely, that "the Rabbis' laws concerning the slaughtering of animals contain scientific insights that eluded even Galen"[18]; he follows this up with Solomon ibn Adret's comment that natural science cannot explain many of the wondrous properties found in nature, such as magnetism and dream interpretation.[19] These dicta preface the methodological declaration that, when confronted with a rabbinic observation that seemingly contradicts scientific knowledge, Lampronti will invoke a matching view expressed by an ancient philosopher, even if this position was subsequently rejected; alternatively, he classifies the rabbinic observation in the category of knowledge derived from tradition, and makes no attempt to reconcile it with current scientific knowledge.[20]

Changes in the scientific consensus in the early modern period put this policy to the test. Based on evidence that lice reproduce by laying eggs rather than through spontaneous generation, Lampronti questioned the traditional assumption that they may be killed on the Sabbath. He brought the matter before his teacher, Judah Briel of Mantua, who upheld the traditional position. Briel explained that science contradicts tradition on various matters, such as the existence of the evil eye, but that hitherto this has not been deemed a sufficient reason to alter Jewish law. Briel also pointed out that science is fickle, and that the consensus sometimes swings back to the position supported by the scholars of antiquity, as in the case of the heliocentric thesis.[21] Lampronti replied that talmudic knowledge could be flawed when the Sages based their dicta on current — ancient — science, rather than on Jewish tradition. He also noted that scientists often disagree, and that

17 Vol. 5, Reggio Emilia 1813, fol. 72v–73r, s.v. *klaiot yoatzot*.

18 *Kuzari* IV: 31.

19 *Responsa Attributed to Solomon ibn Adret*, #286.

20 There are medieval precedents for the view that the laws of *treifot* are matters of received tradition, and hence not subject to change on the basis of scientific advances. See: Maimonides, *Code*, Laws concerning Shehita 10:12; Solomon ibn Adret, *Responsa*, part 1, #98; Isaac b. Sheshet, *Responsa*, #447. Note that Lampronti approached non-Jewish sources in the same uncritical spirit. He often adduced a Greek or Roman work, and sometimes recent European authorities, in support of a statement from a traditional Jewish source, but these sources are never subjected to critical scrutiny. See, e.g., vol. 18, col. 689–90, s.v. *isha roa dam*; vol. 2, Venice 1753, fol. 100r, s.v. *dam nida*.

21 bPesahim 94b.

it is, therefore, still possible to maintain the geocentric thesis, as well as belief in the evil eye.[22] On the basis of these arguments, Lampronti clung to talmudic views on the natural order, with their halakhic implications, in the face of the evidence and conclusions of contemporary science.

On the other hand, medieval authorities were fair game. This stance finds expression in Lampronti's head-on collision with received tradition on another question pertaining to animal anatomy. The Gemara states that cattle have three tubes (*kanim*). Rashi explains that these three tubes actually refer to the windpipe, which splits into three tubes after it enters the chest; ultimately this interpretation is codified in the *Shulhan Arukh*.[23] Lampronti flatly rejects Rashi's interpretation, insisting that the various tubes are not interconnected. This is easily proved, he explains, by inflating the lung after cutting and severing it from the liver and heart: the lung would fail to inflate were it connected to these organs.[24] The crucial point here is that Lampronti did not hesitate to give preference to his own knowledge of bovine anatomy over a halakhic tradition dating back to Rashi, though it had held sway for seven hundred years. He made no attempt to salvage Rashi's position through interpretation, and does not appear to have been the least bit daunted by the weight of Rashi's authority. Yet we must also note that the incident did not lead Lampronti to question the overall merit of Rashi's interpretative edifice. On the contrary, in some cases Lampronti upholds Rashi's comments, but gives them his own reading.[25]

Lampronti also expressed views at variance with those of the Tosafists, whose glosses on the Talmud and on Rashi had long since been vested with the mantle of legal authority. For example, the Talmud declares a scholar (*talmid hakham*) to be one who rules that his own meat is unfit to be eaten (bHulin 44b). The Tosafists linked this statement to another talmudic law (bShabat 114a), according to which a scholar who claims ownership of a lost object is to be believed on his

22 Vol. 11, Lyck 1874, s.v. *tzeida*. The remark about the evil eye opens a window on Lampronti's attitude toward magic and the supernatural, a topic worthy of separate investigation. On the lice quandary, see David B. Ruderman, "Contemporary science and Jewish law in the eyes of Isaac Lampronti of Ferrara and some of his contemporaries," *Jewish History* 6 (1992), 211–24.

23 bHulin 45b; YD 34:10.

24 Vol. 14, Berlin 1887, fol. 53r–54r, s.v. *telata kanei havei*.

25 Vol. 17, Jerusalem 1961, col. 19, s.v. *i tania tania*.

own say-so, even if he fails to supply any identifying marks. In other words, the Tosafists applied the rule concerning lost objects to anyone known to have prohibited his own meat. Lampronti wrote: "And I, the writer, find this difficult," because the Talmud defines a scholar differently in its discussion of lost objects. The Tosafists' dictum has practical implications, and in this respect Lampronti's rejection of it seems more striking than his critique of Rashi, whose point appears to have been merely academic.[26] This is a significant mark of independence from the authority of his great predecessors, in light of the words of Moses Alsheikh, of sixteenth-century Palestine. Alsheikh asserted that latter-day scholars are not empowered to diverge from the positions and rulings of their predecessors when they were on entirely different planes of knowledge, bringing as an example the impropriety of a contemporary scholar taking issue with the Tosafists.[27]

Maimonides, a fellow rabbi-physician, occupied a special place in Lampronti's heart. His attitude to Maimonides is plain from his discussion of the three tubes:

> According to Maimonides, the prince of physicians (*abir harofim*), and the scholars in the field of surgery, these three tubes are not related to each other, do not draw from each other, and do not branch off from each other, but rather each has its own existence, as opposed to what Rashi stated. Look clearly with your own eyes and the wisdom of your intellect, and you will see that I am right.[28]

In praising Maimonides as "the prince of physicians," Lampronti was doing more than expressing professional solidarity. By aligning

26 Another example of Lampronti's independence of the Tosafists concerns the latter's assertion that R. Tarfon was R. Akiva's teacher, a claim Lampronti rejects using strong language. See Tosafot on bAvoda Zara 45a s.v. *amar rabi akiva ani ovin veadun lefanekha*; *Pahad Yitzhak*, vol. 3, Venice 1796, fol. 21v, s.v. *halekha hamorekha tarfon*. This issue also surfaced in Lampronti's discussion of the Ten Tribes: vol. 9, Lyck 1868, fol. 172v, s.v. *aseret hashvatim*. See also David Malkiel, "The Sambatyon and the ten lost tribes in Isaac Lampronti's *Pahad Yitzhak*" (Hebrew), *Pe'amim* 94/95 (2003), 159–80. On R. Akiva, see also vol. 19, col. 484–85, s.v. *biur trumot umaasrot*.

27 *Responsa Alsheikh*, #39, canonized in the gloss of Shabtai Hakohen on *SA*, HM 25:3, n. 21.

28 Vol. 14, fol. 53v, s.v. *telata kanei havei*. See *Code*, Laws concerning Shehita 6:5, 6:8, 7:1. See also Julius Preuss, *Biblical and Talmudic Medicine*, trans. and ed. Fred Rosner (NY: 1978), 103.

Maimonides with "the scholars in the field of surgery," Lampronti is suggesting that "the great eagle" held the correct view by virtue of his medical credentials, rather than his halakhic expertise.

Despite his affinity for Maimonides, Maimonides' code plays only a minor role in the *Pahad Yitzhak*, for the *Shulhan Arukh* had long since become the authoritative source of Jewish law. In a rare exception to this rule, Lampronti followed the *Mishne Torah* rather than the *Shulhan Arukh* in 1728, when faced with a case of a child whose circumcision had been postponed due to illness, and was now due to take place on the festival of Shemini Atzeret. Circumcision constitutes a desecration of the Sabbath and festivals, and Lampronti wrote that had Shemini Atzeret been the original date of the circumcision, it would have been impossible to postpone the ritual so as to avoid the desecration. However, since Shemini Atzeret was in any case not the original date, it occurred to him ("*ala bedaati*") to conduct the circumcision a day later, on Simhat Torah, since this would only constitute a desecration of the second day of a festival, known as "the second-day festival of the Diaspora," which by all accounts is a less sacred day. Medieval opinion was divided regarding the permissibility of such desecration, with Maimonides heading the list of lenient authorities and Asher b. Yehiel heading the stringent camp, which included Joseph Karo.[29] Lampronti wrote that since the Ferrara community had no fixed custom on this matter, he brought his suggestion before "the great rabbis of the yeshiva," and they approved it unanimously.[30] In this case, then, the *Mishne Torah* got the nod over the *Shulhan Arukh*, although this was not as radical a move as it might appear at first glance, since, as Lampronti noted, Shabtai Hakohen had, in his glosses on the *Shulhan Arukh*, already adopted Maimonides' position.

For the most part, however, Lampronti drew from the *Mishne Torah* in those areas where Maimonides had a special contribution to make. One such area is that of laws that are in abeyance due to the Exile. Thus, Lampronti cites Maimonides on the laws concerning the sale of a daughter into servitude.[31] Maimonides also plays a significant role in

29 *Code*, Laws concerning Circumcision 1:9; *SA*, YD 266:8.

30 Vol. 6, fol. 96r–v, *s.v. mila shelo bizmana eina doha shabat ve yom tov*.

31 Vol. 17, col. 9, s.v. *av mokher bito leama*. This is not to say that Lampronti only cited the *Mishne Torah* in cases such as these. There are, e.g., numerous references to it in connection with the laws concerning the return of lost objects, which are certainly applicable to daily life in the Diaspora.

entries devoted to non-halakhic topics. Lampronti relied on the historical introduction to the *Mishne Torah* for his entry on R. Judah the Patriarch's authorship of the Mishnah.[32]

Maimonides' *Code* occupies a particular pride of place in entries pertaining to matters of science. Lampronti's entry on the proper way to a healthy regimen is based entirely on Maimonides' prescriptions.[33] Likewise, Lampronti is heavily indebted to Maimonides for pharmacological insights into the composition of the Temple incense.[34] Elsewhere, Lampronti explains a talmudic expression with an example from logic (including a diagram), and his source — though unacknowledged — is Maimonides' treatise on logic.[35] Ethics, being part of the philosophical curriculum, belongs in this category too, and the *Mishne Torah* is cited in the entries on love of humanity and of God.[36]

Naturally, Maimonides plays an important role in entries devoted to theological and philosophical matters, such as resurrection. In these realms (which call for separate treatment) Lampronti's position vis-à-vis Maimonides is respectful but not uncritical. For instance, he admits to being unable to decide between the views of Maimonides and Solomon ibn Adret on the question of whether the material world will continue to exist at the End of Days.[37] In the same vein, an entry devoted to the *Guide for the Perplexed* states simply: "and his words are very problematic" (*udvarav temuhin harbei*).[38]

The limited role of Maimonides' *Code* in the *Pahad Yitzhak* reflects the niche it occupied in the curriculum of the Ferrara Jewish community somewhat later in the eighteenth century. A set of statutes from the local Talmud Torah, dated 1767, provides for study of sections from the *Mishne Torah* at three of the school's four levels, but only particular, isolated sections: for level 2 students, the laws concerning the recitation of the Shema and the Amida prayers; hand-picked students at level 3

32 Vol. 6, fol. 219r, s.v. *mishna, im ketava rabi*.
33 Vol. 18, col. 28, s.v. *beriut dinei hanhagat haadam ba*.
34 Vol. 11, fol. 175r–v, s.v. *ketoret vesamemanav*.
35 Vol. 17, col. 213, s.v. *aderaba ifkha mistabra* (from second ed.).
36 Vol. 17, col. 216, s.v. *ahavat ish et ahiv; ahavat hakadosh barukh hu*.
37 Vol. 14, fol. 28r–v, s.v. *tehiyat hameitim*.
38 Vol. 6, fol. 67r, s.v. *more nevukhim*; Lampronti refers readers to his entry on intercessory prayer (vol. 11, fol. 33v–58r, s.v. *tzrakhav al yishal*). See David Malkiel, "Between worldliness and traditionalism: eighteenth-century Jews debate intercessory prayer," *Jewish Studies, an Internet Journal* (2003), 169–98.

were to be taught the laws of doctrines[39] and of repentance; students at level 4 were to study the opening section, devoted to fundamentals, and the section on doctrines.[40] These selections deal with what were apparently considered fundamental doctrines of ritual law and religious ideology, areas in which Maimonides' formulations seem to have provided the desired content in clear, concise, and elegant formulations.

As Robert Bonfil has described, during the Italian Renaissance the *Mishne Torah* declined in popularity as a practical guide to Jewish law, and was largely replaced by Jacob b. Asher's *Arbaa Turim*.[41] However, judging by the *Pahad Yitzhak*, the *Turim* was no longer dominant in the eighteenth century. It is rarely cited, and the citations more often address the principal commentaries on the *Turim*, the *Bayit Hadash* and *Beit Yosef*, than the *Turim* proper. The obvious reason for this change is the appearance of the *Shulhan Arukh* around 1565 and its striking ascendancy thereafter.

In one instance Lampronti does give serious consideration to the position of Jacob b. Asher.[42] At issue was the Tosafists' view regarding the blessings recited at the conclusion of a wedding feast. Lampronti writes that he was perplexed by the fact that the position attributed to the Tosafists in the *Turim* contradicts the text of the Tosafists themselves "as you, the reader, can see with your own eyes."[43] He recounts that his suspicion that his text of the Tosafot might be defective led him, while visiting Padua and Venice in 1724, to check a number of texts of the relevant talmudic passage, in different editions, and thereby confirm the accuracy of his own copy.

This entry further illuminates Lampronti's methodology. It is fairly unusual for Lampronti to report having compared different printed editions of halakhic works in order to ascertain the correct text.[44] Still, this sort of textual criticism was an element of Lampronti's empiricism,

39 Namely *Code*, Hilkhot Deiot — Laws concerning the Fundamental Principles of the Torah.

40 Simha Assaf, *A Source Book for the History of Jewish Education* (Hebrew), second ed., ed. S. Glick (NY and Jerusalem: 2001), vol. 2, 366–67.

41 Robert Bonfil, *Rabbis and Jewish Communities in Renaissance Italy*, trans. Jonathan Chipman (Oxford: 1990), 256, 263–64.

42 Vol. 20, Jerusalem 1976, cols. 133–35, s.v. *birkat hatanim*.

43 *Ata hameayen roe beeinekha*. See *Arbaa Turim*, EH 62; cf. *Tosafot*, bPesahim 102b s.v. *sheein omrim*.

44 See below, however, on Lampronti's attitude to textual criticism.

and it reflects the value he attached to first-hand knowledge, to seeing with one's own eyes. To return, however, to the main point, the entry documents an exceedingly rare instance in which Lampronti lavished careful attention upon the *Arbaa Turim*.

More surprising is the less-than-complete authority accorded the *Shulhan Arukh* in the *Pahad Yitzhak*. Lampronti sets down his approach explicitly in the following statement: "There are those who say that it was written, not by R. Joseph Karo, but rather by one or more of his disciples, and therefore we do not rule in accordance with it, but rather we examine the *Beit Yosef* before issuing a ruling."[45] The statement is ambiguous, for Lampronti neither identifies openly with the hypothesis, nor distances himself from it. Whether or not he believed that Karo authored the *Shulhan Arukh*, other entries in the *Pahad Yitzhak* reflect the same sort of critical stance. In an exchange of views with Samson Morpurgo of Ancona regarding a conflict between the laws of mourning and those of wedding celebrations, Lampronti follows Maimonides rather than the *Shulhan Arukh*. Morpurgo criticized him for spurning the *Shulhan Arukh*, which he deemed a universally accepted source, in favor of Maimonides and Jacob b. Meir Tam, the Tosafist, whom Morpurgo viewed as less authoritative than Karo.[46]

45 Vol. 13, Berlin 1886, fol. 209v, s.v. *shulhan arukh*. This hypothesis was aired in the seventeenth century, in a responsum by Samuel Aboab, *Dvar Shmuel* (Venice: 1702), #255; see Elon, *Jewish Law*, n. 4 above, vol. 3, 1371. See also Meir Benayahu, "Why did R. Joseph Karo write the *Shulhan Arukh*, and for whom?" (Hebrew), *Asufot* 3 (1989), 266. For an example of an entry in which a view expressed in the *Beit Yosef* is explicitly rejected, see vol. 8, Lyck 1866, fol. 156r–v, where Lampronti writes: "the Beit Yosef would be pleased to have this obstacle removed from his books, and God is with us."

46 Vol. 17, col. 118, s.v. *aveilut bepurim*. See *SA*, YD 392. A similar combination of deference and independence toward the *Shulhan Arukh* was expressed by Jacob Emden, a younger contemporary of Lampronti, in the introduction to his Mishnah commentary, quoted in Roth, n. 4 above, 111–12. In a responsum, Emden cited the dictum, attributed to Moses Lima of Lithuania, that one is only qualified to issue legal decisions if he is able to uproot a section of the *Shulhan Arukh*; see Emden's *Sheeilat Yaavetz* (Lemberg: 1884), part 2, #20, fol. 12v. On Emden's attitude to Maimonides, see J.J. Schachter, "Rabbi Jacob Emden, philosophy and the authority of Maimonides," in Schachter, n. 4 above, 131–39. Yair Haim Bacharach (*Havot Yair*, #165) anticipated Morpurgo's wholesale embrace of the *Shulhan Arukh*, which was shared by Jonathan Eibeschutz, see *Urim Vetumim* on *SA*, HM 25, paras. 123–24 ([Carlsruhe: 1775], vol. 1, fol. 46v–47r). On the history of the reception of the *Shulhan Arukh*, see Elon, n. 4 above, vol. 3, 1368–1422; Isadore Twersky, "The *Shulhan Arukh*: enduring code of Jewish

Lampronti's attitude toward earlier authorities and halakhic tradition surfaces obliquely in an entry devoted to a controversy that erupted in Ferrara in 1700 over the wedding of a young, single woman who was already pregnant. At issue was the halakhic requirement that the wedding be delayed for two years. The woman's family opposed the delay, partly because their prospective son-in-law had threatened that, if forced to wait, the couple would apostasize and marry as Christians. Shabtai Elhanan Sanguinetti of Ferrara was unyielding, arguing, inter alia, that Israel Isserlein of fifteenth-century Germany had already ruled that the threat of apostasy is not a halakhic consideration.[47] In reply, Judah Briel and Joseph Barukh Cases, the leading rabbis of Mantua, cited David b. Samuel Halevi (1586–1667), author of *Turei Zahav*, one of the principal commentaries on the *Shulhan Arukh*, who rejected Isserlein's position.[48] Sanguinetti would not relent, and he upbraided the Mantuan authorities for adhering to the view of a relatively recent scholar against that of earlier authorities:

> And should you say to [your] servant: "The law is in accordance with later scholars, as opposed to those of antiquity,"[49] I wish I knew

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law," in Judah Goldin (ed.), *The Jewish Expression* (New Haven: 1976), 322–43; Ben-Menahem et al., n. 16 above, vol. 1, 513–85.

47 *Terumat Hadeshen*, Pesakim, #138. Moses Isserles had incorporated Isserlein's ruling into his gloss on YD 334: 1, regarding the laws of excommunication.

48 *Turei Zahav* YD ad loc.

49 *Hilkheta kevatraei neged hakadmonim*. On this principle, see: Moses Alashkar, *Responsa*, #54; Moses Alsheikh, *Responsa*, #39; Moses Isserles on *SA*, HM 25:2. Numerous sources are collected in *Controversy and Dialogue*, n. 16 above, vol. 1, 243–91. See also: Abraham Joshua Heschel, *Theology of Ancient Judaism* (Hebrew), vol. 3 (Jerusalem: 1990), 147–50; Elon, n. 4 above, vol. 1, 267–72; Israel Ta-Shma, "The law is in accord with the later authority — *hilkhata kebatrai*: historical observations on a legal rule," in H. Ben-Menahem and N.S. Hecht. (eds.), *Authority, Process and Method: Studies in Jewish Law* (Amsterdam: 1998), 101–28 (including both a translation of Ta-Shma's original article, which appeared in *Shenaton Hamisphpat Haivri* 6–7 (1979/1980), 405–23, and a postscript added in 1994); idem, *Ritual, Custom and Reality in Franco-Germany 1000–1350* (Jerusalem: 1996), 76–78; I. Yuval, "Antiqui et moderni, rishonim veaharonim," *Zion* 57 (1992), 372–94; Avraham Meir Rafeld, "The halakha follows the later sages" (Hebrew), *Sidra* 8 (1992), 119–40; Shai Wosner, "*Hilkheta kevatraei*: a new perspective," *Shenaton Hamishpat Haivri* 20 (1997), 151–67; Jeffrey R. Woolf, "Between diffidence and initiative: Ashkenazic legal decising in the late Middle Ages," *JJS* 52 (2001), 92–97.

> how far back this rule applies, giving permission to recent scholars (*aharonim*) to overturn the views of earlier ones (*harishonim*), whose knowledge was broader than ours is. And should we say "forever," this is unthinkable.[50]

Ultimately the rabbis of Ferrara, including Sanguinetti, yielded to the Mantuan scholars. Lampronti addressed Sanguinetti's comment on the authority of predecessors: "You should know that the author of the *Turei Zahav* was the wonder of his generation, and all the scholars of Israel would yield to his words, for he was like a Tanna and an Amora, and the word of God was truly in his mouth." He later added a personal note: "I remember that when we once had a case involving some blackguard (*beli-yaal*), and we considered following the *Terumat Hadeshen*, we could not bring ourselves to perform an act that contravened the [view of the] author of the *Turei Zahav*, a great and wonderful rabbi, especially since he was right."[51] Instead of debating Sanguinetti on the merits or relevance of the principle that "the law is in accordance with later scholars" (*hilkheta kevatraei*), Lampronti emphasized Halevi's reputation and the justice of his position in the case at hand; for him, these considerations overrode both Isserlein's reputation and the authority supposedly commanded by his status as an earlier authority. This was so despite the fact that Isserlein's stance had been codified in Moses Isserles' canonical gloss on the *Shulhan Arukh*, the *Mapa*.

Lampronti's extravagant praise for David Halevi is noteworthy, for the *Pahad Yitzhak* is not rich in encomia for individual scholars, apart from formulaic references to medieval titans. However, it is not unique — Lampronti also extolled an older contemporary of Halevi, Yom Tov Zahalon, the Maharitatz (b. 1559): "I heard from my teachers that the most learned scholars (*geonim*) wrote that no one knows how to answer the questions of the Maharitatz."[52] This compliment is not nearly as

50 Vol. 18, col. 583, s.v. *isha eina mitkadeshet ela ad ahar zeman yenika*. Sanguinetti's final remark is a partial quote from responsum #53 by Moses Alashkar, as he immediately acknowledges. Yuval, n. 49 above, 382–86, notes that, paradoxically, the *hilkheta kevatraei* principle also served to cut off the possibility of innovation, rather than to justify and expand judicial autonomy. Joseph Kolon, of 15th century Italy, broke new ground by applying the principle to medieval decisors, but did not consider it applicable to subsequent authorities, such as his own contemporaries.

51 Ibid, col. 592.

52 Vol. 6, fol. 25r, s.v. *maharitatz*.

extravagant as Lampronti's panegyric for a nearer contemporary, Yair Haim Bacharach (1638–1702):

> He explains his early and later words and strengthens them . . . with the profundity of his intellect and erudition and the sweetness of his tongue, which is golden. Study him, for he is great and powerful, and I consider his might greater (*yishar helei*) than that of all of his contemporaries (*bnei gilo*). For I truly saw from his book that he was perfect in Torah and piety, and expert in all the books and sciences that he needed. And there is in him [something] of Maimonides' knowledge, and he followed his path; blessed be she who bore him.[53]

The piety, elegant style, and scientific knowledge for which Bacharach is praised seem to represent the virtues dearest to Lampronti's heart. Maimonides, to whom Bacharach is compared, very likely served as Lampronti's role model, not least, as noted above, because of their shared occupation.

Lampronti's position in the Sanguinetti brouhaha was probably determined, at least partially, by his fidelity to Briel and Cases, both of whom had been his teachers. Lampronti's devotion to his teachers also emerges from an entry about whether, upon leaving a cemetery, one ought to dry his hands after washing them. Lampronti noted that he had seen his two teachers, Rabbis Briel and Cases, dry their hands, "and I followed them and **always** did as they did"[54] (emphasis added). Thus it seems that although Lampronti deviated from the medieval masters, he held the authority of his own teachers to be unimpeachable.[55]

Lampronti's independence of the *Shulhan Arukh* was sufficient to allow him, in a matter related to the laws of mourning, to explicitly reject a position codified in the *Shulhan Arukh* in favor of that of an

53 Vol. 10, Lyck 1871, fol. 4v, s.v. *pidyon bekhor*.

54 Vol. 11, fol. 67v, s.v. *kavru hamet*. In 1706 Lampronti queried the two Mantuan scholars on a matter of ritual: vol. 6, fol. 19r–v, s.v. *megila mevarekhin ahareha*. Similarly, regarding the questionable obligation to prostrate oneself during the passage beginning "And [when] the priests and the people (*vehakohanim vehaam*)" in the Musaf service for Yom Kippur, Lampronti noted: "And I, the author, served great scholars and I saw that they did not prostrate themselves." See vol. 6, fol. 52r, s.v. *musaf beyom hakipurim vedinav*.

55 Whether Lampronti's judicial decisions mirror this declaration of fidelity has yet to be determined. On the requirement of fidelity to teachers, as opposed to other authorities, see Roth, n. 4 above, 84–85; Silman, n. 4 above, 58–61. This value may be related to the veneration of custom, discussed below.

exact contemporary, Jacob Reischer of Prague.[56] This is a powerful mark of Lampronti's refusal to blindly accept the rulings of authoritative works. The decision to embrace Reischer's stance also demonstrates Lampronti's willingness to invoke a broad spectrum of views. Rather than adhere to the Sefardic axis of Alfasi, Maimonides, Jacob b. Asher, and Joseph Karo, Lampronti cited an impressive range of sources, with no clear preference for earlier works, or for those of a particular geographical or ethnic stamp, be it Ashkenazic, Sefardic, or Italian.

This broad-ranging approach to sources is illustrated by Lampronti's use of unconventional sources from within the corpus of medieval Hebrew literature. A prime example is Azariah de Rossi's *Meor Einayim*, banned shortly after it was printed in 1573, and not reprinted until the end of the eighteenth century. Lampronti refers to the four proofs this work offers for the rule that one must begin a tale with an invocation of the divine name.[57] He also cites Leon Modena's *Shaagat Arye*, which was available only in manuscript.[58] This eclecticism in itself implies independence from authority.

It might be expected that the legal rulings of one with mastery of such a wide range of sources, who by no means exhibits slavish adherence to his predecessors, would be bold and original. In this respect Lampronti's halakhic judgment is sometimes disappointing. In 1721 he was asked whether it was permissible to lend an object to another for a specified period of time, at the end of which the lender would be repaid the current value of the object, even if that value was higher

56 Vol. 17, col. 8, s.v. *av yakhol letzavot*, See *SA*, YD 344: 10 and Reischer, *Shvut Yaakov*, part 2, #102.

57 Vol. 20, col. 209, s.v. *beshem hashem naase venathil kol maase*. See also vol. 5, fol. 72v, s.v. *kelaiot yoatzot*. Cf. Aviad Sar Shalom Basilea, *Emunat Hakhamim* (Mantua: 1730), fol. 38r, who critiqued Azariah de Rossi ("Edom") at roughly the same time. For other references to *Meor Enayim* in the 16th to 18th centuries, see Yom Tov Lipmann Zunz, "The history of R. Azaria de Rossi" (Hebrew), *Kerem Hemed* 5 (1841), 146.

58 Vol. 5, col. 483, s.v. *gemara vekabala holkim ze al ze*. It seems that Lampronti intended to refer to another of Modena's manuscript works, *Ari Nohem*. The error is implied in his remark that Modena wrote the work for his student, the physician Joseph Hamiz. It was a common error: Isaiah Bassan also referred to *Ari Nohem* by that name, as did Aviad Sar Shalom Basilea. See Isaiah Tishby, *The Wisdom of the Zohar*, trans. David Goldstein (Oxford: 1989), vol. 1, 36. Tishby notes that although *Ari Nohem* was still in manuscript, it was not unknown, as evidenced by the fact that it inspired Moses Haim Luzzato's defense of Kabbala, *Hoker Umekubal*.

than the original value, which might render the act usurious and hence unlawful. Lampronti replied in the negative, maintaining, "the new law that you thought to generate from the wellspring and source of your intellect is not to be seen or found in the [responsa of] the Maharik [Joseph Kolon], nor in any of the decisors, new or old, for the law is not a true law."[59] For Lampronti, the innovation was suspect because it did not fit the main thrust of the legal sources, "new or old."

But Lampronti felt that his correspondent's suggestion was not only unsubstantiated, but wrongheaded as well. In his view, repayment at the commodity's later value would only be lawful if the contract between the parties stated that the borrower would be repaying in kind; if, however, the loan, when originally made, was explicitly linked to the initial value of the object, the borrower had to repay the stipulated sum, regardless of subsequent fluctuations in the object's value. In this case, if not always, Lampronti's respect for sources and precedents was of secondary importance. His primary consideration was substantive, rather than methodological: if an idea made sense, he tended to accept it.[60]

This scale of values is implicit in the statement, quoted above, that the rabbis of Ferrara could not bring themselves to contravene the view expressed in David Halevi's *Turei Zahav*, "especially since he was right." But the *Pahad Yitzhak* also contains an explicit policy statement to this effect. In one entry, Lampronti notes that the responsa of recent halakhic authorities (*aharonim*) sometimes state disparagingly that a

59 Vol. 8, fol. 1v, s.v. *seia beseia asur lilvot*.

60 This attitude evokes the talmudic dictum that one must insist that left is left and right is right, and reject assertions to the contrary no matter how authoritative their source. See jHorayot 1:1 (45d); Maimonides, *Code*, Laws concerning Offerings for Transgressions committed through Error, 13:5–6. However, the opposite view can also be found: Sifre Deuteronomy, Mishpatim, 154; Rashi on Deuteronomy 17:11; Maimonides, *Code*, Laws concerning Rebels 2:2. See: Yitzhak D. Gilat, *Studies in the Development of the Halakha* (Hebrew), (Ramat-Gan: 1992), 183–90; Yaakov Blidstein, " 'Even if he tells you that right is left': on the force and limits of authority in Jewish law" (Hebrew), in Avi Sagi and Zeev Safrai (eds.), *Between Authority and Autonomy in Jewish Tradition* (Hebrew), (Tel Aviv: 1997), 158–80; Michael Z. Nehorai, "Between knowledge and faith" (Hebrew), (Jerusalem: 1982), 6–10. This issue often serves as a point of departure for discussions of conscience and equity in Jewish law. See Elon, n. 4 above, vol. 1, 247–61; Aaron Kirschenbaum, "Subjectivity in rabbinic decision-making," in Sokol, n. 4 above, 61–91.

particular scholar was the only one to draw a certain distinction, while at other times this silence is presented in a benign light: since the scholarly community did not take issue with the distinction, it must have found it compelling. Lampronti then presents the following view:

> I have seen in my heart that the nature of this matter depends on the judge's judgment. If that decisor's distinction is correct and reasonable, and is not contradicted by the Gemara and by the decisors, even by close analysis (*midiuka*), then we say that the law is in accord with [the view of] that decisor, and presumably everyone admits [the truth of his distinction]. However, if it is possible to cast doubt (*legamgem*) on the decisor's distinction on the basis of the meaning of the Gemara or the decisors, or logically, then we say that presumably they disagree with it.[61]

Although this passage implies that the decisor enjoys a considerable degree of latitude, it is nevertheless a fairly conservative statement, for it legitimizes novel distinctions and rulings only provided they can be aligned with talmudic and halakhic tradition. By the same token, however, Lampronti is expressing a fairly open view of the halakhic process, since he maintains that there is always room for new contributions, provided they pass the test of critical scrutiny. Being right, as in the case of the *Turei Zahav*, legitimates new ideas, regardless of when they are produced or by whom. This independence and fidelity to truth rather than authority, is characteristic of Lampronti's value system.

Where Lampronti is situated on the spectrum of conservatism and originality is clearly reflected in a statement he made in a discussion about the relatively new fashion of depilation, and its possible violation of the biblical prohibition against the shaving of facial hair (*peiot*): "I heard that in Rome, and I also see every day here in Ferrara, that it has become customary to shave the *peot* of the beard with *morducco* and *squardo*, which is a combination of lime and quicksilver and other things that depilate, and I did not see the elder decisors object."[62] Although Lampronti conceded that Hillel b. Naftali Hertz of Lithuania

61 Vol. 10, fol. 10r, s.v. *posek*.

62 Vol. 10, fol. 1v, s.v. *peiot hazakan*. The word "*morducco*" comes from *mordicare*, that is, corrosion by means of a chemical agent; the origin of *squardo* is unclear. Lampronti's observation on the then-current distaste for facial hair is confirmed by a communal ordinance from Ferrara, dating from before 1751, which permits the use of a razor only to shave below the throat, far from the bone and the upper lip. See Assaf, n. 40 above, vol. 2, 356.

prohibited depilation,[63] he nonetheless opted to defend the practice, particularly because his own teachers had not protested it. Relying on the statement in the Mishnah that one is liable only if he used a razor, but not the tool referred to as *rehitani*,[64] Lampronti declared: "In my opinion, there is no difference between [the] *rehitani* and the thing called *morducco*."[65] Both, he explained, depilate without shaving, and therefore without "destroying" (*hashhata*), the term that appears in the biblical commandment.[66]

This entry captures the combination of conservatism and originality that characterizes Lampronti's activity as a decisor. He utilized a familiar conceptual distinction (between "destroying" facial hair and other methods) to arrive at a novel and liberal ruling. However, Lampronti gave no indication that he was motivated by the need to justify an ostensibly illegal, if widespread, practice. Rather, he stated forthrightly that the behavior of his teachers dictated his position. In this respect his stance reflects a conservative bent as well as a willingness to innovate.

Elsewhere, Lampronti's conservative bent appears to have stemmed not from an ideological opposition to innovation, but from caution. A disciple, Yoav Barukh Lampronti,[67] asked him to explain a passage from the Tosafot about the talmudic legend of the woman whose seven sons were martyred at the hands of the Romans.

63 See *Beit Hillel*, #2 on *SA* ad loc.

64 mMakot 3:5. *Rehitani* has been variously defined, but is clearly a tool composed of two parts that are easily detached.

65 Vol. 10, fol. 2r, s.v. *peiot hazakan*.

66 Lampronti's stance was enthusiastically endorsed by Aviad Sar Shalom Basilea of Mantua, who wrote that the only reason he did not remove facial hair with a combination of lime and quicksilver was that the foul odor was bad for his heart. Basilea also offered an astrological explanation of the prohibition, ibid., s.v. *peiot rosh vezakan*. Ezekiel Landau, too, allowed the use of chemical depilation, contrary to the view of Hillel b. Naftali Hertz. See *Noda Biyehuda*, second ed., YD #81. Cf. Samson Morpurgo, *Shemesh Tzdaka*, part 1 (Venice: 1743), YD 61, 102b. On facial hair in medieval and early modern Jewish culture, see Elliott Horowitz, "The early eighteenth century confronts the beard: Kabbalah and Jewish self-fashioning," *Jewish History* 8 (1994), 95–115, as well as the Hebrew version, with slightly different emphases and wonderful illustrations: Elimelech Horowitz, "On the significance of the beard in Jewish communities in the East and Europe in the Middle Ages and early modern times" (Hebrew), *Pe'amim* 58 (1994), 124–48.

67 He is mentioned in two other places in the *Pahad Yitzhak*: vol. 18, col. 565, s.v. *esh min haeitzim*; vol. 11, fol. 16v, s.v. *tzeida*.

According to the Tosafot, only six sons recited a verse at the moment of their death, but a parallel text in the Midrash associates each of the seven martyrs with a verse.[68] Lampronti replied that although he had assumed that the discrepancy resulted from a flaw in the Tosafists' version of the talmudic text, he was opposed to textual emendation, because

> to correct by means of reason what our feeble reason has distorted by multiplying the existing entities (*hahavayot*) unnecessarily is not the way of the wise of heart and those who carry the Torah of God in their heart. Rather, everyone is obligated to uphold the version of his book by any means available. If he cannot, then he can switch [to another version], or else concede that he does not know, as a wise man said (in the presence of scholars who were discussing some philosophical matter (*hamitpalsefim*) among themselves: after lengthy discussion, they conceded that they did not know or understand, for "what their eyes saw was beyond the understanding of their hearts" [Isa. 44:18]): The first words of an ignorant man — "I do not know" — are also the last words of a scholar, after all his efforts to attain knowledge.

Ultimately Lampronti became convinced that the Tosafists did, indeed, have a different text, but in the above passage he emphasizes the need for a conservative approach to textual tradition.[69] The passage stresses the wisdom of recognizing the limits of one's knowledge or intellectual capacity.

Lampronti also makes this point in his entry on resurrection. When a correspondent invited his interpretation of the legendary scenario of the righteous sitting with crowns upon their heads (bBerakhot 17a), Lampronti responded as follows: "My guiding principle is that, on matters like these, I am not embarrassed to say 'I do not know.' If you

68 Vol. 3, fol. 79r–v, s.v. *haval alekha kesar*. See *Tosafot* on bGitin 57b s.v. *atiyuhu lekamei*; Lamentations Rabbah 1, s.v. *maase bemiriam*.

69 Cf. the passage, above, on his examination of variant texts of the Tosafists. See also vol. 5, fol. 9v, s.v. *yehoshafat melekh yehuda*, in which Lampronti pondered the meaning of the reference, in 2 Chron. 21:2, to Jehoshaphat as king of Israel rather than Judea. He wrote that of all the copies of the Bible known to him, printed and manuscript, only the handwritten copy of the Ferrara Jewish community (as well as the Vulgate) refers to Jehoshaphat as king of Judea. Rather than emend the text, Lampronti suggested an exegetical solution to the problem. On Lampronti's awareness of the existence of biblical variants, see also vol. 6, fol. 219v, s.v. *mishna im ketava rabi*.

have a decisive argument (*hakhraa)*, on rational, traditional or textual grounds, kindly tell me."[70]

The most thoroughgoing discussion of the problem of the weight of tradition appears in the entry on the principle of majority rule. Lampronti declares that one must follow the majority at the time a decision is handed down, but that subsequent decisors are at liberty to reverse earlier rulings, and to adopt what was previously the minority position. Lampronti notes that "the law books are full of cases in which Rashi forbade [a practice] and R. Tam, his daughter's son, permitted [it], based on his own judgment." However, Lampronti proceeds to distinguish between the authority of earlier generations and that of more recent scholars. The entry goes on to state that the authority to adopt what was formerly a minority view is only available when a scholar produces irrefutable arguments. "Moreover, in our time . . . even when we have evidence, we do not rely on the evidence to overturn the reasoning of earlier scholars."[71]

This entry also airs the dilemma faced by latter-day rabbis in cases where earlier authorities disagreed with each other regarding a point of law.[72] Lampronti maintains that contemporary rabbis lack the authority to adduce evidence in order to choose between the conflicting views of the great decisors; rather, their responsibility is to establish which position was accepted by most of the classic decisors through the ages, and to rule accordingly. In case of a deadlock, one should choose the position of the scholar with the stronger reputation, or, if that cannot be established, adopt the more stringent of the two positions.

70 Vol. 14, fol. 28r, s.v. *tehiat hameitim*. The identical sentiment was expressed by Samson Morpurgo of Ancona, Lampronti's contemporary and fellow rabbi-physician. In a discussion of irrational ritual practices, Morpurgo wrote that whenever he studied these matters: "I knew that I did not know, but I did know that on theological matters one should not add knowledge that does not accord with the principles of traditional wisdom." "Traditional wisdom" (*hahokhma hamekubelet*) usually refers to Kabbala, rather than to halakhic tradition, although in this case both meanings are plausible. See vol. 6, fol. 137r, s.v. *minhag uketzat dinav*.

71 The opposite view was expressed by Elijah, the Gaon of Vilna. See *Beer Eliahu* on *SA*, HM 25, published in *Sefer Hagra*, ed. J.L. Maimon (Jerusalem: 1954), part 3, 206.

72 Roth, n. 4 above, 127–32; Silman, n. 4 above, 71–78, 113–15. For sources on the problem of controversy and its relation to authority, see Ben-Menahem et al. n. 16 above, vol. 1, 293–353.

Lampronti asserts that where earlier decisors disagreed regarding a biblical commandment, the latter-day authority must automatically adopt the more stringent of the two established positions. However, he notes that in practice this policy is often ignored, and scholars routinely choose a lenient ruling over a stringent one if it reflects the scholarly consensus, even where a biblical commandment is at stake. Lampronti explains this questionable practice by positing that although a minority position is of no consequence when it is held by a single scholar, a contemporary decisor may adopt a minority position when it is the view of two or three authorities. He affirms that this policy is valid not only for civil litigation (*dinei mamonot*), but also for disagreements regarding biblical commandments. But he requires that the "two or three" scholars be among the greatest and best-known decisors of all time, listing Alfasi, Maimonides, and Asher b. Yehiel as worthy of this designation.

As always, Lampronti proffers numerous references in support of his claims, and, although he does not state as much, all the cases he cites refer to situations in which the minority view is the more stringent one, implying that in his view, one may not adopt the minority view when it is also the lenient one. This approach is supported by the principle he states next, namely, that a stringent position is to be preferred even where it is the minority position, provided that the arguments for it are more compelling. But Lampronti also asserts that one should follow the **lenient** point of view when the arguments adduced in its favor are stronger than those produced in support of the stringent position. This undercuts the assumption that the minority view is only preferable when it is also the stringent one. It also indicates that despite the examples he brings, in all of which the minority view is the stringent one, Lampronti's tendency to cite such rulings is not an ideology. Lampronti's final position is, thus, quite different from the early part of his discussion, for it grants the decisor the freedom to opt for the minority view even where it is the more lenient of the two alternatives.[73]

73 This assessment of Lampronti's methodology rests entirely on his own generalizations and principles. A determination as to how radical or conservative he was in absolute terms can only be made on the basis of a comprehensive comparison of Lampronti's judicial decisions with those of contemporaries (Italian or otherwise). On the significance of the minority opinion in Jewish law, see Michael Rosensweig, "*Eilu ve-Eilu Divrei Elohim Hayyim*: halakhic pluralism and theories of controversy," in Sokol, n. 4

The autonomy of the decisor in Lampronti's halakhic methodology is further attested by his subsequent contention that one may also uphold a lenient position on the basis of the common practice. He illustrates this principle with the case of the chained woman, or *aguna*,[74] whom decisors have historically gone to great lengths to release from the bonds of matrimony, notwithstanding the possibility that their lenient ruling could result in the violation of a biblical prohibition. Lampronti argues that even where a biblical prohibition is at stake, the principle that one must follow the majority opinion is not sacrosanct, and the minority opinion must receive serious consideration. This is so, he explains, because the principle of majority rule originally applied to the courtroom situation, in which an odd number of judges sit in judgment and take a vote to determine their verdict. This social context is not applicable to the work of rabbinic decisors, who, historically, did not function as a group, but rather as discrete individuals, in a wide variety of periods and locales. And so it was that, on the basis of the various criteria set out above, at times the decisors accepted the principle of majority rule, and at other times they ignored it.[75]

Lampronti's attitude toward authority is not easily summed up, and certainly defies easy characterization. He makes a number of programmatic statements of a traditionalist flavor, and portrays himself as conservative, yet his own decisions and actions often reflect an independent spirit. He is critical of medieval authorities, overtly or through his choice of sources, and can frequently be observed to break the bonds of traditionalism for the sake of truth. Nonetheless, to dismiss Lampronti's traditionalist sentiments as mere lip service or false modesty would be an oversimplification, and, I believe, unjust. Avoiding both the straitjacket of traditionalism and the anarchy of revolution, Lampronti navigated carefully and deliberately between the poles of *auctoritas* and *veritas*. After over a thousand years of post-talmudic halakha, this policy can be characterized as not only prudent, but even courageous.

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above, 110–22. A number of halakhic sources discuss the applicability of the rule that a decision is not binding if it was reached because the decisor was unaware of an authoritative halakhic source ("he has erred on a matter of Mishnah").

74 I.e., a woman whose husband has disappeared or been reported dead, and who is therefore imprisoned in her marriage either until his death is proven, or he sends her a writ of divorce.

75 Vol. 5, fol. 22r–v, s.v. *yahid verabim halakha kerabim*.

Custom

Custom represents the extra-textual, empirical component of Jewish law, and hence an investigation of Lampronti's attitude to the question of its inviolability will complement the investigation, just completed, of Lampronti's stance on the authority of written legal traditions. In principle, talmudic tradition revered custom. Classical and medieval scholars assumed that accepted norms might reflect lost ancient legal traditions, and at the very least reflect a genuine effort to fulfill the commandments, in spirit as well as literally. Custom was held in such high regard that a series of major medieval scholars granted greater legitimacy to a custom than to a legal tradition, when the two conflicted.[76] At the same time, custom was a source of tension for rabbinic decisors. Custom lends itself to anarchy. By definition, it is not dictated by the sources, and historically, entrenched customs deemed misguided have often proved difficult to eradicate.[77]

The ambivalent status of custom makes it a useful vehicle for examining a scholar's approach to the issue of tradition and innovation. When subjecting the halakhic oeuvre of any expert to examination, it is useful to take note of his attitude both to custom in general, and to particular customs, with special reference to those he deems problematic or errant (*minhag taut*). Under what circumstances does he tend to endorse a custom or strive for its elimination, and what considerations factor into his overall tendency? As was true regarding the issues explored above, a halakhic authority's views on custom will help us situate him on the spectrum between traditionalist and innovator.[78]

76 Chaim Tchernowitz (Rav Tzair), *History of Hebrew Law* (Hebrew), (New York: 1945), vol. 1, 146–47.

77 A classic example of this pattern is the case of the employ of non-Jews on the Sabbath. As Katz observed, it is noteworthy that in this case popular practice was more stringent than the law. See Jacob Katz, *The "Shabbes Goy": A Study in Halakhic Flexibility*, trans. Yoel Lerner (Philadelphia: 1989). Cf. the portrait of early modern Polish Jewry in Edward Fram, *Ideals Face Reality: Jewish Law and Life in Poland 1550–1655* (Cincinnati: 1997), 48–64.

78 On the role of custom, see: Zvi Hirsch Chajes, *Darkhei Hahoraa*, in *Kol Sifrei Maharatz Chajes* (Jerusalem: 1958), vol. 1, 225–28; Tchernowitz 1945, n. 76 above, 144–50; Elon 1994, n. 4 above, vol. 2, 880–944; Daniel Sperber, *Jewish Customs: their Origins and History* (Hebrew), vol. 1, (Jerusalem: 1989), 20–38; vol. 2 (Jerusalem: 1991), 1–8; E.E. Urbach, *The Halakhah: Its Sources and Development*, trans. Raphael Posner (Jerusalem: 1986), 31–41; Roth, n. 4

Although the legitimacy of custom is a perennial issue, it occupies an especially prominent place in the halakhic literature of the early modern era. There are probably many reasons for this, and the matter requires independent study, but a likely factor is the loss of what may be termed uncharted territory. Over time, the legal literature set down in increasingly fine detail the code of behavior mandated by religious law, and hence custom, given its non-textual origins, became the one area in which scholars could play an active, creative role as legal authorities, documenting and evaluating the popular religious practices of their immediate environment. In addition, the burgeoning halakhic literature made it increasingly possible to argue for several alternative courses of action on numerous issues, leaving the decisors with hard choices to make. Custom provided a way out of the labyrinth, and had the advantage of being rooted in social reality, which served as the empirical justification for the customs that had become entrenched. This halakhic methodology also became more prominent because of the ever-increasing sense of anxiety over the "decline of the generations," which made scholars reluctant to exercise their authority to lay down the law.

An emphasis on custom is manifest in the *Pahad Yitzhak*. Lampronti habitually supplements his presentation of textual material with customs, with the goal of offering readers the most detailed instructions for practice, both consuetudinary and text-based, he can provide. While Lampronti peppered countless entries with observations concerning regulations and principles established in the legal literature, his information and views on customs are a particularly valuable resource for the study of Jewish law and cultural history, aside from their considerable significance for his intellectual portrait.

Throughout the encyclopedia, Lampronti makes frequent reference to the customs of various communities. He sometimes documents customs from far-off communities, such as Amsterdam and Cracow, but takes most of his examples from Italy, particularly from his own community, Ferrara.[79]

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above, 205–30; Israel Schepansky, "Communal ordinances," *The Ordinances of Israel* (Hebrew), vol. 4 (Jerusalem: 1993), 1–76. See also the articles collected in *Torah Shebeal Pe* 41 (2000).

79 For Amsterdam, see vol. 3, fol. 4v, s.v. *havraa*: "And that is what I saw here [to be] the custom of the Sefardic community of Amsterdam." By "saw here," Lampronti may have meant that there were Jews from Amsterdam in the Sefardic congregation of Ferrara. For Cracow, about which Lampronti had indirect information rather than personal experience, see

The location of the references to customs, as well as their number, reflects the perspective of the eighteenth-century halakhic scholar. Typically, customs are mentioned toward the end of entries, after explanatory material and bibliographical references. This is where Lampronti habitually places his own contributions to entries. It is the space reserved for the contemporary scene, for Lampronti's own latter-day "turf," the realm that had yet to become part of the received halakhic canon.

On a number of occasions he cites the custom of part of a community, such as a particular synagogue or ethnic group within a community. For example, Lampronti entered into the encyclopedia the custom of Ferrara's Sefardic community regarding the blessings to be recited over the four cups of wine at the Passover Seder, and then added the tradition of the Ashkenazic community.[80] This example highlights the question of Lampronti's intended audience. He may have intended to assist decisors everywhere, as they grappled with issues that presented more than one option. Alternatively, he may have recorded these practices purely for the benefit of his own community, to prescribe a clear course of action. Yet even if Lampronti was, by dint of geographic and pragmatic constraints, somewhat limited in what he was able to observe, his intended audience clearly encompassed both the Ashkenazic and the Sefardic communities.[81]

Lampronti's documentation of customs reflects the importance he ascribed to empirical knowledge, as opposed to theoretical speculation. This is evidenced by his frequent use of the expression "to see with one's own eyes." For example: "The custom of Ferrara, as I have seen with my own eyes in the days of the elder judges (*hadayanim hazkeinim*) [is]. . . ."[82] Similarly: "The custom of Ferrara, as I have seen,

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vol. 4, Venice 1798, fol. 17v, s.v. *halitza vesidra*. For Ferrara, see, e.g., vol. 19, col. 496, s.v. *beila beshabat*.

80 Vol. 18, col. 517–18, s.v. *arbaa kosot vedineihem*. He derived the Ashkenazic custom from Moses Isserles' gloss on OH 474: 1. See, similarly, vol. 20, col. 82, s.v. *birkat eirusin*; vol. 2, fol. 75r, s.v. *geshem, zeman hazkarato*.

81 Lampronti was affiliated with the local Sefardic congregation: see vol. 12, fol. 185v, s.v. *ktanei ktanim*; vol. 14, fol. 152v, s.v. *tekiot al seder habrakhot*. This, despite the fact that in 1711–1712 he taught in the study hall of the Italiani community: vol. 2, fol. 86r, s.v. *dagim vesimaneihem*; vol. 7, fol. 78r, s.v. *nefilat apayim*. He also preached to the Italiani community, see vol. 20, col. 420, s.v. *gehinom, im haneshamot yordot bo*.

82 Vol. 11, fol. 63v, s.v. *kviut makom lehalitza*.

and also heard from the decisors that preceded me, is . . . ."[83] In these cases and others (though not everywhere), Lampronti refers to his own personal experience in order to stress the reliability of the tradition that he received from his teachers and predecessors. In his mind, then, empirical observation is linked to the idea of the masoretic tradition, the chain of transmission that, according to Jewish tradition, began at Sinai, handing down teachings orally from one generation to the next.

But Lampronti's observations are more than empirical: they are legal. Like a witness in court, Lampronti testifies, stating for the record what he has seen or heard about particular customs. The care he takes to emphasize that his information comes from an eyewitness account suggests that he intended and expected that his testimony would be considered authoritative. This explains why his data on customs is couched in a formal, official style, like that which would be used by a court reporter.

Not every encyclopedia entry presents the custom of the Ferrara Jewish community (or an ethnic segment thereof), even when the subject of the entry would seem to warrant it. When, then, did Lampronti see fit to include a custom in his discussion? Apparently, the relationship between the custom and the written law was an important factor in this decision. Customs may gain halakhic significance where the law is ambiguous. This is illustrated by the case of the pregnant wife of a man of priestly descent. The medieval authorities were divided as to whether or not such a woman must avoid the pollution that results from proximity to corpses (*tumat met*) for the sake of her fetus, who — though as yet unborn — is also of priestly descent and hence enjoined to avoid contamination. After citing the relevant sources, Lampronti recorded that such avoidance was the custom in Ferrara.[84]

Customs are also important when they are blatantly extra-halakhic, that is to say, lacking classical or medieval roots. For example,

83 Vol. 9, fol. 160r, s.v. *eruvei tehumin al tnai*. See also: vol. 18, col. 262, s.v. *almana, hakones ota*; ibid., col. 320, s.v. *amira legoi liftoah ulekalkel hahotam beshabat*; s.v. vol. 20, col. 9, s.v. *barukh adonai leolam*; ibid., col. 152, s.v. *birkat kohanim*; ibid., cols. 257–58, s.v. *basar sheshaha*; vol. 21, Jerusalem 1986, col. 97, s.v. *get baal yikhtevenu*; vol. 7, fol. 78r, s.v. *nefilat apayim*; vol. 11, fol. 63v, s.v. *kviut makom lehalitza*.

84 Vol. 19, Jerusalem 1970, col. 74, s.v. *eshet kohen meuberet*. See, similarly, vol. 18, col. 493, s.v. *afarkesuto*. On the role of custom in the resolution of conflicts between laws, see Elon, n. 4 above, vol. 2, 936; Roth, n. 4 above, 223–24.

Lampronti recorded the Ashkenazic custom of having mourners refrain from reciting the priestly benediction, and he then noted the deviation of Ferrara's Ashkenazic community from this tradition.[85] In cases like this, Lampronti's purpose was not necessarily to combat the practice, or even to censure it, but merely to note the history of less-than-total compliance with the relevant law.[86]

Lampronti did not always accept a custom uncritically. He reported that in 1679, in nearby Cento, the witnesses to a wedding neglected to sign the marriage contract (*ketuba*). He then added the following personal testimony:

> Know, dear reader, that this bad custom was eradicated from our community a long time ago, because it caused trouble, for sometimes the *ketuba* remained unsigned, and no one knew who the witnesses were. And it once happened to R. Phineas Zamorano, known as "Purim," that he married Gioia Levia, and the *ketuba* was not signed on the wedding day, and they lived together for several years and bore children. And in their time of troubles (*beet tzarotam*) they reviewed their actions and discovered the *ketuba* unsigned, and no witness could be found who remembered their

85 Vol. 19, col. 4, s.v. *ashkenazim*. For another report of an ostensibly non-halakhic custom, see vol. 6, fol. 192v, s.v. *matzat mitzva nohagim shelo lalush beerev pesah ad ahar shesh shaot*. On the conflict between custom and law, see: Isaac Zeev Kahana, "On the relationship between law and custom" (Hebrew), in Solomon Joseph Zevin and Zerah Warhaftig (eds.), *Mazkeret* (Jerusalem: 1962), 554–64; Yedidya Dinari, "Custom and law in the responsa of Ashkenazic rabbis in the fifteenth century" (Hebrew), E.Z. Melamed (ed.), *Benjamin De Vries Memorial Volume* (Jerusalem: 1968), 168–98.

86 The *Pahad Yitzhak* records an 18th century debate over whether customs supersede law. Lampronti's student, Phineas Anau, held that longstanding customs supersede law as regards a Rabbinic prohibition, even if the latter rests on a biblical allusion. This stance was attacked by Aaron Ashkenazi of Florence, to whom Anau then responded. Joseph Ergas of Livorno sided with Ashkenazi, as did Immanuel Ricchi, and Anau refuted their arguments. See vol. 6, fol. 139v, s.v. *minhag mevatel halakha*. Relatively speaking, custom has greater authority to establish halakha, and even to displace it, in matters of civil law than matters of ritual law. See Isserles on *SA*, OH 690:17 (based on Joseph Kolon); Chajes 1958, n. 78 above, 225–26; Elon, n. 4 above, 903–11; Roth, n. 4 above, 211–22, 226–29; Sperber, n. 78 above, vol. 1, 24–30; Berachyahu Lifshitz, "Custom abrogates law" (Hebrew), *Sinai* 86 (1980), pp. 8–13; David Henshke, "Custom abrogates law? (corroborating a theory)" (Hebrew), *Dine Israel* 17 (1993/4), 135–54; Jeffrey R. Woolf, "The authority of custom in the responsa of R. Joseph Colon (Maharik)," *Dine Israel* 19 (1997/8), 53–73.

> wedding. The court required Zamorano to write another *ketuba*, but he passed away before he could do so.[87]

This source not only proves that Lampronti acknowledged the concept of a "bad" custom, it also reveals that the Ferrara community was ready to take the necessary steps to actively resist undesirable practices.[88]

This report also illustrates the geographic aspect of Lampronti's conception of custom: a practice could be common and recognized in Cento but banned in Ferrara, a mere eighteen miles away. Many more examples can be cited of variations between the customs in cities and towns of northern Italy, and it is clear that Lampronti viewed communities as autonomous and authority as decentralized. This approach is similar to that generally taken with regard to the Jewish communities of medieval Germany, and the similarity may be at least partly attributable to the historical links between Italian and German Jewry: in the tenth century, Italian Jews played an important role in the Jewish settlement in the Rhineland, and later, in the fourteenth century, large numbers of German Jews migrated south and founded new communities in northern Italy. However, the similarity may also be the result of a common sociopolitical situation. Throughout the Middle Ages, both Germany and Italy were politically fragmented, and this may have dictated an extremely localized notion of regional identity in the minds of the inhabitants of these realms, and a corresponding localization of the notion of custom.[89]

The *Pahad Yitzhak* also documents minute variations in custom between even nearby communities. A prime example is the entry about

87 Vol. 19, col. 497–98, s.v. *beila beshabat*. No details are available on the nature of the couple's "time of troubles," although the general tenor of the passage suggests that it involved some sort of family crisis, perhaps a sudden death.

88 Lampronti also attacked the "bad custom" of congregants' praying loudly along with the cantor. He added: "And many times we upbraided them and were able to void their bad custom for a month or for some months, but they quickly return to their teaching, like a dog to his vomit." See vol. 12, fol. 49v–50r, s.v. *kriat sefer tora*. Note that Lampronti attributed this behavior to the diffusion of prayer books, indeed, it constitutes an excellent example of the impact of printing on religious life.

89 The suggested moral of the story — that an unsigned *ketuba* could account for misfortune — is also significant, for it sheds light on Lampronti's theodicy and perhaps most significantly, his view of the impact of the supernatural on human existence. Lampronti's views on metahalakhic matters merit a separate study.

the shoe used in the ritual of *halitza*, the repudiation of the levir. Lampronti differentiates the shoe of Ferrara from that of Mantua on a number of points. For example, in Ferrara the shoe is made from a single piece of leather, while in Mantua it is made from three pieces. In Ferrara, but not in Mantua, left-handed levirs wore a special shoe, which Lampronti carefully described, on their left foot.[90]

The minutiae with which Lampronti and his contemporaries were concerned lends their stock of customs a baroque quality. This could be viewed as the natural result of the development of the legal system. As it developed, Jewish law generated an increasingly ramified network of branches, and with the passage of time increasingly fine points were defined. There is, however, another perspective, more phenomenological than historical. Customs fill voids left by the legal literature, in a manner analogous to that in which the kashrut regulations in talmudic law spell out the manner in which the prohibition against seething a kid in its mother's milk is to be observed.[91] This is as true for the Middle Ages as it is for the eighteenth century, with the difference that, figuratively speaking, later scholars hold their magnifying glass closer to the object of their scrutiny, and thus describe their subject in greater detail. While kabbalists filled these halakhic voids with ritual content of symbolic significance to their theology, the broader phenomenon is the simple tendency to fill these voids with practical directives, kabbalistic or other.

The *Pahad Yitzhak* drives home the innovative potential of custom, and also highlights the grey area at the boundary separating custom from law.[92] Concerning the salting and rinsing of meat on a Sabbath

90 Vol. 4, fol. 17r-v, s.v. *halitza vesidra*, and see also vol. 6, fol. 151r, s.v. *minaal shel halitza*. Cf. *SA*, EH 169:15–20. For other differences between the customs of Mantua and Ferrara, see vol. 12, fol. 185v, s.v. *ktanei ktanim*.

91 This is why custom is sometimes referred to as "concealed legislation," as opposed to legislated statutes (*takanot*), which are known as "open legislation"; see *Encyclopedia Judaica*, "Minhag" (written by Menachem Elon). On the supplementary role of custom, see Elon 1994, n. 4 above, vol. 2, 901–03; Kahana, n. 85 above, 560.

92 The idea that some customs did not merely evolve, but were instituted by the religious authorities, is not new. A well-known source is Maimonides, *Code*, Laws concerning Rebels 2:2–3, which, however, stipulates that the legitimacy of legislated customs is contingent on their acceptance by the public. See Elon 1994, n. 4 above, vol. 2, 885–88; Joseph B. Soloveitchik, "Two kinds of tradition" (Hebrew), in *Shiurim Lezekher Aba Mari* (Jerusalem: 1983), 220–39; Isadore Twersky, *Introduction to the Code of*

that happens to be the third day following the slaughter of the animal, by which time these activities must be performed, Lampronti writes as follows:

> I, the young author, think that I saw it written that by way of a stratagem (*haarama*), one may wash one's hands over this meat on the Sabbath, and carry it in an unusual manner (*kileahar yad*) and place it in rainwater, or else push it with one's feet — or in some other unusual way — into vessels with water. . . . And I heard from R. Samson Morpurgo that in Ancona they practiced this stratagem, with the consent of the elder decisors. And the same custom was practiced here in Ferrara and the scholar-decisors that preceded me did not protest. . . . And after writing this, God illuminated my eyes with responsum #1 in *Eidut Beyaakov*, and he said it all.[93]

The stratagem was practiced in both Ancona and Ferrara, although Lampronti says nothing about when and how this transpired. He states that the rabbis of Ancona actively supported the custom, while those of Ferrara did so only passively, but the very mention of these rabbinic responses implies that the custom was not a time-honored tradition. It is, therefore, striking evidence of the innovative role custom sometimes played in eighteenth-century Italy. Notwithstanding Lampronti's closing remark, it remains an open question whether the relatively new practice was fundamentally text-based or consuetudinary in nature. What is unambiguous, however, is that the proposed solution came into being through an intricate interaction between custom and law, in the liminal zone between the two realms.[94]

Anxiety over the impression that local traditions had lost some of their authority seems to have been one of the forces that motivated Lampronti's meticulous recording of customs. The following case illustrates this perspective:

> We, the members of the Ferrara yeshiva, on 18 Heshvan 5481 [19 November 1720], voted to renew the practice of our city's ancient custom, and we announced in all the synagogues, by means of the community sexton, [that we would] require the examination of endives [for worms],

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Maimonides (*Mishneh Torah*), (New Haven: 1980), 124–34, especially 130; Gerald J. Blidstein, *Authority and Dissent in Maimonidean Law* (Hebrew), (Tel Aviv: 2002), 92–108.

93 Vol. 20, col. 257, s.v. *basar sheshaha*. The author of *Eidut Beyaakov* (Saloniki: 1719/1720) is Jacob de Boton.

94 Note, also, Lampronti's willingness to edit his entry, based on the acquisition of new information.

> as had once been customary and was almost forgotten by the public (*hamon haam*), though a select few (*yehidei segula*) continued to uphold the ancient custom, as you can see in the book of the secretary of our yeshiva, the *haver* Elisha Michael Finzi, my disciple.[95]

This intriguing process whereby customs are forgotten and renewed is obscure. The text links the dynamic to the dichotomy between "most of the public" and "the select few." Lampronti's reference to the public is vaguely disparaging, and thus it might seem, at first glance, that the rank and file of the community had forgotten the custom, while those in the yeshiva had remembered it. Yet Lampronti's formulation cuts across the rabbinate–laity divide, suggesting that those who had forgotten and those who recalled the custom were not easily classified in terms of these groups. It may be, therefore, that Lampronti is alluding here to the more and the less observant members of the Ferrara community. If so, he speaks of "forgetting" figuratively rather than literally, to indicate a shift in values away from punctilious observance.

Whatever the meaning of this "forgetting," the problem highlights a second cultural context for the creation of the encyclopedia (the first being the information overload generated by the accumulated weight of the ramified halakhic literature). It suggests that Lampronti was making a concerted effort to preserve traditions, by documenting existing customs for posterity, or, as in this case, restoring a lost custom. Or more generally, Lampronti's *Pahad Yitzhak* in its entirety might be intended as a means of shoring up the foundations of tradition. The implications of this suggestion vary according to one's view of the period: pessimists will emphasize the problem of erosion and loss, whereas optimists will point to the energy, and therefore the hope, with which Lampronti sets about revitalizing the religious life of his flock.

The story of another Ferrarese custom reveals a different sort of forgetting and remembering, which also involves change, though no weakening of observance. After adducing evidence that one ought to recite the blessing over the new moon out of doors, Lampronti produces sources that mitigate the force of this regulation, including Abraham Gombiner's comment that one may recite the blessing indoors when there are dirty alleys outside.[96] An uncharacteristically

95 Vol. 14, fol. 13r, s.v. *tolaim biyrakot*. See also vol. 6, fol. 92r, s.v. *mila, ger shemal kodem shenitgayer*. On the public announcement of customs, see Tchernowitz 1945, n. 76 above, 149.

96 *Magen Avraham* on *SA*, OH 426:4, n. 14.

vehement narrative follows:

> And this is the custom of Ferrara. But some neophytes (*hadashim mikarov bau)* [Deut. 32:17] who bear a faint scent of Torah and consider themselves wise and bearers of tradition, although they are opposed by the wise, leave the Sefardic synagogue on Saturday night, even though they could certainly recite the blessing [while looking] through the windows of the synagogue, or in the synagogue courtyard, which is a clean and open location. Instead, they proceed, contemptuously, along the road opposite the wall of the synagogue, to a very dirty place, near a small and narrow passage (*indrona*) called "*transito*," and there they sit and recite the blessing. And many times have I upbraided them and they did not listen to me. Woe to the people from this insult to the Torah and to holiness (mAvot 6:2) — reciting the said holy blessing in a dirty location.[97]

In this clash of customs, Lampronti sought in vain to stamp out a new custom of which he disapproved. Nevertheless, he would have had to concede that its misguided practitioners were zealous in their religious observance; if anything, their error stemmed from an excess of zeal.

Who were they? The only clue as to their identity is the expression that they identified themselves as "bearers of tradition," *mekubalim*, which is an ambiguous term, denoting either the tradition of law or that of mysticism. Both are possible, but whereas we know nothing of a renascence of the Jewish legal tradition or spirit in Lampronti's milieu, communities all over the Jewish world were experiencing the rising impact of Kabbala on religious life, particularly in the eighteenth century, with the widespread dissemination of printed kabbalistic liturgies. Kabbalistic traditions typically embraced the more ascetic of alternative ritual practices, and based on this consideration, self-styled kabbalists would be likely to insist on taking the trouble to leave the building in order to recite the prayer out of doors, unless they were aware of the undesirability of praying in a dirty location. Hence it seems plausible, if not likely, that Lampronti clashed here with pious devotees of Kabbala.[98]

97 Vol. 20, col. 90–91, s.v. *birkat hahodesh*. On *indrona*, see also bMenahot 33b.

98 It would not, however, be prudent to draw, from this one case, any conclusions about Lampronti's attitude to Kabbala, a subject that awaits thorough investigation. On the efflorescence of kabbalistic ritual in the early modern era, see, e.g., G. Scholem, *On the Kabbalah and its Symbolism* (NY: 1965), 137–57.

The endive and new moon entries reveal much about the deeper implications of custom. Custom is normally associated with a conservative bent or even ideology, because of its links to tradition, but these entries illuminate the creative side of custom. Whether one favored or opposed them, these new customs were innovations (perhaps in the guise of reviving older customs), rather than reflections of stagnation or atavism.

Second, we have taken note of two cases involving contemporary practices Lampronti deplored, though regarding the preparation of endives he sought change, whereas regarding the new moon he clung to custom. The veneration or condemnation of custom was obviously a subjective matter, frequently leading scholars into the morass of social and cultural conflict. It is clear that in Lampronti's age, although customs were normally upheld, and even revered for their antiquity, this was not invariably true.

Third, these cases reflect the kaleidoscopic quality of attributions of tradition and innovation: an action interpreted by some as indicative of a new inclination to increasing stringency may be seen by others as representing no more than affirmation of the written law and correction of a lapse. Such differential interpretations can have practical consequences: even a longstanding norm can quickly lose its legitimacy if it is deemed less stringent.

Lampronti recorded such a case, concerning cheese made of milk from a cow milked by a Gentile without a Jew being present. Could such cheese be eaten? The Jews of Mantua, we are told, recently abandoned their custom of allowing such milk, and we also learn that in 1674–1675 Florence's Jews, too, had prohibited a Gentile-made cheese that had hitherto been viewed as permitted. After reporting these developments, Lampronti cited other customs that had also recently been renounced in favor of more stringent policies, implying that he perceived these cases as representative of a new trend, although whether he championed it or condemned it is unclear.[99]

99 We learn that in one such case, local scholars wondered how earlier scholars had ignored the prohibition, but their leader, Judah of Modona, shrugged off the question and replied that "our fathers left us room to erect our own fences," and that "the law is in accordance with the later scholars" (*halakha kevatraei*). Modona was completely unapologetic about his abandonment of a local custom, and had no compunction about describing his ruling as an innovation, rather than the mere restoration of the standard demanded by Jewish law.

Lampronti then introduces a letter he received from his mentor, Judah Briel, whose approach to the customs regarding Gentile cheese was more respectful. Citing the custom of the Jews of Parmigiano, Briel remarked that one ought to respect such traditions, for until fifty years ago such was also the custom in the area of Mantua, except for some "special" people. In another letter, Briel observed that Italy did not lack places where Jews clung to the custom of eating the cheese in question, notwithstanding the outrage expressed by some zealous Jews in Montagnana. Briel added that such had also been the practice in Mantua, until the custom was adopted for a Jew to oversee the milking of the cow.[100]

In the struggle over Gentile cheese, both Lampronti and Briel described a pattern of abandoning customs in favor of a more stringent legal standard. Yet this change, rather than indicating a shift toward stringency (possibly anticipating today's trend), may also be taken as the corrective annulment of a "bad" custom in favor of normative legal practice. The case is, then, a classic example of the fluidity of attributions of stringency and normativeness. It also highlights the notion of "bad" customs, and the dynamic of their critical evaluation and, in some instances, renunciation.

The best known *Pahad Yitzhak* entry deals directly with the issue of old–new customs and their critical assessment. It focuses on whether a species of fish called "copese" (a type of sturgeon) exhibits the physical characteristics that define kosher fish. Lampronti reports that in 1711 he examined the copese and found it to be kosher, but nonetheless consulted the other rabbis of the Ferrara yeshiva before issuing his ruling. To account for his hesitation, Lampronti pointed to his youth at that time, but also gave another reason:

> I feared that perhaps there was an accepted custom in my city not to eat copese, even though it has all the signs of purity, and I could [then] not declare it permitted, because of [the rule] "You may not permit things that are permitted in the presence of those who are accustomed to prohibiting them."[101] And the elder rabbis answered me with pleasant words: "Heaven

100 Vol. 2, fol. 2r, s.v. *gevinot hagoyim* [#128]. See Michael Ascoli and David Gianfranco Di Segni, "Il problema dei formaggi prodotti da non Ebrei," *Segulat Israel* 4 (1996/1997), 46–50.

101 bPesahim 50a–51b. The copese case was not the only instance in which Lampronti adduced the principle of not permitting something in the face of a contrary custom. He also did so with regard to certain baked goods prepared by Gentiles, from which the Jews of Ferrara were accustomed to

> forbid! There is no custom at all in the city of Ferrara to prohibit copese," for such was the situation throughout their years as decisors, and even in the years of rabbis more senior than they, who had directed the said yeshiva from time immemorial. All agreed that copese may be eaten, as a point of law and custom.[102]

The entry goes on to record that in 1732 someone actually did claim that there was an ancient custom in Ferrara not to eat copese, based on a legal ruling by a scholar of Verona.[103] In reply, Lampronti argued that the ruling in question discussed another type of fish, and not copese, but he also pointed out the absurdity of the notion that the testimony of a Veronese rabbi regarding the custom of Ferrara should be preferred to that of the city's own rabbinic leadership.

Faced with a rare and relatively unknown commodity, Lampronti was uncomfortable basing his ruling on legal criteria, without assurances that his decision accorded with local tradition. Lampronti assumed that the absence of a custom prohibiting it implied the existence of a custom permitting it. In this case, then, custom in its passive form played a crucial role in the shaping of tradition.[104]

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abstain, even though the community in neighboring Cento held the opposite policy. Lampronti stated that both traditions were to be maintained, but he added that Ferrara's Jews were not at liberty to adopt the Cento custom, even if it was correct, because local custom prohibited the permitted foods. Lampronti added that in Ferrara's synagogues announcements had repeatedly reminded the congregants of their prohibition, and that he was recording the Ferrarese custom so as to combat its erosion. See vol. 9, fol. 15r, s.v. *avar aveira*. For a third example, see vol. 13, fol. 43v–44r, s.v. *shavua shehal tisha beav lihiyot betokha*. On the distinction between prohibiting the permitted and vice versa, see Maimonides, *Code*, Laws concerning Repose on the Tenth of Tishri 3:3; Elon 1994, n. 4 above, vol. 3, 910; Roth, n. 4 above, 215–19.

102 Vol. 2, fol. 86r, s.v. *dagim vesimanam*. The focus of the halakhic discussion was the possibility that the copese has scales, but they come off in the water. Lampronti was not the only scholar to grapple with the issue. See also: *Shemesh Tzdaka*, n. 66 above, YD, #14, fol. 61r-v; *Responsa Noda Biyehuda*, second ed., YD #29. See also D. Gianfranco Di Segni, "Il problema dello storione secondo Rabbi Yitzchaq Lampronti nella Ferrara del '700," *Zakhor* 4 (2000), 115–25.

103 Note that the entry deals with the copese issue chronologically, illustrating the database format described in the text above at n. 10. Note, too, that 1732 was also the year of Morpurgo's responsum on the subject.

104 Similarly, see vol. 13, fol. 258r, s.v. *shemitat kesafim bazeman haze*. On the significance of passive reaction to custom, see Tchernowitz, n. 76 above, 149.

Such passivity had a significant impact in a conflict over the Ashkenazic custom of donning tefillin on the intermediate days of festivals. Samson Morpurgo opposed the kabbalists' attempt to suppress this custom, and Lampronti supported him, noting, inter alia, that Ferrara's Ashkenazic community had always had a wide variety of practices regarding the donning of tefillin, since it lacked a fixed custom on the matter.[105] Although Lampronti was not pleased by the Ashkenazic anarchy, he admitted that the city's rabbis had never voiced disapproval, due to the absence of a set custom. With characteristic boldness, the kabbalists lobbied for the promulgation of a new policy, but Lampronti disapproved; medieval scholars had debated the issue without arriving at a clear result, and he could not justify the suppression of a tradition that was both halakhically defensible and accepted by at least part of the city's Ashkenazic constituency.[106] Lampronti expresses categorical opposition to deviation from tradition: "I am greatly pained by those who alter what has been done since antiquity." He adds that if scholars did not stand firm in their defense of the custom in the tefillin case, it would be impossible to oppose changes — presumably, kabbalistic — in the liturgy.[107]

Finally, in debates over customs, the polemical exchanges sometimes focus on the rationality of the controversial practice. The *Pahad Yitzhak* includes a dossier of documents about a controversy that took place in Trieste in 1727 over the legitimacy of "Ushers of Mercy" ("*Makhnisei Rahamim*"), a liturgical poem in which angels are petitioned to intercede on behalf of the Jewish people.[108] In this case, as in others, the charge of irrationality is conflated with that of heresy, due to the

105 For a similarly laissez faire policy in Ferrara, in a situation of multiple defensible traditions, see vol. 14, fol. 180v, s.v. *tashmish hamita betisha beav*.

106 Elsewhere, Lampronti advocated a similarly pluralistic stance by citing the expression "to each river its own flow" (*nahara nahara ufeshatei*, from bHulin 18b). See vol. 14, fol. 152v, s.v. *tekiot al seder habrakhot*.

107 Vol. 14, fol. 103v–04v, s.v. *tefilin beholo shel moed*. See Jacob Katz, "Tefillin on intermediate days of festivals: differences of opinion and public controversies of kabbalistic origin" (Hebrew), *Proceedings of the World Congress of Jewish Studies* 7 (Jerusalem: 1981), vol. 1, 203–04 [*Halakha and Kabbala* (Hebrew), (Jerusalem: 1984), 115–16].

108 Vol. 11, fol. 33v–58r, s.v. *tzerakhav al yishal adam bilshon arami*; vol. 6, fol. 137r, s.v. *minhag uketzat dinav*. The conflation of irrationality and heresy is also evident in the 18th-century debate over *kaparot*, which is mentioned in the aforementioned entry, but which also has a medieval history. On the Trieste struggle over intercessory prayer, see Malkiel, n. 38 above.

assumption that behaviors rooted in theological error are by definition irrational. Although the charge is ideologically neutral, historically, kabbalistic customs have often been subjected to this line of attack.

Through his thorough documentation of contemporary praxis, Lampronti might be said to have bridged the gap separating reality and lawbook. The *Pahad Yitzhak*'s consuetudinary corpus is significant not only for antiquarians or folklorists in search of the quaint mores of another age. Lampronti's presentation illuminates both the manifest and the more subtle characteristics and connotations of custom in the early modern period. It also sheds light on Lampronti's own attitude to tradition. Specifically, it confirms that, with regard to both authority and custom, Lampronti combined reverence for received tradition with its critical evaluation. In his approach to the textual and consuetudinary traditions of his age, Lampronti confronted the burden of the past with the care and creativity that make the *Pahad Yitzhak* an epoch-making literary achievement.[109]

109 This article is based, in part, on a lecture delivered at the 7th *Italia Judaica* conference in Reggio Emilia in 1998. I would like to thank Avriel Bar-Levav of the Open University, Joseph Davis of Gratz College, and Matt Goldish of Ohio State University for comments on an earlier version of this paper.

PART TWO

CONFERENCE PAPERS

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SOME INTRODUCTORY REMARKS ON GENESIS RABBAH AND THE LAW

HANINA BEN-MENAHEM*

Genesis Rabbah is an Amoraic commentary on the book of Genesis. Composed in the land of Israel in the fifth century, it is one of the oldest running commentaries on the first book of the Torah. In Genesis Rabbah, halakhic and aggadic materials are interwoven in a manner indicating that the two genres are on a par, neither having a preferential status. But it is not my intention to discuss the relationship between halakha and Aggada in general. Indeed, in this context, I would prefer to see the salient contrast as that between rules and narrative. Even if, technically speaking, the narrative segments can usually be classed as Aggada, this characterization is in some ways too broad, and obscures the issue on which I want to focus — the crystallization and refinement of the law by way of its contextualization. That is, I want to explore the impact of embedding a rule in a narrative, and the consequences of presenting it in a particular context.

I would like to suggest that the stories related in Genesis Rabbah, or at least some of them, can be approached as precedents — every precedent is, after all, a narrative detailing a particular incident — raising the issue of their relationship to rules. The precedents in question are incidents mentioned in the Bible or Amoraic elaborations thereon, events from the daily lives of the Sages, or imagined scenarios, parables, and even reports on the conduct of the heavenly court. So as not to blur the distinction between legal precedents in the classic sense and the types of precedents referred to here, we can call the latter 'hypothetical precedents.'

Narratives of the sort encountered in Genesis Rabbah are indeed precedents — and thus part of legal discourse — in the sense that legal

* Hanina Ben-Menahem holds the Montesquieu Chair in Comparative Law and Legal History at the Faculty of Law, Hebrew University of Jerusalem, and was Gruss Visiting Professor of Talmudic Civil Law at Harvard Law School from 2000–2004.

norms, principles, and policies are associated with them, and they are reported, I submit, with the intent of sharpening our grasp of the law. At least three different relations can obtain between the said precedents and rules: (1) a precedent may narrate the origin of a rule, or put forward a legal foundation for it; (2) a precedent may illustrate the application of a rule, and thus demarcate its limits; (3) a precedent may challenge a rule. My focus here will be the third case, precedents that challenge rules. Whereas in the first two cases, the precedent is compatible with the rule, and serves as an interpretive tool, in the third, the precedent, by contemplating an alternative order, is at odds with the rule, generating tension. The law is challenging one of its own rules. An internal challenge of this sort is without a doubt the most authoritative, and hence most effective, challenge that can be mounted. At the close of this paper I will say a few words about this challenge and its role in studying the law.

It should be noted that the rule in question need not be explicitly invoked. Genesis Rabbah undoubtedly originated in scholarly circles. This can be inferred from the complexity and richness of the legal material discussed, from the fact that it is anchored in biblical verses, from the sophistication of the arguments, and the brevity with which many issues are introduced — some, indeed, are just hinted at. This being so, thoroughgoing knowledge of the law is clearly assumed.[1] As part of a well-established collective body of legal knowledge, the rule being addressed — whether for the purpose of explaining its origins, delineating its scope, or challenging it in some way — need not have been directly and fully articulated.

To be sure, the strategy of challenging a rule by telling, recording, and transmitting a precedent that goes against it, is not an innovation of Genesis Rabbah. In fact, scholars have suggested that Genesis itself records precedents that go against the law as articulated in the Torah,

1 A good example is Genesis Rabbah on Genesis 18:21: " 'I will go down now' — R. Shimon b. Yohai taught: This is one of the ten descents mentioned in the Torah." The full tradition, namely, the complete list of the said "descents," is found in Avot de-Rabbi Nathan (ARN A) ch. 34, and Genesis Rabbah must have assumed that it was known. Let me note that the tradition apparently has nothing to do with the idea that the divine descent in Genesis 18:21 was meant to teach us that judges should first investigate a matter, and only then render a decision. This interpretation of the verse as a procedural rule, quoted by Rashi in his commentary, first appears in Tanhuma, a later work than Genesis Rabbah.

in effect challenging it.[2] As an example, let me cite the well-known case of primogeniture — the right of the first-born. The Torah says:

> If a man have two wives, the one beloved, and the other hated, and they have borne him children, both the beloved and the hated; and if the first-born son be hers that was hated; Then it shall be, in the day that he causeth his sons to inherit that which he hath, that he may not make the son of the beloved the first-born before the son of the hated, who is the first-born; But he shall acknowledge the first-born, the son of the hated, by giving him a double portion of all that he hath; for he is the first-fruits of his strength; the right of the first-born is his.
>
> (Deut. 21:15–18)

Now the language here is noticeably polemical, arguing against a very authoritative target that can be easily identified as the biblical precedent of Jacob's transferring the right of primogeniture from Reuben, the first-born son, to Joseph, the preferred son.[3] The argument is that the biblical text, by preserving the precedent in Genesis, which seems to reflect the law as it was before the Mosaic laws were promulgated, challenges one of its own rules.

But there is an important difference between the challenges mounted in Genesis and those found in Genesis Rabbah. In the former, the challenge is manifested, so the argument goes, in the recording of earlier precedents that may not be in harmony with the prevailing law. The case of Genesis Rabbah is different and more radical in that here we are witness to an ongoing and original challenge issuing from those who are nonetheless in every respect champions, as well as devoted students, of the tradition they are challenging. While the kind of internal challenge found in Genesis Rabbah can also be found in other midrashic texts, the frequency of its occurrence in Genesis Rabbah is, arguably, the result of challenges put forward by the Book of Genesis.

To illustrate Genesis Rabbah's strategy of using a hypothetical precedent to challenge a rule, let me bring some examples. The first three involve procedural rules. We can begin with the first trial in human history, that of Adam, Eve, and the serpent. The careful reader of the biblical narrative will notice that the treatment accorded the serpent differed from that accorded Adam and Eve, inasmuch as there

2 See e.g., Robert M. Cover, "Foreword: nomos and narrative," 97 *Harvard Law Review* (1983), 4–68.

3 See Genesis ch. 48.

was no negotiation between God and the serpent before the serpent was sentenced. This lack of due process calls for some explanation, and the exegete offers the following account[4]:

> "And the Lord God said unto the serpent," and so on. With Adam, He [first] discussed the matter, with Eve, He [first] discussed the matter, but with the serpent, He entered into no discussion. The reason is that the Holy One, blessed be He, said, This serpent is wicked and ready with answers — if I discuss it with him, he will answer Me: You bade them and I bade them. Why did they ignore Your bidding and follow mine? Therefore He pronounced His sentence summarily. Hence, "And the Lord God said unto the serpent."
>
> (Genesis Rabbah 20:2) [Appendix, passage **1**]

It appears that the serpent had a powerful legal argument in defense of its actions — so powerful that, given an opportunity to present it, the serpent would have won the case. The only way to forestall this outcome was to deprive the serpent of recourse to proper legal procedure. But in offering this analysis, a very significant assumption is being made: the exegete, contrary to a universally accepted legal principle, is assuming that punishment for incitement is unjustified. For given that we uphold the view that every individual can freely choose either to abide by the law or submit to evil influences, incitement ought not constitute an offense. Genesis Rabbah's point — that the serpent had a decisive legal argument, namely, that Adam and Eve should have followed God's instruction, not the serpent's — thus presents a clear challenge to the biblical rule that one who "entices" and "draws away" (Deut. 13:7–12) should not only be punished, but punished with particular severity.

The connection between this precedent and the biblical rule governing "one who entices and draws away" is explicit in the following talmudic passage:

> R. Samuel b. Nahman said in the name of R. Jonathan: Whence do we know that we do not plead on behalf of an enticer? From the [story of] the

4 I should point out that Genesis Rabbah is not concerned with the reality of the story, an issue that engages later commentators, who raise such questions as how the serpent knew of the prohibition, how the serpent spoke, what language the serpent spoke, and how the serpent found its way into the Garden of Eden; see *Otzar Hageonim* on bSanhedrin 29a. Nor does Genesis Rabbah concern itself with the question of how a beast can be instructed or punished.

> ancient serpent. For R. Simlai said: The serpent had many pleas to plead, but pled none of them. Why, then, did not the Holy One, blessed be He, plead on its behalf? Because it did not plead for itself. What could it have said [in its defense]? 'When the words of the teacher and those of the pupil [are incompatible], whose words should be heeded? The words of the teacher should be heeded.'
>
> (bSanhedrin 29a)[5] [Appendix, passage **2**]

Comparing the two passages reveals that whereas the former, by implication, challenges the biblical rule that instigators are to be severely punished, the latter sees the precedent as providing the origin and basis for the exceptionally harsh procedural law governing "one who entices and draws away." In deriving from the story the procedural rule that courts ought not plead on behalf of an instigator, the Talmud reverses the analysis offered in Genesis Rabbah, construing the case as exemplifying a type (1) relation between law and precedent, rather than a type (3) relation.

Let us turn to the second trial on record, that of Cain. According to the biblical narrative, Cain murdered Abel while they were in a field, suggesting that the crime was not witnessed, quite apart from the fact that in those days there were very few people around in any event. The biblical narrator does not seem to be concerned about the absence of direct evidence linking Cain to the crime, and merely tells us that after accusing Cain — "What hast thou done? — God only adduces the fact that "the voice of thy brother's blood crieth unto Me from the ground" (Gen. 4:10).

But in Genesis Rabbah, the exegete is troubled by this criminal procedure, and again, the lack of due process does not escape him. (Let me note parenthetically that elsewhere in Genesis Rabbah we are told that Cain received a moderate sentence, relative to his crime, because, as the world's first murderer, he could not have been cognizant of the gravity of his act, an argument implying that human reason alone does not suffice as a guide to proper conduct. This is an important point. The precedent of Cain could be used to challenge the biblical rule mandating capital punishment for murder. By asserting that there are extenuating circumstances in this particular case, Genesis Rabbah "distinguishes" it, depriving it of any precedential value.)

5 See Tosafot on bSanhedrin 29a s.v. *divrei harav; Responsa Havat Yair*, #161; *Margaliot Hayam* on bSanhedrin 29a.

But here we are concerned with the procedure, not the punishment. Genesis Rabbah has the following to say about the matter:

> "And the Lord said unto Cain: where is Abel . . . ?" (Gen. 4:9). This may be compared to a prefect[6] who was walking in the middle of the road, and found a man slain, and another standing over him. He said to him, Who killed him? He said to him, I will ask you [that question] instead of your asking me. He said to him, You have said nothing.[7]
>
> It is like the case of one who entered a garden, gathered mulberries and ate them. And the owner of the garden pursued him, saying to him, What is in your hand? He said to him, Nothing. But surely your hands are stained [from the juice]! Similarly, [God said to Cain], "the voice of thy brother's blood crieth unto Me from the ground."
>
> It is like the case of one who entered a pasture, seized a goat, and slung it behind him. The owner of the pasture pursued him, saying to him, What is in your hand? Nothing. He said to him, But surely it is bleating behind you! Similarly, [God said to Cain]: "the voice of thy brother's blood crieth unto Me from the ground."
>
> (Genesis Rabbah 22:9) [Appendix, passage **4**]

Three different hypothetical precedents are invoked here to demonstrate that circumstantial evidence suffices to connect the offender with the crime even where no direct evidence is available. Let me note that the precedents are presented in ascending order of plausibility, that is,

6 The Greek term used here refers to an official, the precise nature of whose function is debated.

7 That is, "Your argument is of no legal effect." See mBaba Kama 8:6; bBaba Kama 90b:

> It once happened that someone uncovered the head of a woman in the market place. She came before R. Akiva, and he ordered him to pay her four hundred *zuz*. He said to him, Rabbi, give me some time [to carry out the judgment], and he gave him time. He watched until he saw her standing by the door of her courtyard, and then, in her presence, broke a jug that contained an *isar*'s worth of oil. She uncovered her head and collected the oil with the palms of her hands, and put her hands on her head [to anoint it]. He had prearranged for witnesses against her, and he came before R. Akiva. He said to him: Must I give such a woman four hundred *zuz*? He said to him: **You have said nothing**, for where one injures oneself, though he is not permitted [to do so], he is exempt, yet should others injure him, they are liable. So too one who cuts down his own plants, though he is not permitted [to do so], is exempt, yet should others [do so], they are liable.
>
> [Appendix, passage **3**]

the connection between the suspect and the crime is least apparent in the first precedent, and most apparent in the last. In the first case the suspect happens to be at the scene of the crime; in the second his hands are stained with material related to the offense, and in the third he is holding the relevant object. The implication is that in each case there is sufficient evidence to convict the alleged perpetrator.

Compare this with the following Tosefta, which describes the legal status of circumstantial evidence, and may, I submit, have served as the backdrop for the exegete's homiletics:

> R. Shimon b. Shetah said: May I never see comfort[8] if I did not see someone pursuing his fellow with a sword in his hand, and he went into a ruin to elude him, and he went in after him, and I ran after him. And I found him murdered, and the sword in the hand of the murderer, and it was dripping blood. And I said to him: Wicked one, who killed this man? May I never see comfort if neither I nor you killed him. But what can I do to you, since your judgment has not been entrusted to my hands, for the Torah has indeed stated, "At the mouth of two witnesses, or three witnesses, shall he that is to die be put to death" (Deut. 17:6). But rather, He who knows [our] thoughts will exact vengeance from whichever man [killed his fellow]. He had not moved from the spot when a serpent bit him, and he died.
>
> (tSanhedrin 8:3, bSanhedrin 37b) [Appendix, passage **5**]

In this precedent all three of the aforementioned incriminating elements are present: the alleged murderer is found at the scene of the crime, his hands are stained with blood, and the tool with which the crime was committed is found in his hands. Yet the legal rule is that no human conviction can be based on circumstantial evidence. In such a situation, God alone can act — and indeed, the murderer was soon felled by a snake-bite. Now in the case involving Cain, too, it is God who passes judgment, but according to Genesis Rabbah, a human judge can also be justified in acting on the strength of such imperfect evidence (which is in most cases all we have). Here, it is not the sentence God hands down that is challenged, as in the episode involving Adam and Eve, but rather, the rule invalidating circumstantial evidence in human courts.

The adjustment to the law being championed by Genesis Rabbah, then, is that reliance on circumstantial evidence should not be the

8 A customary oath, meaning either, May I suffer afflictions, or, May I never see the comfort of Zion and Jerusalem.

prerogative of the divine court alone, but should also be permitted to human courts.

A similar objection is raised in another case, but in the opposite direction.

Genesis 21 relates the story of the banishment of Hagar and Ishmael. The story, which in many details anticipates the binding of Isaac related a few chapters later, tells us that Ishmael too was close to death when "the angel of God called to Hagar out of heaven, and said to her, What aileth thee, Hagar? fear not; for God hath heard the voice of the lad where he is. . . . And God opened her eyes, and she saw a well of water; and she went, and filled the bottle with water, and gave the lad drink" (Gen. 21:17, 19).

Genesis Rabbah takes us to the deliberations of the heavenly court just before the boy is saved:

> R. Simon said: The ministering angels hastened to indict him. They [came before him and] said: Sovereign of the entire universe! For someone who will, in the future, slay Your children with thirst, will You bring forth a well? He said to them, What is he now? They said to Him, Righteous. He said to them, I do not judge a man except as he is at the time. [Hence Scripture says], "Arise, lift up the lad" and so on (Gen. 21:18).
>
> (Genesis Rabbah 53:14) [Appendix, passage **6**]

The allusion is to the unfriendly manner in which the Israelites who had been sent into exile were greeted by the inhabitants of Arabia; according to the Rabbis, Isaiah is referring to this ungraciousness in the verse: "O inhabitants of the land of Tema, bring water to him who is thirsty, meet the fugitive with bread" (Isa. 21:14).

The legal principle stated here quite categorically — indeed, the text presents it as being enunciated by God Himself — is that one is judged according to his deeds up to the time of the trial, and not in light of his projected future conduct. This is brought out in Scripture by the words "for God hath heard the voice of the lad where he is," interpreted by the commentators as meaning, where he is now, and not where he will be in the future. Note that God does not question the angels' prediction, for He too knows that this small child, Hagar's son, is destined to be wicked, nor does God offer the more obvious — and legally more desirable, in that it is more limited — defense of Ishmael, namely, distinguishing him from his descendants. Rather, the defense is based on the principle that one is not liable before actually committing an offense. This sweeping argument on Ishmael's behalf, however, challenges a legal rule.

Although the legal rule being challenged here is not specified explicitly, we can readily identify it as the rule of the "stubborn and rebellious son" (Deut. 21:18–21). The biblical account of the stubborn and rebellious son does not reveal the precise nature of the misconduct that justifies his execution.[9] In any event, the Sages found it difficult to accommodate such a rule under their policy that criminal liability does not arise before an individual has reached maturity.

The Tannaitic solution to the dissonance between this policy and the law mandating punishment of the "stubborn and rebellious son" is to regard it as a preventative measure: "A stubborn and rebellious son is tried on account of his ultimate destiny: let him die innocent, and let him not die culpable" (mSanhedrin 8:5). R. Jose the Galilean explains that such a son will end up a robber on the highways:

> It has been taught: R. Jose the Galilean says: Was it merely because he ate a *tartemar* of meat and drank a *log* of Italian wine that the Torah said that the rebellious son should be brought before the court and stoned? But rather, the Torah foresaw the stubborn and rebellious son's ultimate destiny. For in the end, after dissipating his father's assets, he would [still] seek to satisfy his ingrained desires, but being unable to do so, would go forth to the crossroads and rob people. [Hence] the Torah said, Let him die innocent, and let him not die culpable.
>
> (bSanhedrin 72a) [Appendix, passage **7**]

Now the level of certainty we would assign to human estimation of an individual's future conduct cannot compare to the absolute certitude of divine foreknowledge. Yet the precedent of the heavenly discussion teaches that notwithstanding divine foreknowledge, divine justice does not operate on the basis of such "facts." How much more so, one is led to think, should this be the case in human legal proceedings. We know from other sources that objections to the law of the

9 18. If a man have a stubborn and rebellious son, that will not hearken to the voice of his father, or the voice of his mother, and though they chasten him, will not hearken to them;
19. Then shall his father and his mother lay hold on him, and bring him out unto the elders of his city, and unto the gate of his place;
20. And they shall say unto the elders of his city, 'This our son is stubborn and rebellious, he doth not hearken to our voice; he is a glutton, and a drunkard.'
21. And all the men of his city shall stone him with stones, that he die; so shalt thou put away the evil from the midst of thee; and all Israel shall hear, and fear.

rebellious son were raised, to the point where it was, in effect, set aside, though never formally rescinded. Our source, then, reflects the general opposition to this particular biblical law.

The three examples we have examined have a common denominator: all suggest that human courts should be more assiduous in emulating divine adjudication. All three are exegesis of narratives from Genesis. But before we proceed to examine a few more examples that are not based on the Genesis narratives, let me first draw attention to the fact that Genesis Rabbah is also very critical of divine justice, and occasionally, faced with what it perceives as divine injustice, expresses incomprehension and frustration.

In describing Abraham's plea on behalf of the people of Sodom and Gomorrah, Genesis Rabbah makes the following argument:

> R. Judah b. R. Simon said: [Abraham pleaded thus:] In the case of a human litigant, an appeal can be made from the commander to the prefect and from the prefect to the governor; but You, because You have no one before whom Your judgment can be appealed, will You not dispense justice? R. Judah said: When You desired to judge Your world, You entrusted it to two, such as Remus and Romulus,[10] so that if one wished to do something, the other could restrain him; but You, because You have no one to restrain You, will You not dispense justice?
>
> (Genesis Rabbah 49:9) [Appendix, passage **8**]

This sentiment is particularly striking when we recall that the idea of courts of appeal is alien to Jewish law, and the exegete here has undoubtedly been influenced by procedures in foreign institutions, as the reference to Romulus and Remus indicates. This should not surprise us, since Genesis Rabbah is replete with Graeco-Roman legal terms, attesting to the considerable influence of both the form and the substance of this foreign culture.[11] The idea that divine justice is carried out without any checks and balances is also voiced elsewhere in the midrashic literature:

> Papus expounded, "He is the one, who can dissuade Him? Whatever He desires, He does" (Job 23:13). He judges by himself all inhabitants of the world, and there is no one to respond to His words. R. Akiva said to him, You have said enough, Papus. He [R. Papus] said, how do you uphold

10 The mythical founders of Rome.

11 See S. Lieberman, "Roman legal institutions in early Rabbinics and in the *Acta Martyrum*," *JQR* NS 35 (1944), 1–57.

> [the verse], "He is the one, who can dissuade Him?" He said to him, One cannot respond to the words of He who spoke and the world was created. But rather, He judges everything truthfully, and all in accordance with the law. (Mekhilta de-Rabbi Ishmael, Beshalakh (vayehi), parsha 6 s.v. *uvnei yisrael*)

Another complaint about divine justice expressed in Genesis Rabbah is the claim that occasionally, divine punishment is inflicted on the innocent rather than the culpable. The phrase used to refer to this deplorable phenomenon is the ironic, "X sinned and Y was punished?" Overall, however, the exegete certainly perceives divine justice as righteous, indeed, as constituting a paradigm of perfect justice, an ideal legal system.

The idea that human courts ought temper law with equity is not voiced only in exegesis of the Genesis narratives. Let me bring two other passages from Genesis Rabbah in which this sentiment can be discerned. One recounts the story of Ula ben Kosher, a fugitive who sought asylum in Lydda, the town where R. Joshua b. Levi lived. The episode is the subject of a small yet delightful book by the late David Daube entitled *Collaboration with Tyranny in Rabbinic Law*.[12] It seems to me, though, that the story of Ula is also of great interest from the perspective of the broader question of the dynamic of internal challenges to the law.

The legal background against which the precedent is recounted is a rule from the Tosefta cited by Genesis Rabbah just before reporting the case:

> It was taught: If a company of people [are accosted] by heathens, who say, Surrender to us one of you and we will kill him, and if not, we will kill [all of] you — they should all be killed and not surrender a single soul of Israel. But if they specified a particular person, as in the case of Sheba, the son of Bichri,[13] they should surrender him and not all be killed.
>
> (Genesis Rabbah 94) [Appendix, passage **9**]

The case of Ula falls under the second part of the rule, in that the demand is for surrender of a named individual:

> Ula b. Kosher was wanted by the government. He arose and fled to R. Joshua b. Levi at Lydda. Officers were dispatched after him. R. Joshua

12 David Daube, *Collaboration with Tyranny in Rabbinic Law*, Riddell Memorial Lectures, 37th series (London: 1965).

13 See 2 Samuel ch. 20.

> b. Levi occupied himself with him, and persuaded him [to surrender]. He said to him, Better that you be executed than that the [whole] community be punished on your account. He allowed himself to be persuaded and he surrendered himself to the authorities. Now Elijah used to speak with him [R. Joshua b. Levi], but when he acted thus, ceased to visit him. He fasted on this account for thirty days, and then he appeared to him. He said to him, For what reason did you absent yourself? He said to him, Am I, then, a friend of informers? He said to him, But is there not a *matnita*[14]: "If a company of people," and so on. He said, And is that a teaching for the pious? That matter should have been dealt with through others, and not through you.
>
> (Genesis Rabbah 94) [Appendix, passage **9**]

Ula surrendered himself voluntarily, as the result of R. Joshua b. Levi's persuasion, but had he refused to do so, the rabbi was legally entitled to force him to surrender, indeed, perhaps even obliged to do so in order to save the community.

The story of Ula b. Kosher is also reported in the Jerusalem Talmud. This parallel passage also records an Amoraic discussion, omitted in the account in Genesis Rabbah, about whether the culpability of the person being sought is relevant. According to one opinion, the fugitive must be surrendered only if he indeed deserves the death penalty. The story of Ula recounted in Genesis Rabbah seems to imply that he had rebelled against the government and was thus culpable. Yet even R. Joshua b. Levi's limited intervention — after all, he did not himself inform on the fugitive — is roundly condemned: "And is that a teaching for the pious?"[15] It is not immediately obvious what he was expected to do in lieu of following the legal rule, but one thing is clear: merely relying on the rule was deemed inadequate.

We should note that the criticism of the R. Joshua B. Levi's conduct does not reflect any objection to the rule as such. Rather, the objection is to its having been acted upon. Now as Daube rightly asserts, the concluding remark, "That matter should have been dealt with through others, and not through you," does not figure in the Jerusalem

14 *Matnita*, a teaching such as a baraita or Tosefta not included in the Mishnah of R. Judah.

15 Some have argued that the reference here is to a specific circle of righteous individuals known as *hasidim* (pious ones), who held themselves to an austere moral code. As the material presented in this talk shows, however, internal challenge of the law did not issue only from such a circle, if it existed at all.

Talmud's account of Elijah's rebuke to the rabbi. But from the fact that the comment is indeed found in the Genesis Rabbah version, he incorrectly infers that Genesis Rabbah objects only to the rabbi's personal involvement in the affair, and not to the ultimate disposition of the matter. It has, however, been demonstrated by Saul Lieberman, on the basis of linguistic considerations, that the said phrase should be omitted, or at least be regarded as a later interpolation.[16] Thus the jurisprudential policy reflected in the Midrash seems to be a two-tiered approach to the law — the rule should remain on the books, but de facto should not serve as a basis for judicial decisions. I will return to this shortly.

The second example I want to adduce is the following:

> Alexander of Macedon visited the King of Ketzia [who dwelled] beyond the dark mountains. He came forth, offering him golden bread on a round golden platter. He said to him, Do I need your money? He said to him, Do you not have what to eat in your own country, in that you have come here? He said to him, I only came because I wished to ascertain how you adjudicate your cases. As he sat with him, a man came with a complaint against his neighbor. He said, This man sold me a dunghill, and I found a treasure in it. The buyer said, I bought a dunghill only, while the seller said, I sold the dunghill and everything within it. He [the king] said to the one, Have you a son? He said to him, Yes. He said to the other, Have you a daughter? He said, Yes. He said, Then marry them and let the money belong to both. He noticed [Alexander] sitting astonished. He said to him, Have I, then, not judged well? He said to him, Yes [you have]. He said to him, If this had happened among you, how would you have adjudicated it? He said to him, I would have slain both and kept the treasure for the ruler [i.e., for himself]. He said to him, Does rain fall in your land? He said to him, Yes. Does the sun shine in your land? He said to him, Yes. Have you small cattle [sheep and goats]? He said to him, Yes. He said to him, Let the soul of this man [referring to himself] expire if [what I say is not true]: It is not for your sake, but for the sake of the cattle, as it is written, "Man and beast Thou preservest, O Lord" (Psalms 36:7) — man for the sake of beast Thou preservest, O Lord.
>
> (Genesis Rabbah 33:1) [Appendix, passage **10**]

To make sense of the story, let us turn to the Jerusalem Talmud, which, in the context of challenging the laws of lost and found objects, also recounts the tale. In the course of the discussion, a precedent involving R. Shimon b. Shetah is reported.[17] His students, having

16 *Tosefta Kifshuta*, tractate Terumot.

17 jBaba Metzia 2:5 (8c).

bought their teacher a donkey to free him from the need to sustain himself by engaging in exhausting physical labor, were delighted to find a precious stone hidden on the animal. Thrilled though they were, their master instructed them to return it to the seller. The account implies that R. Shimon b. Shetah was not, legally speaking, under any obligation to return it. The relevant legal rule here is the law of lost and found objects belonging to Gentiles. According to the law, one is not obligated to return found objects to a Gentile.[18] Apparently, R. Shimon b. Shetah was embarrassed about the position taken by the law: declaring that he was not a barbarian, he returned the stone in order to sanctify God's name in the eyes of the Gentile who had sold them the donkey. The sharp language used by R. Shimon b. Shetah (or at any rate ascribed to him) to describe one who would follow the law to the letter — "What are you thinking!? Is Shimon b. Shetah a barbarian!?" — is telling.

The legal background against which the story of Alexander and his interest in the law is recounted is slightly different, and not stated explicitly. The rule is that if a treasure has been found on or buried in a newly acquired plot of land, and is not the lost property of the individual who sold the land, but was left there by an unknown party, then the buyer, upon discovering it, is under no obligation to hand it over to the seller, whether the seller is Jewish or not.

The abysmal moral profile of Alexander the Great's corrupt regime, especially when contrasted to the compassionate legal order of his host, cannot but prompt one to reflect on the solution one's own legal system has in place to deal with such dilemmas: does it resemble the former, or the latter? I would not like to be misunderstood as suggesting that the story was introduced in order to convey dissatisfaction with the moral standards of the halakha. Rather, my claim is that recording — and thereby encouraging the study of — this hypothetical precedent in the context of the laws of lost and found objects must have served to stimulate reflection on the law and its repercussions in practice.

As to the king's ostensibly fantastic legal order — upon closer scrutiny, we see that the solution to which he had recourse is not all that radical. Basically, he ordered the treasure to be divided between the buyer and the seller, a solution that seems both fair and reasonable, even if not grounded in rigorous legal analysis.

18 jBaba Metzia 2:5 (8c).

There is, of course, an enormous difference between the halakhic legal order and the despotism attributed to Alexander of Macedon, but by any standard, the Jewish rule governing the return of found objects cannot be said to be equitable. Why should the windfall now be the property of the buyer alone? After all, he came into possession of it by sheer luck, and there is no reason to deprive the seller of some share in this good fortune. The conception that appears to be absent from the said law of lost and found objects — namely, that quirks of fate should be redressed where possible — impelled the king to propose his distributively equitable solution. This reading is supported by the king's reference to the equitable divine distribution of natural resources — rain and sunshine — regardless of whether or not each beneficiary has a legal entitlement to it. Let me add here that a similar story is related in Philostratus' *Life of Apollonius*. There, the king dismissed the equitable solution, saying: "I shall seem ridiculous if I order them to share the gold between them, for any elderly woman could settle the matter that way" (Book II, 39). I tend to doubt that this argument is sufficiently strong to justify rejecting the equitable disposition.

Before concluding, I would like to put the phenomenon of internal challenge of the law into broader perspective.

The talmudic literature is known for its commitment to pluralism. Even its most code-like document, the Mishnah, records dissenting views, suggesting that minority views are not excluded altogether, but retained for future reference.[19] Internal challenges to the law are another manifestation of this commitment to pluralism. In putting forward such internal challenges, however, the midrashic literature is employing a mode of voicing alternatives to the legal order that is less direct, but more concrete, than that found in the Mishnah. Yet like direct confrontation with the rule, challenging the law by recording hypothetical precedents entails active engagement in critical evaluation of the law, and as such has epistemic and educational value, in that it necessitates ongoing participation in study of the law, and fosters sensitivity to alternative understandings.

Nevertheless, there is an important difference between the two approaches, that is, between the (mishnaic) direct confrontation with the law, and the (midrashic) contextualization of the law. Whereas direct dissent implies that on the view of the dissenter, the rule in

19 mEduyot 1:5–6.

question requires reformulation, an internal challenge of the sort we have discussed here does not go that far.

My final example, it seems to me, well exemplifies this restrained approach:

> Samuel said: Uncovering, turning round, and putting up are obligatory; but putting on shoes, marital relations, and washing are voluntary. This means: Uncovering the head, turning round the tear [in one's garment], and putting the bed upright are obligatory [on the Sabbath]; putting on shoes, marital relations, and washing, voluntary.
>
> (Genesis Rabbah 101) [Appendix, passage **11**]

Genesis Rabbah ends with the story of the death of Jacob and a list of the laws of mourning. In discussing how a mourner should conduct himself on the Sabbath, two opposing considerations arise — respect for the dead and respect for the day. Samuel, the Babylonian Amora, rules that some laws governing the conduct of those in mourning ought not be observed on the Sabbath on account of the sanctity of the day, while observance of others is optional, that is to say, each mourner should determine for himself whether precedence is to be given to the Sabbath or to showing respect for the dead.

The concluding passage of Genesis Rabbah then goes on to relate a case in which one of Samuel's students acted on the basis of his master's teaching, and opted to give precedence to the Sabbath:

> One of Samuel's students had intercourse and then went and washed. He said to him, I told you this as a [theoretical] law, but did I rule thus with respect to actual practice? He was angry with him, and he died.
>
> [Appendix, passage **11**]

The distinction alluded to here, namely, that between law and law to be applied, is of great importance, and figures in the teachings of both the Palestinian and Babylonian Amoraim. (Samuel, in Babylonia, and R. Johanan in the land of Israel, in particular, are known to have frequent recourse to this distinction). It points to the fact that while the law, as formulated, might require or allow certain types of conduct, the way it is applied in practice may well be different. Several reasons for the disparity between law as formally articulated and law as put into practice can be identified, though I will have to leave that for another occasion. Hypothetical precedents such as those we have considered here suggest a course of action that diverges from the rule, and thus are a means of drawing attention to the phenomenon. Indeed, as we have

seen, Genesis Rabbah is so particular about the law–law to be applied distinction that a student who was unaware of it is said to have met his demise for that reason.

The examples we have examined highlight the fact that the law is not an abstract system that can be reduced to a list of rules, however formulated. Rather, application of the rules calls for responsiveness to the specifics of each case in a manner that cannot be determined in advance.

APPENDIX

1. **בראשית רבה (תיאודור-אלבק) פרשה כ**

[ויאמר י"י אלהים אל הנחש וגו'] עם אדם נשא ונתן, עם חוה נשא ונתן, ועם נחש לא נשא ונתן, אלא אמר הקב"ה נחש זה רשע בעל תשובות הוא, אם אני אומר לו הוא אומר לי אתה צויתם ואני ציויתים למה הניחו צוויי והלכו אחרי ציווי, אלא קפץ עליו ופוסקו ויאמר י"י אלהים אל הנחש וגו'.

2. **תלמוד בבלי מסכת סנהדרין דף כט עמוד א**

אמר רבי שמואל בר נחמן אמר רבי יונתן: מניין שאין טוענין למסית - מנחש הקדמוני, דאמר רבי שמלאי: הרבה טענות היה לו לנחש לטעון ולא טען, ומפני מה לא טען לו הקדוש ברוך הוא - לפי שלא טען הוא. מאי הוה ליה למימר - דברי הרב ודברי תלמיד דברי מי שומעין? דברי הרב שומעין.

3. **משנה מסכת בבא קמא פרק ח משנה ו**

ומעשה באחד שפרע ראש האשה בשוק באת לפני רבי עקיבא וחייבו ליתן לה ארבע מאות זוז אמר לו רבי תן לי זמן ונתן לו זמן שמרה עומדת על פתח חצרה ושבר את הכד בפניה ובו כאיסר שמן גלתה את ראשה והיתה מטפחת ומנחת ידה על ראשה העמיד עליה עדים ובא לפני רבי עקיבא אמר לו רבי לזו אני נותן ארבע מאות זוז אמר לו לא אמרת כלום החובל בעצמו אף על פי שאינו רשאי פטור אחרים שחבלו בו חייבין והקוצץ נטיעותיו אף על פי שאינו רשאי פטור אחרים שקצצו את נטיעותיו חייבים.

4. **בראשית רבה (תיאודור-אלבק) פרשה כב**

ויאמר י"י אל קין אי הבל וגו' לאיפרכוס שהיה מהלך באמצע פלטיה, מצא הרוג אחד ואחד עומד עליו, אמר לו מי הרג זה, אמר ליה אנא בעי לך ואת בעי לי, אמר ליה לא אמרת כלום. לאחד שניכנס לגינה וליקט תותין ואכל, והיה בעל הגינה רץ אחריו, אמר ליה מה בידך, אמר לו ולא כלום, והרי ידין מלוכלכות, כך קול דמי אחיך צועקים אלי מן האדמה. לאחד שנכנס למרעה וחטף גדי והפשילו אחריו, ובעל המרעה רץ אחריו, אמר לו מה בידך, ולא כלום, אמר לו והרי מפעה אחריך כך קול דמי אחיך צועקים אלי.

5. **תוספתא מסכת סנהדרין (צוקרמאנדל) פרק ח הלכה ג**

אמ' שמעון בן שטח אראה בנחמה אם לא ראיתי אחד שרץ אחר חבירו והסייף בידו נכנס מפניו לחורבה נכנס אחריו ונכנסתי אחריו ומצאתיו הרוג והסייף ביד הרוצח ומנטף דם ואמרתי לו רשע מי הרגו לזה אראה בנחמה אם לא אראנו אני ואתה הרגנוהו אבל מה אעשה לך שאין דינך מסור בידי שהרי אמרה תורה על פי שנים עדים או על פי שלש' עדים יומת המת אלא היודע מחשבות הוא יפרע מאותו האיש לא זז משם עד שהכישו נחש ומת

6. **בראשית רבה (תיאודור-אלבק) פרשה נג**

אמר ר' סימון קפצו מלאכי שרת לקטרגו אמרו לפניו רבון כל העולמים אדם שעתיד להמית בניך בצמא אתה מעלה לו הבאר, אמר להם עכשיו מהו, אמרו לו צדיק, אמר להם איני דן את האדם אלא בשעתו קומי שאי את הנער וגו'.

7. **תלמוד בבלי מסכת סנהדרין דף עב עמוד א**

תניא, רבי יוסי הגלילי אומר: וכי מפני שאכל זה תרטימר בשר ושתה חצי לוג יין האיטלקי אמרה תורה יצא לבית דין ליסקל? אלא, הגיעה תורה לסוף דעתו של בן סורר ומורה, שסוף מגמר נכסי אביו ומבקש למודו ואינו מוצא, ויוצא לפרשת דרכים ומלסטם את הבריות. אמרה תורה: ימות זכאי ואל ימות חייב. שמיתתן של רשעים הנאה להם והנאה לעולם.

8. **בראשית רבה (תיאודור-אלבק) פרשה מט**

אמר ר' יהודה בר' סימון בשר ודם תולין לו אנקליטון מדוכס לאיפרכוס מאיפרכוס לאיסטרטלטיס ואת בשביל שאין לך מי יתלה לך אנקליטון לא תעשה משפט אמר ר' יהודה כשבקשתה לדון את עולמך מסרתה אתו בידי שנים כגון רומוס ורומולוס שאם בקש אחד מהם לעשות דבר חבירו מעכב על ידו, ואת בשביל שאין לך מי יעכב על ידך לא תעשה משפט.

9. **בראשית רבה (תיאודור-אלבק) פרשה צד**

תני סיעה של בני אדם שאמרו להם גוים, תנו לנו אחד מכם ונהרגנו, ואם לאו אנו הורגים אתכם, יהרגו כולם ואל ימסרו נפש אחת מישראל, ואם יחדוהו להן כשבע בן בכרי נותנין ואל יהרגו כולם, אמר רבי יהודה בד"א בזמן שהוא מבפנים והן מבחוץ, אבל הוא מבפנים והן מבפנים, הואיל והוא נהרג והן נהרגים, יתנו להם ואל יהרגו כולם, כגון שהוא אומר ותבוא האשה אל כל העם, [אמרה להם] הואיל והוא נהרג ואתם נהרגים תנוהו להם ואל תהרגו כולכם, רבי שמעון אומר [כך אמרה להם] כל המורד במלכות בית דוד חייב מיתה, עולה בן קושר תבעתיה מלכותא, קם וערק לגבי ר' יהושע בן לוי ללוד, שדר פרדיסקי בתריה, איטפל ליה רבי יהושע בן לוי ופייסיה, ואמר ליה מוטב דלקטול ההוא גברא ולא ליענשו ציבורא על ידיה, איפייס ליה ויהביה ניהליהו, הוה קא משתעי אליהו בהדיה, כיון דעבד הכי לא אתא לגביה, צם עלוי תלתין יומי ואתחזי ליה, אמר ליה מאי טעמא אפגר מר, אמר ליה וכי חבר אני למוסרות, אמר ליה ולא מתניתא היא סיעה של בני אדם וכו', אמ' וכי משנת חסידים היא, מבעי להאי מלתא מתעבדא על ידי אחריני ולא על ידך.

10. **בראשית רבה (תיאודור-אלבק) פרשה לג**

אלכסנדרוס מקדון אזל גבי מלכא קצייה לאחורי צלמי שלחשך, נפק טעין ליה גרדומי דדהב בגו דיסקס דדהב, אמר ליה ולממונך אנא צריך, אמר ליה ולא הוה לך מה מיכול בארעך דאתית להכא, אמר ליה לא אתית אלא בעי למידע הית אתון דנין, מה יתיב גביה אתא חד בר נש קבל על חבריה אמר הדין גברא זבילי חדא קיקילתא ואשכחית בה סימתא, ההוא דזבן אמר קיקילתא זבנית, וההוא דזבין אמר קיקילתא וכל דבגווה זבינית, אמר לחד אית לך בר, אמר ליה הין, אמר לחד אית לך ברתא, אמר ליה הין, אמר אסיבו להון ויהא ממונא לתרויהון, חמתיה יתיב תמיה, אמר ליה מה לא טבית דנית, אמו ליה הין, אמר ליה אילו הוה גביכון איך אתון דינין, אמר ליה קטלין לתרויהו וסימא למלכא, אמר ליה נחת לכון מטרא, אמר ליה אין, שמשא דנח לכון, אמר ליה אין, אית גבכון בעיר דקיק, אמר ליה אין, אמר ליה תיפח רוחיה דההוא גברא לא בזכותכון הוא אלא בזכות בעירא דכת' אדם ובהמה תושיע י"י אדם בזכות בהמה תושיע י"י.

11. **בראשית רבה (תיאודור-אלבק) כי"ו פרשה קא**

שמואל אמ' פריעה חזרה זקיפה חובה, נעילה תשמיש רחיצה רשות, פריעת הראש וחזרת קרע וזקיפו המטה חובה, נעילת הסנדל ותשמיש המטה ורחיצה רשות, חד תלמיד מן דשמואל שמש מטתו הלך ורחץ, אמר לו להלכה אמרתי לך, שמא למעשה, איקפד עלוהי ומית.

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GENESIS IN WESTERN CANON LAW

CHARLES DONAHUE, JR.*

The greatest book on canon law written in the western Middle Ages — some would argue that it is the greatest book on any kind of law written in the western Middle Ages — is the *Concordance of Discordant Canons*. It was composed around 1140, perhaps a bit earlier, by a man named Gratian, of whom we know virtually nothing, except that he almost certainly was active in Bologna. He is thought to have founded what was to become the first faculty of canon law in western Europe, and the *Concordance*, also known as the *Decreta*, seems to have been designed as a teaching book.[1]

The *Concordance of Discordant Canons* is first of all a collection of canons, a collection of legal material concerning the Church and her law, arranged in a topical order, of which more shortly. The material extracted, however, is much more than just canons in the narrow sense of the term, legislative pronouncements of councils of the Church, both general and local. Gratian's canons also contain quotations from letters, known as decretals, written by the popes from the very beginnings of the Church to Gratian's time; a large number of quotations from the

* Charles Donahue, Jr. is the Paul A. Freund Professor of Law at the Harvard Law School. He has written broadly on western European legal history, both English and Continental, with considerable emphasis on medieval canon law.

1 For a basic introduction to Gratian, see James A. Brundage, *Medieval Canon Law* (London: 1995), 44–69; for radical (and probably correct) views on the dating, see Anders Winroth, *The Making of Gratian's Decretum* (Cambridge: 2000). Except for an English translation of the first 20 *distinctiones* (the so-called "treatise on laws": *The Treatise on Laws*: *Decretum DD*. 1–20, trans. Augustine Thompson and James Gordley [Washington: 1993]), there is no translation of Gratian into any modern language. The standard edition of the Latin is by Emil Friedberg, in *Corpus Iuris Canonici*, vol. 1 (Leipzig: 1879; reprint Aalen: 1959). It is also available online at http://mdz.bib-bvb.de/digbib/gratian.

fathers of the Church, Ambrose, Jerome, Augustine, and Gregory being the most frequently cited, and extracts from handbooks of penance.

As has often been noted, this list does not include quotations from the Bible. This fact is somewhat puzzling, since some of the canonic collections before Gratian's time did contain extracts from the Bible as canons, but Gratian seems not to have thought a passage from Scripture could be called a "canon."[2]

What is new about Gratian's collection of canons is that he does not content himself with copying canons in some sort of topical order. Gratian also comments on the canons in the so-called "sayings of Gratian" (*dicta Gratiani*), and the particular focus of his attention is on potential contradictions in the canons. Resolution of contradictions is characteristic of the whole work, but it is particularly noticeable in the second, and longest, part, in which Gratian poses thirty-six hypothetical cases, which he then subdivides into questions. He answers the questions by quoting canons that bear on the issues raised by the questions, and in the process resolves the contradictions among the canons. The methods he uses for this resolution will be quite familiar to students of the Talmud.

While there are no passages from Scripture that are explicitly labeled as canons in Gratian's work, there is a great deal of Scripture in the work, both quoted and referred to. These references are found not only in Gratian's *dicta* but also in the sources he quotes; the canons of councils of the Church, papal decretal letters, the fathers of the Church, and penitential handbooks all make use of quotations from and references to Scripture. All told, 3511 direct quotations from, or direct references to, Scripture have been counted in Gratian, 1442 from what he regarded as the Old Testament and 2069 from the New Testament.[3]

2 See, e.g., Gabriel Le Bras, "Les Écritures dans le Décret de Gratien," *Zeitschrift für Rechtsgeschichte* (*Kanonistische Abteilung*) 58(27) (1938), 52–54.

3 Francis Germovnik, *Index Biblicus ad primam partem Corporis iuris canonici* (*Decretum Gratiani*) *secundum editionem Friedberg* (Ottawa: 1980). I did not check this count. My work, however, with the citations to Genesis suggests that Germovnik is accurate in what he says, but that he misses a number of citations; hence, this count understates the number of quotations from Genesis and probably from the rest of the Bible as well. Germovnik's method was to look for references in quotation marks and for proper names. Hence, he misses places where the language of a biblical passage is echoed but which Friedberg did not put in quotation marks and which have no proper names; see n. 21 below.

So the question is not whether Gratian used the Bible, but how he used it and for what he used it. There is some literature on this topic, but not as much as one might think there would be, and, so far as I am aware, there is no study that takes the approach taken here, studying the question of the use of Scripture in canon law by studying how one particular book of the Bible is treated. After looking at Gratian and his sources, we will look at the use made of Genesis in one papal decretal letter about two generations after Gratian; I will argue that much changed over those sixty years. I will close with a very tentative comparison of the way that Gratian uses Genesis and the way that it is used in Rabbinic sources.

Gratian cites the book of Genesis at least 205 times over the course of the *Concordance*.[4] Although this is only fourteen percent of the total number of citations to the Bible, it is more than any other book except for the book of Psalms (234, 16%). The citations to Genesis are spread across the whole book of Genesis; only 11 of the 50 chapters are not cited at all. There is, however, some concentration of citations toward the beginning chapters of the book.[5]

We can get a better a sense of the distribution of citations if we divide the book of Genesis into stories: 45 of Gratian's citations come from the creation story, including Adam and Eve; 22 come from the story of Cain and Abel (including the Lamech appendix); 23 come from the Noah story and its appendices, not including, however, the covenant with Noah, a topic to which we will return at the end[6]; 70 citations come from the Abraham story; 18 come from the Isaac story, up to and including Isaac's blessing of Jacob; 15 come from the Jacob story up to and including Judah and Tamar; and the remaining 12 come from the Joseph story. It is all, in some sense, there, but there is a special focus on the creation story and on the Abraham story, which together account for more than half of the citations. The reason for the prominence of the creation story is probably obvious. Beginning with St. Paul and powerfully reinforced by Augustine, the fall of man plays an important role in Christian thought. As St. Paul says in the First Letter to the Corinthians, "Just as in Adam all die, even so in

4 The dataset on which the following is based is found in the Appendix.

5 Only chapters 5 (the genealogy of Noah) and 13 (the division with Lot) are omitted from the first 31 chapters, and six of the omitted chapters come in the Joseph story.

6 See text at n. 54 below.

Christ shall all be brought to life" (1 Cor. 15:22).[7] The reason for the prominence of the Abraham story may be less obvious, but from the time of St. Paul Abraham has been taken as the type (in what was to become, and may already have been in Paul's time, the technical sense of biblical hermeneutics) of the man of faith.[8] The Abraham story also contains the story of Lot and the cities of the plain, and lawyers have always made much of that story.

The distribution of citations to the book of Genesis within Gratian's work follows the same pattern as the distribution of citations within the book of Genesis itself. Citations to Genesis are found in all parts of Gratian's work, but they are concentrated in certain parts. One hundred and thirty-nine (67%) are found in the *Causae*, the hypothetical cases described above. This approximately corresponds to the proportion of space devoted to the *Causae* in the *Concordance*. These citations are not, however, evenly distributed among the *Causae*. Sixty of them, or more than half, are found in the last ten *Causae*, which are devoted to marriage and sexual matters. This would seem to reflect an emphasis within the book of Genesis itself. Thirty-five citations to Genesis are found in the first part of the *Concordance*, which is divided into 101 distinctions (*distinctiones*), the first 20 of which are devoted to law in general, and the remaining 81 of which deal with the structure and organization of the Church. The proportion of citations to Genesis in these parts is less than we would expect, if we take into account the proportion of space Gratian devotes to these issues in the whole *Concordance*. That Gratian and his sources found relatively little in Genesis that was useful in working out the structure of the hierarchical Church of the Middle Ages is perhaps not surprising. It is perhaps more surprising that Gratian and his sources did not make more use of Genesis when dealing with the nature of law itself. Four citations to Genesis are found in the third part of the *Concordance*, the *De consecratione*, which is devoted to liturgy and the sacraments. This is, again, less than we would expect if we looked simply to the amount of space this part occupies in the *Concordance*, but is, again, not really surprising when we consider its topic. Twenty-six citations to Genesis are found

7 Quotations from Scripture are based on the New Jerusalem Bible (NJB), including the orthographical conventions there employed. I have, however, made occasional changes where other wording was more familiar to English-speakers or where the Latin text that Gratian was using differs.

8 Romans 4 is the *locus classicus*.

in the *De penitentia*, a treatise on penance divided into distinctions that is awkwardly incorporated into *Causa* 33, *quaestio* 3. This is a far higher proportion than we would expect if we simply looked at the amount of space that this treatise occupies in the *Concordance* and, again, this disproportion reflects the content of the book of Genesis itself. Genesis may not be a book solely about sin and sex, but it has much to say on both topics.

Thus, the overall patterns of citation are not surprising granted Gratian's legal purposes and the fact that he is operating within the Christian tradition. Many of the citations make fairly obvious legal points that can be derived directly from the texts, or fairly obvious theological points that are very much in the mainstream of the Christian tradition.

We also find, however, as we find in the Rabbis, texts being used for purposes that appear to us — to put it tactfully — strained. Sometimes these texts are themselves quite obscure. Many readers of this journal will know that a man named Eber (עבר) appears in the book of the Genesis (not to be confused with the better-known Heber (חבר) in the book of Judges). Eber is the son of Shelah the father of Peleg (Gen. 11:14). I challenge my readers to figure out what Eber has to do with the prohibition of marriage between close relatives. Again, we all know that when Joseph was brought down to Egypt as a slave, he was sold to a man named Potiphar. Here, the challenge is to figure out what Potiphar has to do with whether or not a bishop who has paid a bribe to obtain his office may validly ordain priests. Write down your answers and put the paper in your desk drawer; the answers will be given later in the paper.

One more statistic before we get to the specifics: of the 205 citations to Genesis that are found in the *Concordance*, 71 (more than a third) are in the *dicta* of Gratian rather than in canons he quotes. So far as I am aware, no one has ever counted the number of lines of the text that are *dicta* as opposed to the number of lines that are quotations of canons, but my impression is that more than two-thirds of the text is quotations from canons. Hence, we might conclude that Gratian makes more use of Genesis than do his sources. This conclusion is somewhat dangerous, however, because frequently Gratian's reference to Genesis is suggested by the source on which he is commenting. Certainly, we can conclude that Gratian is making no less use of Genesis than are his sources, and there are examples where Gratian comes up with a reference to Genesis that is not suggested in his sources. We will use these

facts at the end of the talk to offer some general suggestions about the use of the Bible in medieval canon law.

Let us begin with a topic that does not deal in any direct way with either sin or sex, but illustrates well Gratian's method. *Causa* 13 of the *Concordance* deals with the population of a parish, which, ravaged by war, moved into the neighboring diocese and began to attend another parish church. They continued, however, to cultivate the fields in the old parish. They paid the tithes on these fields to their new parish. That they should not have done this seems reasonably clear; tithes are owed to the parish within the boundaries of which the crops grow. More difficult is the question whether the rector of the old church can claim these tithes when the thirty year period of prescription has passed. Incidental to this question, Gratian has the rector of the church also claim the right to bury the descendants of his former parishioners. There are two issues here: whether the rector can claim a right to bury his former parishioners, and whether that right extends to their descendants.

For the proposition that husband and wife are to be buried in the same sepulcher, Gratian has a text from Jerome's *Hebrew Questions on Genesis*,[9] a quite extraordinary work written at the end of the fourth century, in which Jerome displays considerable knowledge of Rabbinic traditions:

> Hebron is said to be a city of three men, because in it are buried three patriarchs in a double cave with their wives, that is Abraham and Sarah, Isaac and Rebecca, Jacob and Leah, in addition to Adam himself and his wife Eve. . . . Whom one marriage joins one burial should join, because they are one flesh, and whom God has joined man should not divide.[10]

9 C.23 v.2, *St. Jerome's Hebrew Questions on Genesis*, trans. C.T.R. Hayward (Oxford: 1995), 56–57. Hayward dates the completion of the work 391 X 393. The edition of the Latin text in Migne's *Patrologia Latina* (PL) is inadequate, but there is a good edition in the Corpus Christianorum, Series Latina, vol. 72 (Turnholt, Belgium: 1959).

10 C.13 q.2 c.2 (i.e., *Causa* 13, *quaestio* 2, *capitulum* 2) (all the translations from Latin are mine): *Ebron dicitur esse ciuitas trium uirorum, quia in ea sepulti sunt tres patriarchae, in spelunca duplici cum tribus uxoribus suis, id est Abraham et Sara, Ysaac et Rebecca, Iacob et Lia, preter ipsum Adam et Euam uxorem suam . . . . Quos coniunxit unum coniugium coniungat unum sepulcrum, quia una caro sunt, et quos Deus coniunxit homo non separet*. Hayward's edition and translation, n. 9 above, shows that Jerome's text did not contain the material on the obligation to bury husbands and wives together. It was probably added somewhere in the tradition before it reached Gratian.

There are at least three references to Genesis here, one to Genesis 49:30, where the dying Jacob commands his sons to bury him in Hebron with Abraham and Sarah, Isaac and Rebecca, and Leah, one to Genesis 50:13, where Joseph fulfills this command, and one to Genesis 2:24 ("and the two shall be one flesh"). We can, if we wish, also see references to the earlier descriptions in Genesis of Abraham's purchase of the field from Ephron (Gen. 23:9–16), the burial of Sarah (Gen. 23:19), the burial of Abraham (Gen. 25:9), and the burial of Isaac (Gen. 25:27–9). (The burial of Adam is not mentioned in Genesis, though Jerome thought that it was referred to in Joshua 14:15,[11] and the reference to Genesis 2:24 is one to which we will have to return.)

The notion that husband and wife should be buried together is one that Gratian seems willing to accept, though he does cast some doubt on it in the following *dictum*. What is troublesome for Gratian is the implication that one might draw from the biblical texts (it is not suggested by Jerome) that sons (and their wives) should be buried where their fathers are buried. For if this is right, then the claim of the rector of the former parish of the people in his hypothetical case has some bite.

It is this idea that Gratian wants to refute, and he does it by making use of the same string of texts (less Genesis 2:24) that Jerome had cited in speaking of the burial of husbands and wives, but beginning not with Jacob but with Joseph: "Again," he says, "Joseph dying in Egypt, asked his brothers that when they visited Canaan, they take his bones with them and place them in the sepulcher of their ancestors."[12] Gratian then cites two other examples of burial in an ancestral sepulcher from the Old Testament, one from the New Testament, and one from the lives of the Christian saints. "From all these examples," Gratian continues,

> it is derived that the bodies of children are to be placed in the sepulcher of their parents. Since, therefore, [in the hypothetical case] the parents of these people are buried in the former church, these too should be entombed in it. On the other hand, Adam, as you [probably a hypothetical

11 It is in Genesis Rabbah 58:4, but it seems more likely that Jerome got the idea from the earlier sources from which the Genesis Rabbah was composed. See the discussion in Hayward, pp. 182–83.

12 C.13 q.2 d.p. c.3 (i.e., *dictum Gratiani post capitulum* 3): *Item Ioseph, moriens in Egypto, rogauit fratres suos, ut tempore suae uisitationis ossa sua secum deferrent, et in sepulcro patrum suorum ea collocarent*.

> interlocutor] assert, is entombed in the city of Arbeae.[13] But are all his children buried there? Such a multitude of the human race cannot so easily be included in such a small tomb. Again, Abraham is buried there. But are Ishmael [Gen. 16:15] and Midian, and the others whom Keturah bore buried there [Gen. 25:1–2]? Again, Isaac is placed there. But is Esau buried with him? Again, Jacob is placed there. But are any of his children except Joseph buried with him?[14] We read also that Rachel, too, is not buried in Hebron, but next to Bethlehem [Gen. 35:19–20].[15] By the example of these people, it is apparent that children are free to be buried in the sepulcher of their fathers, and they are free to find a resting place elsewhere as place and time demands. Therefore, these people [in the hypothetical case] are not required to be buried in the sepulchers of their ancestors by this example. Again, what is defined in the laws it is not permitted to change. What is not expressed in the laws, however, is subject to the discretion of human will. Now it is defined in the laws to whom tithes ought to be paid, and therefore the giver of tithes cannot change it. Where, however, someone is to be entombed is not expressed in the laws, and therefore it is a matter for the will of him who is to be entombed.[16]

All of these examples find clear support in Scripture (or, if we wish, lack of support, where Gratian is arguing from silence), except for one.

13 An alternative name for Hebron; see Eucherius of Lyon (d. c. 450), *Instructiones ad Salonium*, PL 50.817D.

14 Gratian does not seem to know Joshua 24:32; see below.

15 Jeremiah 31:15 refers to Ramah, which is not exactly near Bethlehem, but it is much closer than Hebron. The transfer to Bethlehem is reinforced in the quotation of Jeremiah 31:15 in the Gospel of Matthew (2:18), with reference to Herod's slaughter of the baby boys of Bethlehem.

16 C.13 q.2 d.p. c.3: *His omnibus exemplis colligitur, quod in sepultura parentum corpora filiorum collocanda sunt. Quia ergo parentes istorum apud priores ecclesias sepulti sunt, et hi apud easdem debent tumulari. Econtra Adam, ut asseritis, in ciuitate Arbeae tumulatus est. Sed numquid omnes filii eius sepulti sunt ibi? tanta multitudo humani generis tam breui tumulo non tam facile posset includi. Item Abraham ibi sepultus est. Sed numquid Ismahel, et Madai, et alii, quos de Cethura genuit, ibi sepulti sunt? Item Ysaac ibi positus est. Sed numquid Esau cum eo tumulatus est? Item Iacob ibi collocatus est. Sed numquid aliquis filiorum eius preter Ioseph cum eo sepultus est? Rachel quoque non in Ebron, sed iuxta Bethleem tumulata legitur. Exemplo igitur istorum liquet, quod liberum est filiis sepeliri in sepulcris patrum suorum, et liberum est eis alibi pro locorum et temporum oportunitate corpori suo hospitium inuenire. Non ergo hoc exemplo isti coguntur sepeliri in sepulcris patrum suorum. Item, que legibus diffinita sunt mutare non licet. Que autem legibus expressa non sunt arbitrium secuntur humanae uoluntatis. At legibus diffinitum est, quibus decimae sint persoluendae, et ideo danti mutare non licet. Ubi autem quisque tumulandus sit, legibus expressum non est, et ideo in uoluntate tumulandi consistit.*

Joseph did ask that his bones be brought to Canaan, but there is nothing in the text (Gen. 50:25) that says that he wanted to be buried at Hebron, and Joshua 24:32 says pretty clearly that he was buried at Shechem. The great gloss on the Bible, a version of which we know that Gratian was using, contains no such suggestion at the relevant passages, and all the patristic commentaries that I have been able to find on this topic say that Joseph is buried at Shechem. It is possible that Gratian, influenced by the passage about Jacob's will, just got carried away and assumed that this is what Joseph wanted too, and assumed as well that this was what was done after the exodus. In short, he may have forgotten Joshua 24:32.[17]

It is possible, however, that he derived the notion from Acts 7:14–16, a part of the speech that Stephen makes to the Sanhedrin, a speech that ultimately led to his martyrdom: "Joseph then sent for his father Jacob and his whole family, a total of seventy-five people. Jacob went down into Egypt, and after he and our ancestors had died there, their bodies were brought back to Shechem and buried in the tomb that Abraham had bought for money from the sons of Hamor, the father of Shechem."[18] The passage clearly confuses the site of Jacob's burial (at Hebron on land bought by Abraham from Ephron the Hittite) with the site of Joseph's burial (at Shechem on land bought by Jacob from the sons of Hamor). Whether the confusion is Luke's (the supposed author of Acts) or whether it goes further back cannot be said. Much depends on the highly controverted question of Luke's sources.[19] The origin of the confusion may be the tradition, reported

17 None of the printed early commentaries on Gratian catches this mistake (Paucapalea, Rufinus, Rolandus, Stephanus, *Summa Coloniensis*). This may be because they are already focused on a rule that says that one should be buried where one's parents are, unless one has a good reason for not being so buried. The most elaborate commentary on Gratian in print, that of Guido de Baysio (*Archidiaconus super Decreto . . . Rosarium* [Lyon: 1549], fol. 234vb), clearly realizes that there are problems, because Guido cites Joshua 24 at the beginning of the text, but he seems reluctant to say that Gratian was just wrong, and he simply gives what are probably the references to Jacob's burial (misprinted in our edition) at the key spot. He also criticizes the ordinary gloss on Gratian for mixing up Keturah and Hagar.

18 I owe this suggestion to Steve Friedell.

19 See Joseph A. Fitzmyer, *The Acts of the Apostles*, Anchor Bible (NY: 1998), 364–65, 374.

both in Josephus and *Jubilees*, that Joseph's brothers were buried at Hebron.[20]

Nonetheless, I would suggest that this passage illustrates Gratian at his best. The examples from Genesis in Jerome might lead one to the conclusion that burial in an ancestral sepulcher was an obligation. But if one really knows the examples from Genesis, as Gratian clearly did, no such obligation is apparent. Indeed, the possibility of such an obligation can be refuted by a reductio ad absurdum; if such an obligation existed, everyone in the world would have to be buried in Adam's sepulcher in Hebron. They would not, Gratian tells us with considerable understatement, all fit. The Joseph example also puts him in mind (indeed, he may have chosen the example because he already had this in mind) of the will of the person who is to be buried. The rest of the question in Gratian is devoted to the obligation, in most instances, to carry out the last wills and testaments of the deceased.

Genesis 2:24 ("and the two shall be one flesh") is probably the most frequently cited single verse from Genesis in Gratian. The standard reference list gives 7 instances, and a computer search suggests that there are 14 more.[21] The importance of this verse in Christian thought goes

20 Ibid., 374. The passage caused some embarrassment to the Christian commentators. E.g., Bede, writing in the early 8th century, suggests that there was a popular tradition that Jacob was buried at Shechem, and Stephen followed it, because it did not affect the main points of his speech. Beda Venerabilis, *Super acta apostolorum expositio*, PL 92.958B. In the 15th century Joseph Albo used this passage (among others) to show that the apostles did not know the Torah. Joseph Albo, *Sefer Ha-'ikkarim; Book of Principles*, trans. and ed. Isaac Husik (Philadelphia: 1946), vol. 3, 240. (I owe this reference to Steve Friedell.) As long as we are being tendentious, we should point out that Stephen was not an apostle. He was a Greek-speaking Jew from the diaspora, who had just been appointed what a later age would call a deacon. Another of Stephen's "mistakes" (seventy vs. seventy-five who went down to Egypt) is a result of the fact that Stephen was using the Septuagint rather than the ancestor of the masoretic text; see Fitzmyer, ibid.

21 Germovnik's *Index Biblicus* offers C.27 q.2 c.18, C.27 q.2 c.19, C.30 q.4 c.1, C.31 q.1 c.10, C.35 q.1–2 c.14, C.35 q.10 c.1 (2 citations). A computer search on *carne una*, *caro una*, and *una caro* turned up C.13 q.2 c.2 (the Jerome passage quoted above), C.27 q.2 c.18 (another), C.27 q.2 c.19 (another), C.27 q.2 d.p. c.28, C.30 q.4 c.1 (two more), C.30 q.4 c.3, C.32 q.4 c.12, C.33 q.1 c.2, C.35 q.1–2 c.15, C.35 q.1–2 c.21, C.35 q.3 c.3, C.35 q.10 c.1 (another), C.35 q.10 c.2. Of these only C.32 q.4 c.12 is a genuine mistake of Germovnik's because it is in quotation marks (see n. 3 above). All the other references found are verbal variations or quotations of the biblical text without quotation marks.

back to the beginnings of Christianity. There is a saying of Jesus, a *logion* in the jargon of the field, that appears in the gospels of Mark and Luke and twice in the gospel of Matthew (Mark 10:11–12; Luke 16:18; Matt. 5:31–32; Matt. 19:9) in various forms, but the base textual form seems to be, "A man who divorces his wife and marries another is guilty of adultery." Paul's First Letter to the Corinthians (1 Cor. 7:11), which is earlier than any of the Gospels, does not quote the saying but says something quite close: "A man must not send his wife away," and says that the statement is "from the Lord." In all probability the very early Church compiled oral and then written collections of "sayings of the Lord." The presence of this saying in all three synoptic Gospels and its reflection in 1 Cor. 7 make it virtually certain that this was among those early sayings.

This is quite different from the Jewish law both of Jesus' time and today, although the prophet Malachi had quite harsh words to say about divorce (Mal. 2:14–15). This difference did not escape the notice of the New Testament writers. Both the gospel of Matthew and that of Mark situate the *logion* in the context of a question that the Pharisees put to Jesus. Matthew 19:3–9 preserves more of the Jewish details:

> Some Pharisees approached him [Jesus], and to test him they said, "Is it against the Law for a man to divorce his wife on any pretext whatever?" He answered, "Have you not read that the Creator from the beginning made them male and female [Gen. 1:27] and that he said: 'This is why a man must leave his father and mother, and cling to his wife, and the two become one body' [Gen. 2:24]? They are no longer two, therefore, but one body. So then, what God has united, man must not divide." They said to him, "Then why did Moses command that a writ of dismissal should be given in cases of divorce" [Deut. 24:1]? "It was because you were so unteachable," he said, "that Moses allowed you to divorce your wives, but it was not like this from the beginning. Now I say this to you: the man who divorces his wife — I am not speaking of fornication — and marries another, is guilty of adultery."

Many things are puzzling about this passage, not the least of which is the meaning of the except clause ("I am not speaking of fornication"). The tendency among modern Protestants and Orthodox has been to take it literally, that is, as meaning that under some circumstances, of which adultery is one, divorce and remarriage are permissible. In the medieval west, however, this passage and the others like it, which do not have the except clause, were read to say that under certain circumstances, of which adultery was one, separation, but not divorce and remarriage, was permissible.

What does seem reasonably clear is where the question posed by the Pharisees comes from: "Is it against the Law for a man to divorce his wife on any pretext whatever?" The Mishnah tells us that the school of Shammai and the school of Hillel debated this question, the school of Shammai taking the position that the only ground for divorce was adultery, and the school of Hillel, it would seem, taking the position that a man could give a bill of divorce for any fault he found in his wife; later followers of Hillel appear to have extended this to any reason at all.[22] Matthew is depicting the Pharisees as trying to see which side of the debate Jesus would take. He takes neither side. He says that what God has joined man must not divide, citing Genesis in preference to Deuteronomy.[23]

Genesis 2:24 is also quoted in a letter to the Ephesians attributed to St. Paul (Eph. 5:21–33). "He who loves his wife," the author of Ephesians tells us, "loves himself. For no one ever hates his own body, but he nourishes it and tenderly cares for it, just as Christ does for the church, because we are members of his body. This is why a man must leave his father and mother, and cling to his wife, and the two become one body."

The source of this extraordinary analogy between the relationship of husband and wife and the relationship of Christ and Church is the Bible: Israel is the bride of the Lord in much prophetic writing (e.g., Hos. 1:2; Isa. 62:5). But the author of Ephesians goes quite a bit further. Just as the bride is bathed before marriage, so a Christian is baptized to become the bride of Christ. Just as Christ sacrificed himself for the Church to make her holy, so the husband should sacrifice himself for his wife. Just as the Church obeys Christ, so the wife should obey the husband. Just as Christ loves the Church, so the husband should love the wife. The union of husband and wife, our author then tells us, "is a great mystery, but I am applying it to Christ and the church."

22 bGitin 9:10. R. Akiva (who is later than the 1st century) is the one who takes the extreme position in the text as we have it; what the school of Hillel says is "even if she breaks a dish." They are all splitting the syntax of Deuteronomy 24:1. The Hebrew is כִּי, which looks to me more like the "because" of NAB and NRSV than it does the "and" of NJB.

23 If the except clause meant that divorce for adultery were permissible, there would have been nothing particularly notable about it. Jesus would simply have been taking Shammai's position in the debate. That he did not, but took a much more radical position, is clear, I think, from the passage and its context.

The word translated here as "mystery" was translated into Latin as *sacramentum*, "sacrament," and this fact came to be important when Christians began to define the sacraments of the Church. (The eastern Church, which still uses the word "mystery," went through a similar process of definition.)

Genesis 2:24 is thus fundamental to the Christian understanding of marriage. It was also used to make some extensions to the law of marriage that a later age would regard as unfortunate and the modern age regards as bizarre. (No Christian Church that I know of follows these extensions today.) If husband and wife are one flesh, then the same rules that apply to consanguinity also apply to affinity. That is to say, if my wife is forbidden by the rules of consanguinity from marrying her fourth cousins, then upon her death I cannot marry any of her fourth cousins. There are even texts that suggest an application of these rules to children of a second marriage.[24] They cannot marry the consanguines of their parent's former spouse.

By and large, Gratian passes over these texts (though he includes them as canons) without commenting on their basis in Genesis 2:24. He may have regarded the extensions as unfortunate. Unlike some of his immediate predecessors, he certainly shows no tendency to extend these extensions.

There is one place, however, where it seems likely that Gratian was strongly influenced by the tradition surrounding Genesis 2:24, though he cites it only once in his *dicta* on the topic.[25] Obviously, if marriages are going to be indissoluble, it becomes critically important to know when they become indissoluble. Until the twelfth century, there was no clear answer to that question. Authorities could be found in support of the idea that (what we would call) engagements were indissoluble, the notion that indissolubility arose at the time of wedding ceremony, and the view that it did not arise until the couple had had sexual intercourse. Genesis 2:24 would tend to support this last view, which is the one Gratian adopts. It was ultimately adopted by the Church, though it took some while to get there.

The Rabbis made use of Genesis in devising procedural rules.[26] So did the medieval doctors. The lessons of the first trial, that of Adam,

24 C.35 q.10.

25 C.27 q.2 d.p. c.28. It is also cited several times in two of the canons quoted in the same *quaestio*, c. 18 and 19.

26 See Hanina Ben-Menahem's "Some introductory remarks on Genesis Rabbah and the law," pp. 135–153 above.

were well known to them. There must be a summons, the defendant must appear, there must be a complaint, and an opportunity for the defendant to be heard.

These procedural requirements are all in Gratian, but he does not use the story of Adam and Eve to illustrate or derive them. Rather, he uses the story in a quite different context. In his treatise on penance, Gratian makes an elaborate argument about the necessity of confession for forgiveness. If we do not confess, we will not be forgiven, and we will be damned. If we do confess, we will be forgiven, and we will be saved. Adam and Eve confessed when questioned by the Lord. Ultimately, they were saved. "Cain, too," Gratian continues,

> when he added fratricide to the first sin, was similarly questioned by the Lord about his fault, when the Lord said to him: "Where is your brother Abel?" But because in his pride [Cain] did not want to confess his sin, but tried rather to deceive the Lord by a lying denial: "Am I my brother's keeper?", he was judged unworthy of forgiveness. Whence, plunged in the depth of despair, when he said, "My iniquity is too great to earn forgiveness,"[27] a wanderer and an exile he departed from the face of Lord, signifying that those who evade confessing their sins are held to be unworthy of divine mercy.[28]

Taking the first two "trials" in this context allows Gratian to come up with an answer to the question that had puzzled other readers of Genesis who thought of them in a procedural context. Adam and Eve are asked for their version of the story; Cain is asked for his version of story, but the serpent is not asked for his. The serpent is condemned without a hearing. But if the purpose of asking the question of Adam and Eve and of Cain was to elicit a confession, so that they might be saved, then the failure to ask the question of the serpent is quite understandable. The serpent is Satan; he is already damned. Confession can

27 This is probably not what the Hebrew says, but it is what the Vulgate says.

28 De pen. D.1 d.p. c.60 (i.e., *De penitentia*, *distinctio* 1, *dictum Gratiani post capitulum* 60). *Cayn quoque cum primae prevaricationi fratricidium addidisset, similiter a Domino de culpa requisitus est, dum dicitur ei "ubi est Abel frater tuus?" Sed quia superbus peccatum suum confiteri noluit, potius mendaciter negando Dominum fallere conatus est, dicens: "Numquid custos fratris mei sum ego?" indignus venia iudicatus est. Unde in desperationis profundum mersus, dum ait: "Maior est iniquitas mea quam ut veniam merear." Vagus et profugus exiit a facie Domini, significans, eos qui peccatum suum confiteri dissimulant, respectu divinae misericordiae indignos haberi.*

do him no good, so he is not given the opportunity to confess, as are Adam and Eve, and Cain.[29]

Gratian does make use of other passages from Genesis for procedural purposes. A decretal attributed to an early pope, but, in fact, a ninth-century forgery, was used by others, as it was probably intended to be used, to make the argument that lay people could not accuse clerics of crimes, members of a bishop's flock could not accuse the bishop, etc. The decretal states, "By the sentence of Ham, the son of Noah, are condemned those who publish[30] the fault of their teachers or superiors, like Ham, who did not cover the pudenda of his father, but exposed them to ridicule."[31]

Gratian thinks that this decretal is too broad. Under some circumstances, lay people should be allowed to accuse clerics, and members of a bishop's flock, their bishop, but he does not comment on the decretal where he places it. Rather, he waits until after a text of Augustine's that says that good men keep silent about the sins of others that cannot be proven in court.[32] "By this authority [the decretal on the sentence of Ham]," Gratian says, "subordinates are not prohibited from accusation, but from publishing. It is one thing to publish, another to accuse. He publishes who does not offer proofs. He accuses who, with the defendant being present, presents to the judge a crime that he intends to prove. Ham alone saw the pudenda of his father, and therefore through him is to be understood those who, alone aware of the crimes of their prelates and who for this reason cannot accuse them, nonetheless offer their lives up to ridicule by defaming them."[33]

29 Ibid. *Peccato transgressionis primi parentes corrupti a Domino sunt requisiti de culpa, ut peccatum, quod transgrediendo conmiserant, confitendo delerent. Serpens autem de culpa requisitus non est, quia per confessionem non revocabatur ad vitam.*

30 The Latin word also means "betray" and is going to be important in the analysis.

31 C.2 q.7 c.12: *Sententia Cham* [Ham] *filii Noe dampnantur qui suorum doctorum vel prepositorum culpam produnt ceu* [=*sicut*] *Cham, quia verenda patris non opuerit sed ridenda monstravit.*

32 C.2 q.7 c.27.

33 C.2 q.7 d.p. c.27: *De his etiam illud Anacleti intelligitur*. . . . [quotes c. 12] *Hac enim auctoritate subditi non prohibentur ab accusatione, sed a proditione. Aliud enim est prodere, alius accusare. Prodit qui non probanda defert: accusat qui reo presente crimen iudici offert, probaturus quod intendit. Cham solus vidit pudenda patris, et ideo per eum intelliguntur, qui, cum sint soli conscii criminum suorum prelatorum atque ideo eos accusare non possunt, vitam tamen eorum infamando alias ridendam offerunt.*

(A key and unstated premise in this argument is that to condemn someone, canon law, like Jewish law, in most instances requires that there be two witnesses to the offense.)

So far we have presented Gratian as an author writing within a tradition who knows how to manipulate the tradition to get sensible results. This is the overall impression of Gratian that I want to leave, but text-based traditions working with a fixed canon of sources will come up with what strike us as bizarre arguments when faced with problems for which the sources provide no clear answers. Let us now turn to the challenges that we posed at the beginning of the paper.

Genesis 11:14–17:

> When Shelah [the grandson of Shem] had lived thirty years, he became the father of Eber; and Shelah lived after the birth of Eber four hundred three years, and had other sons and daughters. When Eber had lived thirty-four years, he became the father of Peleg; and Eber lived after the birth of Peleg four hundred thirty years and had other sons and daughters.

This is the sum total of what Genesis tells us about Eber, though some of the information about him is repeated in chapter 10.[34] What could he possibly have to do with the rules about marrying relatives?

Just this[35]: Gratian lived in a world in which many people thought that one should not marry any relative as close as one's sixth cousin. Obviously, no such rules were being followed in the book of Genesis. The characters in Genesis are pretty clearly not even following the incest rules that can be derived from Leviticus 18. The standard explanation for this fact was that God had relaxed the rules in the interest of multiplying the human race. The children of Adam and Eve had to marry their brothers and sisters. This same argument was extended to the patriarchs.[36] They were allowed to marry close relatives in order to multiply the numbers of those faithful to God. Gratian is here extending the argument to those shadowy characters that appear between Noah and Abraham. Only the ones named in the genealogy of Abraham remained faithful to God in the way that Noah had been.

34 In Genesis 10:21 he is given a kind of prominence that may support Gratian's use of him. See below.

35 C.35 q.1 d.p. c.1.

36 The outlines of the argument are clearly seen in C.35 q.1 d.a. c.1, which not only cites the example of the children of Adam and Eve, but of Abraham, who married his half-sister; Isaac, who married the daughter of his maternal aunt, and Jacob, who married the daughters of his maternal uncle.

This idea is connected with an argument found in the tradition to the effect that the descendants of Eber continued to speak Hebrew, and that grace continued through them as it did not through those who spoke other languages.[37] Gratian is not saying that Eber married a close relative (his wife is not named), but that he could have.

Now to Potiphar and the problem of the sacraments of simoniacs. Simony, the purchase and sale of ecclesiastical offices and rites, was a vice universally condemned by the reformers of the eleventh and twelfth centuries, of whom Gratian was one. The issue was not whether it should be condemned; it had been universally condemned by the fathers of the Church, and texts from both the Old Testament and the New Testament could be found in support of the condemnation.[38]

37 The barest hints of this argument may be found in the great gloss, *Biblia Latina cum glossa ordinaria* (Strassburg: 1480/1; repr. Turnhout, Belgium: 1992), Genesis 11:10 s.v. *Sem erat*, in a gloss ascribed to Bede: *Nusquam in tota hac serie generationum addidit "mortuus est," sicut in etate que precessit diluvium* [Gen. 5], *quia nemo erat in tota hac complexione nascentium de quo ex ceteris excepto dici posset sicut ibi de Enoch "Ambulavit cum Domino et non apparuit, quia tulit eum deus"* (Gen. 5:24). A confused gloss on Genesis 10:21 s.v. *Heber* apparently wonders why he is given such prominence in that verse, granted what Genesis 10:24 and 11:14 say about the generation to which he belonged. (The verse also can be read to make Eber the elder brother of Japheth, which contradicts both later genealogies.) It speculates that Eber may be the eponym of "Hebrew." (Jerome seems to have agreed in *Ad Genesim* 10:24, PL 23.955B; it seems to have been a popular etymology, and the root does seem to be same: עבר.) Or, the gloss suggests, he is mentioned because it is through him that the genealogy passes to Abraham (but the same could equally be said of Arpachshad and Shelah; did the glossator know that the root of the name עבר means "to pass over"?). Augustine apparently questioned the etymology; Augustinus, *Quaestiones in Genesim*, PL 34.552. There are more than hints of it in the *Liber de promissionibus* 1.10, attributed to Prosper of Acquitaine, PL 51.742; see Isidore of Seville, *Etymologies*, PL 82:276C: *HEBER transitus. Etymologia ejus mystica est, quod ab ejus stirpe transiret Deus, nec perseveraret in eis translata in gentibus gratia. Ex ipso enim sunt exorti Hebraei*. The idea is developed in Bede's *Hexaemeron*, PL 91.120B.

38 The most obvious passage is that from which simony takes its name. In the eighth chapter of Acts we learn that a Samaritan magician named Simon sought to buy the Holy Spirit from Peter so that he could perform miracles in the way the apostle did. "May your silver perish with you," Peter tells him, "because you thought you could obtain God's gift with money" (Acts 8:20). A more complicated story is found in 2 Kings 5:15–27. After Elisha has cured Naaman the Aramean of leprosy, Naaman offers him gifts,

The issue was, rather, the legal consequences of simony. If a bishop purchased his office or paid a bribe to get it, did that mean that all the priests whom he ordained were not, in fact, priests? If a priest purchased his office or paid a bribe to get it, did that mean that his masses were invalid or that he had no power to forgive sins? Gratian's ultimate resolution of this problem strikes us as sensible. The simoniacal ordination of a bishop or a priest is valid, but it gives no spiritual benefits to the simoniac. If, however, the simoniac exercises the powers of his office, these exercises are not only valid, but also provide spiritual benefits, grace, at least to those who are unaware that the man is a simoniac.[39]

Potiphar comes in in an argument to the contrary, an argument that the sacraments of simoniacs have no efficacy, even if the recipient of the sacrament is unaware that the man is a simoniac. A text attributed to Augustine but almost certainly written at the height of the reform movement in the eleventh century makes the following argument: "Just as the man who bought Joseph was a eunuch, so he who makes commerce out of grace has no living semen in his dry genitals."[40] The argument, as Gratian recognizes, is that the simoniac can confer no spiritual benefit by his sacraments, and he immediately counters this text with a genuine text from Augustine that says that sacraments confer grace even if the priest who dispenses the sacraments is a bad man.[41] But what could the author of the first text have been thinking about? He has been confused by the Vulgate's use of the word *eunuchus*

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which Elisha refuses. But Gehazi, a servant of the prophet, follows after Naaman and extracts from him a large donation on the pretense that it is needed to support two young men of the prophetic brotherhood. When Elisha finds out what Gehazi has done, he is angry, and he prophesies that Naaman's leprosy will cling to Gehazi — which it does. While it is not completely clear whether Gehazi is condemned simply for taking money or for taking it under false pretenses, it is, nonetheless, easy to see how this story could be used as a proof-text about simony — as it was. See H.-J. Horn, "Giezie und Simonie," *Jahrbuch für Antike und Christentum*, 8/9 (1965/1966), 189–202.

39 Comprehensive support for this and what follows can be found in my "Malchus's ear: Reflections on classical canon law as a religious legal system," in Michael Hoeflich (ed.), *Lex et Romanitas: Essays for Alan Watson* (Berkeley: 2000), 91–120.

40 C.1 q.1 c.29: *Sicut eunuchus fuit, qui Ioseph conparauit, ita qui gratiam mercatur uiuum semen non habet siccis genitalibus*.

41 C.1 q.1 d.p. c.29, c.30.

to describe Potiphar as a court official.[42] The word does not necessarily imply that Potiphar was a physical eunuch, as one of the first commentators on Gratian quite rightly points out.[43] Potiphar, after all, was married, though his wife may not have found him a totally satisfactory husband.

My next example is not from Gratian. It comes from the very end of the twelfth century. By this time, Potiphar the eunuch is gone. Most of the canonists who deal with the problem of simony, even when they are commenting on Gratian, pay no attention to the argument about Potiphar.

More dangerously — if only because I cannot offer a full panoply of evidence to support it [44] — I would like to make the suggestion that not only is this particular argument gone, but arguments like it are also gone.[45] Of course, the canonists still know the Bible, they still quote

42 Genesis 39:1.

43 Rufinus, *Die Summa Decretorum des Magister Rufinus*, ed. Heinrich Singer (Paderborn, Germany: 1902), 209.

44 Support can be found in Peter Landau, "Alttestamentisches Recht in der 'Compilatio Prima' und sein Einfluss auf das kanonische Recht," *Studia Gratiana* 20 (1976), 111–33; Gabriel Le Bras, "Les Écritures dans la codification des Décretales," in *Mélanges Eugène Tisserant*, Studi e testi 231 (Vatican City: 1964), 1.245–54; Raymonde Foréville, "Le recours aux sources scripturaires: A quel moment d'histoire l'Écriture a-t-elle cessé d'être source directe du droit de l'Église?" *L'Année canonique* 21 (1977), 49–55.

45 I recognize that here I am disagreeing — though how much is still not clear to either of us — with Richard Helmholz, "The Bible in the service of the canon law," *Chicago-Kent Law Review* 70 (1995), 1557–81. Certainly, Helmholz sees less of a change around 1200 than do I. When, however, all the qualifications that follow in "Malchus's Ear" are taken into account — and all the caution found in Helmholz's paper — the difference between us may be that between a half-full and a half-empty glass. I would emphasize one point more than does Helmholz: innovation was not the canonists' long suit. If a biblical example was in Gratian, or firmly embedded in the tradition independently of Gratian, the canonists would continue to cite it into the 16th century. Hence, there is nothing surprising about the use of Nebuchadnezzar's decree (Dan. 3:29) in the context of discussions of blasphemy. It was, as Helmholz points out, mentioned by Gratian in this context in five places; see Helmholz, p. 1568 and n. 46. The question that I am raising here (it can hardly be answered) is whether, if one removes repetitions of biblical authority derived from the past and purely rhetorical use of the Bible, there remain many examples of use of the Bible to advance the arguments in which the canonists were engaged.

from it both consciously and unconsciously, and biblical images and rhetoric come easily to them, but by and large they are not using the Bible to resolve the burning issues of the day.

Licet Heli, the famous decretal on the topic of simony issued around the year 1200 by Pope Innocent III, illustrates this difference in approach.[46] The decretal is famous because it says that simony should be dealt with by a new form of procedure, an inquisitorial process, in which the judge of his own motion questions those who know about the incident, and proceeds to issue a ruling. The judge does not have to wait until someone makes a formal accusation, nor is he bound by the elaborate set of procedural rules that limit those who can make such an accusation and those who can testify about it.[47]

The decretal contains two biblical references, the only authorities cited in it. "Although Eli, the high priest, was himself a good man," the decretal begins, "nonetheless because he did not effectively punish the wickedness of his sons, he brought down the rod of divine judgment both on them and on himself."[48] That a pastor has the obligation to discipline his flock is a fundamental principle of canon law, and one does not need to cite examples from the Old Testament to show it.[49] "I will go down," the decretal later says, quoting words that Genesis ascribes to God in the context of Sodom, "and see whether they have done in fact what is reported to me."[50] This is a little closer to the real issue, because it suggests that reports of crimes must be investigated. But the quotation raises more issues than it settles: Is the pope really

46 X 5.3.31 (i.e., *Decretales Gregorii noni, liber* 5, *titulus* 3, *capitulum* 31).

47 For the background, see, most recently, Richard Fraher, "IV Lateran's revolution in criminal procedure," in Rosalio Castillo Lara (ed.), *Studia in honorem eminentissimi cardinalis Alphonsi M. Stickler* (Rome: 1992), 97–111; Richard Fraher, "The theoretical justification for the new criminal law of the High Middle Ages," *Illinois Law Review* (1984), 557–95.

48 *Licet Heli summus sacerdos in se ipso bonus existeret, quia tamen filiorum excessus efficaciter non corripuit, et in se pariter, et in ipsis animadversionis divinae vindictam excepit*. X 5.3.31. The reference is to 1 Sam. 2:12–4:18.

49 The *locus classicus* for this requirement is 1 Tim. 3:4–5: "He [the bishop] must manage his household well, keeping his children submissive and respectful in every way — for if someone does not know how to manage his own household, how can he take care of God's church?" See, e.g., D.47 d.p. c.8 (with a long string of biblical examples, including Eli).

50 "*Descendam," inquit Dominus, "et videbo utrum clamorem, qui venit ad me, opere compleverint*." X 5.3.31, quoting Genesis 18:21.

arrogating to himself the power of divine judgment? How is the pope to know what God knows? In particular, is there anything about the story of Sodom that suggests that it is appropriate for the pope to set aside the ancient canonical requirements about accusers and witnesses? It would seem, then, that the Bible is being used here more for the purpose of rhetorical effect (no one who heard these words would miss the implicit verbal equation of simony and sodomy)[51] than it is for the guidance that it provides with respect to resolving the issue at hand.

The caution just expressed about Innocent's use of this text is not new. A canon quoted by Gratian and attributed, though wrongly, to an early pope, has this to say about it: "If God," it says, "who knows all and who knew in advance the evils of the Sodomites, the report of which had reached all the way to heaven, did not wish to believe or to judge before he, having carefully investigated with faithful witnesses, proved in fact what he had heard, we, who are men and sinners, to whom the secret judgments of God are unknown, taking precautions, ought to judge and condemn no one before true and just proof. . . ."[52]

We have just seen one reason why the nature of canonical argumentation seems to change by the end of the twelfth century: the increasing recognition of the pope's power makes recourse to a closed system of sources unnecessary. If the canonists do not have to work with a closed system of sources, but if they, rather, ask the pope what to do about new problems that arise, then arguments like that adducing Potiphar the eunuch will no longer be necessary. But the baby may be thrown out with the bath water. If the canonists no longer think about Potiphar in the context of simony, they may also no longer think about the burial of the patriarchs in the context of burial rights and duties. They may just get a papal ruling on the topic, and as papal rulings on

51 The equation, of course, is not legal but rhetorical. It consists in the phonic similarity of the words.

52 C.2 q.1 c.20: *Si enim Deus omnium cognitor Sodomorum mala quorum clamor ad celum usque pervenerat, omnia sciens prius, nec credere, nec iudicare voluit, quam ipse ea cum fidelibus testibus diligenter investigans, que audierat, opere conprobaret, nos qui sumus homines et peccatores, quibus incognita sunt occulta iudicia Dei, <haec> precaventes, nullum ante veram iustamque probationem iudicare aut dampnare debemus, manifeste Paulo apostolo dicente "Tu quis es, qui iudicas alienum servum? Suo enim domino stat aut cadit"* (Rom. 14:12).

various topics increase, they will focus their attention on analogous papal rulings when new problems arise.

There is another reason why biblical argument tends to drop out of canon law around the beginning of the thirteenth century, a reason buried in the history of canon law as a profession. Increasingly, over the course of the twelfth century, canon lawyers separated themselves from moral and dogmatic theologians. The theologians, to exaggerate slightly, took the Bible with them and left the lawyers with their canons, the ever-increasing body of decretals, and the *leges*, the Roman law, which the canonists and civilians were in the process of developing into the *ius commune*.[53] The separation was never complete. Gratian's great collection of canons and decretals intermingled with extracts from the fathers, with their strongly biblical orientation, and the arguments that Gratian himself makes, a striking number of which have a biblical base, continued to be a basic source-book for the canon lawyers. The canonists of the thirteenth and later centuries continued to use the Bible in teaching and argument, but they ceased to be creative in biblical argument in the manner of Gratian when he is dealing with the burials of the patriarchs. They no longer used biblical passages to create new arguments. New arguments arising from the decretals and the *leges* more than sufficed to keep them busy.

If this argument is even half right, it may help to explain why Christianity never developed a full-fledged religious legal system in the manner of Judaism or Islam.

Again if this argument is even half right, that would mean the moment in time in which the development of canon law proceeded most like the development of Jewish law would be the period from Gratian to the end of the twelfth century. This is obviously far too broad a proposition to try to prove here, but we have certainly seen hints of it in the way that Gratian uses Genesis, and we have also seen that he was relying, to a certain extent, on a tradition that goes

53 The still-standard account in English of the development of the various faculties may be found in Hastings Rashdall, *The Universities of Europe in the Middle Ages*, ed. F.M. Powicke and A.B. Emden (Oxford: 1936). The separation of theologians from lawyers, which antedated, though not by much, the formation of the faculties, still lacks a single comprehensive treatment, but see the essays by Jean Leclercq, Richard Southern, John Baldwin, and Stephan Kuttner, in Robert L. Benson and Giles Constable (eds.), *Renaissance and Renewal in the Twelfth Century* (Cambridge MA: 1982), 68–87, 113–72, 299–323.

back to the fathers of Church, who, however, were, by and large, less concerned than was Gratian to develop a body of law for the Church. But one of the biggest traps of comparative law is the "Oh, yes, we have that too" phenomenon, sometimes given its French name *comme chez nous*. So let me suggest some ways in which, as a general matter, Gratian differs from what I understand to be the method of the Rabbis.

The six or seven Noahide commandments (there is some disagreement about what they are) rest, ultimately, on six passages in Genesis: 2:15–17 (the commandment about the tree of knowledge); 6:11–13 (God to Noah, "The earth was corrupt"); 6:20 and 7:14 (animals "two of every kind" and "after their kind"); 9:1–7 (the covenant with Noah); 11:4 ("Come, let us build us a city"), and 20:1–18 (the story of Abraham, Sarah, and Abimelech). Of these, only the last two are directly cited in Gratian. Gratian believes, as do the Rabbis, that there is a body of law binding on all men, and that it was binding from the very beginning of creation. He calls this law "natural law," and believes, like the Rabbis, that it can be derived from the Bible, although his Bible, unlike that of the Rabbis, includes the Christian New Testament. What Gratian is not particularly interested in doing is deriving the contents of that law from particular words in the book of Genesis, in deriving the Noahide laws, for example, as some of the Rabbis do, from the words of the very first commandment that God gave to Adam and Eve, not to eat of the tree of knowledge of good and evil. The book of Genesis, for Gratian, is a book of examples, precedents if you will. Gratian's legal points about Genesis are, by and large, derived from the narrative, not from close analysis of particular words.

Now, of course, the Rabbis also draw legal points from the narrative. In this, their method does not differ from Gratian's, even though they may arrive at different results. But Gratian does not follow the Rabbis in their close verbal analysis. One reason for this is probably caution, though the caution is never stated. Gratian knew that he was dealing with a translation, not with the original text. He obviously cannot play with puns and with the mutation of triliteral roots, because his text, by and large, does not contain the puns, and it has no triliteral roots.

The difference, however, may go deeper than this. Let us look at how Gratian uses one of the sources of the Noahide laws, Genesis 11:4 ("Come let us build a tower"). The citation appears at the end of a rather long *dictum* that distinguishes between natural law and the law of custom. The occasion for this discussion is the problem of nocturnal seminal emissions, and the text of Gregory the Great on which Gratian

is commenting begins with a citation of Leviticus 15:16 which says that a man who has a seminal emission shall purify himself with water and remain ritually unclean until the evening.[54] From this one might derive the rule that a Christian in this situation, too, should ritually bathe and stay out of Church until vespers. Gregory does not think that that is required, at least not in all cases, and this stance in turn raises the question whether Gregory is changing the natural law, which is how Gratian, at the very beginning of the book, has characterized what is found in the Old Testament and the New Testament. "In the law and the gospels," Gratian replies, "natural law is contained, but not everything that is contained in the law and gospels can be shown to be a matter of natural law. There are moral precepts in the law, such as 'Thou shalt not kill,' etc., and there are mystical precepts, such as those about sacrifice. The moral commandments pertain to the natural law," and cannot be changed. The mystical ones, though they seem not to be matters of natural law, are "annexed" to the natural law in their moral understanding. They can be changed so far as their externals are concerned, but their moral understanding cannot be changed. Hence

> natural law, which begins with the beginning of rational creatures, remains unchangeable. The law of custom had its beginning after the beginning of rational creatures, when men gathering together began to live together, which is believed to have happened when Cain built a city. With the flood, because of the scarcity of men, the law of custom seemed almost extinct. Afterwards from the time of Nimrod, it is thought to have been reborn or rather transformed. This happened when he, with others, began to oppress others and in their weakness they became subject to his dictates, whence it is read of him, "Nimrod began to be a strong hunter before the Lord," that is, an oppressor and suppressor of men. These men he lured into building the tower.[55]

54 D.6 c.1 (i.e., *Distinctio* 6 [of the first part], *capitulum* 1).

55 D.6 d.p. c.3: *In lege et euangelio naturale ius continetur; non tamen quecunque in lege et euangelio inueniuntur naturali iuri coherere probantur. Sunt enim in lege quedam moralia, ut "non occides," et cetera, quedam mistica, upote sacrifitiorum precepta, et alia his similia. Moralia mandata ad naturale ius spectant atque ideo nullam mutabilitatem recepisse monstrantur. Mistica vero, quantum ad superficiem, a naturali iure probantur aliena, quantum ad moralem intelligentiam, inueniuntur sibi annexa; ac per hoc, etsi secundum superficiem uideantur esse mutata, tamen secundum moralem intelligentiam mutabilitatem nescire probantur. Naturale ergo ius ab exordio rationalis creaturae incipiens, ut supra dictum est, manet immobile. Ius uero consuetudinis post naturalem legem exordium habuit, ex quo homines conuenientes in unum ceperunt simul habitare; quod ex eo tempore factum creditur, ex quo Cain ciuitatem edificasse legitur, quod*

One note in passing: Genesis does not say that it was Nimrod who built the tower of Babel, but it does say that he was the potentate of Babylon. The connection between Nimrod and the tower is easy to make, perhaps even intended by the text, and the connection appears in Christian writing from at least the time of Jerome, who says that he got it from Josephus.[56] What is of interest to us, I would suggest, is how Gratian uses this story to build up a tripartite scheme of law: unchangeable natural law, found in things like the ten commandments, divine positive law, like the rules about temple sacrifice or ritual pollution, which can be changed in its externals, but not its moral sense, and the law of custom, which Gratian here suggests is not only mutable, but frequently arises from unsavory characters such as Cain and Nimrod. What interests Gratian about the Babel story is not the blasphemy of those who built the tower, though he probably would have agreed that it was indeed their sin, but rather, what it tells him about a grand scheme of the changeable and the non-changeable in the law.

How Christian law came to regard a scheme like this as fundamental to an understanding of law is a complicated question to which we cannot do justice here. Hints of ideas like this may be found in the Rabbis, but I am not aware of any schematization as sharp as this one, and it is certainly not as fundamental for the Rabbis as it is for Gratian.

Let us close by using the story of Abimelech and Sarah to raise the issue about change in Christian law, but also the issue about getting to the moral core of the law. In the case of the former, I doubt that there is anything quite like it in the Rabbis; in the case of the latter, I simply do not know. The story of Abimelech and Sarah can, of course, be used to derive the proposition that adultery was condemned before it appeared in the ten commandments. Gratian does not use it for these purposes, though I am not saying that someone in the Christian tradition could not have used it for such purposes. Christian writers, however, following the lead of St. Paul, tend to regard the ten commandments, at least those from "Honor thy father and thy mother"

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cum diluuio propter hominum raritatem fere uideatur extinctum, postea postmodum a tempore Nemroth reparatum siue potius immutatum existimatur, cum ipse simul cum aliis alios cepit opprimere; alii sua imbecillitate eorum ditioni ceperunt esse subiecti, unde legitur de eo: "Cepit Nemroth esse robustus uenator coram Domino," id est hominum oppressor et extinctor; quos ad turrim edificandam allexit.

56 Hieronymus [St. Jerome], *De situ et nominibus locorum hebraicorum*, PL 23.877C.

forward, as statements of the natural law. In short, they tend to downplay the potentially covenantal aspects of the ten commandments, and hence they do not need the story of Abimelech and Sarah to derive the proposition that adultery is wrong in all times and all places.

The Christian law of adultery is, however, quite different from the Jewish law. In Christian law, adultery is committed if either or both of the couple are married to someone else. In short, a married man may commit adultery with an unmarried woman. This extension of the law of adultery goes a long way back in Christianity. It may even be derived from the *logion* of Jesus on divorce quoted earlier.[57] The secular law of Rome was much more like the Jewish law in this regard, and in a canon quoted by Gratian, Ambrose warns his flock not to be misled by the secular law. Sexual intercourse between a married man and an unmarried woman is adultery, even if the secular law does not punish it as such. Indeed, any sexual intercourse outside of the bond of marriage is sinful. But adultery is worse than fornication: "The crime is more grave," he says, "where the rights of an existing marriage are violated and the chastity of a wife is dissolved." The proof-text for this proposition? The story of Abimelech and Sarah: "We know [from this text]," Ambrose continues, "that God is like a protector and guardian of marriage, who does not allow another's bed to be polluted, and if anyone does it, he sins against God [i.e., not just against the spouse of the person with whom he commits adultery]. . . ."[58]

The story of Abimelech and Sarah is, of course, also a story about the culpability of someone who acts in ignorance of a key fact. Saint Augustine, discussing this issue, first cites Luke's Gospel, where Jesus says at the moment of his crucifixion, "Father, forgive them, for they know not what they do."[59] He then cites Abimelech's statement to God, "Lord, would you slay an unknowing people?"[60] It is a bit hard to figure out how Augustine sees the two situations. He may think that Abimelech had a better excuse than did those who crucified Jesus. In any event, the situations in the two texts give rise to an aphorism: "Not everyone who is ignorant is free from penalty. He who is ignorant

57 Above, following n. 21.

58 C.32 q.4 c.4: *Cognoscimus velut presulem custodemque esse coniugii Deum, qui non patiatur alienum thorum pollui, et si quis fecerit, eum peccare in Deum, cuius legem violet . . .*

59 Luke 23:34.

60 Genesis 22:4. This is probably not quite what the Hebrew says, but it is what the *vetus latina* says.

can be excused from penalty if he did not find that by which he might learn. One cannot be ignorant, however, of that which he had the means to learn, when he did not make the effort."[61] Gratian quotes the aphorism without quoting the scriptural passages that give rise to it.

Let me close by posing three questions about these passages: (1) We all know that the Rabbis had many ways to change the law, but would they have done this in the way it was done in the case of adultery? I doubt it. Jesus was thought to have proclaimed a new covenant. That makes it possible, on the one hand, to ignore the covenantal aspects of laws promulgated under the old covenant, to blend, as it were, laws of the Noahide covenant with those of the Mosaic and call them all "natural law," and, on the other hand, to take statements of Jesus, and, I might add, of St. Paul, and use them to make quite radical changes in the existing legal regime. I think I am right when I say that the Rabbis would not have proceeded in this way. (2) Ambrose takes the actions of God in the Abimelech story as indicative of the varying ranks of seriousness of certain kinds of sins. God prevented a man from committing adultery even unknowingly. I can certainly imagine the Rabbis making an argument like this, but I can't recall ever having seen such an argument. Have I missed something? (3) The very real moral issue that is presented by those who act in ignorance is reduced by Augustine to an aphorism. That the rabbis struggled with such issues is clear enough; that they were given to aphorisms is also clear enough, although perhaps not at this level of generality. The aphorism is then transmitted independent of the scriptural sources that gave rise to it. The solution commends itself by its reasonableness, independent of its scriptural or textual support, although the authority of Augustine obviously helps. Would the Rabbis have done this? I recognize that there are mishnaic aphorisms that rest only on the authority of the Rabbi who spoke them, but are they at this level of generality on matters of what in the west would be called moral principle?[62]

61 D.37 c.16: *Non omnis ignorans est immunis a pena. Ille enim ignorans potest excusari a pena, qui a quo* [original reading for Gratian's *quod*] *disceret non invenit. Illis autem hoc ignosci non poterit, qui habentes a quo discerent, operam non dederunt*. For the original text, see Augustinus, *Quaestiones veteris ac novi testamenti*, 67, PL 35.2262.

62 This paper was first delivered as a talk at a conference on Genesis and Jewish Law at the Harvard Law School in May of 2003. I have added some footnotes and have made corrections on the basis of the lively discussion that followed. I have tried, however, to preserve the tentativeness of the talk, particularly in the questions at the end, which call for answers by those with more expertise in Rabbinic sources than I have.

APPENDIX

CITATIONS TO GENESIS IN GRATIAN'S *CONCORDANCE OF DISCORDANT CANONS*

Gen Cite	*Gratian Cite*
1:2	De pen. D.2 c.35
1:2	C.15 q.1 c.6
1:4–31	C.32 q.1 c.12
1:6	De pen. D.2 d.p. c.44
1:24	D.35 c.8
1:26	C.33 q.5 d.p. c.11
1:26	C.33 q.5 c.17
1:27	C.33 q.5 c.13
1:28	C.31 q.1 c.12
1:28	C.32 q.2 d.a. c.1
1:28	C.32 q.2 d.p. c.2
1:31	C.24 q.3 c.39
2:1–14	De cons. D.4 c.35
2:7	D.8 c.1
2:7	De pen. D.2 c.32
2:10	D.15 c.1
2:16	D.35 c.8
2:16	C.11 q.3 c.99
2:21	De pen. D.2 d.p. c.30
2:21–23	C.33 q.5 c.20
2:21–24	C.31 q.1 c.10
2:23–25	C.32 q.2 d.p. c.2
2:24	C.35 q.2 c.14
2:24	C.35 q.10 c.1
2:24	C.30 q.4 c.1
2:24	C.27 q.2 c.19
2:24	C.27 q.2 c.18
2:24	C.35 q.10 c.1
3:1	D.35 c.8
3:1–5	C.32 q.5 d.p. c.16
3:1–6	D.6 c.2
3:1–6	D.45 c.5
3:1–24	De pen. D.2 d.a. c.31
3:7	De pen. D.2 c.39
3:9	De pen. D.1 d.p. c.60
3:9–13	De pen. D.1 d.p. c.87
3:10	De pen. D.3 c.36
3:10	De pen. D.1 c.45
3:13	De pen. D.1 c.47
3:16	D.5 c.2
3:17	C.24 q.3 c.12
3:19	D.50 c.64
3:19	C.24 q.3 d.p. c.11
3:21	De pen. D.1 c.80
3:22	C.11 q.3 d.p. c.24
4:3–8	C.7 q.1 d.p. c.48
4:4	De pen. D.5 c.1
4:4–5	C.3 q.7 c.5
4:4–5	C.14 q.5 c.11
4:5	D.1 c.26
4:5	D.90 c.3
4:7	De cons. D.2 c.86
4:9	De pen. D.1 c.47
4:9	De pen. D.1 c.47
4:9	De pen. D.1 d.p. c.60
4:9	De pen. D.1 d.p. c.87
4:9	De pen. D.3 c.36
4:11	C.24 q.4 d.p. c.11
4:13	De pen. D.1 d.p. c.60
4:15	C.15 q.1 d.p. c.2
4:15	De pen. D.1 c.47
4:16	De pen. D.1 c.45
4:17	D.6 d.p. c.3
4:19	C.24 q.3 c.19
4:19	C.31 q.1 c.10
4:24	C.15 q.1 d.p. c.2
6:1–3	C.35 q.1 d.p. c.1
6:3	De pen. D.1 c.75
7:1–2	C.32 q.1 c.12
7:7	D.47 c.9

Gen Cite	*Gratian Cite*
7:17–21	C.24 q.1 c.22
7:17–21	C.24 q.1 c.25
7:21	C.23 q.5 c.6
7:21–22	D.6 d.p. c.3
8:21	C.12 q.1 c.1
9:20	D.35 c.8
9:21	D.35 d.a. c.1
9:22	D.96 c.8
9:22	C.2 q.7 c.9
9:22	C.2 q.7 c.12
9:22	C.2 q.7 d.p. c.27
9:22	C.2 q.7 d.p. c.27
9:22	C.15 q.5 c.1
9:22–27	D.47 c.9
9:25	C.1 q.4 d.p. c.11
9:25	C.24 q.3 d.p. c.11
10:9	D.6 d.p. c.3
11:4	D.6 d.p. c.3
11:14–17	C.35 q.1 d.p. c.1
12:3	C.24 q.3 d.p. c.11
12:3	C.32 q.4 d.p. c.2
12:11	C.22 q.2 d.p. c.21
12:11–20	De pen. D.1 d.p. c.60
12:13	C.22 q.2 c.22
12:15–16	C.32 q.5 c.6
14:18	De cons. D.2 c.83
14:18	De cons. D.2 c.88
14:20	C.16 q.7 c.6
14:23	C.23 q.5 c.25
15:1	C.23 q.5 c.25
15:18	C.23 q.5 d.p. c.49
16:2	C.32 q.4 c.3
16:3	C.32 q.4 d.a. c.1
16:3	C.32 q.4 c.2
17:8	C.32 q.4 d.p. c.2
17:11	De pen. D.1 d.p. c.37
18:1–5	D.42. d.a. c.1
18:1–5	D.42. c.2
18:1–8	C.35 q.8 §6
18:20	D.56 c.10
18:21	C.2 q.1 c.20

Gen Cite	*Gratian Cite*
19:1–3	D.42 d.a. c.1
19:4	C.7 q.1 d.p. c.48
19:7	D.14 c.1
19:8	C.27 q.2 c.41
19:8	C.27 q.2 c.42
19:8	C.32 q.7 c.12
19:9	C.3 q.5 c.8
19:9	C.3 q.6 c.13
19:14	C.27 q.2 c.41
19:14	C.27 q.2 c.41
19:14	C.27 q.2 c.41
19:14	C.27 q.2 c.42
19:23–25	C.24 q.3 d.a. c.1
19:24–25	C.23 q.5 c.6
19:25	C.1 q.4 d.p. c.11
19:30–36	D.35 c.8
19:30–38	D.40 c.10
19:30–38	C.15 q.1 c.9
19:30–38	C.32 q.4 c.3
19:31–36	D.35 d.a. c.1
19:32	C.15 q.1 c.7
20:4	D.37 c.16*
20:7 [recte 6]	C.32 q.4 c.4
20:12	C.35 q.1 d.a. c.1
20:17	C.33 q.1 c.4
21:2	C.32 q.4 c.2
21:9	C.32 q.4 c.2
21:10	D.56 c.9
21:10	C.32 q.4 c.9
21:10	C.32 q.4 c.2
21:10	C.32 q.4 c.2
21:10	C.23 q.4 c.39
21:10	D.47 c.9
21:10	C.32 q.2 c.12
21:17	C.23 q.4 c.39
21:23	C.22 q.1 c.16
22:2	C.22 q.2 d.p. c.20
22:2	C.23 q.5 c.15
22:5	C.22 q.2 d.p. c.20
22:10	C.23 q.5 c.9
22:10	C.23 q.8 c.14

Gen Cite	*Gratian Cite*
22:12	C.22 q.2 d.p. c.20
22:18	C.32 q.4 d.p. c.2
23:2	C.13 q.2 d.a. c.2
23:9–19	C.13 q.2 c.2
23:15	C.13 q.2 c.12
23:15	C.13 q.2 c.13
23:16	C.13 q.2 c.13
24:15	C.35 q.1 d.a. c.1
24:57	C.32 q.2 c.13
24:65	C.30 q.5 c.8
25:1	C.32 q.4 d.a. c.1
25:1	C.32 q.4 c.1
25:7–10	C.13 q.2 d.p. c.3
25:9	C.13 q.2 c.2
25:9	C.13 q.2 d.p. c.3
25:25	C.32 q.4 c.2
25:25	C.32 q.4 c.2
25:25	D.56 c.5
25:29–34	D.41 c.1
25:29–34	C.7 q.1 c.8
26:4	C.32 q.4 d.p. c.2
26:7–11	De pen. D.1 d.p. c.60
27:5–27	C.1 q.1 d.p. c.24
27:5–27	C.22 q.2 d.p. c.22
27:29	C.24 q.3 d.p. c.11
27:34	De pen. D.3 c.36
28:12	D.88 c.1
28:12	C.2 q.7 c.27
28:22	C.16 q.7 c.6
29:9–29	C.35 q.1 d.a. c.1
29:22–26	C.29 q.1 Gr.
30:3	C.32 q.4 d.a. c.1
30:3	C.32 q.4 d.a. c.2
30:9	C.32 q.4 d.a. c.1
30:9	C.32 q.4 d.a. c.2
31:53	C.22 q.1 c.16
34:1–3	De pen. D.5 c.1
35:22	C.24 q.3 c.10
35:27–29	C.13 q.2 d.p. c.3
35:27–29	C.13 q.2 c.2
38:16	D.56 c.8
39:1	C.1 q.1 c.29
42:1–5	C.5 q.5 c.2
42:15	C.22 q.1 d.p. c.16
43:1	C.5 q.5 c.2
44:15	C.22 q.2 c.18
47:22	C.23 q.8 d.p. c.22
49:30	C.13 q.2 c.2
50:3	C.13 q.2 d.p. c.3
50:13	C.13 q.2 c.2
50:13	C.13 q.2 d.p. c.3
50:23–25	C.13 q.2 d.p. c.3
50:23–25	C.13 q.2 d.p. c.3

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DUE PROCESS AND LEGAL AUTHORITY IN THE GARDEN OF EDEN: JURISPRUDENCE IN AGGADIC MIDRASH

TIMOTHY D. LYTTON*

Occasionally, rabbinic commentary on the Bible employs legal imagery to interpret stories that do not — at least on the surface — deal with law or legal themes. For example, a handful of rabbinic comments envisioning divine judgment in the context of formal legal proceedings are made in interpreting the Genesis stories of Adam and Eve, Cain and Abel, Sodom and Gomorrah, and the Binding of Isaac.[1] These scattered comments offer insight into such jurisprudential issues as the importance of procedural fairness and the nature of legal authority.

This essay examines one such example of rabbinic jurisprudence, a Midrash[2] on God's punishment of the serpent within the Garden of Eden story. The Midrash points out that in the story God interrogates both Adam and Eve before punishing them, and offers them each an opportunity to provide an excuse for the transgression. God does not, however, similarly interrogate the serpent or give it any chance to make an excuse, thereby denying the serpent due process. The Midrash speculates that God denies the serpent an opportunity to speak out of a desire to suppress what the serpent would have said in its own

* Timothy D. Lytton is Professor of Law at Albany Law School. He teaches and writes in the areas of jurisprudence, constitutional law, statutory interpretation, torts, and alternative dispute resolution.

1 See e.g., Genesis Rabbah 20:2 (proposing a legal defense for the serpent in the Garden of Eden), 22:9 (offering different standards of proof for convicting Cain), 49:12 (portraying Abraham's pleas on behalf of Sodom and Gomorrah in terms of trial advocacy), 56:11 (comparing the ten tests to which God subjected Abraham to divorce proceedings).

2 The term "Midrash" — from the Hebrew verb *darash*, to "seek" or "ask" — refers to a genre of rabbinic literature concerned with interpretation of the Bible. The term is also used to denote a particular interpretation. For a detailed discussion, see H.L. Strack and Gunter Stemberger, *Introduction to the Talmud and Midrash*, 2nd ed., trans. Markus Bockmuehl (Minneapolis: 1996), 234.

defense. Some statements, it seems, are so subversive that suppressing them is more important than procedural fairness.

The suggestion that God perceives a need to suppress subversive statements exposes the fragility of divine authority in the garden, a fragility that is also characteristic of human political and legal authority in the early stages of a new regime or in the face of rebellion. As we shall see, the serpent does not threaten God's power to impose His will by force, but it does undermine God's ability to project that power through commands and rules, which require obedience in order to be effective. That is, the serpent's potential legal defense poses a threat to the authority of divine law.

By suggesting that God suppressed the serpent's defense, this Midrash exposes a tension between due process and legal authority. On the one hand, due process requires that those accused of crimes be given an opportunity to respond to the charges against them. On the other hand, when they use that opportunity to challenge the legal system, this weakens the authority of the law and the officials who exercise power under it. Judges thus face a dilemma with regard to defendants who seek to use their trials to attack the legal system: should they uphold due process and allow them to speak, or protect legal authority and silence them? The Midrash offers no easy solutions. Instead, it attempts to elucidate the sources of this tension between due process and legal authority, to deepen our appreciation of its complexity, and to expose the inevitable shortcomings of rulings that judges must make in individual cases. The Midrash aims to advance debate rather than settle it. As we shall see, this tendency to explore rather than to resolve tension, so characteristic of the genre of Midrash known as aggadic Midrash, is what makes this particular Midrash, and others like it, a rich source of jurisprudential insight.

The Biblical Account

To appreciate the rabbinic interpretation of the Garden of Eden story, it will be helpful to first examine the biblical account on its own terms. The Bible relates that following Adam and Eve's eating of the forbidden fruit, God seeks them out and questions them:

> 8 They heard the sound of the Lord God moving about in the garden at the breezy time of day; and the man and his wife hid from the Lord God among the trees of the garden. 9 The Lord God called out to the man and

said to him, "Where are you?" 10 He replied, "I heard the sound of You in the garden, and I was afraid because I was naked, so I hid." 11 Then He asked, "Who told you that you were naked? Did you eat of the tree from which I had forbidden you to eat?" 12 The man said, "The woman You put at my side — she gave me of the tree, and I ate." 13 And the Lord God said to the woman, "What is this you have done!" The woman replied, "The serpent duped me, and I ate." 14 Then the Lord God said to the serpent, "Because you did this, more cursed shall you be than all the cattle and all the wild beasts: on your belly shall you crawl and dirt shall you eat all the days of your life. 15 I will put enmity between you and the woman, and between your offspring and hers; they shall strike at your head, and you shall strike at their heel." 16 And to the woman He said, "I will make most severe your pangs in childbearing; in pain shall you bear children. Yet your urge shall be for your husband, and he shall rule over you." 17 To Adam He said, "Because you did as your wife said and ate of the tree about which I commanded you, 'You shall not eat of it,' cursed be the ground because of you; by toil shall you eat of it all the days of your life: 18 thorns and thistles shall it sprout for you. But your food shall be the grasses of the field; 19 by the sweat of your brow shall you get bread to eat, until you return to the ground — for from it you were taken. For dust you are, and to dust you shall return." 20 The man named his wife Eve, because she was the mother of all the living. 21 And the Lord God made garments of skins for Adam and his wife, and clothed them. 22 And the Lord God said, "Now that the man has become like one of us, knowing good and bad, what if he should stretch out his hand and take also from the tree of life and eat, and live forever!" 23 So the Lord God banished him from the garden of Eden, to till the soil from which he was taken. 24 He drove the man out, and stationed east of the garden of Eden the cherubim and the fiery ever-turning sword, to guard the way to the tree of life.[3]

Human disobedience and divine punishment are two prominent themes in the story. These themes are closely linked by the imposition of punishments that correspond to the particular characteristics of the disobedience in question. The serpent, who attempted to place itself above not only the other animals and his human masters, but also above God, is made the lowest of the animals — more cursed than cattle and wild beasts, forced to crawl on the ground and eat dirt (v. 14). Eve, for seeking to dominate her husband, is made subordinate to him ("…and he shall rule over you") (v. 16). Adam, since he ate what did

3 Genesis, ch. 3, New JPS translation (I have altered the format and capitalization for ease of reading).

not belong to him in a world where everything else was his for the taking, is forced to toil for his food and to earn his keep (vv. 17–19).[4]

The story also plays a role in the larger context of the Bible. The final verses, in which God banishes Adam and Eve from the garden, introduce a theme that runs throughout Scripture: exile as a result of human disobedience to God. While the Creation story in Genesis 1 deals with the origin of the cosmos, the Garden of Eden story in Genesis 2 and 3 lays the conceptual foundation for the Bible's theological politics. The latter is not merely a second account of Creation; it is a preamble to exposition of the three-way relationship between God, the Israelites, and the land of Israel — a theme that dominates the biblical history of Israel from Abraham to Nehemiah.[5]

The Trial of the Serpent

In many instances, rabbinic commentary highlights the appropriateness of the divine punishments for the transgressions of Adam, Eve, and the serpent.[6] In this section, however, we examine a Midrash that questions the fairness of God's actions. In particular, the Midrash examines God's treatment of the serpent.

The Midrash responds to an anomaly in the biblical text: while God questions Adam and Eve before punishing them, he engages in no such dialogue with the serpent. This absence is even more notable given the chiastic structure of the story in verses 9–19:

A. God questions Adam, and he offers an excuse (vv. 9–12).
  B. God questions Eve, and she offers an excuse (v. 13).
    C.
    C′. God declares the serpent's punishment (vv. 14–15).
  B′. God declares Eve's punishment (v. 16).
A′. God declares Adam's punishment (vv. 17–19).

4 The Garden of Eden story has, of course, been the subject of extensive and diverse interpretations. For observations by ancient and modern commentators similar to those suggested here, see Genesis Rabbah 19:1, 20:10; Umberto Cassuto, *A Commentary on the Book of Genesis* (Jerusalem: 1989), vol. 1, 158–68; Nahum Sarna, *JPS Torah Commentary: Genesis* (Philadelphia: 1989), 27–28.

5 For an example of this reading, see Genesis Rabbah 19:9.

6 See generally, Genesis Rabbah, chs. 19–20.

There is, clearly, a gap in the biblical presentation, represented in this schema by "C": God neither questions the serpent nor affords it any opportunity to offer an excuse. Moreover, neither God nor the narrator indicates the nature of the serpent's transgression. Unlike Adam and Eve, the serpent did not disobey God's command not to eat from the tree. The only reference to the serpent's transgression is when God says to it in verse 14, "Because you did this . . . ." But to what exactly does "this" refer?

The first half of the Midrash upon which we will focus explains the precise nature of the serpent's transgression by reference to a scriptural verse in the book of Proverbs:

> "A man who perverts words stirs up strife, and a whisperer alienates friends" (Prov. 16:28). "A man who perverts words" refers to the serpent, because he perverted words against his Creator; "a whisperer" because he whispered words against his Creator, saying, "Surely, you will not die [if you eat from the tree]" (Gen. 3:4). "Alienates friends" because he alienated the Friend of the World, and thereupon he was cursed.[7]

The Midrash explains that the serpent's transgression consists of stirring up strife in the garden. More specifically, the language of the verse from Proverbs implies a particularly extreme form of strife. The term for "a man who perverts words" (*ish tahapukhot*) derives from the Hebrew root *hafakh*, meaning to overturn or overthrow.[8] The serpent does not merely pervert God's words; it does so as a means of overturning the hierarchical order of God, humans, and animals in the garden — it seeks to overthrow God's authority. The term for "whisperer" (*nirgan*) derives from the Hebrew root *ragan*, meaning to

7 Genesis Rabbah 20:2.

8 For biblical examples where *hafakh* denotes the overthrow of a regime, see Genesis 19:29 ("…and [God] sent Lot out of the midst of the upheaval (*hahafekha*) when overthrowing (*behafokh*) the cities [i.e. Sodom and Gomorrah] in which Lot dwelt."); Jeremiah 20:16 ("And that man will be like the cities which God overthrew (*hafakh*) without regret."); Lamentations 4:6 ("And the punishment of my people grew greater than the sin of Sodom, which was overthrown (*hahafukha*) in a moment."); Amos 4:11 ("I overthrew (*hafakhti*) you [i.e. Israel] like God's overthrow (*kemapeikhat elohim*) of Sodom and Gomorrah…"); 2 Samuel 10:3 ("…Has not David sent his servants to you in order to reconnoiter the city and its surroundings and to overthrow it (*ulehafkha*)?"); Jonah 3:4 ("…and [Jonah] called out saying, 'in another forty days, Ninveh will be overthrown (*nepakhet*)' ").

murmur against or incite.[9] Together, the terms *ish tahapukhot* and *nirgan* suggest that the serpent's offense is that of inciting rebellion.[10]

The second half of the Midrash addresses God's failure to question the serpent or afford it an opportunity to make an excuse:

> With Adam, He [first] discussed the matter; with Eve, He [first] discussed the matter, but with the serpent, He did not discuss the matter. Instead, the Holy One, blessed be He, said, "This serpent is wicked and adept at responding, and if I discuss it with him, right away he will say to me: 'You commanded them, and I commanded them. Why did they disregard Your command and follow my command?' So [God] acted quickly in [the serpent's] case, and passed judgment upon him.[11]

The Midrash explains that God did not afford the serpent an opportunity to defend itself because He already knew what the serpent would say, and did not want the serpent to express it. The Midrash does not, however, make clear **why** God did not want the serpent to speak. Instead, it invites us to speculate.

9 The term is used in the Bible to refer to the murmuring of the Israelites against God during their sojourn in the desert. See, e.g., Deuteronomy 1:27 ("You murmured (*vateragnu*) in your tents and you said, 'It is because of God's hatred of us that He brought us out of the land of Egypt to deliver us into the hands of the Amorites in order to destroy us.' "); Psalms 106:25 ("They murmured (*vayeiragnu*) in their tents; they did not heed the voice of God.").

10 Since the two clauses of the verse from Proverbs, "A man who perverts words stirs up strife, and a whisperer alienates friends," display a stylistic parallelism that is characteristic of biblical poetry, the two subjects — *ish tapukhot* and *nirgan* — should be interpreted in light of each other; so too the parallel predicates in each clause should be read together. The Hebrew word for "strife" (*madon*) derives from the root *din*, judgment. It thus connotes legal challenge. The parallel predicate in the second half of the verse, "alienates friends," employs the Hebrew *aluf* for the term "friend." This term has another meaning, head of a clan. Applied by the Midrash to God, it connotes both God's intimacy with, and His authority over, the garden's inhabitants. Reading these parallel predicates together and applying them to the story implies that the serpent's rebellion represents some type of legal challenge that destroys God's intimacy with Adam and Eve as well as His authority over them. On biblical parallelism, see Robert Alter, *The Art of Biblical Poetry* (NY: 1985); James Kugel, *The Idea of Biblical Poetry* (New Haven and London: 1981); Adele Berlin, *The Dynamics of Biblical Parallelism* (Indiana: 1992).

11 Genesis Rabbah 20:2. I follow the Soncino translation in rendering *nasa venatan* "discussed the matter"; see *Midrash Rabbah*, trans. H. Freedman (London and NY: 1983), vol. 1, 159–60.

Perhaps since God already knew what the serpent was going to say, there was simply no need for the serpent to say it. This explanation does not fit well with the rest of the story, however, since God allowed both Adam and Eve to offer excuses even though He presumably knew what they were going to say. God suppressed only the serpent's defense. There is, one suspects, something about it very different from the excuses offered by Adam and Eve.

I would like to suggest that God suppressed the serpent's defense because it threatened His authority. This becomes clearer in light of a theory of authority developed by Bruce Lincoln.[12] Lincoln defines authority as "the capacity to produce consequential speech."[13] Authority is the ability to speak in a way that commands "not just the attention, but the confidence, respect, and trust of [one's] audience, or — an important proviso — to make audiences act *as if* this were so."[14] "Authority," he argues, "depends upon nothing so much as the trust of the audience, or the audience's strategic willingness to act as if it had such trust."[15] In other words, the exercise of authority requires the audience to respond in a way that signals assent or obedience to the speaker. The particular motivations for such assent or obedience are entirely secondary. Thus, the essential components of authority are: "(1) an effect; (2) the capacity for producing that effect; and (3) the commonly shared opinion that a given actor has the capacity for producing that effect"[16] — that effect being a response that signals assent or obedience.

In light of Lincoln's conception of authority, the serpent's defense — "You commanded them, and I commanded them. Why did they disregard Your command and follow my command?" — amounts to an assertion that God lacks authority over Adam and Eve, while the serpent has authority over them. The assertion that God lacks authority is all the more threatening because, on Lincoln's conception of authority, it is true: God's command not to eat of the tree did not effect obedience. Moreover, there is no evidence that God has the capacity to induce obedience to His commands, and allowing the serpent to state this publicly is likely to destroy any impression among the garden's

12 *Authority: Construction and Corrosion* (Chicago and London: 1994).
13 Ibid., 4.
14 Ibid., 4.
15 Ibid., 8.
16 Ibid., 10.

inhabitants that He does. This does not mean that God lacks the power to impose His will in the garden, but only that He lacks the capacity to do so by means of exerting authority. As Lincoln explains, authority is distinct from coercion. Like coercion, authority is a way to exert control over others, but unlike coercion, authority works by means of the audience's willing compliance, not brute force.[17] Of course, the two are not always wholly separate. Coercion is often implicit in the exercise of authority when the person issuing the command has the power to force compliance.[18] Nevertheless, without obedience, the issuing of commands and the power to punish do not in themselves constitute authority.

Viewed in this light, the serpent's defense is no longer merely an excuse, but rather a justification. Whereas an excuse simply explains why one should be spared punishment for having done something that was admittedly wrong, a justification asserts that one's conduct was not wrong in the first place.[19] Adam and Eve offered excuses. They did not deny wrongdoing; they merely attempted to place ultimate responsibility for it on others, to "pass the buck." They are, in the end, lawbreakers. By contrast, the serpent was ready to offer a justification, to deny any wrongdoing on its or anyone else's part. The serpent is a rebel, and the implications of its defense are highly subversive.

If, as the serpent's defense suggests, God lacks authority in the garden, then the serpent has done nothing wrong by inciting Adam and Eve to eat from the tree — at least nothing wrong from any perspective other than God's own. While the serpent may have contradicted God's will, it transgressed no accepted norms or rules. This reduces any implicit charges made by God against the serpent to mere personal complaints. Moreover, if God lacks authority in the garden, there is no legitimate basis for His jurisdiction to sit in judgment of the serpent. Indeed, these considerations apply also to Adam and Eve, reducing God's charges against them to mere expressions of personal dissatisfaction, and undermining the legitimacy of their punishment. Thus, the serpent's defense, if exposed, threatens to unravel God's authority altogether. This explains why God suppresses it: God denies the

17 Ibid., 6.

18 Ibid., 4–6.

19 H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: 1970), 13–14.

serpent due process in order to protect His own authority to rule over and sit in judgment of, not only the serpent, but all the earth's inhabitants.

The boldness of the serpent's challenge to God in the Midrash is highlighted by comparing it to a variant in the Talmud. In a passage discussing the rights of the accused in formal court proceedings, the Talmud states: "What could [the serpent] have said [in its defense]?: 'The words of the teacher [say one thing] and the words of the student [say another]. To whose words should one listen? One should listen to the words of the teacher.' "[20] In the Talmud's version, the serpent's defense is no longer a justification, but merely an excuse. It asserts that ultimate responsibility for wrongdoing lies with Eve: just as one should not follow the opinion of a student who contradicts the words of a teacher, Eve should never have heeded the advice of the serpent in defiance of God's command. No longer defiant, the serpent in this version attempts to pass the buck, just like Adam and Eve before it. Moreover, in comparing itself to a student and God to a teacher, the serpent recognizes God's authority. In the Talmud's version, the serpent is no rebel, but just an errant subordinate.

Even the way in which the Talmud gives voice to the serpent's defense domesticates the serpent. The Talmud proposes a merely hypothetical response on behalf of the serpent — "What **could** he say (*mai hava lei lemeimar*)?" By contrast, the Midrash relates what the serpent was prepared to say to God given the opportunity — "right away he **will** say to me (*akhshav hu omer li*)." This difference reflects the distinct enterprises in which the two texts are engaged: whereas the Talmud explores the defensibility of claims, the Midrash fills gaps in the biblical narrative. The effect of this difference is that the Talmud's presentation gives the impression that while the serpent itself had no defense prepared, rabbinic scholars could conceive of one, whereas the Midrash suggests that the serpent had a defense ready and that God suppressed it. In the Talmud, the serpent is merely the voiceless subject of a legal hypothetical whose status is comparable to that of a lowly student within the rabbinic academy. By contrast, in the Midrash, the serpent is a rebel to whom God denies an opportunity to speak, a subversive "whisperer" who "perverts words" and "stirs up strife,"

20 bSanhedrin 29a.

who stands ready to assert that its commands are more effective, and hence more authoritative, than God's.[21]

The Tension between Due Process and Legal Authority

The Midrash expresses the view that some legal arguments are so threatening to authority that they should be suppressed, even at the expense of justice. It is far from clear, however, that the Midrash endorses this view. After all, if the serpent's defense is so subversive that it ought to be suppressed, why does the Midrash give voice to it? Then again, our understanding of the serpent's defense requires significant interpretive effort. The dangerous truth of the serpent's defense is conveyed somewhat esoterically, perhaps indicating that the Midrash does indeed take seriously the danger of open challenges to God's authority. By refusing to take a clear stand, the Midrash highlights, rather than resolves, the tension between due process and legal authority.

This tension results from the fragility of God's authority. It is because God's authority is vulnerable to the serpent's potential challenge that God denies the serpent an opportunity to defend itself. This insight has implications for human authority. That the Rabbis drew parallels between divine and human authority can be seen in another Midrash on the garden story, observing that, "From the beginning of the book [of Genesis] until this point, [there are] seventy-one mentions [of God's name] — this tells you that [the serpent] was judged by a full

21 The Talmud's portrayal of the serpent as a subordinate within a teacher–student relationship rather than as a rebel may reflect what recent historical scholarship has characterized as the more institutionalized hierarchical culture of the Babylonian rabbinic academy as compared to the less settled situation of the rabbinic establishment in Roman Palestine. See, e.g., Jeffrey Rubenstein, *The Culture of the Babylonian Talmud* (Baltimore: 2003), 2, 21, 87–99 (discussing the hierarchical structure of the rabbinic academy in Sasanid Mesopotamia in the Stammaitic period, 450–650 CE); Richard Kalmin, *The Sage in Jewish Society of Late Antiquity* (London and NY: 1999), 27–28, 110 (attributing the distance between rabbinic and non-rabbinic circles in Babylonia to the rigidly hierarchical cultural context of Persian society, and the closer relationship between rabbinic and non-rabbinic circles in Palestine to the more egalitarian milieu of Roman Palestine); Seth Schwartz, *Imperialism and Jewish Society 200 B.C.E to 640 C.E.* (Princeton: 2001), 103–05 (describing the weakness of rabbinic institutions and culture in Roman Palestine).

Sanhedrin."[22] Here we see an explicit analogy between God's authority and the authority of the supreme rabbinic legislative and judicial council, the seventy-one member Sanhedrin.

In drawing out the jurisprudential implications of the Midrash about God's denial of due process to the serpent, we can begin by observing that human authority, like divine authority, is fragile. In one important respect, the fragility of human authority is more problematic than the fragility of divine authority. The fragility of God's authority does not threaten His ability to rule — He still has the power to single-handedly impose His will through brute force. The power of the human ruler to impose his will, by contrast, ultimately depends not on his own individual power, but on his authority over others willing to wield coercive force at his behest. Thus, whereas God without authority still has the power to rule, humans do not, since the human capacity for self-rule ultimately relies on authority.

This point may become clearer with the help of a distinction. When we speak of judicial authority, for example, we are really talking about two distinguishable types of authority. On one hand, judicial authority normally entails issuing rulings that ordinary citizens obey. Judges have authority over citizens. On the other hand, judicial authority also entails the capacity to order law enforcement officers to coerce ordinary citizens when they fail to obey the said rulings. Judges have authority over law enforcement officers. Let us call the first type of authority adjudicatory authority and the second, enforcement authority. These two types of authority are to some degree interdependent. Adjudicatory authority is strengthened by enforcement authority, since the willingness of citizens to obey judicial rulings may be influenced by an awareness of the court's capacity to coerce them to do so. Similarly, enforcement authority is strengthened by adjudicatory authority, since the willingness of law enforcement officers to obey judicial orders may be influenced by their perception that the judge's rulings are legitimate insofar as most citizens are willing to obey them.[23] Similarly, political authority encompasses these two types of authority: the authority to

22 Genesis Rabbah 20:4.

23 For an illuminating study of the relationship between adjudication and enforcement, see Robert Cover, "Violence and the Word," in Martha Minow, Michael Ryan, and Austin Sarat (eds.), *Narrative, Violence, and the Law* (Ann Arbor: 1992), ch. 5.

make laws that ordinary citizens obey — legislative authority — and the authority to enforce them.

Thus, in contrast to divine authority, human political and judicial authority has no recourse to coercive force independent of authority. This means that a challenge to human authority is a threat not only to one mode of ruling, but to the very capacity to rule. This explains the tendency of human judges to suppress challenges to their authority even at the expense of denying those accused of crimes a full defense. We should note, however, that the tension between due process and legal authority is not complete, since the authority of judicial rulings in the eyes of citizens and law enforcement officers may itself depend upon a perception that they are the result of fair procedures. Thus, even as it seeks to protect judicial authority, the denial of due process has the potential to undermine it. This helps explain why judges tend to suppress testimony only in extreme cases. We should also note, in defense of judicial suppression, that due process is possible only where effective judicial authority exists to provide it. Thus, upholding the due process rights of those in a position to destroy legal authority may, ultimately, render the legal system unable to provide these rights to others.

Let us consider an example from rabbinic law. The Talmud explains that it is normally the job of judges in a capital case not only to consider evidence that might exonerate the defendant, but to raise such evidence themselves on his behalf if he fails to present it. An exception to this rule is made in the trial of one who incites others to idolatry.[24] Such a person's alleged offense undermines the foundation of the rabbinic legal system — allegiance to God — and therefore the authority of the court. In such a case, the Rabbis are less vigilant about providing procedural protection for the accused.

It bears emphasis that while the Rabbis appreciated the fragility of legal authority as a serious concern that might motivate judges to deny due process to subversive defendants, the Midrash on God's trial of the serpent does not clearly support suppression of challenges to legal authority. On the contrary, the Midrash itself discloses the challenge to God's authority that the serpent never got to make at trial. Moreover, in allowing exonerating evidence to remain undisclosed in the case of one who incites another to idolatry, the Rabbis do not go so far as to actively suppress the evidence. Nevertheless, they do appear willing to

24 bSanhedrin 29a. This text cites God's trial of the serpent as a proof-text; see above.

allow a capital conviction that the undisclosed evidence might have prevented. While much is made of the tolerance of dissenting views in rabbinic jurisprudence, the Midrash on the trial of the serpent raises the question of the limits of that tolerance when dissent challenges rabbinic authority. Notably, however, the Midrash raises the question in a way that does not lead to an easy resolution, but rather provides an opportunity for discussion.

The Midrash's failure to come down clearly on the side of either due process or legal authority makes sense in light of recent historical studies of the Rabbis' own legal authority in Roman Palestine. Roman law viewed rabbinic judicial proceedings as a form of arbitration, enforceable only where parties voluntarily accepted the court's authority.[25] Historians have suggested that this denial of compulsory jurisdiction to rabbinic courts led to forum shopping among Jewish litigants.[26] That is, Jewish litigants were free to pursue remedies in either rabbinic or Roman courts, whichever they found more favorable. Thus, in thinking about legal authority, the Rabbis may well have been influenced by the jurisdictional rivalry between rabbinic and Roman courts. On one hand, it is possible that the Midrash's recognition of the courts' need to defend their authority by suppressing subversive statements reflects the Rabbis' anxiety about the fragility of their own legal authority. The Rabbis may well have feared that direct challenges to their authority could undermine the prestige of rabbinic courts among Jews who had the option of rejecting rabbinic jurisdiction and taking their disputes to Roman courts instead. On the other hand, by giving voice to the serpent's due process challenge, the Midrash may reflect rabbinic antipathy toward Roman legal authority.

Aggadic Midrash and Jurisprudence

Midrash is generally divided into two types: halakhic and aggadic.[27] The first type, halakhic, or "law-related," clarifies the legal implications

25 Natalie B. Dohrmann, "The boundaries of the law and the problem of jurisdiction in an early Palestinian Midrash," in Catherine Hezser (ed.), *Rabbinic Law in its Roman and Near Eastern Context,* Texts and Studies in Ancient Judaism 97 (Tubingen: 2003), 92–93.

26 Ibid., 91–92, esp. n. 30 (citing recent historical scholarship on Roman–rabbinic jurisdictional overlap and forum shopping).

27 See Strack and Stemberger, n. 2 above, 239–40.

of particular biblical passages. For example, when Scripture states: "When a fire is started and spreads to thorns, so that stacked, standing, or growing grain is consumed, he who started the fire must make restitution" (Exod. 22:5),[28] a series of midrashic comments clarify that in such a case: liability is strict; there is no liability if the fire first crosses a river, road, or stone fence higher than ten handbreadths; damage to any kind of goods is covered, including trees and stones for building; the rule covers both men and women; and restitution is to be calculated on the basis of the yield of a similar area of the most fertile land owned by the fire-starter.[29] The second type of Midrash, aggadic, is often defined in terms of its contrast with halakhic Midrash, namely, as non-legal exegetical or homiletical commentary that addresses ambiguities, gaps, or other notable features in the biblical narrative.[30] Aggadic Midrash occasionally presents detail or dialogue that is not presented in the biblical narrative.

When it comes to jurisprudence, this distinction between halakhic and aggadic Midrash is misleading, for, as we have seen, aggadic Midrash does, on occasion, address legal themes.[31] Insofar as aggadic Midrash addresses ambiguities in the biblical text and offers literary interpretations, it is especially well suited to raising jurisprudential issues in a way that encourages reflection rather than easy resolution. Biblical narrative is, by design, rife with ambiguities that call out for interpretation. As Meir Sternberg puts it, when reading the Bible, we are "invited to fill in the gaps, to reconstruct motive and psychological process, to draw the normative conclusions for ourselves."[32] The biblical narrative calls upon us to judge the Bible's characters "in the court of conscience."[33]

On occasion, aggadic Midrash provides legal concepts that help inform the process of judgment called for by the biblical narrative.

28 New JPS translation.

29 Mekhilta de-Rabbi Ishmael, Lauterbach edition (Philadelphia: 1933), vol. 3, 110–12.

30 See David Stern, *Parables in Midrash: Narrative and Exegesis in Rabbinic Literature* (Cambridge MA: 1991), 74–77.

31 On the manner in which legal themes in aggadic Midrash occasionally challenge rabbinic law, see Hanina Ben-Menahem, "Some introductory remarks on Genesis Rabbah and the law," pp. 135–153 above.

32 *The Poetics of Biblical Narrative: Ideological Literature and the Drama of Reading* (Bloomington IN: 1987), 505.

33 Ibid., 441.

By characterizing the scene in the Garden of Eden as a trial, and by suggesting a problem with the way God conducts the trial, the Midrash invites the reader to engage in a kind of literary or mock appellate review of God's judgments. The Midrash also supplies legal standards of review: first, the accused should be given an opportunity to reply to the charges against him, and second, a court may refuse to hear arguments designed to undermine its authority. Of course, these two norms support different views, and the Midrash offers them not to dictate the reader's judgment of God's judicial performance, but rather to prompt reflection and perhaps even discussion about the tension between them.

For the Rabbis, raising issues in a manner that encourages dialogue with the biblical text and other readers is not only a pedagogically valuable way to teach jurisprudence, but also a practical exercise in sustaining the authority of the law. As we have seen, the capacity to rule by law ultimately rests on obedience, on what Lon Fuller calls "fidelity to law."[34] Coercive power, while sufficient to impose the ruler's will, cannot secure fidelity to law. (Indeed, in the case of human rule, coercive power itself rests on the obedience of those charged with enforcing the will of the ruler). If coercion cannot secure fidelity to law, what can?

Borrowing from what is perhaps the most familiar type of authority, parental authority, we observe that obedience grows out of a relationship between parent and child that is based on a mixture of motives such as love, trust, fear, and hope of reward. We might characterize obedience to political and legal authority similarly as arising from a relationship between the sovereign and those subject to his authority. Throughout the history of philosophy, the foundation of political and legal authority has often been analyzed using the imagery of parental[35] and contractual[36] relationships. The Bible presents the basis of divine authority as a covenantal relationship.[37] Indeed, a central theme of the Bible is the development of a covenantal relationship between God and Israel through a series of direct encounters between God and man.

34 Lon Fuller, "Positivism and fidelity to law — a reply to Professor Hart," 71 Harv. L. Rev. 630 (1958).

35 See e.g., Plato's "Crito," in *The Trial and Death of Socrates*, trans. G.M.A. Grube (Indianapolis: 1975), 51–52.

36 See e.g., J.J. Rousseau, *On the Social Contract*, trans. Judith Masters (NY: 1978).

37 See Jon Levenson, *Creation and the Persistence of Evil: The Jewish Drama of Divine Omnipotence* (Princeton: 1994), chs. 10–12.

The Rabbis, however, found themselves in a post-prophetic age, without the possibility of direct contact with God. Eager to sustain a covenantal divine–human relationship, and with it fidelity to divine law, they turned to the Bible itself, which they believed to be the word of God.[38] David Stern has described rabbinic exegesis as a kind of conversation with God:

> Following the destruction of the Temple, the text of the Torah became for the Rabbis the primary sign of the continued existence of the covenantal relationship between God and Israel, and the activity of Torah study — midrash — thus became the foremost medium for preserving and pursuing that relationship.... Midrash became a kind of conversation the Rabbis invented in order to enable God to speak to them from between the lines of Scripture.[39]

Thus, Midrash may be seen not merely as an interpretive pursuit, but also as an activity through which the Rabbis sought to maintain a sense of covenantal relationship with God, a relationship on which the authority of divine, and by extension, rabbinic, law was premised.

By fostering active engagement with the biblical text, Midrash also offers tools for keeping the text — and with it, a sense of revelation and covenant — alive in every generation. For many of those who observe rabbinic law today, it is this sense of covenant that gives the law authority, and accounts for their fidelity to the law. Midrash also offers contemporary secular readers a valuable jurisprudential resource. As we have seen, Midrash voices challenges to divine authority. The model of fidelity to law reflected in rabbinic Midrash leaves room for doubt, and may thus prove edifying for a secular liberal legal culture that endorses the order provided by fidelity to law while protecting the liberty to dissent.

Perhaps, in the end, what is most notable about the jurisprudential aggadic exegeses is their capacity to not only deepen our understanding of law, but also strengthen our fidelity to it. By presenting ordinary readers with difficulties in the biblical text and giving them conceptual tools with which to address these difficulties, this type of Midrash

38 James Kugel, *The Bible As It Was* (Cambridge MA: 1997), 21–22.

39 David Stern, *Midrash and Theory: Ancient Jewish Exegesis and Contemporary Literary Studies* (Evanston IL: 1996), 31.

offers each of us a chance to play the role of judge, allowing us to explore our own views about what features of legal authority make it worthy of our respect. For, as the serpent's defense reveals, it is the views of those who choose to obey the law (or not) that ultimately make rule by law possible.[40]

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PART THREE

CHRONICLE

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A TALE OF TWO CULTURES: CONSPICUOUS RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOLS OF FRANCE AND THE UNITED STATES

MARTIN EDELMAN*

The United States and France are two of the world's oldest democracies. Both have long histories recognizing the centrality of individual rights to their democratic cultures.[1] Yet the distinctive political and social culture of each country is marked by a different approach toward such rights as the freedom of religion. This is manifested in their legal systems' disparate treatment of public school students wearing "conspicuous religious symbols."

I

Their shared democratic ideals mean that both the United States and France accept equality and state neutrality with respect to religion as axiomatic. Each enshrines the separation of religion and the state in its basic laws,[2] and in both countries this is taken to mean that the government cannot fund churches, synagogues, mosques, etc. These shared general principles, however, do not imply common policies regarding the role of religion in educating the young.

In the United States, the separation of religion and the state, and government neutrality, mean that government may not directly fund religious schools.[3] In France, the same principles[4] permit the government to finance denominational schools that follow the state

* Department of Political Science, Rockefeller College of Public Affairs and Policy, University at Albany, SUNY.

1 The American Declaration of Independence (1776); The French Declaration of the Rights of Man and the Citizen (1789).

2 The Constitution of the United States, Amendment 1 (1791); 1958 Constitution of France, Art. 1.

3 *Everson v. Board of Education*, 330 U.S. 1, 15–16 (1947).

4 French Law of 1905, reprinted in C. adm. 787 (Fr.) (23rd ed. 1994).

curriculum alongside inculcation of religious values and practices.[5] In the United States, the government may not support religious practices in the public schools,[6] but these institutions must exhibit as much tolerance of individual students' religiously-motivated practices as is feasible. In France, too, the government may not support religious practices in public schools (except in Alsace-Lorraine),[7] but it does not tolerate student manifestations of their religious beliefs in the public schools.

These differences are the consequence of the distinctive American and French political cultures.[8] The democratic culture of France is based on the idea that political stability requires a shared commitment to the value of a secular state.[9] For most of human history, it was assumed that political stability required religious homogeneity in the population. French history is understood as having demonstrated — first, by the religious wars sparked by the Reformation (Catholics against Huguenots), and later by the Catholic Church's opposition to the Republic — the potentially disastrous consequences of trying to create a religiously homogeneous society by means of state power. The separation of religion and the state in France has therefore come to mean the relegation of religious beliefs to the private realm, and the development of a completely secular national political identity. French democracy is understood as being rooted in exclusively secular values. Contemporary French culture assumes that the stability of the Republic requires secular homogeneity in the public square.[10]

5 Sudhir Hazareesingh, *Political Traditions in Modern France* (London: 1990), 117–18.

6 *Engle v. Vitale*, 370 U.S. 421 (1962) (prohibiting recitation of prayers in public schools); *Abington School District v. Schempp*, 374 U.S. 203 (1964) (prohibiting Bible reading in public schools); *Stone v. Graham*, 449 U.S. 39 (1980) (prohibiting display of the Ten Commandments in public schools); *Lee v. Weisman*, 505 U.S. 577 (1992) (prohibiting recitation of prayers at public school commencements).

7 Because Alsace-Lorraine was part of Germany when the 1905 law took effect, French policy-makers decided not to change this aspect of public education when the area reverted to France after World War I.

8 Political culture refers to the shared stories, rituals and symbols that are the shared heritage of a nation's people. Lucian Pye, "Introduction," in Lucien Pye and Sidney Verba (eds.), *Political Culture and Political Development* (Princeton: 1965), 3–27.

9 "France shall be an indivisible, **secular**, democratic and social Republic." 1958 Constitution of France, Art. 1 (emphasis added).

10 See Hazareesingh, n. 5 above, 84, 93.

The democratic culture of the United States is based on a pluralistic tolerance of diversity.[11] World history is understood as having demonstrated the devastation that can be caused by seeking to establish one "true" religion on earth, but it is taken as axiomatic that religious belief can play an essential role in the development of virtuous citizens. In American culture, therefore, the separation of religion and the state signifies the prohibition of officially established religion alongside the permission, even encouragement, of individual expressions of belief in public. Governmental abstention from, and individual involvement in, religion are both thought beneficial to the public weal. This duality has led to a complex, often bewildering, mix of laws and practices.[12] But the basic principle is clear: the American political culture assumes that in a pluralistic society, a regime that respects divergent beliefs will have much greater stability because of the support it receives from all component groups.

In the United States, the national political culture inclines officials toward tolerance of religious expression, and recognition that interference with expressions of religious beliefs in the public square should be no greater than necessary for the attainment of policy objectives. In France, the political culture discourages expressions and displays of religious beliefs for fear of fracturing a societal unity that is based entirely on secular values. It thus inclines its officials to suppress expressions of religious beliefs in the public square in the name of promoting a common French identity. When confronted by the same religiously-motivated modes of dress, therefore, public school authorities in France and the United States are bound to respond in different ways.

II

Religion deals with an individual's place in the universe and his/her relationship to a deity. Religions frequently dictate a whole way of life in which beliefs cannot easily be separated from actions. Because an individual's manner of dress can symbolize his/her beliefs, whether

11 The official motto of the United States — *E Pluribus Unum* — was originally thought to mean one nation out of many states, but now is taken to mean one national identity from many different national identities.

12 See M. Edelman, "Something there is that doesn't love a wall," *Jewish Law Annual* 14 (2003), 353–65.

casual (dressing in the "latest fashion") or fundamental (dressing in the manner required by one's religion), many religions have distinctive modes of dress. Since both the United States and France give wide ambit to religious practices in the private realm, it is hardly surprising that some religious groups have promoted and emphasized these distinctive modes of dress.

In Judaism, for example, religious commitment is seen by some as requiring a particular head covering. Keeping the head covered is not required by the biblical text. Beginning in the Middle Ages, the practice of covering the head at all times developed among Jewish men as a sign of piety. "What started as custom eventually assumed halakhic validity."[13] The practice remained uniform until the Enlightenment broke down the monolithic understanding of Judaism that had prevailed up to that point, and the consequent emergence of non-Orthodox religious streams. Today, there is a wide spectrum of practice as regards covering the head, from the Orthodox, who generally retain the practice of men covering their heads at all times, to Reform Jews, many of whom who do not cover their heads even for prayer services.

Even the specific form of head covering is associated with specific religious affiliations and commitments. Currently, ultra-Orthodox men from Ashkenazic backgrounds tend to wear wide-brimmed black fedoras. Each Hasidic group has its own distinctive hat. Orthodox men of Sefardic origin, though differentiated by country of origin, tend to wear skullcaps (yarmulkes, *kipot*) that differ somewhat from those worn by their Ashkenazic co-religionists. The *kipot* worn by Ashkenazic men vary from the black felt *kipot* of those who pray at Young Israel synagogues to the crocheted *kipot* of those who identify with religious Zionism, especially in Israel and among members of the Bnei Akiva movement. While all religious authorities recognize that virtually any head covering satisfies the relevant halakhic requirements, the distinctive beliefs and practices of each group extend to the head covering deemed appropriate for its members.

Whereas Jewish practice originally regarded the covering of a man's head as no more than a pious act (as opposed to a halakhic obligation), the covering of a married woman's hair dates back to biblical times (though not the biblical text). Indeed, it was regarded as a necessary safeguard of a married woman's modesty in all ancient Near Eastern cultures. The practice was codified as law in the Talmud,

13 *The New Encyclopedia of Judaism* (NY: 2002) 188, 193.

and was reinforced by the Rabbis' ruling that a man could divorce his wife for appearing bareheaded outdoors without forfeiting any part of her dowry.[14] Single women were exempt from this halakhic stricture. It was thus the practice for married Jewish women to wear a headscarf (*tikhel*) — later, in some places, a wig — to cover her hair. Inasmuch as this practice was dictated by religious commitment, since the Enlightenment it has varied widely. Today, many Orthodox Jewish women cover their heads with a scarf or a wig when they are outside the home, the choice between these options usually arising from the customs of the particular community to which they belong: all do so when attending synagogue services. Married Conservative Jewish women tend to cover their heads with a hat or small lace kerchief when attending religious services; an increasing number do so, out of egalitarian considerations, by wearing a yarmulke. The practice of Reform Jewish women with respect to head coverings largely follows the fashions of the day. Hats are worn when in style, but not otherwise.[15]

Similar practices are found in Islam. Islam, like Judaism, emerged in the Near East, and reflects the prevailing cultural concern with protecting the modesty of women. Although the Quran does not explicitly mandate a particular dress code, the *Hadith of Sadih Bukhari*, which reveals the traditional teachings of the Prophet Mohammed to the believers, contains the foundations of a general Islamic dress code. It sees clothing as intended for "cover and simple adornment," not to exhibit social status or attract the opposite sex. Clothes should be loose fitting, "so that the shape of the body is not highlighted"; clothes should not be "transparent or sheer"; and clothes should cover "certain prescribed parts of the body."[16]

Islam has the same Middle Eastern origins as Judaism, so it is not surprising that the former shares the latter's concern with protecting the modesty of women. The dress code for Muslim women prescribes covering "everything except the face, hands, and feet." In accordance with these guidelines, many Muslim women have traditionally worn a head covering or scarf known as a *hijab*, and some have cloaked their entire body from head to toe in a black *chador*. Contemporary

14 Ibid.

15 *Encyclopedia Judaica*, vol. 8, 2–6.

16 *Teaching About Islam in the Public Schools*, 3rd ed. (Fountain Valley CA: 1995), 15. See also, *Hijab: The Muslim Woman's Mode of Dressing According to the Qur'an and Sunnah* (Lagos: 1985).

religiously-motivated dress continues to be influenced by customary practice: "A Muslim woman who wears a *hijab* does so out of a sense of religious obligation, piety, and modesty, and to be clearly recognized as a Muslim woman."[17]

For males, the guidelines specify only the minimal requirement of covering the body "from the navel to the knee." Most male Muslims, however, dress so as to be covered from the ankle to the neck. In this context, headgear appears to be optional, and depends largely upon community standards and individual attitudes. In the West, many Muslim men have taken to wearing a *kufi* (skullcap) for the same reasons a woman might wear a *hijab*, namely, a sense of religious obligation, piety, and modesty, and to be clearly recognized as a Muslim.

III

In the United States, the Constitution's First Amendment guarantees the free exercise of religion. As interpreted by the Supreme Court, this does not require a government agency to accommodate religiously-motivated conduct that is forbidden by neutral rules of general applicability.[18] Therefore, no one is entitled, as a matter of a constitutionally-protected right — as distinct from a policy promulgated by statute or some other regulation — to wear religious headgear in places where rules of general application require all heads to be bare or to be covered in uniform ways. In *Goldman v. Weinberger* (1986),[19] for example, the Supreme Court held that an Army physician was not entitled to wear a *kipa* while on duty because it violated express provisions of the military dress code. Congress subsequently changed that policy and required the military dress code to permit such headgear in most circumstances. But that accommodation of religiously-motivated dress was not required by the Constitution.

Nevertheless, American courts have generally operated on the assumption that "toleration is the best course in a pluralistic nation. Accommodation of religiously-inspired conduct is a token of respect for, and a beacon of welcome to, those whose beliefs differ from the

17 Ibid.

18 *Employment Division v. Smith*, 494 U.S. 872 (1990).

19 475 U.S. 503. See M. Edelman, "Yarmulkes, the Supreme Court and the free exercise of religion," *Jewish Law Annual* 8 (1988), 210–20.

majority's."[20] On this basis, the Federal Court of Appeals for the Seventh Circuit sharply reprimanded a District Court judge for excluding spectators whose religious beliefs required them to cover their heads:

> The best way for the judiciary to receive the public's respect is to earn that respect by showing a wise appreciation of cultural and religious diversity. Obeisance differs from respect; to demand the former in the name of the latter is self-defeating. It is difficult for us to see any reason why a Jew may not wear a yarmulke in court, a Sikh his turban, a Muslim woman her chador, or a Moor his fez. Most spectators will continue to doff their caps as a sign of respect for the judiciary; those who keep heads covered as a sign of respect for (or obedience to) a power higher than the state should not be cast out of court or threatened with penalties.[21]

The Seventh Circuit formulated that policy in the absence of any explicit rule dealing with appropriate dress in a courtroom. Yet even where there are neutral rules of general applicability, American courts have usually, though not uniformly, sought to accommodate religiously-motivated articles of dress. Cases involving prisoners provide a good example, because like the military, courts defer to prison authorities.

The Supreme Court has recognized that prisoners retain their right to the free exercise of religion.[22] In applying the general interpretive principle announced in *Smith*, the Court has held that a prison regulation that impinges on this First Amendment right is valid only if it is reasonably related to a legitimate penological interest.[23] Within this framework, the judges have been sensitive to the need to respect religious diversity.

The Federal courts' policy of accommodation begins with their willingness to accept prisoners' claims that a particular head covering is religiously required. "Many religious practices that clearly are not mandatory, such as . . . wearing yarmulkes, in the case of Orthodox Jews (optional because while Jewish men are required to cover their heads, the form of head covering is not prescribed), are [nonetheless] important to their practitioners, who would consider the denial of them a grave curtailment of their religious liberty."[24] This tolerant approach

20 *United States v. James*, 328 F.3d 953, 957 (7th Cir. 2003) (per Easterbook, J.).
21 Ibid., 957–58.
22 *O'Lone v. Estate of Shabbaz*, 482 U.S. 342, 348 (1987).
23 Ibid., 349.
24 *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) (per Posner, C.J.).

dovetails with the courts' traditional reluctance to be the arbiters of which practices are religiously required and which are optional, which are central to religious observance and which peripheral.[25] This is not to say that the courts automatically accept any claim that a particular piece of clothing is religiously required; it is only to say that the courts take a tolerant approach to such assertions.

Once a prisoner is able to establish that the practice of wearing an item is important to the votaries of a particular religion, the burden shifts to the prison authorities to demonstrate that "there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it."[26] The prison authorities invariably seek to defend a "no cap policy" by asserting the need to prevent contraband (including the concealment of weapons under headgear) and the need to quickly and easily identify inmates. But the judges will not accept any reason in any context. While permitting considerable discretion to the authorities, they insist on examining the nexus. The courts have sustained a prisoner's right to wear a *kipa* or a *kufi* in the close confines of his cell where these tight-fitting head coverings pose little threat to prison security.[27] But they have denied the same right to Rastafarians, because their loose-fitting crowns would, the judges believed, permit a prisoner to conceal contraband.[28] Because they have found that the asserted need to quickly and easily identify inmates is legitimate, some courts have sustained regulations that prohibit inmates from wearing even tight-fitting *kipot* and *kufis* in exercise yards (where the prisoners are observed from above) and even in walking from their cells to the designated place of prayer within the prison.[29] But other courts have not been convinced that

25 "'Religion' is not defined in the Constitution . . . [T]he concept is to be given a wide latitude in order to ensure that state approval may never become a prerequisite for the practice of one's faith." *Remmers v. Brewer*, 361 F. Supp. 537, 540 (S.D. Iowa 1973); *Thomas v. Review Board*, 450 U.S. 707, 716 (1981); *Employment Division v. Smith*, 494 U.S. 872, 886–87 (1990).

26 *Turner v. Safley*, 482 U.S. 78, 89 (1987). Accord, *O'Lone v. Estate of Shabbaz*, 482 U.S. 342, 349 (1987).

27 *Burgin v. Henderson*, 536 F.2d 501 (2d Cir. 1976). Accord, *Wilson v. Moore*, 270 F. Supp. 2d 1328 (N.D. Fla. 2003) (Native American cannot be denied right to routinely wear headband.)

28 *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990).

29 *Muhammad v. Lynaugh*, 966 F.2d 901 (5th Cir. 1992).

such head-covering restrictions are legitimate means for furthering legitimate security goals within a prison.[30]

Thus in dealing with head coverings related to prisoners' religious practices, the Federal courts have generally been more accepting of religious claims than required by *Smith*. The judges have not upheld neutral prison regulations of general applicability. Rather, they have begun their analyses by giving wide ambit to prisoners' claims to the free exercise of religion. Then, in seeking to accommodate this right, the judges have frequently acceded to modification of prison rules.

Against this background, it is hardly surprising that the Federal courts have taken a generous approach to similar claims by public school students. Students, like prisoners, retain the protections of the First Amendment, including the right to the free exercise of religion.[31] And on any scale of values, students are viewed in a more favorable light than prisoners. Moreover, public schools are expected to teach their students about the importance of individual rights enshrined in the Constitution. So despite neutral rules of general applicability dealing with appropriate student dress, school authorities have only limited latitude to restrict head coverings related to religious practices.

The primary reason for a public school's restriction of a First Amendment right is evidence that the limitation is necessary to prevent interference with its educational activities[32] or with the rights of others, and to prevent disturbances.[33] But the mere possibility of interference with a pedagogic goal is not sufficient. The courts must thus examine the reasonableness of the educational authority's claim. Only "if a school can point to a well-founded expectation of disruption — especially one based on [similar] past incidents — may the restriction pass constitutional muster."[34]

The Federal courts have been particularly protective of student claims arising from the free exercise of religion. In *Chalifoux v. New*

30 *Sledge v. Cummings*, 1996 U.S. Dist. Lexis 17041 (Kan. 1996).

31 *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

32 "Educators do not offend the First Amendment by exercising editorial control over the style and content of a student speech in school sponsored expressive activities so long as their actions are reasonably related to pedagogical concerns." *Hazelwood School District v. Kuhlmeir*, 484 U.S. 260, 273 (1988).

33 *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 343 (2002).

34 *Saxe v. State College Area School District*, 240 F.3d 200, 212 (3d Cir. 2001).

Caney Independent School District (1997),[35] a school banned the wearing of rosary beads under a general dress code rule forbidding group symbols. The rationale for the rule was the fear that gang symbols would be disruptive. But the two students who brought the suit were neither affiliated with, nor identified as, members of any gang. They wore rosaries for religious reasons. Despite the neutral rule, the District Court held that the students could not be prevented from wearing rosaries.

In general, the Federal courts have accorded headgear "mandated" by religious doctrine a privileged status. In *Isaacs v. Board of Education of Howard County, Maryland* (1999), the court ruled that a student could be disciplined for wearing headwraps she considered expressive of her African cultural identity. The public schools had a "no hats" policy that explicitly permitted students to wear religious headgear to class. The court held that the school system's reasons for the "no hats" policy furthered the important government interest of providing an environment conducive to education and learning, because hats may:

> (i) cause increased horseplay and conflict in the hallways; (ii) obscure the teacher's view of the student wearing the hat or view of the students sitting behind that student (and as a result can cause the teacher to miss signs of substance abuse or other health problems); (iii) obscure students' view of the blackboard; (iv) allow students to hide contraband, (v) foster a less respectful and focused climate for learning.[36]

The District Court sustained the "no hats" policy as applied to Shermia Isaacs under the traditional standard of review, which requires only that the challenged action be shown to have **some** rational relationship to legitimate state purposes.[37] The court did not require that the school show a well-founded expectation for its concerns. It simply accepted the reasons proffered by the educational authorities.

The court indicated, however, that it would not apply the same standard to religious headgear. Wearing religiously-mandated headgear involves a basic liberty stemming from a fundamental liberty guaranteed by the Constitution. That provides, the court held, "ample basis for the school system's decision to exempt religious headgear from its 'no hats' policy."[38] Presumably, the same constitutional

35 976 F. Supp. 659 (S.D. Tex. 1997).
36 Ibid., 338.
37 Ibid., 339.
38 Ibid., 339.

penumbra would authorize the court to create a religious exemption for religious headgear in those student dress codes that had none.

The United States Department of Justice evidently has the same understanding. The Muskogee, Oklahoma public schools had a "no hats" policy. Nashala Hearn, an 11 year-old Muslim girl, was twice suspended for wearing a *hijab*. When she brought suit in Federal court against the school board for violating her religious rights, the Justice Department filed a brief on her behalf. "No student should be forced to choose between following her faith and enjoying the benefits of a public education," said R. Alexander Acosta, the Assistant Attorney General for Civil Rights.[39] The Muskogee Public School District subsequently entered into a consent decree that revised its dress code to create a religious exemption.[40]

Thus in dealing with student head coverings related to religious practices, the Federal courts have been more accepting of religious claims than required by *Smith*. The judges have permitted school boards to make explicit exceptions for religious headgear. They have also indicated their own willingness to create the same sort of exemptions in neutral school regulations of general applicability. In practice, then, the Federal courts have utilized the pre-*Smith* standard. When it comes to issues raised by students wearing religious headgear, the Federal courts tend to sustain only those regulations which further a compelling governmental interest using the least restrictive means.[41]

IV

In Article 1, the French Constitution of 1958 proclaims that the Republic "shall ensure the equality of all citizens before the law,

39 *New York Times*, 31 March 2004, A17.

40 *Muskogee Daily Phoenix and Times Democrat*, 13 Nov. 2004, 1. www.usdoj.gov/crt/religdisc/hearn_consent_decree_final.pdf

41 In light of this policy, a Sikh sued the Metropolitan New York Transit Authority in order to be able to wear his turban as a subway motorman; see *New York Times*, 10 June 2004, B1. In another case, the American Civil Liberties Union brought suit challenging Omaha Nebraska's rule forbidding a Muslim mother from accompanying her children at a city swimming pool while fully dressed, the suit was settled in Feb. 2005. The city said it had "amended its swimming pool dress code to accommodate religious or medical needs" (*AP* wire, 18 Feb. 2005).

without distinction of origin, race, or religion. It shall respect all beliefs." Moreover, under the Law of 1905 separating religion from the State, "The Republic ensures freedom of conscience. It guarantees the free exercise of religion subject to the sole restrictions established in the interests of public policy."[42] Yet individuals have an extremely difficult time vindicating these rights in France.

In the French legal system, the general courts are not involved in protection of the freedoms of belief and conscience, and of the right to the free exercise of religion. These courts apply the criminal law, enforce commercial agreements and private contracts, and resolve disputes between citizens arising from automobile accidents, family law matters, and so on. The protection of individual rights is the responsibility of the legislature and the executive branch. Since the Code Napoleon, the legislature has been expected to define these rights quite precisely. The large, centralized administrative apparatus is expected to implement the statutorily defined rights. When disputes arise about the implementation of government programs, including those involving alleged infringements of individual rights, they are resolved by the highly trained corps of administrative law judges. The general judiciary is forbidden to intervene: "The judges will not be allowed, under penalty of forfeiture, to disturb in any manner whatsoever, the activities of the administrative corps, nor to summon before them the administrators, concerning their functions."[43]

Title VII of the Constitution of 1958 established a Constitutional Council. It has the authority to ensure that institutional acts and legislation are consonant with the constitution. Decisions of the Constitutional Council cannot be appealed, and are binding on all public authorities, on all administrative bodies, and on all courts. But governmental acts must be referred to the Constitutional Council **before** they are officially promulgated. And they can only be referred to that body by important governmental officials — the President, Prime Minister, President of the Senate, President of the National Assembly, or any group of sixty Deputies or Senators. Individual citizens have no standing to question the constitutionality of a statute or administrative regulation.[44]

42 See n. 4 above.
43 Bernard Rudden, *A Source Book on French Law* (Oxford: 1991), 142.
44 1958 Constitution of France, Arts. 56–63.

Thus French legal culture clearly and explicitly recognizes human rights, entrusting their protection to the democratically-elected representatives of the people, and, particularly, to the administrative corps. Individuals cannot protect their rights through litigation in the general courts. When an issue of a possible human rights violation arises in France, its politicians and administrative elite are expected to resolve it. And their points of reference are to be found in the Constitution, statutes, and administrative rulings of the regime, not in judicial decisions.

Within this legal framework, the recently-enacted law prohibiting the wearing of "conspicuous religious symbols" in public schools[45] was conclusive. And the European Court of Human Rights refused to intervene. In July 2004, that court had interpreted the relevant section of the European Convention of Human Rights[46] to reject a similar claim. It held that Istanbul University had not violated the rights of female medical students by expelling them for wearing *hijab*s. Their expulsion was based on the university's policy of promoting equality and secularism.[47] The general courts of France afford Muslims and others affected by the law no opportunity for redress.

As of the September 2004 school year, students are forbidden to wear a *hijab*, a *kipa*, a Sikh turban, or a large Christian cross in state elementary and high schools. Violators will be punished by warnings, suspensions and expulsions. If students and their parents believe that this regulation infringes their religious beliefs, they can elect to attend a private, state-supported religious school. The law was enacted in order to maintain and strengthen the uniform secular political identity of French citizens. In the words of President Jacques Chirac, "Secularism is one of the great successes of the Republic. It is a crucial element of social peace and national cohesion. We cannot let it

45 *New York Times*, 4 March 2004, A12.

46 The European Court of Human Rights was established in 1959 to enforce the European Convention of Human Rights, which maintains (Art. 9, sec 2.): "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law **and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others**" (emphasis added).

47 *Chamber Judgments in the Cases of Leyla Sahin v. Turkey and Zeynep Tekin v. Turkey*, www.echr.coe.int/eng/press/2004/june/chamberjudgmentssahinandtekin.htm.

weaken."[48] The great majority of France's political leadership agrees. The law passed overwhelmingly in the National Assembly[49] and Senate,[50] with the support of a significant popular majority.[51]

The French political establishment enacted the law because of the growing militancy of the country's Muslim population. France has had increasing difficulty integrating its large concentration of Muslims — 5 million people, which is 8 percent of the population — into the mainstream. The Muslims have experienced a variety of political, economic and social barriers to full participation in French society. In response to these obstacles, and in the wake of events in the Middle East and elsewhere, France's Muslim population has become much more assertive of its religious identity. The law was enacted in an attempt to confine Islamic practices to the private sphere, as traditionally defined by French culture and law, and thereby preserve a national unity based on secular French culture.

Whether this goal can be achieved in this manner is highly problematic. To the extent that French Muslims seek their primary identity in Islam, they will establish their own state-supported religious schools, and remove their children from the general public schools. Devout Catholics and Jews already have extensive state-funded private religious-school networks, but they have long identified with the French nation. The first Muslim high school was opened in September, 2003.[52] Because the Muslim community already perceives itself as isolated and discriminated against, separate Muslim schools are likely to make its integration into mainstream French culture more difficult. Under the new law, France may well find itself underwriting the very social fragmentation it is seeking to diminish.

V

Both intangible and real, political culture is elusive. The principles and values that constitute a nation's political culture can be seen only in the words and actions of its people. Yet these principles and values have

48 *New York Times*, 17 Dec. 2003, A15.
49 494–36 (31 abstentions), ibid., 11 Feb. 2004, A3.
50 276–20, ibid., 4 March 2004, A12.
51 Ibid., 21 Dec. 2003, A10.
52 Ibid., 8 Feb. 2004, A4.

the power to shape and direct the society in question. In recognition of the power a culture exerts over its members, rabbinical tradition has long held that in civil matters, "custom overrides the law."[53] And it is also why France and the United States can actualize the same legal principle in very different ways.

In its 1990 *Smith* decision, the United States Supreme Court interpreted the First Amendment's Free Exercise Clause in the manner France has always understood this right. From this point on, in the formal law of both countries, an individual's religiously-motivated actions are limited by neutral governmental regulations of general applicability. Because French officialdom has traditionally seen its democratic culture as rooted in an exclusively secular national identity, it has no qualms about forbidding students to wear "conspicuous religious symbols" in the public schools. Because Americans have come to believe that their democratic culture is based on a pluralistic tolerance of diversity, federal judges have been hesitant to permit governmental officials to enforce neutral dress code regulations of general applicability; they have instead insisted that the officials, especially in the public schools, "point to a well-founded expectation" that wearing conspicuous religious symbols will be disruptive.

At this writing, it is probably too early to pass judgment on the relative merits of each approach. It does appear, however, that the American conception of the nature of a democratic culture may well have greater staying power. The same forces that are driving the globalization of the world's economies are also undermining the cultural homogeneity of national societies. Cultural interflow, as the Chinese call it, inevitably follows the exchange of goods and services. People soon follow. Immigration is on the rise everywhere, especially in advanced democratic societies. Under these circumstances, the survival of democratic nations will in all likelihood favor regimes that respect divergent beliefs rather than impose a standardized national culture.

53 Menachem Elon, *Jewish Law: History, Sources, Principles* (Philadelphia: 1994), vol. 2, 880–944.

JEWISH LAW IN THE STATE OF ISRAEL

DANIEL B. SINCLAIR*

1 *A Rabbinical Court Decision Regarding a Dispute over the Fate of Pre-Embryos*

In *X v. District Rabbinical Court of Jerusalem*,[1] the Supreme Rabbinical Court of Appeals dealt with the issue of a husband's right to prevent his estranged wife's implanting into her womb pre-embryos produced in the course of IVF (in vitro fertilization) using his sperm. The couple were married in 1997. The husband had three children from his previous marriage, but it was the wife's first marriage. She had difficulty becoming pregnant, and the couple began IVF in the first year of their marriage. Toward the end of the first year, following two unsuccessful fertility treatments, the marriage began to fail, and following a third round of treatment, but before the implantation of any pre-embryos, the husband sued for divorce. The wife did not agree to accept the divorce, and petitioned the District Rabbinical Court of Jerusalem to order the husband to co-operate in an attempt to save the marriage and restore marital harmony to the home (*shlom bayit*). She also expressed her intention to proceed with implantation of the pre-embryos produced as a result of the third round of fertility treatment. The husband then petitioned for an order preventing the wife from implanting the pre-embryos.

Both parties argued their case before the District Rabbinical Court in terms of the halakhic laws of partnership. Under these laws, a valid partnership set up for the purpose of achieving a particular goal is binding until the goal has been achieved. For example, if a partnership is established for the purpose of acquiring and selling agricultural

* Professor of Jewish and Comparative Biomedical Law, Law School, College of Management, Rishon Lezion.

1 1–21–054973797 (unpublished).

produce, neither partner may dissolve it unilaterally until the agreed market day for the sale of the produce has passed.[2]

In the present case, the wife claimed that the husband had effectively entered into a legally binding partnership with her for the purpose of producing a child. Hence, he is not permitted to withdraw his co-operation until she becomes pregnant, and gives birth to their common offspring.

The husband's case rested on an opinion written by R. Saul Yisraeli in relation to the *Nahmani* case.[3] In that case, a number of Mrs. Nahmani's eggs were harvested prior to surgery for the removal of her womb, and the couple sought to use a surrogate mother to give birth to their child. At the time, surrogacy was not permitted in Israel, and a court order was required in order to permit the fertilized eggs to be sent overseas for implantation into the womb of a surrogate mother. However, by the time the order was granted, Mr. Nahmani had separated from his wife and gone off to live with another woman, with whom he subsequently fathered a child. He refused to give permission for the eggs to be sent overseas, on the grounds that he no longer wished to father a child together with Mrs. Nahmani. Mrs. Nahmani went to the Haifa District Court seeking an order to the effect that the Israeli fertility clinic in which her fertilized eggs were being kept was permitted to release them for implantation into a surrogate, notwithstanding her husband's refusal to consent to their use. The case went on appeal to the Supreme Court, and eventually, at the end of a further hearing by the full bench of the Supreme Court, Mrs. Nahmani was granted the right to implant her fertilized eggs into a surrogate contrary to her husband's wishes.

In his analysis of the halakhic position in relation to the *Nahmani* case, R. Yisraeli applied the laws of partnership. In his view, the agreement between the Nahmani's to undergo IVF with a view to using a surrogate mother so as to bring the fetus to term constituted a valid partnership agreement under Jewish law. However, the halakha recognizes that if the objective circumstances of one of the partners change to such an extent that he can no longer be reasonably expected to continue with the partnership, he is permitted to withdraw from it on a unilateral basis. Examples of such changes are sickness and serious

2 *Shulhan Arukh* (henceforth *SA*), HM 176:15–17.

3 For a summary of the case, see D. Sinclair, "Jewish Law in the State of Israel," *Jewish Law Annual* 12 (1997), 253–59.

financial loss. These and similar events are defined as "duress" (*ones*), and in the context of a partnership agreement, are sufficiently serious to justify a unilateral breach of the agreement.[4] According to R. Yisraeli, the separation between the Nahmani's constituted such a significant change in circumstances, and Mr. Nahmani was, therefore, permitted to unilaterally withdraw his consent to the implantation of the fertilized eggs.

In the present case, the husband claimed that he had only consented to supply the sperm for his wife's IVF treatment because he had hoped that the birth of a child would strengthen their marriage. In his view, the marriage was now beyond redemption, and his objective situation was, therefore, entirely different from what it had been when he originally entered into the partnership. On the basis of R. Yisraeli's conclusion in the *Nahmani* case, the husband argued that he ought to be allowed to dissolve the partnership unilaterally on the grounds of duress.

The wife argued that the two cases were dissimilar, since in the *Nahmani* case, the husband had actually left his wife and was living with another woman. Her husband was still occupying the matrimonial home, and, in any case, she did not believe that the marriage had broken down irretrievably.

The District Rabbinical Court decided in favor of the husband. It refused to impose an order of *shlom bayit* as requested by the wife, and acceded to the husband's request for an order preventing her from proceeding with implantation of the fertilized eggs.

The wife appealed to the Supreme Rabbinical Court of Appeals, which upheld the District Rabbinical Court's decision. Following R. Yisraeli's reasoning, the majority of the *dayanim* (rabbinical courts judges) found that the failed marriage was a highly significant change in the objective circumstances of the parties, and, as a result, the husband was entitled to unilaterally terminate the partnership, for the purpose of bringing a child into the world, between himself and his wife. The Court supported this finding with the observation that the evidence showed that both parties had commenced fertility treatment with the declared aim of cementing their marriage with the birth of a child, rather than merely bringing a child into the world.

In his judgment, R. Abraham Sherman dealt with a fundamental objection to the application of the laws of partnership to the present case.

4 See *SA*, HM 333:5.

There is a general principle in Jewish law that human bodies are divine property, and that human ownership does not extend to bodies, body parts, or human tissue. This principle is used by Maimonides to explain the biblical prohibition against taking a ransom for the soul of a murderer,[5] and by R. David b. Zimra to justify the non-acceptance of confessions in capital cases.[6] It also underlies the halakhic prohibition against inflicting bodily harm notwithstanding the person's consent.[7] Clearly, a partnership cannot be created in relation to something that the partners are legally precluded from owning. Since human gametes and pre-embryos are not subject to human ownership, it is arguable that the laws of partnership are wholly inapplicable to the present case.[8]

R. Sherman rejects this objection on the basis of a number of recent responsa on the sale, for profit, of blood, bone marrow, and organs for purposes of transplantation. According to R. Moses Feinstein, it is permitted to sell one's blood for transfusion, since the object of the sale is to perform a religiously-mandated act (*mitzva*), namely, the saving of a human life.[9] R. Solomon Zalman Auerbach permits the sale of bone marrow and transplant organs for the same reason.[10] These opinions are premised on the notion that one owns his body for the purpose of using it to perform a *mitzva*. It is only in circumstances in which he wishes to use it for non-*mitzva* purposes that the principle of divine ownership becomes operative. Now begetting progeny is both a biblical[11] and a Rabbinic *mitzva*,[12] hence, in the present case, the issue of the human non-ownership of body parts does not arise.

It should be pointed out that notwithstanding the fact that, in principle, the commandment of procreation is binding upon males

5 Numbers 35:3; Maimonides, *Code*, Laws concerning Murder and the Preservation of Life 1:4.

6 Radbaz, Laws concerning the Sanhedrin 18:6.

7 *Shulhan Arukh Harav*, Hilkhot Nizkei Haguf 5:4.

8 The fact that the Bible specifies that feticide carries a financial penalty payable to the mother's husband (Exod. 21:22–23) is not dispositive of the question of the ownership of a fetus, see R. Daichovsky's opinion below.

9 *Responsa Igrot Moshe*, HM 1, #103. R. Feinstein also observes that the Talmud regards blood-letting as a therapeutic activity.

10 See *Nishmat Avraham*, YD 349.

11 Genesis 1:28, 9:1, 7:25; mJebamot 6:6; bJebamot 61b–64a.

12 Isaiah 45:18, mEduyot 1:13, bJebamot 62a.

only,[13] a married woman who assists her husband in the fulfillment of his obligation is also considered to have performed a *mitzva*.[14] Since both the husband and the wife contributed their gametes for the purpose of engaging in a *mitzva*, they can both be considered owners for the purposes of forming a partnership under Jewish law.

Moreover, the notion that gametes can be owned is implicit in the widely accepted view that a sperm donor is considered to be the father of the child produced by insemination. In the absence of a concept of ownership of semen, this view would be somewhat problematic.[15]

R. Sherman also considered the wife's claim that under talmudic law she has a right to a child who will look after her in her old age. According to the Talmud, a married woman may petition the court to compel her impotent or infertile husband to divorce her on the grounds that she needs "a staff in her hand, and a hoe for digging her grave," that is, support in her old age.[16] Later authorities make it clear that this phrase indicates the existence of a general right on the part of a married woman to a child from her marriage; if her husband is incapable of providing her with children, the courts can compel him to grant her a divorce.[17] R. Sherman distinguishes between the husband's fundamental marital obligations, such as provision of food and clothing,[18] and the wife's desire to have a child as a result of the marriage. A breach by the husband of a fundamental matrimonial obligation generates a right on the part of the wife to sue for fulfillment of that obligation. The frustration of the wife's aim of having a child, however, merely gives her the right to have the court press the husband to divorce her. In the present case, the wife's right to a child from her marriage is irrelevant, since she is not seeking a divorce. On the contrary, she is pressing for the marriage to continue so that the pre-embryos can be implanted into her womb.

R. Sherman also pointed out that even if it were to be argued that a husband was under an obligation to provide his wife with a child, this argument would only extend to natural reproduction. It would not apply to artificial reproductive methods. This is the position adopted

13 See Maimonides, *Code*, Laws concerning Marriage 2:15.
14 *Responsa Avnei Nezer*, EH #79.
15 *Responsa Maase Hoshev*, 3, #2.
16 bJebamot 65b.
17 *Tosafot*, bJebamot 65b s.v. *beino leveina; SA*, EH 154:6.
18 See Maimonides, *Code*, Laws concerning Marriage 12:1–2; *SA*, EH 62:1–2.

by R. Solomon Zalman Auerbach in his ruling that a husband may not require his wife to undergo artificial insemination to help him fulfill his halakhic obligation to reproduce.[19] The same position would be adopted with regard to the wife's request that the husband participate in IVF so as to help her have a child, that is, the court would not even consider coercion in such circumstances.

The wife then changed tack and argued her case in terms of the halakhic obligation to preserve fetal life. Under Jewish law, it is permitted to desecrate the Sabbath on behalf of fetal life.[20] The reason is that a fetus is a potential person, and as such, it may be assumed that it will grow into a Sabbath-observing adult. It is better to break one Sabbath so as to save the life of a fetus who will, in the future, observe many Sabbaths, than to refrain from breaking this one Sabbath, and thereby, bring about the breach of many future Sabbaths as a result of their non-observance by the individual who would have been born had his life not ended at the fetal stage.[21] This argument, she claimed, applies to fetuses of all ages, and thus ought to be applied in the present case in order to require the husband to consent to the continuation of the fertility treatment, notwithstanding the failure of the marriage.

Insofar as it was prepared to put moral pressure on the husband to allow his wife to implant the pre-embryos for the sake of avoiding the destruction of potential life, the District Rabbinical Court accepted this argument. It was not, however, prepared to make a normative ruling to that effect.

R. Sherman rejects the moral argument on the grounds that in terms of its potential, the future does not bode well for this particular fetus. He or she will be born into a situation of marital strife, and will almost certainly be brought up in a one-parent family. If the mother does remarry, there is no guarantee that the stepfather will treat the child as he would his own. In terms of its potential life, therefore, the fetus in the present case faces an ongoing struggle, physically and otherwise. Since the court must place the welfare of the child at the top of its list of considerations, the wife's claim with respect to the obligation to implant the

19 "Artificial Insemination" (Hebrew), *Noam* 1 (1958), 158.

20 See D. Sinclair, *Jewish Biomedical Law: Legal and Extra-legal Dimensions* (Oxford: 2003), 16–17.

21 bYoma 85b; Nahmanides, bYoma 82a; *Tur*, OH 617; *Responsa Tzitz Eliezer*, 8, #11; *Shmirat Shabat Kehilkhata* 36:2.

pre-embryos on the basis of the principle of fetal potential in the context of the Sabbath laws is neither morally nor legally weighty.

R. Sherman also pointed out that a number of halakhic authorities object to IVF as a matter of principle. Chief amongst these authorities is R. Eliezer Waldenberg, who is of the view that IVF is both morally repugnant and halakhically forbidden. He is particularly concerned with gamete mix-ups and the potential for incestuous relationships as a result of such mix-ups.[22] R. Sherman is of the opinion that the questionable nature of IVF in Jewish law is also grounds for declining to put moral pressure on the husband to permit his wife to implant the pre-embryos.

R. Solomon Daichovsky approached the case from the perspective of the biblical law under which a person who causes a woman to miscarry must pay an agreed sum to her husband.[23] The implication here is that the ownership of a fetus is vested in the woman's husband, and she herself has no legal title to the fruit of her womb. In R. Daichovsky's view, the fact that the issue of ownership of a fetus is regulated by biblical law means that it is not subject to the general halakhic refusal to recognize human ownership over bodies or body parts. In the present case, therefore, the husband would appear to be the sole legal owner of the fetus, and as such, ought to be able to exercise that ownership by declining to permit his wife to have the pre-embryos implanted.

In actual fact, the position is much more complex. The Tur cites a dispute between Maimonides and R. Asher (Rosh) regarding payment of compensation for the destruction of a fetus in a case where the woman's husband dies between the time of the assault and the court hearing. According to Maimonides, the appropriate course of action in such a case is to pay the woman. Rosh, however, rules that the payment goes to the husband's heirs.[24] Evidently, Maimonides is of the opinion that the woman too owns the fetus, but as long as her husband is alive, he receives the compensation money since all the earnings of a married woman go to her husband in consideration of her maintenance. Rosh, on the other hand, maintains that the husband alone owns the

22 *Responsa Tzitz Eliezer*, 15, # 45; Sinclair, n. 20 above, 95–99.
23 Exodus 21:22–23; *SA*, HM 423:1. Also see Sinclair, ibid., 17–19, 22–23.
24 *Tur*, HM 423.

fetus, and the compensation is therefore paid to his heirs.[25] It is, therefore, not clear that the biblical law of compensation for the destruction of a fetus is dispositive of the issue of ownership of fetuses or pre-embryos.

Furthermore, it is not clear that a valid analogy may be made between a fetus in its mother's womb, and pre-embryos in a test tube. The biblical law may be confined to a fetus inside its mother's womb, leaving the issue of ownership of pre-embryos in vitro open to debate.

It is also arguable that the law of compensation only applies to a fetus of forty days. Prior to this stage, the Talmud describes the fetus as being "mere water," and any gift made to a fetus at this early stage of its development is invalid.[26]

R. Daichovsky concludes that in the absence of any resolution of these issues, the ownership issue remains moot. As a result, neither the husband nor the wife have a right to prevent the implantation of the pre-embryos and their development into viable infants. In his opinion, there is a general obligation in Jewish law to do everything possible to bring children into the world, and this obligation is not subject to considerations relating to their anticipated welfare. Both the prohibition against destroying seed, and the halakhic restrictions on abortion, are based upon this obligation, and in neither context is the halakha prepared to sanction deviations from the principle of procreation because of considerations relating solely to the future welfare of the said offspring.

Finally, R. Daichovsky observed that as long as the marriage still existed, there was no reason to dissolve the partnership, or to refuse the wife's request for *shlom bayit*. In his view, therefore, the husband's refusal to allow his wife to implant the pre-embryos into her womb should be disregarded.

R. Solomon Ben-Shimon rejected the very idea of a partnership in relation to a pre-embryo. In his opinion, partnership applies to commercial matters only. Its application to fertility treatment is artificial, and may lead to absurd results. Moreover, like R. Waldenberg, he objects to IVF on both moral and halakhic grounds. Finally, he argues

25 A similar dispute occurs in relation to the widow of a convert who has no legal heirs under Jewish law. According to Maimonides, the compensation is paid to the widow. According to Rosh, it is simply left unpaid, since no one is legally entitled to receive it.

26 *SA*, HM 26:1.

that since the couple are on the verge of divorce, it would be wrong for the court to do anything that would require them to be in contact in the future. It is a principle of Jewish divorce law that nothing be done by way of partnership or business dealings, the effect of which is to bring ex-spouses into frequent and close contact. The reason for this is the fear that since they have previously been on very familiar terms, they may be tempted into sin. Indeed, any person who knowingly sets up a business relationship between ex-spouses is liable to excommunication.[27] In the present case, compelling the husband to consent to the implantation will very likely lead to a situation in which his ex-wife will conceive and give birth to a child. This will entail the ex-spouses coming into close contact for a lengthy period of time. Given the disfavor with which such a scenario is viewed, the Supreme Rabbinical Court of Appeals would be greatly remiss if it lent its support to such an arrangement.

R. Ben-Shimon joined R. Sherman in dismissing the appeal and in upholding the decision of the District Rabbinical Court.

2 *Kofin al midat sdom: Abuse of Rights in Jewish Law*

The facts in *Ruker v. Salomon*[28] are as follows. In 1986, the appellants applied for permission to build an addition to their home using a storage area that was part of the common property of the building where both they and the respondents lived. Following the granting of a building permit to the appellants by the local town planning committee, the respondents appealed to the district town planning committee to overturn the local committee's decision, as the addition in question would deprive them of storage space. Their appeal was rejected on the grounds that they had, apparently, consented to the addition when the appellants first broached the subject. Moreover, the appellants had undertaken to build two storage facilities which would adequately compensate the respondents for the storage space lost as a result of the addition. The respondents then appealed that decision to the Magistrate's Court. The Magistrate's Court upheld the decision of the district town planning committee. The respondents continued to

27 Maimonides, *Code*, Laws concerning the Study of the Torah 6:14. See also bKetubot 28a.

28 CA 6339/97.

appeal, and in 1995, the District Court overturned the verdict of the Magistrate's Court, and ruled in the respondents' favor on the grounds that there was, in fact, no convincing evidence that they had originally consented to the appellants' building plans. However, between the lodging of the appeal in the District Court and the actual hearing, the appellants succeeded in completing the addition. An order was then issued by the District Court requiring the appellants to tear down the addition, and to fully restore the respondents' proprietary rights in the building's common property.

The appellants appealed to the Supreme Court, requesting that it use its discretion to cancel the order requiring demolition of the addition. The roots of this discretion lie in the general principles of English equity, and the civil law concept of good faith, both of which were absorbed into the Israeli legal system.[29] In relation to property disputes in particular, the relevant directive is section 14 of the *Land Law, 1969*, which provides that the existence of a legal right to property does not mean that it will always be enforced "if doing so will result in damage or discomfort to someone else."

Englard J. pointed out that the interpretation of this section is the subject of both a judicial and an academic debate. According to one view, the aim of the section is to prevent the landowner from exercising his rights in the land solely to cause grief or suffering to another party. It does not, for example, protect trespassers, or other illegal users of land. Another view is that the section is much broader, and is to be understood as a directive to the court to strike a balance between the benefits accruing to the possessor of a property right as a result of its enforcement, and the damage caused to another person as a consequence of the enforcement of that right.[30] The latter approach, known as the "objective approach," is in Englard's view the approach adopted in several previous Supreme Court decisions. Israeli courts have applied the objective approach to section 14 of the *Land Law*, and have cancelled orders requiring the demolition of illegal buildings in cases where they have come to the conclusion that the main effect of the

29 See *Makitan v. Makitan*, CA 634/61, PD 16 (2) 952.

30 See Y. Weisman, *The Law of Acquisition* (Hebrew), (Jerusalem: 1997), 52–55; A. Rosen-Tzvi, "Abuse of rights in land — a commentary on section 14 of the *Land Law, 1969*" (Hebrew), *Iyunei Mishpat* 4 (1975/6), 669.

order is to cause damage or discomfort to a third party.[31] This view, however, is not universally accepted, and the debate continues.

Englard J. found support for his position in Jewish law. The idea that where the result is gratuitous damage or injury to another person, the law should intervene so as to prevent the exercise of legal rights, has a long history in Jewish law. According to the Mishnah, one whose attitude is "what is mine is mine, and what is yours is yours,"[32] should be admonished, in that he is "acting in the manner of Sodomites," especially if the concession he is being asked to make does not cause him any loss.[33] In several instances, the Talmud provides that people "acting in the manner of Sodomites," that is, standing up for their rights when this causes hardship to others and no loss to themselves, may be forced to waive them — *kofin al midat sdom*. Among the talmudic examples of the application of this principle is the case of a son who bought property abutting his father's estate during the latter's lifetime. Upon the father's death and the division of his estate between his sons, the son with the abutting land has prior claim to the part of the father's estate contiguous with his own property. The reason is that he will derive significant benefit from the consolidation of his property, and provided that the land in question is not more valuable than any other land in the estate, his brothers will not lose anything by giving up their right to an absolutely equal division of the estate. The Talmud concludes that in this type of case, "we force people not to act in the manner of Sodomites," and the brothers are compelled to allow their sibling to receive his inheritance in such a way that he will be able to consolidate his property.[34]

Englard J. locates the source for this idea in the underlying philosophy of Jewish law, which, in the words of Maimonides, is to "bring people to both ethical and intellectual perfection."[35] Unlike many contemporary liberal societies, in which the law's major concern is to prevent harm to its members, the chief focus of Jewish law is to

31 See *Radomilski v. Friedman*, CA 782/70, PD 25 (2) 531 and *Bezalel v. Simantov*, CA 403/73, PD 29 (1) 44.

32 mAvot 5:10. The Mishnah actually cites two views. The first sees the attitude as characteristic of the "average person." The second sees it as "the manner of Sodomites." For an explanation of the two views, see the text below at nn. 36–37.

33 See Rashi, bEruvin 49a, s.v. *midat sdom*.

34 bBaba Batra 12b. See too bKetubot 103a; bEruvin 49a; bBaba Batra 59a, 168a.

35 *Guide for the Perplexed* III:54.

foster ethical conduct and spiritual perfection. As a result, it is prepared to coerce individuals to give up their rights and act in an unselfish manner. However, it is also evident that coercion detracts from the moral quality of even the most ethical of acts. Indeed, in philosophical terms, one may rightfully ask whether there is anything ethical at all about an action motivated by anything other than the conviction that it is the right thing to do. To resolve the apparent conflict between these two positions, namely, endorsement of coercion to make someone waive his or her rights, and upholding the principle that only voluntary acts are ethically valid, Jewish law invokes the harm principle. Coercion is mandated only when failure to give up one's rights will cause harm to another. If no such harm results, then coercion is not applied, even if the conduct in question is unethical.

This distinction between cases involving harm to others, and those in which no such harm is present, explains why the above-mentioned Mishnah[36] records the view that one who says "what is mine is mine, and what is yours is yours" is not guilty of acting like a Sodomite, but is simply an "average person." The stubborn rights-holder is only to be regarded as a Sodomite and, hence, subject to coercion, if his attitude results in harm to someone else. However, in the absence of such harm, he is simply to be regarded as an "average person," and is not subject to any action on the part of the court.[37]

A survey of the views of a wide range of halakhic authorities on the nature and scope of the principle that "we force people not to act in the manner of Sodomites," supports this idea. Indeed, the principle is almost always invoked together with the qualification that it only applies in situations in which "one person benefits, and the other does not lose." No one is required to give up his or her rights if by doing so, they will incur a loss. However, if no such loss will be incurred, and the other party will suffer as a result of the right's being exercised, then coercion may be applied.[38]

36 See n. 32 above.

37 See A. Lichtenstein, "A clarification of the 'We coerce individuals not to act in the manner of Sodomites' principle" (Hebrew), in *Jewish Philosophy in America* (Hebrew), 1 (1972), 362. See also Rashi's comment on mAvot 5:10, s.v. *zo mida beinonit*.

38 See Lichtenstein, ibid.; N. Rakover, *Unjust Enrichment in Jewish Law* (Hebrew), (Jerusalem: 1988); A. Weinroth, "Abuse of rights in Jewish law" (Hebrew), *Dine Israel* 18 (1995/1996), 53; S. Shilo, "*Kofin al midat sdom*: Jewish law's concept of abuse of rights," *Israel Law Review* 15 (1980), 149.

In the light of all this, Englard J. recommended that section 14 of the *Land Law*, the language of which is certainly unclear, be interpreted in light of the halakhic principles governing these matters. This recommendation is based on both the long and complex history of the doctrine of the non-enforcement of legal rights in Jewish law, and the underlying morality of Jewish property law, which seeks to limit the individual's dominion over his property, and encourage him to use it for the good of others as well as for himself. The application by Israeli courts of a halakhic principle reflecting this moral position would be of educational value, and is undoubtedly in harmony with the complementary values of "Judaism and democracy," which, according to the *Human Dignity and Freedom Act*, 1992, constitute the underlying ideology of the State of Israel.

Englard J. concluded the halakhic portion of his judgment with the harsh words of the prophet concerning the utter lack of a generous and charitable spirit on the part of the residents of biblical Sodom: "For surely this was the sin of Sodom your sister, it possessed both great material prosperity and peace and quiet, but its citizens entirely ignored the poor and the destitute."[39]

Given that the demolition of the addition would cause considerable damage and distress to the appellants; that the appellants were prepared to abide by their undertaking to build alternative storage facilities; that the respondents would receive damages for the distress caused by the appellants' actions; and the insistence of the respondents that their claim was purely a matter of principle, Englard J. ruled that, on the basis of the "objective approach," the appeal should succeed: the demolition order should be cancelled.

The majority, however, adopted a more restrictive view of the discretion implicit in section 14 of the *Land Law*, and decided in favor of the respondents. At the end of his majority judgment, Tirkel J. referred to the Jewish law principle of "*kofin al midat sdom*," and cited a number of sources to support his argument that this principle was not strong enough to override the biblical prohibition against trespass.[40] Moreover, in his view, the halakhic sources are not especially supportive of the use of coercion to secure the waiving of first-order property rights of a material nature, even in cases of damage to other parties.[41]

39 Ezekiel 16:49. According to the Talmud, their total lack of sensitivity to the plight of others sealed the fate of the people of Sodom (bSanhedrin 109a).

40 Deuteronomy 19:14; 27:17.

41 See the sources cited in Weinroth, n. 38 above.

The discretion in section 14 of the *Land Law* is to be used extremely sparingly, and applied only to rare and exceptional cases.

Cheshin J., Barak J., Mazza J., S. Levin J., and Strasberg-Cohen J. concurred with Tirkel J., and the appeal was rejected.

3 *A Definitive Rabbinical Court Decision on the Status of Civil Marriage*

In the present case,[42] two Jewish citizens of the State of Israel married in a civil ceremony in Cyprus in 1987. The marriage did not work out, and the couple separated. In 1997 the husband obtained a ruling from the District Rabbinical Court to the effect that the Cypriot civil marriage carried no legal significance under Jewish law, and both parties were to be regarded as single people for purposes of Jewish marriage in Israel. The wife appealed against the District Rabbinical Court's ruling to the Supreme Rabbinical Court of Appeals, which upheld the decision of the lower court regarding the marital status of the parties, but required that the phrase "and we hereby dissolve the civil marriage" be added to its ruling. The wife then appealed to the Supreme Court on the grounds that the civil marriage had been dissolved without specifying the reasons for this step.

It should be pointed out that notwithstanding the fact that the rabbinical courts have sole jurisdiction over Jewish citizens and residents of Israel in matters of marriage and divorce, the Supreme Court, in its role as High Court of Justice, has the right to accept appeals involving alleged breaches of natural justice in the religious court system. The appeal in the present case fell into this category, and hence, adjudication by the Supreme Court was warranted.[43]

In response to the appeal, the Supreme Court asked the Supreme Rabbinical Court of Appeals for the reasons behind its ruling. The judgment of the Supreme Rabbinical Court of Appeals addresses both the secular legal ramifications of civil marriage between Jewish citizens and residents of the State of Israel, and the definitive position of the

42 SRC/4276 (2003).

43 For a discussion of the areas in which the secular Supreme Court is authorized to hear appeals against decisions in the religious court system in Israel, see D. Sinclair, "Jewish law in the State of Israel," in N. Hecht et al. (eds.), *An Introduction to the History and Sources of Jewish Law* (Oxford: 1996), 401–06.

Israeli rabbinical courts regarding the halakhic status of such marriages. In the light of the reasons it provided for the dissolution of the civil marriage, the appeal to the Supreme Court was dismissed.

It is noteworthy that the documentary evidence submitted by the appellant to the Supreme Court included a report by the Central Bureau of Statistics, which stated that in the year 2000, the number of Israelis who married overseas came to 5,600. They constituted 7 percent of all Israelis who married in the course of that year.

The Supreme Rabbinical Court of Appeals began its judgment with a discussion of the ramifications of civil marriage under general Israeli family law. These ramifications are of a purely civil nature, and include matters such as maintenance and succession. The Court favored the view that the marital status of Jewish citizens and residents of the State of Israel undergoing civil ceremonies overseas is determined by Jewish law, and since a civil marriage is not a Jewish one, it is not valid for purposes of establishing marital status under Israeli family law. Hence, there is no obligation in Israeli family law for a Jewish man who marries a Jewish woman in a civil ceremony overseas to maintain her in Israel.[44]

However, even with respect to a marriage valid only according to the law of the country in which it took place, should another marriage be entered into in Israel, under section 176 of the *Penal Law, 5737–1977*, bigamy is being committed. Hence, a Jewish citizen or resident of Israel who marries in a civil ceremony in Cyprus will risk a five year prison sentence for bigamy if he or she marries someone else in Israel without first terminating the Cypriot marriage.

This rather anomalous situation was described by Silberg J. as follows:

> In effect, the legislator has expressed a wish that notwithstanding the invalidity of the marriage under Israeli law, it should still constitute a bar to remarriage . . . the Israeli legislator has created a totally unique form of marriage which I would entitle "marriage for the purposes of bigamy."[45]

44 See M. Shawa, *Personal Law in Israel* (Hebrew), (Tel-Aviv: 1992), vol. 2, 539–72. This approach was adopted by the Tel-Aviv District Court in relation to Paraguayan marriages contracted by Israeli citizens and residents in *Singer-Bruchowitz v. Bruchowitz*, 1044/99, P.M. 5758 (3) 204. There is, however, a contractual obligation for a man to maintain his civilly-married wife which exists independently of their marital status.

45 *Streit v. Chief Rabbi of the State of Israel*, H.C. 301/63, P.D. 18 (1) 623.

Now, in order to avoid a clash between the invalidity of civil marriage under Jewish law, and the crime of bigamy, it is the practice of the rabbinical courts to dissolve overseas civil marriages before permitting a halakhically valid marriage. Once such a civil marriage has been dissolved by a rabbinical court, the parties involved can contract another marriage without being subject to the charge of bigamy. This practice is based on the argument that the rabbinical courts possess sole jurisdiction with regard to the marriage and divorce of all the Jewish citizens and residents of Israel, and this jurisdiction would be severely weakened if they did not also have the authority to dissolve marriages, including those of a civil nature.[46] However, they must issue a reasoned order dissolving the marriage in question before the parties may remarry. A mere statement to the effect that civil marriages are halakhically invalid is not sufficient.

This approach is consistent with section 177 of the *Penal Law*, which states:

> Any married person is presumed to be married for the purposes of section 176 unless they bring proof of the invalidation or dissolution of the marriage by virtue of the death of their spouse, or a judicial decision, or the decision of a religious court . . . in accordance with the laws of the Torah. . . .

It is, therefore, within the authority of a rabbinical court in Israel to dissolve a civil marriage performed overseas on the basis of the laws of the Torah alone. A Jewish citizen or resident of Israel whose civil marriage has been so dissolved is then free to remarry in Israel, without fear of contravening the criminal prohibition against bigamy.

In terms of Israeli family law, then, the decision of the Supreme Rabbinical Court of Appeals is now clear. The Cypriot civil marriage is invalid under Jewish law and is, therefore, not binding on the couple. However, to ensure that both parties are free to remarry, the District Rabbinical Court must officially dissolve the marriage in order to fulfill the requirements of the *Penal Law* with respect to the crime of bigamy.

The Supreme Rabbinical Court of Appeals then turned to a halakhic analysis of its position on civil marriage. If the marriage was contracted as a result of the inability of the parties to get married halakhically, for instance, if they could not find a rabbi to perform the wedding, or they were living in a country in which religious marriages were illegal, then

46 See P. Shifman, *Family Law In Israel* (Hebrew), (Jerusalem: 1995), vol. 1, 248–58, 268, 371, 376.

the civil marriage is viewed as a marriage "for the sake of strictness" (*nisuin lehumra*). The reasoning here is that one of the ancient methods for contracting a valid marriage is sexual intercourse,[47] and the Talmud presumes that Jewish couples living together do not intend their relationship to be a promiscuous one.[48] Although sexual intercourse is no longer an accepted method of contracting a marriage,[49] the presumption of marriage still applies whenever a Jewish man and woman live together publicly, provided, of course, that there is no legal bar to their union under Jewish law. The manifest intention of the parties to a civil marriage to establish their legal status as man and wife, and the presence of witnesses at the ceremony, are important factors in establishing the public nature of the union, and hence, its presumptive halakhic validity.[50] However, this presumption only arises if it is evident that the parties intended to marry in a Jewish ceremony in accordance with "the laws of Moses and Israel," but were prevented from doing so by circumstances of a purely objective nature such as those mentioned above. In the absence of any such intention, the presumption of marriage does not apply.

This type of presumed marriage is viewed as a marriage "for the sake of strictness" rather than a full-fledged marital union under Jewish law, both because of the absence of a halakhic ceremony, and the fact that its validity is based on a presumption that can be rebutted by adducing the intention of the parties.[51] As soon as it becomes possible to do so, the couple must undergo a Jewish marriage ceremony in order to change the status of their union to that of a full marriage under Jewish law. Many authorities[52] insist that *nisuin lehumra* may only be terminated during the lifetimes of both spouses by a *get lehumra*,

47 bKidushin 9b; *SA*, EH 33:1.

48 bGitin 81b; bKetubot 72b, 74a; Maimonides, *Code*, Laws concerning Divorce 10:19; *SA*, EH 149:1; E. Ellinson, *Non-Halakhic Marriages* (Hebrew), (Jerusalem: 1980), 115–28.

49 bKidushin 12b; Maimonides, ibid. 3:21; *SA*, EH 26:4, 33:1.

50 See Ellinson, n. 48 above, 129–69.

51 See S. Daichovsky, "Civil marriage" (Hebrew), *Tehumin* 2 (1981), 252.

52 There is considerable discussion among the halakhic authorities as to the need for a bill of divorce in these circumstances. However, the view that it is required — in the first instance, at any rate — is widely accepted; see *Terumat Hadeshen*, #209; *SA*, EH 26:1; *Responsa Igrot Moshe* 1, EH #73–75; *Responsa Sridei Esh* 3, #22; *Responsa Minhat Yitzhak* 1, #12–14; Ellinson, n. 48 above, 177–83.

namely, a standard bill of divorce given by the husband to the wife "for the sake of strictness."[53] However, it is a special feature of this type of marriage that if one of the spouses wishes to divorce, and succeeds in obtaining a rabbinical court order on his or her behalf, but the other spouse refuses to co-operate with the order — that is, either the husband refuses to give the *get*, or the wife refuses to accept it — then the court can dissolve the marriage by issuing a decision to that effect; a bill of divorce (*get*) is not necessary.[54]

On the other hand, if the couple never desired to enter into a halakhically valid relationship, and, *ab initio*, chose to marry civilly rather than "in accordance with the laws of Moses and Israel," their subsequent relations are irrelevant as far as the establishment of any type of halakhic marriage is concerned.[55] In such circumstances, the presumption of a halakhic marriage is clearly inapplicable, and both parties are free, as far as Jewish law is concerned, to marry the spouse of their choice in a Jewish ceremony in Israel. However, to avoid falling afoul of the prohibition against bigamy, they must first have their civil marriage officially dissolved by a rabbinical court.

In the course of its decision, the Supreme Rabbinical Court of Appeals elaborated on the issue of dissolution of marriage according to Jewish law. As already mentioned, one of the features of *nisuin lehumra* is that such marriages may be dissolved on the basis of a court order and without a *get* if the husband proves recalcitrant in the face of an order to divorce issued by a rabbinical court. In Jewish law, there are only a few situations where a marriage can be terminated in the lifetimes of both parties without a *get*. One is annulment of a marriage (*hafkaat kidushin*) in order to avoid the creation of *mamzerim*.[56] Contemporary rabbinical courts will, in particularly difficult cases,

53 Since the marriage is only "for the sake of strictness," as a result of its presumptive nature, the requirement of a bill of divorce is also a mere stricture, and only applies in the first instance.

54 See P.D.R. 7, 36–37. If the husband in this type of marriage absconds, a rabbinical court can dissolve the marriage, and allow the woman to remarry without the long delay normally associated with such a situation in the case of a couple who had a Jewish wedding.

55 *Responsa Rivash* #6; *Responsa Tashbetz* 3, #47; *Tur,* EH 149; *SA*, EH 149:5; *Terumat Hadeshen* #209; Rema, EH 26:1; *Responsa Maharam Schick*, EH #21; *Responsa Beit Yitzhak*, EH #29; *Responsa Melamed Lehoil*, EH l, #20; *Responsa Levush Mordekhai*, EH #40–41; *Responsa Kol Mevaser* 1, #22.

56 See M. Elon, *Jewish Law* (Philadelphia: 1994), vol. 2, 564–66, 631–42, 846–79.

use annulment of a marriage as a last resort to avoid the tragic consequences of *mamzerut*. Another is the institution of concubinage (*pilagshut*), which is a halakhically recognized form of relationship between a man and a woman, and may be dissolved by a rabbinical court without a *get*.[57] A third instance is a marriage contracted by a deaf-mute. A special form of the marriage and divorce ceremonies is used when one or both parties is a deaf-mute, the aim being to protect them from exploitation. Here, divorce is effected by a *get* issued by the court, not the husband.[58] To this list may be added the dissolution of civil marriages entered into by the parties as a result of not being able to undergo a valid Jewish ceremony. In light of their merely presumptive status, such marriages may be dissolved by the rabbinical courts in cases where the husband refuses to give a *get lehumra*[59] when the court orders him to do so.

The Supreme Rabbinical Court of Appeals also advised Israeli rabbinical courts that the adoption of a "play it safe" policy regarding all civil marriages, namely, requiring a *get lehumra* even in cases in which it was quite evident that the parties to the marriage had never intended to enter into a halakhically valid union, was a mistake. There is absolutely no virtue in insisting on a *get* in this kind of situation, on the grounds that there might nonetheless be some evidence, which the court did not hear, of a halakhically valid union. Such a policy is likely to be misinterpreted, and to create the impression that the halakha actually requires a bill of divorce in such cases. Moreover, rabbinical courts which arrange for a bill of divorce when it is not halakhically required are acting *ultra vires*, and their actions merely serve to bring the halakha into disrepute.

In the final portion of its decision, the Supreme Rabbinical Court of Appeals justified ruling on the dissolution of civil marriages in accordance with the minority view of R. Joseph Rosin, the Rogatchover Gaon,[60] who maintains that all such marriages, whether or not intended to effect a union "in accordance with the laws of Moses and Israel," have independent validity under Jewish law. As already explained, the majority opinion is that the halakhic status of civil

57 See Raavad, *Laws of Marriage* 1:4 and Ellinson 1980, n. 48 above, 40–96.

58 bJebamot 112a-113b; bGitin 71a; Maimonides, *Code*, Laws concerning Divorce 2:17.

59 See n. 53 above.

60 Russia 1858 — Vienna 1936.

marriage is based on the presumption of marriage that is created by the fact that the civil ceremony is a public confirmation of the parties' intent to live together as man and wife, and the Jewish parties to the marriage in question did not intend to reject halakhic marriage by marrying civilly. According to R. Rosin, however, the biblical verse: "Therefore, a man will leave his father and mother and cleave to his wife" (Gen. 2:24) is the source for the commandment to marry under the Noahide laws. These laws governed all humankind prior to the giving of the Torah, and continue to bind the entire human race.[61] There are also situations in which, notwithstanding the giving of the Torah to the Jewish people, they continue to bind Jews, and a case in point is marriage. If Jews enter into a valid non-Jewish marriage, which is, by definition, binding under Noahide law, then, under Jewish law, they are treated as a married couple with respect to the need for a *get*.[62] R. Rosin argues that the principal force of Noahide marriage is to create an official union between a man and a woman; it does not prohibit other relationships within marriage in the same way as does marriage "in accordance with the laws of Moses and Israel." It is, nevertheless, an independently valid form of marriage recognized by the halakha, and if engaged in by Jews, a *get* is required before the parties are permitted to remarry.[63] In R. Rosin's view, therefore, all valid civil marriages are halakhically binding, and must be dissolved by means of a bill of divorce before the parties can remarry.[64]

Now, although R. Rosin is an eminent authority, his view is definitely a minority opinion,[65] and the Supreme Rabbinical Court of Appeals sought to justify deciding in accordance with it. Citing a

61 See M. Elon (ed.), *The Principles of Jewish Law* (Jerusalem: 1974), 708–710.

62 The import of the Noahide laws with respect to the halakhic obligations of post-Sinaitic Jews is a complex topic well beyond the scope of the present survey. It is addressed in my *Jewish Biomedical law: Legal and Extra-Legal Dimensions* (Oxford: 2003), 35–47.

63 *Responsa Tzofnat Paaneiah*, #26–27. R. Rosin also makes the point that due to the different nature of the Noahide form of marriage, the *get* required by Jews marrying in a non-Jewish ceremony employs different terminology than that used in a standard *get*.

64 See R. Yisrael Lau, "A clarification of the view of the *Tzofnat Paaneiah* regarding civil marriage" (Hebrew), *Yahel Yisrael*, #32.

65 See *Responsa Dvar Avraham* 3, #29; *Responsa Sridei Esh* 3, #22; *Responsa Helkat Yaakov*, EH #74; *Responsa Yabia Omer,* EH #10.

ruling of Maimonides,[66] the Court explained that the form of divorce binding upon Noahides is determined by convention. In the distant past, it was effected by a separation of the parties without any written document. Nowadays, it is the established convention among non-Jews to divorce by court order in the case of irretrievable marital breakdown. The order dissolving the marriage does not, in the view of the court, need to come from a non-Jewish court; it may be issued by a rabbinical court. Once such a court has established that the marriage has broken down beyond repair, it is empowered to dissolve it, and this is precisely what was done in the present case. The parties to the Cypriot marriage never intended to enter into a halakhically valid marriage, so that the only grounds for requiring a *get* would be the Noahide commandment, which was binding upon them irrespective of any intention on their part. Since the District Rabbinical Court, on the prompting of the Supreme Rabbinical Court of Appeals, had formally dissolved the marriage on the grounds of its irretrievable breakdown, the couple was no longer married under Noahide law, and both parties were, therefore, free to marry again under Jewish law.

The dissolution of the civil marriage by a rabbinical court, therefore, fulfills two functions. First, in the event of remarriage, it removes the threat of a bigamy charge under secular Israeli criminal law against either party. Second, it dissolves the Noahide marriage which, on the view of the Rogatchover Gaon, would have, in the absence of a *get*, constituted a halakhic bar to remarriage.

The grounds for dissolving the civil marriage in the present case were, therefore, the irretrievable breakdown of that marriage, and in such circumstances, a marriage may be terminated by a decision of a rabbinical court; no *get* is necessary.

66 *Code*, Laws concerning Kings 9:8; Radbaz ad loc.

PART FOUR

SURVEY OF RECENT LITERATURE

SURVEY OF RECENT LITERATURE

Contributors: Stephen M. Passamaneck (SMP), John W. Welch (JWW), and the following students from the J. Reuben Clark Law School, Brigham Young University, who provided abstracts: Jason Knapp, Iliana Pedraza, and Joseph Prete.

BIBLICAL LAW

Jonathan P. Burnside, *The Signs of Sin: Seriousness of Offence in Biblical Law* (London: 2003). — Using semantic, literary, semiotic, and other tools, this study demonstrates that, in several identifiable ways, biblical law differentiates between various offenses in terms of their seriousness. Case studies of Leviticus 4:1–35, Deuteronomy 21:9, 18–21, 22:20–21, 25:5–10, and Ezekiel 8:1–18, show that seriousness is a function of the status of the offender, location of the offense, relationship between the parties involved, and other such factors. Degrees of seriousness are communicated through several descriptive and performative registers, and seriousness is a reflection of wrongfulness more than harmfulness. This analysis offers modern readers clear methods for measuring the seriousness of various offenses and for shaping a societal consensus concerning relevant values.

JWW

Dan W. Clanton, "(Re)dating the story of Susanna: a proposal," *Journal for the Study of Judaism* 34 (2003), 121–140. — A consensus as to the date of the story of Susanna would be of assistance in interpreting the story and determining its purpose. Comparing the two ancient versions of the story, and concurring with the thesis of Nehemiah Brüll, who first proposed dating Susanna in the first century BCE, Clanton argues that the story was composed in response to issues having to do with the treatment of witnesses and gender relations; these issues surfaced in the early first century. Discussing the themes of witnesses, gender, and male and female leadership, the author builds on the work of Tal Ilan, contrasting the Susanna story with the stories of Esther and Judith.

After arguing for the early first century BCE date, he makes some suggestions, on the basis of chronological data, as to the purpose of the Susanna story.

JWW

Tikva Frymer-Kensky, "Israel," in Raymond Westbrook (ed.), *A History of Ancient Near Eastern Law* (Leiden: 2003), vol. 2, 975–1046. — This encyclopedic descriptive overview is aptly situated among the comprehensive entries on the laws of ancient Egypt, Mesopotamia, Anatolia, and the Levant that make up this two-volume handbook. It concisely identifies and describes the sources of Israelite law: constitutional and administrative law, family law, property and inheritance, contract law, litigation, personal status, crime and delict, and regulations for the conduct of warfare.

JWW

Anselm C. Hagedorn, *Between Moses and Plato: Individual and Society in Deuteronomy and Ancient Greek Law*, Forschungen zur Religion und Literatur des Alten und Neuen Testaments 204 (Göttingen: 2004). — A comparative study of the cultural and legal mindsets of the peoples of Deuteronomic Israel and ancient Greece, this book rebuts the argument that the ancient Greek and Deuteronomic legal systems directly prompted or influenced each other. The author argues for a cultural and legal mindset common to both these societies, most notably, the emphasis placed on being governed by a sovereign law, and argues that it stems from their shared geography, both being situated in the Levant or eastern Mediterranean region. He employs an innovative comparative model from the field of cultural anthropology in support of his thesis. Further research, comparing Solon of Athens with Moses of Israel, is encouraged.

J. Prete

Scott Walker Hahn and John Seitze Bergsma, "What laws were 'not good'? A canonical approach to the theological problem of Ezekiel 20:25–26," *Journal of Biblical Literature* 123:2 (2004), 201–18. — The authors propose that the "laws that were not good" were certain laws in Deuteronomy. Examining first the literary structure of Ezekiel 20, the authors rely on Block's three-fold division of the text as well as on linguistic evidence, such as the contexts of masculine and feminine forms of the same word, to show that the narrative sequence that unfolds in Ezekiel 20 "strongly suggests the correspondence of the 'not good

laws' with the giving of the Deuteronomic code." The authors argue that in several ways the Deuteronomic code secularized or conflicted with the Priestly standards found in Leviticus, particularly with respect to three changes in the sacrificial law concerning firstlings. Thus, a priest trained in the Holiness code could well have viewed the Deuteronomic code as deficient, if not shocking, and, therefore, "not good."

I. Pedraza

Jione Havea, *Elusions of Control: Biblical Law on the Words of Women* (Atlanta: 2003). — This study, drawing on the boundary-crossing aptitude of south Pacific Islanders, puts forward an alterative approach to reading biblical law. The injunction "keep your vow" in Numbers 30 is examined and deconstructed in various ways, focusing on the subjects emphasized, ignored, or marginalized in this text, and circumreading the text with narratives involving similar subjects (daughters, wives, widows, and divorcees). The study moves from illusion of control to elusion of control, making possible particularization, disclosure, and liberation.

JWW

Gershon Hepner, "Jacob's servitude with Laban reflects conflicts between biblical codes," *Zeitschrift für die alttestamentliche Wissenschaft* 115 (2003), 185–209. — It is the contention of this article that the slavery laws in Exodus, Leviticus, and Deuteronomy did not ground the story of Jacob's servitude in Laban's household, but rather the story grew out of the laws, and thus reflects the conflicts between them. The creator of the story sought to synthesize these three provisions regarding slavery; and by incorporating both the Deuteronomic and the Covenant codes into the Pentateuch, vested equal authority in each, regardless of any Deuteronomic attempt to strip the Covenant code of its validity. In the course of his detailed examination, the author also notes parallels between the Laban story and the account of Joseph and the Israelites in Egypt. Linguistic and verbal patterns by means of which these narratives can be seen to reflect differences between the Codes are used to elucidate the implications, intentions, and allusions in the narratives.

I. Pedraza

Gershon Hepner, "Lot's exodus from Sodom foreshadows that of the Israelites from Egypt and the Passover Laws," *Zeitschrift für*

Altorientalische und Biblische Rechtsgeschichte 9 (2003), 129–64. — Linking the narratives of Lot's escape from Sodom and the Exodus of the Israelites from Egypt by identifying parallels in language and symbolism, the author seeks both to assess the literary significance of this foreshadowing of the Exodus, and to uncover allusions to the Passover in the account of Lot's flight. Lot's rescue from the destruction of Sodom is associated with the fall of Egypt and the departure of the Israelites, he contends, by twenty-six verbal resonances to the Passover in the narrative of Lot's escape. He suggests that the story of Lot is a literary construct that reflects later historical events and echoes later laws.

I. Pedraza

Robert S. Kawashima, "The Jubilee year and the return of cosmic purity," *Catholic Biblical Quarterly* 65 (2003), 370–89. — While the Jubilee has been examined for its historical purpose and context, as well as its connection to other biblical sources, it has a meaning and function within the Priestly system that is not addressed when interpreted from these perspectives. Arguing that the Jubilee year is symbolic of atonement from socioeconomic pollution, the author outlines the Priestly view of the Jubilee as the restoration of the cosmic order. The importance of spatial order to the Priestly understanding of creation, atonement, and re-creation is emphasized to demonstrate how, within the organized universe, everything is interconnected. More specifically, the priests understand nationhood in terms of the correlation of people and the land on which they live, and therefore view the Jubilee as a method of social reform: during the Jubilee the land and the people are purified and society is restored, temporarily, to its original state of purity. The Flood narrative and its chronology demonstrate a connection to the Day of Atonement, and are linked as well to the Priestly reliance on spatial and kinship orders for the determination of purity. Acknowledging the absence of words such as "purity," "pollution," and "atonement" in the Jubilee provisions, the author concludes that the priests lacked the concepts to express their understanding of the Jubilee as a cleansing and temporary suspension of pollution.

I. Pedraza

John W. Martens, *One God, One Law: Philo of Alexandria on the Mosaic and Greco-Roman Law* (Boston: Brill, 2003). — Martens examines Philo of Alexandria's use of Greek forms of higher law in his discussion of the law of Moses. The Greek ideals of the law of nature, the unwritten

law, and the living law all appear to inform Philo's understanding of the law of Moses. Ultimately, Martens sees Philo as adapting the Hellenistic principles of higher law to strengthen the Mosaic law, and using these Greco-Roman concepts to instill in the law of Moses a greater universalism.

J. Knapp

John P. Meier, "Is there *halaka* (the noun) at Qumran?" *Journal of Biblical Literature* 122 (2003), 150–55. — This essay addresses two questions: was the word "*halakha*" in use at the turn of the Common Era, and, if so, did it refer to legal rulings about proper conduct? In light of the two instances where this noun occurs in the Qumran texts (1QS 1:25 and 3:9), it concludes that the word "*halakha*" refers to walking, conduct, or behavior in general, not to legal rulings or opinions in the later technical Rabbinic sense.

JWW

Eckart Otto, "Tendenzen der Geschichte des Rechts in der Hebräischen Bibel," *Zeitschrift für Altorientalische und Biblische Rechtsgeschichte* 9 (2003), 1–55. — An expansion of the entry on law in ancient Israel in U. Manthe (ed.), *Die Rechtskulturen der Antike* (Munich: 2003). This article presents geographical, historical, and literary perspectives on the history of law in ancient Israel, and surveys legal institutions, including the judicial process, family law, blood vengeance, bodily harm and the talion, and personal property, as well as the legal principles reflected in the collections of biblical laws.

JWW

HALAKHIC LITERATURE

a Marriage and Divorce

Shlomo Riskin and Jeremy Wieder, "*Hafka'at kiddushin*: towards solving the *aguna* problem in our time," *Tradition* 36:4 (2002), 1–53. — The halakhic authorities have to date found no generally-accepted method of ameliorating the plight of a wife whose husband refuses to issue her a bill of divorce and who persists in this attitude even in the face of serious court-imposed sanctions by secular authorities. R. Riskin presents a lengthy argument in favor of *hafkaat kidushin*, the annulment of

Jewish marriage by a competent rabbinical court. This procedure, in the author's opinion, would go a long way toward resolution of the problem. R. Jeremy Wieder attempts to rebut R. Riskin's proposal, and R. Riskin responds to his arguments, in a most interesting exchange. The arguments are grounded in talmudic sources, which both discussants present with great clarity and precision.

SMP

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STYLE SHEET

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All papers are to be submitted in English. Hebrew should be transliterated wherever possible, as follows:

alef	a	lamed	l
bet	b	mem	m
vet	v	nun	n
gimel	g	samekh	s
dalet	d	ayin	a
hei (pronounced)	h	pei	p
vav	v	fei	f
zayin	z	tzadi	tz
het	h	kuf	k
tet	t	reish	r
yod	y	shin	sh
kaf	k	sin	s
khaf	kh	tav	t

patah; kamatz	a
hirik	i
shva (pronounced)	e
segol	e
shuruk; kubutz	u
holam	o
tzeire	ei

No diacriticals, apostrophes, hyphens, doubling of consonants or capitalization should be used as elements of the transliteration or to indicate prefixes and the definite article.

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Authorized Version abbreviations for books of the Bible, listed in dictionaries and style guides such as *The Chicago Manual of Style*, should be used. In referring to the Talmud, tractate names should not be abbreviated. m, b or j prefixed to the tractate name should be used to indicate whether the Mishnah, the Babylonian Talmud or the Jerusalem Talmud is being referred to.

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Hebrew titles should be translated into English. Where an English translation of the title is given in the original, please provide it. If no English title is given, please provide both the (transliterated) Hebrew title and a translation, and indicate to us that the translation is yours.

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23 A. Sagi and D. Statman, *Religion and Morality* (Amsterdam: 1995); henceforth, Sagi and Statman 1995.
24 See Englard 1991, n. 11 above, 67.
25 Ibid., 121.
26 See Sagi and Statman 1995, n. 23 above, chs. 6–7.