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THE PROCEDURES OF JEWISH LAW AS THE PATH TO GOOD-NESS AND GOD-NESS: HALAKHAH IN THE JEWISH TRADITION

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Introduction

Law, both in matters of procedure and substance, has a universalistic and a particularistic component to it; Jewish law is no different. This essay was written to explain the works, process, and history of Jewish law (*halakhah*) to the uninitiated. It assumes little background and hopes to present complex topics about many different procedural areas of Jewish law and theology (and the relationship between the two), so that those who have never really examined Jewish law or the Jewish system should have some sense of how the system called *halakhah* addresses many different matters.[1] The first section of the article addresses the basic meaning of the term "*halakhah*" and the relationship between law and theology in Judaism. The second section provides a historical context for precedent and hierarchy in the Jewish legal tradition. The third section addresses ethical doctrines in Jewish law. The final section discusses Jewish law as it functions today. "Conclusions" as a section is hardly proper in timeless religious doctrines, and thus this article has none. Jewish law goes on.

The Role of Theology in Jewish Law

The term *halakhah* (in Hebrew, "the way" or "the path") is usually interpreted to refer only to Jewish law as it relates to practical observance. However, it encompasses all of Judaism; law, theology, and ethics are all encapsulated in "the way" a Jew must observe. Thus, *halakhah* can be understood to refer to "law" in its largest definition: a structure in

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[1] Some of the material in this essay can also be found in the entry "Halakhah, Law in Judaism," in *The Encyclopedia of Judaism* (Leyden: Brill, 2000) 340–350.

which internal faith as well as external conduct is measured and governed.

Within the greater body of *halakhah*, though, Jewish theology and Jewish law run parallel to one another but do not often intersect: while matters of creed fall under the jurisdiction of *halakhah*, they receive nowhere near the same attention as deed. The two share a common beginning: the moment of revelation at Sinai, when, according to traditional belief, Moses was given the Torah—the first five books of the Hebrew Bible as well as a clear oral tradition of interpretation—by God. Despite this shared root, theological dogma is much less nuanced than concrete activity in the Jewish tradition. This is not to say that dogma is irrelevant to or missing from Judaism or Jewish law, as some thinkers have proposed. However, in comparison to the painstaking detail used to clarify practice, the parameters of faith are more fluid. What is set forth in the Torah provides a good example of this difference. It contains only a few key theological doctrines: the singularity of God and the fact that Israel must worship only God, that God has given the Torah to the people Israel, and that God created the world. In contrast, the Torah contains scores of ritual laws regulating everything from dietary practice to the construction of the ark that contains the tablets of the Law. This pattern continued under rabbinic authority; belief had a necessary place in Jewish thought, but the contours provided for it by law were not as clearly delineated as those for practice.

The most intense attempt at rendering Jewish belief into legal form is found in the Code of Maimonides. Perhaps the greatest of Jewish medieval philosophers and halakhic thinkers, Maimonides clarified the elements he considered necessary for proper faith in his codification of Jewish law, the Mishneh Torah; he also elaborated on them in his philosophical treatise, *The Guide of the Perplexed*.[2] Among these tenets are the existence of God, the unity of God, the truth of prophecy, the revelation of Torah from heaven, and so on. Maimonides indicates that belief in these principles is itself a matter of law, and rejection of any one of them constitutes heresy. If one is guilty of heresy, legal penalties are imposed; for example, a heretic would be ineligible to be a witness in a legal proceeding. By including his Thirteen Principles in his treatise on Jewish law, Maimonides sought to integrate law and theology by codifying be-

[2] Moses ben Maimon, *The Guide of the Perplexed*. Translation/introduction by Shlomo Pines (Chicago: University of Chicago Press, 1963). Maimonides [1135–1204] is also known by his rabbinic acronym, Rambam. Mishneh Torah is not to be confused with Mishna, the codification of the oral law redacted around 200 c.e.

lief. The parameters he set gained wide currency throughout the Jewish world.[3]

However, not all of his contemporaries—or those who followed—agreed with the specific delineation found in Maimonides' Code, both in terms of what was included and what was excluded.[4] More significantly, some took issue with the methodology employed by Maimonides. Indeed, Rabbi Abraham of Posquieres (Ravad) completely disagreed with the validity of listing heretical beliefs. He posited that a person cannot become a heretic through mistaken belief alone—such as the literal anthropomorphism of God—if the belief is arrived at through sincere study of Jewish sources such as the Bible or other homiletic sources, even if one is completely mistaken with respect to both context and meaning. Rabbi Joseph Albo recorded similar sentiments.[5] According to Albo's approach, doctrinal error never makes one a heretic if one arrives at it through sincere exploration of Jewish sources. This vastly curtails the legal methodology needed to search for heretics, and increases the methodological gap between Jewish law and Jewish philosophy; essentially, it renders heresy unpunishable and nearly impossible to determine. This stands in sharp contrast to Jewish law governing deeds, which all authorities agree has no place for sincere error. In law, this is referred to as unintended sin. These competing schools of thought established by Maimonides and Ravad shape the discussion that follows between later authorities.

Maimonides was unique in his efforts to integrate deed and creed. It is telling that, for the most part, great legalists were not philosophers, and vice-versa. The bulk of *halakhah* (in its largest sense) does not follow the pattern set by Maimonides. The very question of whether the methodology of Jewish law is drawn into the realm of Jewish philosophy is itself a matter of dispute.[6] Theology and law stem from one source (divine revelation), but progress along discrete paths according to most thinkers. In sum, law—both in the sense of positive law and of ethics in practice—is

[3] Moses ben Maimon, *Hilkhot Teshuva* 4:3.

[4] Marc Shapiro, "The Last Word in Jewish Theology? Maimonides' Thirteen Principles." *The Torah U-Madda Journal* 4 (1993) 92–117. See also J. David Bleich, *With Perfect Faith* (New York: KTAV, 1983).

[5] *Sefer Haikrim*, Ch. 1 notes that in discussing the major theological differences between the various Rishonim, so long as all participants are *le-shame shamayim* none become heretics, although certainly some are not correct.

[6] J. David Bleich, *With Perfect Faith*. (New York: KTAV, 1983).

the lifeblood of *halakhah*. Thus, law forms the bulk of that with which "the path" of *halakhah* is occupied.

The Structure of Jewish Law[7]

The pre-Talmudic period

The Pentateuch, referred to by Jews as the Torah, is the touchstone of Jewish law. According to religious tradition and its derived legal theory, the Torah is the manifestation of the divine word, having been revealed to Moses at Mount Sinai.

According to traditional belief, alongside God's revelation of the written Torah (represented in the text of the Pentateuch), was a collection of material originally handed down orally—hence referred to as the Oral Torah—which consists of a variety of additional laws, rules, and interpretive tools. The divine, and therefore binding nature, of both of these Torahs is the predicate belief of normative Jewish law.

The biblical books contained in the Prophets and Writings, which together with the Torah constitute the Hebrew Bible, were written during the 700 years following composition of the Pentateuch. The Jewish biblical canon as a whole appears to have been completed no later than the year 150 C.E., and perhaps as early as 150 B.C.E.[8] While the Prophets and Writings are traditionally understood to have been written with divine inspiration—and certainly had considerable impact on both the discourse and the homiletic material that appear in the primary documents of Jewish law—they are of far less significance than the Torah for establishing either the legal or ethical norms of Judaism. Indeed, very little historical information is available to us about the nature of normative Jewish law through the end of the prophetic period. Religious authority during this pre-talmudic era was shared by a triumvirate of the monarchy, prophets, and high priests *(Kohen Gadol)*. Interestingly, Jewish legal theory identifies Moses—who received the Torah directly from God—as the only Jewish leader who held all three titles, this being one of the indicia of his unique status.

[7] With respect to the history and structure of Jewish law, see generally Menachem Elon, *Jewish Law: History, Sources, Principles*, vols. 1–4. (Philadelphia: Jewish Publication Society, 1994).

[8] Michael Broyde, "Defilement of the Hands, Canonization of the Bible, and the Special Status of Esther, Ecclesiastes and Song of Songs," *Judaism* 44/ 1 (1995) 64–79.

The interval from the close of the canon until approximately 250 C.E. is known as the era of the *Tannaim*, the first redactors of Jewish law, whose period closed with the editing of the Mishnah, traditionally ascribed to Judah the Patriarch. The Mishnah, a redaction of nearly all areas of Jewish law then extant, became the basis of subsequent Jewish legal literature and is composed of material thematically structured in six "orders," dealing with agricultural law, family law, civil and criminal law, law pertaining to the holidays, Temple law, and the law relating to ritual purity.

The Tannaitic period witnessed the transformation of the very nature of Jewish law in three crucial ways. First, religious leadership was permanently transferred from the triumvirate of king/priest/prophet to the rabbis, who assumed the mantle of authoritative expositors of Jewish oral and written law, thereby becoming the architects of authoritative Rabbinic decrees and customs. Second, during this period the oral law gradually came to be set in writing, a process that culminated in Judah the Patriarch's pivotal decision to permit creation of an authoritative text of the oral law, codified in the Mishnah. "Oral Law" as a category still exists in Jewish law, although today it too is written down. Finally, by the end of this period Jewish law, indeed Judaism itself, was firmly rooted in the Diaspora and no longer geographically confined to the land of Israel. These three transitions caused profound changes in Jewish law.

The Talmudic period

The next five or six centuries saw the writing of the Babylonian and Jerusalem Talmuds, two running commentaries on most sections of the Mishnah, containing elaboration and explanation of the rules and cases found therein. These documents were written and edited by scholars called *Amoraim* ("those who recount [Jewish law]") and, to a lesser extent, *Savoraim* ("those who ponder [Jewish law]"). On the whole, the Babylonian Talmud is a far more complete and refined work than the Jerusalem Talmud. As a result—and for a variety of additional reasons—its authority ultimately eclipsed that of the Jerusalem Talmud, giving it far greater significance and authority throughout most of Jewish legal history. The material of the Talmud is diffuse, loosely edited and frequently presents multiple explanations of a given difficulty without resolving the problems presented. A variety of hermeneutic methodologies are used repeatedly throughout the Talmud, which represent approaches to Jewish law, tradition, and ethics. Furthermore, the dissemination of the Talmud resulted in the codification of many customs, practices, and

decrees as normative in the Rabbinic tradition (although, in accordance with its largely dialogic character, the Talmud also records many subordinate traditions that did not become normative).

The fundamental significance of the Talmud to Jewish law cannot be overstated. As Asher ben Yehiel of thirteenth century Spain notes, Jewish authorities accept that Talmudic law provides the touchstone basis for all discussions of Jewish law.[9] Its authority is beyond dispute, so that denial of the authority of the Talmud excludes one from the community of adherents. While the Talmud might in certain circumstances be unclear, might itself accept more than one view as normative, or may cite many different views without resolving the matter under discussion, it nonetheless establishes the framework of analysis for all that is Jewish within Jewish law.

The post-Talmudic period

The post-Talmudic era is divided into three periods: the Geonic era, named for the *Geonim*, or scholars who lived in Babylonia until its destruction in the middle of the eleventh century; the era of the *Rishonim* (the early authorities), who lived in North Africa, Spain, Franco-Germany, and Egypt until the end of the fourteenth century; and the period of the *Aharonim* (the latter authorities), which encompasses all scholars of Jewish law from the appearance of the Shulhan Arukh until the present.

The *Geonim*

The history of the Geonic era remains shrouded in uncertainty. Both modern scholarship and traditional Jewish law are hard-pressed to define an exact dividing line between the *Savoraim*, who ended the Talmudic era, and the *Geonim*. Indeed, in a number of cases, it appears that Geonic authorities engaged in argument with Talmudic statements, as though they were contemporaneous with the Talmudic authorities themselves. Although these instances appear to be confined to matters of custom rather than law, this apparent ongoing dialogue may nonetheless indicate that the *Geonim* perceived themselves as a continuation of the Talmudic period and tradition and not as a distinctive group of authorities. Two primary figures of this period were Hai Gaon (939–1038) and Sherira ben Hanina (tenth century), both of the Pumbedita Academy in Babylonia. Based on manuscripts now available, it appears that the Geonic era was

[9] Commentary of Rabbenu Asher ben Yeheil, Rosh, *Babylonian Talmud*, *Sanhedrin* 3:4.

an active period of re-codification within Jewish law. However, at the current time, only tentative inferences are possible, as sufficient data is not available for this early period.

The *Rishonim*

In the era of the *Rishonim*, the division of Jewish law into geographic schools of thought first developed. The Franco-German school, led by Solomon Yitzhaki (known by the acronym "Rashi," 1040–1105) in northern France and his students and descendants, such as his grandson, Jacob ben Meir Tam ("Rabbenu Tam," 1100–1171), created the system of practice and interpretation that shaped Ashkenazic Jewry. The North African, Egyptian, and remaining Persian communities, under the leadership of Isaac Alfasi (1013–1103) and Moses ben Maimon, or Maimonides (known by the acronym "Rambam," 1135–1204), eventually became recognizable as a distinctive Sephardic Jewry. In this period, a sizable Jewish community also existed in Provence, with its own unique customs and significant scholars, including Menahem Meiri (1249c.–1316) and Abraham ben David of Posquieres (c. 1120–1198). The same was true in Spain, where Moses ben Nahman, or Nahmanides (known by the acronym "Ramban," 1194–1270), Solomon ben Abraham Adret (c. 1235–1310), and Yom Tov ben Abraham Ishbilli (c. 1250–1330) were among the most significant scholars. These last two communities, Provence and Spain, eventually merged into Ashkenazic and Sephardic Jewry respectively. Asher ben Yehiel (c. 1250–1337) served as a transitional figure between the Franco-German school and the Muslim Spanish communities, making him another significant figure of the period, as was his son, Jacob ben Asher (c. 1270–1340), author of the important law code the Arba'ah Turim (see below).

The literary methodologies of the *Rishonim* varied considerably, although adherence to a particular genre or literary style does not seem to correlate with geographical location. Three primary literary methodologies were employed during this period: codification, responsa, and Talmudic commentary. Codification involved the redaction of normative Jewish law into concise rules, typified by Maimonides' Mishneh Torah, which remains to date the only comprehensive rendering of all Jewish law. The responsa literature (in Hebrew, *she'eilot v'teshuvot*, literally, "questions and answers"), typified by the 2,500 letters written by Rabbi Adret to Spanish Jewry, was generated by the exchange of written questions and answers between individual rabbis and congregants or communities. The issues tend to be fact-specific rather than general restatements

of law. The responsa form is one of the unique literary contributions of Jewish law to the general body of legal literature, as the genre is not found in other legal systems. Talmudic commentary, the most common form of Rabbinic literature of the era, was the process by which scholars interpreted uncertainties within the Talmud or criticized and elaborated on the commentaries of others. It often directly involved discussions of normative Jewish law. Note that many rabbis wrote in more than one literary format. For example, in addition to his thousands of responsa, Rabbi Adret wrote commentaries on all areas of the Talmud, commonly published under the title *Hidushei HaRashba*, as well as a codification of the ritual laws, *Torat Habayit LeRashba*.

The Shulhan Arukh

From the mid-fourteenth century until the early seventeenth century, Jewish law underwent a period of codification, which led to the eventual acceptance of the Shulhan Arukh, the law code of Joseph Karo (1488–1575), as the basis for modern Jewish law. The Shulhan Arukh (and the Arba'ah Turim of Jacob ben Asher, which preceded it) divided Jewish law into four separate areas: the portion of the text referred to as Orah Hayyim is devoted to daily, Sabbath, and holiday laws; Even HaEzer addresses family law, including financial issues; Hoshen Mishpat codifies financial law; and Yoreh Deah contains dietary laws as well as miscellaneous legal matters.

While the Arba'ah Turim was not the first law code—Maimonides' Mishneh Torah was completed approximately a century and a half earlier—it was unique in that it did not attempt to present a final and authoritative version of *halakhah*. Rather, it collected and presented the range of opinions found among the *Rishonim*. Combined with Karo's commentary, known as the Beit Yosef, and Yoel ben Samuel Sirkes' (1561–1640) Beit Hadash, Arba'ah Turim remains the classic restatement of the principles of Jewish law. It is important to emphasize the much overlooked difference in methodology between the Arba'ah Turim of Rabbi Asher and the Shulhan Arukh of Rabbi Karo: The Tur, as it is called, cannot strictly be considered a codification of Jewish law in that Asher did not judge among conflicting opinions within the received halakhic traditions. Rather, he sought only to redact *halakhah* topically in organized chapters, by faithfully collecting *all* opinions that he thought plausible, while only rarely voicing an opinion as to what should be the normative approach on a given question. Conversely, the Shulhan Arukh

was intended as a code, rarely citing more than one opinion and attempting to provide definitive answers to questions of *Halakhah*.

Many significant scholars, themselves as important as Karo in status and authority, wrote annotations to the Shulhan Arukh that made the work and its surrounding comments the modern touchstone of Jewish law. But despite Karo's clear intention that the Shulhan Arukh should serve as a final and authoritative code of Jewish law, the text did not in fact attain that status. Instead, repeated commentaries have used the Shulhan Arukh as a reference point in collecting areas of disagreement with Karo and other decisors. The most significant of these commentators is Moses Isserles (c. 1525–1572), a Polish scholar whose glosses on the Shulhan Arukh present normative Ashkenazic practice. Among the other significant commentaries are: Turei Zahav, on all four sections, by David ben Samuel Halevi of Poland (1586–1667); Magen Avraham, on Orah Hayyim, by Abraham Abele ben Hayyim Halevi Gombiner (Poland, 1637–1683); Sefer Meirat Einayim, on Hoshen Mishpat, by Joshua ben Alexander Hacohen Falk (Poland, c. 1555–1614), and Siftei Kohen, on Hoshen Mishpat and Yoreh Deah, by Shabbetai ben Meir Hakohen of Lithuania (1621–1662). The most recent annotated edition of the Shulhan Arukh (Vilna, 1896) contains no less than 113 separate commentaries on Karo's text. In addition, hundreds of other volumes of commentary have been published as self-standing volumes, a process that continues to this very day. Significant works among this body of literature include Israel Meir Hakohen's (1838–1933) Mishnah Beritrah on Orah Hayyim and the Arukh Ha-Shulhan of Yehiel Mikhal Epstein (1829–1908), the most recent comprehensive restatement of normative Jewish law.

The *Aharonim*

Since the time of the Shulhan Arukh, conventional Jewish law has viewed itself as being in the ultimate stages of development. Accordingly, this era is referred to as that of the *Aharonim*, or latter authorities. The normative view is that these later authorities may not—except in rare circumstances—engage in dispute with the views of earlier masters. Their task, rather, is only to determine which earlier view should prevail in a matter under dispute and to establish how inherited positions are to be applied in factual settings not addressed in the prior literature.

While the status of the Talmud as the central legal document is well established, the relationship between and among latter authorities is gov-

erned by informal rules of precedent rather than by formal hierarchical rules. As a general matter, the commonly accepted tradition is that authorities of one era do not dispute the rulings of authorities of an earlier era, and certainly do not dispute their unanimous opinions. However, even these informal rules have exceptions. As noted by Rabbi Moshe Feinstein, an authority of the late twentieth century:

> Is it possible to believe that there is an end and a limit to Torah innovation? God forbid that law should be determined merely from what is found in books; when perchance questions arise that are not found in books, they will not be decided but by our efforts. And in my humble opinion, it is forbidden to say that Jewish law is no longer great in this generation, now, in our time. It is the responsibility of every able person to make decisions about law, in examination and interpretation, in Gemara and halakhic authorities, with correct understanding and proper insights, even though this new law is not stated in books. And if law is found in books, certainly the teacher also needed to understand it, and to interpret according to his opinion . . . and not merely because [it] was found in other books. And such a teacher [is discussed] in a Mishnah, as the Tana'im said, "it confuses the world to resolve matters of law merely by looking at the precedent." This is from the Mishnah in Sotah 20b, and in the Rashi as well. And even if one's interpretation is, at times, in contradiction with the Aharonim who are our teachers: what difference does that make? It is certain that even we are empowered to disagree with the Aharonim, and even at times with the Rishonim, when there are strong proofs, and more importantly, logical reasons [why they are wrong] . . . so long as what one decides is not contradicted by the unanimous consensus of the commentaries of the Shulhan Arukh that were accepted in our jurisdiction.[10]

Thus, while even post-Talmudic Jewish law has a hierarchy of sorts, it is far less formal and mandatory than the superior authority bestowed upon the Talmud itself.

The greatest concentration of scholarly activity during the time of the later *Aharonim* (1750 and onward) occurred in Eastern Europe, the location of the vast majority of the world's Jewish population. Ashkenazic Jewry developed a highly intellectual and analytical approach to the

[10] Moses Feinstein, *Iggrot Moshe Yoreh Deah*, responsum 101.

study of Jewish law, focusing less on the establishment of normative Jewish law (as in the era of the codifiers) and more on the law's conceptual basis and, of equal significance, on the concept of the study of Torah as a form of divine worship. Typical of this approach is the work of three Lithuanian scholars, Hayyim ben Isaac Volozhiner (1749–1821), Naftali Tsevi Judah Berlin (1816–1893), and Hayyim Soloveitchik (1853–1918), each of whom emphasized the abstract study of Jewish law principles. The division between Ashkenazic and Sephardic authorities also sharpened considerably during this era; the terms themselves came to denote schools of thought and tradition, rather than merely geographical locations: while the Ashkenazic Jewish community lived in Eastern Europe and the Sephardic predominantly in Iran/Iraq, neither stayed geographically constant.

The literary style of the *Aharonim* appears similar to that of the *Rishonim*, although there is considerably more emphasis on responsa and codes than on commentaries. Some scholars, pointing to the significant differences in the nature of the problems confronted after a major historical shift, maintain that the era of the *Aharonim* should be divided into two periods: pre-emancipation and post-emancipation. Still others have argued that the proper division is pre- and post-Holocaust.

Halakhah today:

Two principal Jewish communities exist in the world today, and thus there are two major areas of Jewish legal activity, each with its own distinct character: Israel and the United States. In addition, there are significant Jewish communities in England and France, and smaller ones in North Africa and Iran. The vast majority of Jewish legal scholarship is centered in Israel, with its many *yeshivot* (classical Talmudic academies) and other academic institutions. A smaller—but still considerable—number exist in America. Israel and America differ profoundly in institutional structure, in that Israel has a government-supported rabbinate directed jointly by a Sephardic and an Ashkenazic chief rabbi. The rabbinate in Israel performs both governmental and pseudo-governmental functions, including the supervision of marriage and divorce, as well as involvement in many other official areas of Jewish public life. In general, Judaism, as the state religion of Israel, is publicly funded. This financial support extends to the students of Jewish law and to the institutions for halakhic study, including *hesder* (which combines military service with yeshiva studies), religious Zionist *yeshivot* (which defers

military service until completion of yeshiva studies), and Eastern European style *yeshivot* (which discourages military service). The development of Jewish law in America has taken a different path, for Judaism in America functions with essentially no governmental support. Rabbis are paid by the congregations they serve, and *yeshivot* are supported by donations and tuition providing scholarships based on need and ability.

Issues of Content in Jewish Law

A proper understanding of Jewish law cannot be gained by reference only to historical data or trends. Jewish law has always had ethical, religious, and communal functions that continue to provide direction to the adherents thereof. This ethical component, while not completely ahistorical, is best summarized by a review of principles and ideals rather than via a historical review.

Many significant principles inform and direct Jewish law in the ethical arena. Primary among these is the mandate to imitate the divine (*imitatio dei),* which provides that adherents of Jewish law seek to function in an ethical and just manner, aspiring to do as the divine would. Furthermore, adherents must seek to promote correct conduct and values in the hope that all humanity—created in the image of God (Gen. 1:26)—may come to act accordingly. This principle provides a religious imperative as to what the results of the Jewish tradition should look towards. Second, Jewish tradition recognizes the related mandate of *tikkun olam,* "fixing the world," which imposes a duty on members of society to seek to improve the daily life of God's creatures through a variety of socially constructive projects. *Tikkun olam* directs an outward looking, ethically positive view of one's obligations to ensure that the general community adheres to proper values and that Jews, through Jewish law, participate in that process. In addition, there is the philosophical mandate that arises from Isaiah 42:6, to be a "light unto the nations." David Kimchi (c. 1160–1235) presents one interpretation of this concept: "because of the influence of the Jews, the gentiles will observe the seven [*Noahide*] commandments and follow the right path." But more typically in Rabbinic contexts, the phrase "light unto the nations" is understood to mean that Jews should behave in an exemplary manner that non-Jews will wish to imitate, not as a mandate to proselytize observance. This is exemplified by Isaiah's prophecy: "Nations shall walk by your light, kings by your shining radiance" (Is. 60:3).[11]

[11] For more on this, see "Jewish Law and the Obligations to Enforce Secular Law," *The Orthodox Forum Proceedings VI: Jewish Responsibilities to Society,* ed. David Shatz and Chaim Waxman (1997) 103–143.

Two interrelated concepts, "the ways of peace" *(darchei shalom)* and "lest there be hatred" *(meshum e'va),* have sometimes been used to sanction actions that would not normally be permitted under Jewish law. The recognition that Jews are part of the larger society and need to participate in societal activities is used by Maimonides as the basis for the obligation to participate in public charities and to support poor people of all faiths. The notion that a Jew's conduct has the potential to incite antisemitism and thus to endanger the welfare of other Jews leads to the concept of "lest there be hatred." This principle has resulted in mandates such as the duty to desecrate the Sabbath to save the life of a non-Jew, not technically permitted by Jewish law. The force of these two concepts within the Jewish tradition is not to be understated.

Notably, Jewish tradition points clearly to natural law as a force in the development of *halakhah.* Babylonian Talmud, Eruvin 100b recounts in the name of Yohanan that "if Torah had not given us certain rules, we would have learned modesty from the cat, the prohibition against stealing from the weasel, the prohibition of adultery from the dove," and so on. The exact parameters of natural law and its status with respect to revealed law are matters of great controversy, especially for circumstances in which the two might be in conflict. Nonetheless, it is clear that natural law plays a role in the Jewish legal tradition, creating an inherent ethical basis for conduct.

Natural law thinkers fall into two categories, those whose conception is *a priori* and those whose conception is *a posteriori.* The former depend on pure reason and intuition, the latter, on the experience of most nations. Judaism—which rebelled against much of what prevailed among the nations with which it came into contact—would not consider the *a posteriori* of any consequence. However, a priori natural law is found not only in the Code of Maimonides but also very clearly in the Talmud. Without calling them natural rights, the rabbis recognized and enforced rights that were precisely that. For example, when the schools of Shammai and Hillel debated the status of a person who is half slave and half free—owned by one partner and emancipated by the other—the Shammaites convinced the Hillelites with an argument from natural law. The latter had thought it would be possible for such a person to work for himself one day and for his half-owner the next. The rejoinder of the school of Shammai is classic: "You have taken good care of the master but have you taken care of the slave himself? He cannot marry a female slave, because he is half free, and he cannot marry a free woman, because he is half slave. How will he

fulfill God's will to populate the earth?"[12] Needless to say, if his status does not allow him because of God's law to populate the earth, then he is under no obligation to do it: God's law stops him. But the school of Shammai was concerned with the slave's natural right, though that term is not used. The slave is not to be denied his humanity.

This controversy clearly indicates that the rabbis are concerned with the existence of natural rights, in this instance, the right to have and raise a family equal in status to that enjoyed by others in that society. It is not simply because God gave the command to be fruitful and multiply to all humans, and this person, half-slave and half-free, is entitled to fulfill that command given to him by God. Rather, his right is broader. Even in his half-slave and half-free condition, he could procreate. There are women with whom he may cohabit, at the very least women in the same status as he. But what he cannot do is to procreate and have completely free offspring. It is this very right that rabbis safeguarded for him, a natural right to be equal to all in his society with regard to having and raising a family.

Indeed, in the halakhic context, ethical obligations were not merely ideals without means of enforcement; Jewish law recognized the need to provide practical incentives for ethical conduct. The Talmudic sages, and continuing in this tradition Jewish courts to this day, ensure that improper behavior, even when technically permitted according to *halakhah*, results in sanction. For example, the Sages decreed that one who enters into a commercial transaction that is not technically binding, but is viewed as such by many, and then seeks to back out when the terms are no longer advantageous, should be publicly denounced. Such public pronouncements were designed to deter unethical behavior by making it difficult to engage in such conduct and still remain a participant in the public market. The rabbis similarly aver that the spirit of the sages does not reside with a person who engages in particular types of conduct that ought to be discouraged. Many halakhic authorities even rule that one who ignores an ethical mandate of the law is to be considered an "evil-doer" (Heb., *rasha*) and must be treated as one with no legal credibility in court. This serious penalty carries significant consequences, for it deprives such a person of the trustworthiness in commercial matters that merchants otherwise legally possess.

Just as unethical conduct that is technically permitted by Jewish law will be condemned, so righteous conduct not directly mandated by Jew-

[12] *Babylonian Talmud, Pesachim* 88a.

ish law is encouraged. Hence the Talmudic category of conduct that is "beyond the letter of the law." Consider the case addressed by Isserles in his commentary on the Shulhan Arukh of a lost object whose owner has relinquished hope of return prior to the moment that the finder discovers it. Since the owner has given up all thought of possession, in such circumstances, Jewish law does not require return of the object; the finder may keep it. Even so, returning such an object is recognized as ethically proper and therefore is encouraged. One who goes beyond the letter of the law to fulfill such an ethical responsibility is considered to have fulfilled the "mandate of heaven."[13] Similarly, while a licensed medical practitioner is under no legal obligation to pay compensation for damage he caused that was truly accidental, the practitioner, who does in fact cause such damage, is encouraged to fulfill the mandate of heaven by making such compensation. Thus, just as unethical, but permitted, behavior can be subject to legal sanction, so too Jewish courts sometimes can require the performance of pious or ethical conduct not strictly required by Jewish law. In this we see the difference in scope between halakhah and other legal systems guided by the idea that the job of the courts is only to determine what is legal, not what is ethical or proper.

Rabbinical decrees to promote justice are not only of the ethical or religious variety. A number of decrees in the financial area also are designed to allow for ethical or religious conduct. Consider, for example, the Talmudic *takanat hashavim,* "decree for those who wish to repent." Jewish law rules that a person who steals must return what he stole; if he has sold it, he becomes indebted to the victim in the amount of its value. Talmudic scholars considered the predicament of the thief who wished to repent, but was burdened with so many debts—obligations to repay the value of goods he had stolen and sold—that he would never contemplate repentance for fear of being hounded by his creditors. Thus, the Talmudic rabbis ruled that in certain circumstances, so as to allow for and encourage repentance, a thief is exempt from the duty to repay those from whom he stole, so long as the stolen item is no longer in the thief's possession.[14]

Yet other decrees seem to have both economic and ethical foundations. Consider, for example, the "decree of the marketplace" *(takanat hashuk).* According to biblical law, when a thief sells a stolen item, he

[13] Aaron Kirschenbaum, *Equity in Jewish Law Beyond Equity: Halakhic Aspirationism in Jewish Civil Law* (Hoboken: KTAV, 1991).

[14] For details on *Takanat Hashavim* see generally *Bava Kama* 94b–95a and *Shulhan Arukh* 360:1.

conveys no title at all to the purchaser, even if the purchaser is completely unaware that the goods were stolen. The original owner therefore may reclaim possession from the purchaser, who absorbs the loss. Talmudic rabbis decreed that in order that the marketplace should continue to function properly, goods sold in open market (in common law, "market overt") convey valid title, even though the one who sold them—the thief—did not possess valid title. This decree was grounded in economic concerns—to allow for the free sale of goods—as well as ethical ones—to rectify the injustice done to the buyer.[15]

Wider implications

Halakhah not only regulates the conduct of Jews but also insists on the existence of a universal legal code, referred to as the Noahide law, understood to be binding on all descendants of Noah, that is, everyone. The Talmud enumerates seven Noahide commandments: idol worship, taking God's name in vain, murder, prohibited sexual activity, theft, eating flesh from a living animal, and the obligation to enforce laws. Each of these items represents a broad legal category, which itself comprises many distinct injunctions. Thus, for example, the prohibition against sexual promiscuity includes both adultery and all forms of incest. The Noahide laws thus encompass nearly sixty of the total of 613 biblical commandments understood to be incumbent upon Jews and nearly a quarter of those commandments generally thought still to apply in post-Temple times. However, because of non-Jews' and early Jewish authorities' historical inattention to Noahide laws—only recently has interest increased in the ramifications of Jewish ethical law for a secular society—many of them remain unclear.

The halakhic understanding of divorce for those outside of the Jewish community exemplifies this ambiguity in Noahide law. The Jerusalem Talmud states that, within Noahide law, there is no formal divorce. Later commentators understand this in three radically different ways. Some claim the statement means that divorce is not available to gentiles, so that they have no legal means of ending marriages. Others maintain that the passage suggests only that there is no formal process of divorce for non-Jews, so that either spouse can end the marriage simply by leaving the

[15] For details on *Takanat Hashuk* see *Bava Kama* 115a and *Shulhan Arukh Hoshen Mishpat* 60:2 and 356:1–6.

union. Yet other authorities insist that, according to Noahide law, while a man may never divorce his wife, she may divorce him at will.[16]

Since Jewish law cannot be expected to control the behavior of non-Jews in our society generally, this particular issue does not have obvious practical ramifications. But similar ones are important, for instance, concerning the interaction of Jewish and Noahide law in the area of commerce, a topic that also remains clouded in uncertainty. Thus we see the extent to which the Noahide law might be part of normative Jewish law but has not been adequately developed. Such development would be significant since, as a jurisdictional mandate, Jewish law does have a component that seeks to regulate the conduct of society in general.

Jewish law recognizes that not all activities that are prohibited to Jews by *halakhah* are intrinsically bad or unethical. While commenting on grafting fruits (a clear violation of Jewish law), Rabbi Judah Luria (*Maharal* from Prague) speaks eloquently about the power of human creativity to reshape the universe, and how that power was given to humanity at the time of creation. He states:

> The creativity of people is greater than nature. When God created in the six days of creation the laws of nature, the simple and complex, and finished creating the world, there remained additional power to create anew, just like people can create new animal species through inter-species breeding. . . . There are those who are aghast of the interbreeding of two species. Certainly, this is contrary to Torah, which God gave the Jews, which prohibits inter-species mixing. Nonetheless, Adam (the First Person) did this. Indeed, the world was created with many species that are prohibited to be eaten. Inter-species breeding was not prohibited because of prohibited sexuality or immorality . . . Rather it is because [Jews] should not combine the various species together, as this is the way of Torah. As we already noted, the ways of the Torah, and the [permissible] ways of the world are distinct . . . Just like the donkey has within it to be created [but was not created by God] . . . but was left to people to create it.[17]

[16] For more on this, see "Jewish Law and the Obligation to Enforce Secular Law," *The Orthodox Forum Proceedings VI: Jewish Responsibilities to Society,* ed. David Shatz and Chaim Waxman (1997) notes 31–33.

[17] Rabbi Judah Luria of Prague (*Maharal Me-Prague*), *Bu'ir Hagolah* (Jerusalem 5731) 38–39.

Maharal's point is that human creativity is part of the creation of the world, and this creativity changes the world, which is proper—even when such creativity (if done by Jews) violates substantive Jewish law. Who, then, should engage in this divine duty? Gentiles are directed to fix the world in this way.

Halakhic foundations of Jewish self-governance

At the beginning of this century, Nathan Isaacs wrote an essay on "Study as a Form of Worship," which described the unique fact that, in Judaism, study, in addition to prayer, is a most honorable way of expressing and fulfilling one's love of God. He referred, needless to say, to the study of the Bible, Talmud, and other sacred writings.

For many Jews, even in modern times, this is the ideal, to spend one's life studying Torah. The less relevant the study to the art of living or the advancement of human knowledge, the more it fulfills the religious goal of learning Torah exclusively for Torah's sake. Today the study of Jewish law by most Jews who engage in it is for that reason. One example of the irrelevancy of the study is impressive. Few Talmudic texts and themes are as popular as Jewish criminal law. Yet, even though texts and themes accommodated more to the realistic requirements of the social order have become obsolete, the fact is that ancient and medieval Jewish society required governance by authorities charged with the maintenance of public order and safety. For example, the biblical rules of evidence too often made possible avoidance of prosecution and punishment. Consequently there was resort to a virtually parallel system of law. Arnold N. Enker described this transition. He wrote:

> Jewish criminal law for Jews functions on two tracks. One, which for want of a better term might be called the purely religious track, concerns man's relation with God. The religious courts have exclusive jurisdiction in this area. Special procedures and unusual rules of evidence and of substantive law apply in these cases and serve to limit punishment of offenders to the most serious and brazen acts of open defiance of God's will. The second track involves the day-to-day concerns of law enforcement and the protection of the social order. On this track, which is administered apparently primarily by the king's courts, although the religious courts also have such jurisdiction. The courts are mostly free to apply whatever rules of practice and evidence they see fit, to evaluate the evidence free of restraint by formal rules and to punish

> the defendant as seems to them appropriate to accomplish the protection and preservation of the social order.[18]

The parallel system of law, called "The King's Law," is based on Joshua 1: 18, which states that the people invested Joshua with the power to give orders and to impose the death penalty on anyone who defied him. This blanket grant of power later became the basis for many a medieval monarch's claim that his right to rule derived from the people. In the same period, Jewish communities in Europe hesitated to arrogate unto themselves such power. They preferred another biblical source upon which to predicate their power to exercise control over the economy, and in this way, they managed to maintain law and order.

The Talmud understood that, at Ezra 10:8, the people had granted Ezra the power to issue orders, disobedience of which would result in forfeiture of all of an offender's property. This grant of power became the justification for the rule that a duly constituted rabbinical court can declare anyone's property ownerless and also transfer it to another. It was because of this power, one view in the Talmud holds, that Hillel was able to avoid the cancellation of debts in the Sabbatical year. He had created the *Prozbul*[19] and so provided a way for creditors to collect from debtors, which in effect was an expropriation of debtors in favor of creditors. Circumstances warranted his innovation. It was not a capricious ruling, and it was for the benefit of the debtors to make credit available in the years preceding the sabbatical. But, nonetheless, it was revolutionary legislation. In the Middle Ages, this power enabled the Jewish communities—and their councils and judiciary—to govern, to impose taxes and to collect them, as well as to punish offenders against all laws of the community. The combination of the two powers—that of the "King's Law" and that of declaring property ownerless—made it possible for communities to legislate in many areas pertaining to the economy, such as rent control, prohibiting resort by litigants to non-Jewish courts, punishment of informers, etc. In a general way, biblical law pertaining to virtually every area of commerce and industry could be updated to address general or local needs.

[18] Arnold N. Enker, "Aspects of Interaction between the Torah Law, the King's Law, and the Noahide Law in Jewish Criminal Law." *Cardozo Law Review* 12 (1991) 1145.

[19] Prozbul refers to a document that transfers debts to the courts so that they may be collected after the sabbatical year.

Issues of Contemporary Halakhah

More than any generation in the last hundred years, the current one has witnessed the revival of the study of *halakhah*. The classical Talmud-based *yeshivot* promote intense study of Jewish law through the classical methodologies of analysis, analogy, and precedent, with a particular focus on the codification of normative Jewish law. Indeed, a new legal genre, the Jewish law hornbook, has emerged to become a significant form of literature within the field of modern Jewish law. Classical commentaries on Jewish law were principally devoted to the Shulhan Arukh, which in many respects had become the authoritative standard of *halakhah*; consequently they were organized according to its chapter and content divisions. In contrast, these recent works present the *halakhah* on a single topic in a systematic, rule-based manner, with references and variant opinions in the notes. Such hornbooks have been published on both significant and less significant topics.

The re-establishment of the state of Israel has created a rabbinical court system with adjudicative legal authority of the type not seen since the Golden Age of Spanish Jewry. This has given rise to additional types of literature in Jewish law. While there were always responsa, there now emerges a body of formal case law, reported in the rulings of rabbinical courts. Particularly in light of the decrees of Abraham Isaac Hacohen Kook (1865–1935; the first Chief Ashkenazic Rabbi of Palestine) and Isaac Halevi Herzog (1888–1959; Chief Ashkenazic Rabbi of Israel, 1937–1959) and the creation of an appellate rabbinical court system, there is now a significant source of normative Jewish law for areas in which the rabbinical courts have jurisdiction, such as family law.

The study of Jewish law in the state of Israel has taken yet another direction as well. There are those who argue that Jewish commercial law should form the basis for modern Israeli law, and that Jewish financial law exists as a self-standing commercial legal code, awaiting implementation in Israeli society. Recently advocated by Justice Menachem Elon (1923–), the *mishpat ivri* ("the Law of the Hebrews") school argues that Jewish law can be divided into sections and that secular society may accept as binding only its commercial or family portions. Individuals who accept this approach focus almost exclusively on those areas of Jewish law applicable to a secular society. Still, while a number of modern Israeli statutes originate in Jewish law, one would be hard pressed to claim that the *mishpat ivri* school has yet succeeded in its goals. *Mishpat ivri*

has, however, been a significant source of scholarship in the Israeli academic study of Jewish law.

In modern biomedical ethics, Jewish law and ethics have been significant, unlike most other areas of normative *halakhah*, which have had little impact on secular ethics and values. *Halakhah* relating to bioethics has become an accepted partner in general discourse, even in the American Diaspora. In all areas of current bioethical debate and scholarship, including abortion, neo-natal testing, and cloning, the Jewish legal tradition has played an active role and has had a significant impact on the development of the general ethical discourse.

Other areas of Jewish law, however, are developing more slowly. For example, the Jewish court, or *beit din* system, has never been fully functional in the diaspora and retains a weak and uncertain status. Thus, although Eastern European Jewry could claim a well-established *beit din* system as late as 1920, America cannot, and even in Israel *beit din* appears limited to those areas in which there is a clear governmental mandate.

In all, however, it is an exercise in futility to ponder, as (surprisingly) many have and still do, whether Jewish law has a future. First and foremost, so long as there will be Jews practicing Orthodox Judaism, Jewish law will be studied for its guidance in all matters. One must never forget that the literature of Jewish law is integrated: civil law, criminal law, public law, the law of prayer and holidays, family law all interface with each other, and new religious problems may be resolved from all the precedents available. *Halakhah* remains the bedrock of morality, law, and justice for the Jewish people throughout the world; it remains "the path" that Jews travel along on the journey through religious life.