JERUSALEM – CITY OF LAW AND JUSTICE

JERUSALEM CITY OF LAW AND JUSTICE

Edited By

NAHUM RAKOVER

The Library of Jewish Law

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Ministry of Justice

The Jewish Legal Heritage Society

PROCEEDINGS

of the Third International Seminar on

The Sources of Contemporary Law:

Jerusalem – City of Law and Justice

Jerusalem, July 1996

P.O.Box 7483 Jerusalem 91074
Printed in Israel 1998

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PREFACE

The volume herewith presented to the reader comprises the proceedings of an international seminar on "Jerusalem – City of Law and Justice," held at Jerusalem in June 1996. Most of the papers delivered at the sessions are reproduced here, some in translation from the original Hebrew.

This was the third in a series of seminars on "The Sources of Contemporary Law." The first seminar in the series dealt with "The Bible and Talmud and their Contribution to Modern Legal Systems," and the proceedings were published in a volume entitled *Jewish Law and Current Legal Problems*. The topic of the second seminar was "Maimonides as Codifier of Jewish Law," and the proceedings were published under that title.

Like its predecessors, the present seminar was held under the auspices of the Israel Ministry of Justice, the Hebrew University of Jerusalem, the Israel Bar and the New York County Lawyers' Association, presided over by Mr. Klaus Eppler. Participants included approximately 200 men and women of different religions – Jewish, Christian and Muslim – from different countries.

The opening session was held in the official residence of the President of Israel, with the participation of some of the most distinguished representatives of this country's judicial system, judges, rabbis and scholars. The greetings by President Weizman and other guests at that session appear at the beginning of the volume, followed by the open-

ing lecture of the seminar, by Chief Rabbi and President of the Supreme Rabbinical Court Eliyahu Bakshi-Doron.

The organizing committee received a great number of lecture proposals from both Israel and abroad. For that reason, it was decided to hold parallel sessions, in English and Hebrew, on some days of the seminar.

The topic of the seminar, "Jerusalem – City of Law and Justice," was chosen as part of the celebration of the three thousandth anniversary of Jerusalem as capital of Israel. A few sessions were accordingly devoted to Jerusalem itself, its legal and international status and its position in the different monotheistic faiths. Some papers discussed the Temple Mount and rights of access to it and prayer there. Other sessions dealt with the ideas represented by Jerusalem as "City of Law and Justice" – equity and human dignity, as well as ethics in the fields of administration and medicine. A few lectures considered constitutional matters and questions relating to Israel as a Jewish and democratic state.

Some time after the seminar, one of the most distinguished world figures in Jewish Studies, Professor Isadore Twersky, passed away. Professor Twersky was a leading member of the Jewish Legal Heritage Society and served on the Advisory Committee of the seminar. The society derived considerable encouragement from his evaluations of its various research projects and of its activities for the advancement of Jewish Law in Israel and in the world at large. *Yehi zichro baruch.*

An important contribution to the preparation of this seminar was made by Professor Charles Philips, who also helped in the first stage of the editorial work for the present volume. Mr. David Louvish was responsible for some of the editorial work, and Mr. Moshe Kaplan assisted in preparing the material for the press. I am indebted to them all.

N.R.

Jerusalem, Israel
5758 – 1998

OPENING ADDRESS

Nahum Rakover

Mr. President; President of the Supreme Rabbinical Court R. Eliyahu Bakshi-Doron; your Honors President of the Supreme Court Prof. Aharon Barak, State Comptroller Mrs. Miriam Ben-Porat and Justice Moshe Landau; Chief Rabbis of Jerusalem and Haifa; Minister of Justice Prof. Yaakov Ne'eman; President of the Israel Bar Association Mr. Dror Hoter-Ishai and President of the New York County Lawyers' Association Mr. Klaus Eppler; Supreme Court Justices past and present, including our friend and colleague Justice Haim H. Cohn; Religious Court Judges; Rabbis, Magistrates, Ladies and Gentlemen.

This is the third in a series of seminars devoted to the contribution of Jewish Law to modern legal systems. Like its predecessors, this seminar is being held under the auspices of the Israel Ministry of Justice and under the aegis of the Hebrew University of Jerusalem, the Israel Bar Association and the New York County Lawyers' Association. The participants have come from fourteen countries and are of different faiths – Jews, Christians and Muslims.

Our topic is *Jerusalem – City of Law and Justice*. There is surely no need to elaborate on the special relationship between Jerusalem and Law, Jerusalem and Justice. It was the Jewish people who gave the world the basic values of law and justice, of human rights. Our object in this seminar is to stress the contribution of Jewish sources not only to the classical legal systems – that contribution is now a

matter of common knowledge – but also, and in particular, the vital significance of Jewish law and sources for modern jurisprudence, here and now. We tend at times to place greater emphasis on what we have received from others, and less on what we have and what we have given to other nations. I would like to think that one outcome of this gathering, as of its predecessors, will be the realization that the legal systems of many other nations have taken up and assimilated ideas originally propounded in Jewish Law; in many cases, our own system has given birth to ideas that other nations were at first unwilling or unprepated to embrace. I am indeed convinced that much of contemporary Jewish Law will ultimately find its way into the legal systems of the world at large.

Jerusalem – that same Jerusalem which is constantly occupying the forefront of the national and international stage – has always been the City of Law and Justice. I do not wish to bore you, and neither would it be proper to mention only some of our speakers. Nevertheless, I would like to refer specifically to one lecture, that of our distinguished visitor, Professor Abdul Hadi Palazzi of Rome. Professor Palazzi, Director of the Istituto Culturale della Comunità Islamica Italiana in Rome, will speak on the sanctity of Jerusalem to the Jewish people. The sources that he intends to quote, from both the Bible and the Koran, indicate that, just as Mecca is sacred to Islam, so is Jerusalem sacred to Judaism. He sees no contradiction in the fact that Jerusalem, also sacred to the Muslims, should be under Jewish sovereignty. As he tells us, he is no politician; he is merely giving us the benefit of his opinion as a theologian, a religious scholar: there is nothing wrong, he says, with Jerusalem being the undivided capital of the Jewish State, under Israeli sovereignty. Here is ample illustration of my conviction that our ideas may be corroborated from various directions. And this is, I repeat, only one of the topics to be discussed here.

I am indebted to President Weizman for hosting the opening session of the seminar. Let me express the hope that our discussions will be interesting and fruitful.

GREETINGS BY THE PRESIDENT OF ISRAEL

Ezer Weizman

Ladies and Gentlemen,

Far be it from me to try and compete with all these words of wisdom. I would just like to welcome this distinguished company to the residence of the presidents of Israel. As a layman, I must say that I, too, have sensed a certain reluctance on the part of many Israelis to acknowledge our great debt to Jewish sources, to the roots of our unique heritage. For that reason I am particularly happy to host the opening of your important conference, for what could be more basic to Jewish culture, to that Jewish heritage, than Jewish Law? Jewish Law is the very foundation of our existence here.

My subjective impressions, looking back on my life here, tell me that when people of my generation spoke of law, they might have been referring to Ottoman law, English law, and the like; they were rarely concerned with any attempt to forge a legal system of our own, which would serve the state for which we were all working. And even after the foundation of the State of Israel, we continued to rely on Ottoman legal institutions, on British laws, for better or for worse. Perhaps that is why the topics you are about to discuss are so significant. For we are now on the eve of the 21st century, and we must think of the face of this country in 20 or 30 years, in the middle of the next century. Will we still be able to speak of it as a "Jewish State"? What is meant by an "Israeli State"? a "Hebrew State"? While these are all concepts with which we grew up, they merit care-

ful thought; and while such matters may begin with the use of Hebrew and Jewish culture in such areas as poetry, literature, theater, and the like, nowhere are they more prominent than in the realm of law.

If this conference should indeed contribute to the consolidation of the State of Israel as a Jewish State, it will have fulfilled its primary purpose. I wish you all the most fruitful and useful discussions.

GREETINGS BY THE PRESIDENT OF THE SUPREME COURT OF ISRAEL

Aharon Barak

Mr. President, Ladies and Gentlemen.

Jerusalem has thousands of faces: heavenly Jerusalem and earthly; spiritual Jerusalem and material; Jerusalem of the sacred and of the profane; Jerusalem of stone and of the heart; Jerusalem of the Jews and of other faiths; Jerusalem of the Orthodox and of the secular; Jerusalem of the extremist and of the moderate; Jerusalem of hatred and of brotherhood; Jerusalem of destruction and of renaissance. Everyone has his or her own Jerusalem.

I came to Jerusalem at an early age. My whole world was shaped in Jerusalem: my Jerusalem was that of the War of Independence and of the Six-Day War; it was divided by a wall and surrounded by a wall; it was the seat of learning and scholarship, of government and justice. For me, Jerusalem is indeed the city of law and justice. It was here that I studied law and taught law; here I have promoted the rule of law and have contributed to the consolidation of the law. This is the Jerusalem of which Isaiah prophesied: "I will restore your magistrates as of old, and your counselors as of yore. After that you shall be called City of Righteousness, Faithful City. Zion shall be saved by justice, her repentant ones by righteousness." My Jerusalem is the City of Justice, the city of magistrates. "There the thrones of judgment stood." Thus it was in the past, when judges occupied the thrones of judgment in Jerusalem, and thus it is today: Jerusalem is

the home of the Supreme Court of Justice, of the Supreme Rabbinical Court.

Justice is done in Jerusalem. The Supreme Court, since its very foundation at the inception of the State of Israel, has been engaged in that task, handing down objective and fair judgment in disputes brought before it. It treats all equally, left-wing and right-wing, secular and religious, Arab and Jew, man and woman, occidental and oriental, young and old. The Supreme Court has maintained the rule of law, jealously guarded human rights, developed law and created one of the most advanced legal systems in the world – indeed, ahead of many western countries. That is the case with regard to such areas as contracts and torts, in constitutional and administrative law.

As far as the establishment of justice by the Supreme Court is concerned, the goal of being "a light unto the nations" has been largely realized. Throughout the years of its existence the institution has successfully shaped a system based, on the one hand, on democracy and liberalism, and, on the other, on the Jewish values of Israel. Through years of legal deliberation, it has laid the foundations for a synthesis of Israel's values as a Jewish state and its values as a democratic state. Its decisions give expression to Jewish heritage, political Zionism and our basic conceptions of majority rule and the rights of the individual. It has weighed all these principles in light of the basic social perceptions of our nation, expressing the profound social consensus of Israeli society in all its diversity and variety. If the law going forth from Zion is not sufficiently known abroad, that is only because of linguistic barriers.

I have no doubt that we will continue this work in the future, protecting the basic values of the State of Israel, developing its unique character as a Jewish state, its heritage and its Zionism, realizing its most inherent essence as a democratic country upholding human rights and implementing the rule of the people. Our paramount ideal should be human dignity. With this ideal constantly before us, we shall fulfill our mission as a Jewish state, always conscious that human dignity was evolved in our own heritage, in the understanding that all dignity emanates from the Creator – it is no accident that the same Hebrew word, kavod, is used for both "dignity" and "Divine

Glory." Thus, human dignity derives from Divine honor, for humans were created in the image of God: "And God created man in His image, in the image of God He created him." When we develop and uphold human dignity, we develop the most important, major human right, which should be upheld and protected by every democracy. Indeed, by placing human dignity at the center of our conceptual world, we are achieving that vital synthesis between our character as a Jewish state and as a democratic state. Let us nurture unity and tolerance, raising a banner with which all sectors of Israeli society can identify, the most precious banner of all. Thereby we shall fulfill the ancient prophecy, "for the law shall come forth from Zion."

May this seminar justify the title Jerusalem – City of Law and Justice, by successfully expressing this aspect of the uniqueness of Jerusalem, the city in which the rule of law is governed by the desire for true justice.

GREETINGS BY THE MINISTER OF JUSTICE

Ya'akov Ne'eman

Your Excellency, President of Israel, Mr Ezer Weizman; Your Honor, President of the Supreme Court, Prof. Aharon Barak; Chief Rabbi and President of the Supreme Rabbinical Court, Rabbi Eliyahu Bakshi-Doron; my friend and colleague, Deputy Attorney General Prof. Nahum Rakover, the driving spirit behind this important seminar; Rabbis and Judges; Your Honor Justice Miriam Ben-Porat, whom I am honored to count among my teachers; Your Honor Justice Haim Cohn, Dr. Zerah Warhaftig, and other trailblazers of the rule of Jewish law in the State of Israel; friends and colleagues, and all participants in this seminar.

I would like to say a few words about the importance of Jewish Law in Israel's legal system. Before that, however, I must follow the teaching of our Sages that one should always begin one's greetings with a tribute to the host. Allow me, therefore, to offer my thanks to the President of Israel, who has offered us his hospitality on this important occasion. Indeed, is there any other nation in the world whose president could lend his residence for the opening session of a seminar touching on millennia of Jewish history, on the cultural and religious heritage that has brought us back to our homeland after so many years?

Regrettably, Jewish Law has not achieved its proper place in the Israeli legal system. Instead of imbibing the pure waters of our sources, we have sought refreshment in gentile realms. This has pro-

duced various absurdities; for example, there are legal principles that we have received in the context of English law, such as non-discrimination and equity, which English law itself absorbed from the primary source of Jewish law. The same applies to the basic principle of the "rule of law," which implies the superiority of the judicial system and the interpretive privileges of the judiciary – all these derive from Jewish Law, as has indeed been acknowledged more than once by foreign sources as well.

The failure to rely on our own sources also extends to broader principles, of ethical and other import. Justice Barak, in his greetings, referred to the basis of human dignity in the book of Genesis, which celebrates the Divine image in humankind; and one can also trace to the Bible such ideas as the protection of freedom, of the status of women, of the basic right to life, and so on. But in all these contexts we constantly refer to other legal systems! The Foundations of Law Act, passed by the Knesset in 1980, which directs judges to consider their decisions in the light of Jewish traditional principles of freedom, justice, equity and peace, has unfortunately failed to find its proper place in this country's legal practice. It has opened a narrow crack in the wall – no more as yet. Few attorneys appearing before our courts cite Jewish Law in a routine fashion; and the courts, for their part, do not resort to this rich fountain.

Let me quote some of our most illustrious legal minds on the matter.

Justice Barak, in LCA 7504 – better known as Yemin Yisra'el – offered some important comments in this connection, from which I quote only one passage:

> *I accept the interpretation of the Israel government registrar of parties, that the group known as Yemin Yisra'el has one overriding goal: that legislation in the State of Israel should seek inspiration in Jewish Law. This goal by no means contradicts the existence of Israel as a democratic country. Indeed, Justice Moshe Landau has called Jewish Law a treasure of our national culture (Mishpatim 1, 305). It has accompanied the Jewish people throughout its long history. "The Jewish nation has treated Jewish law, throughout all periods and in all parts of the*

> *Diaspora, as a unique possession, as part of its most basic cultural property" – as declared by the late Justice Agranat in Skornik v. Skornik (P.D. 8, 177). To be inspired by Jewish Law in consolidation of legislation and in its interpretation is fully consistent with the fact that we are at one and the same time a Jewish state and a democratic state.*

I agree and have nothing to add, other than the earnest desire that these ideas be brought to fruition.

As an anecdote, lest I sound too serious, I would like to cite a story attributed to the former Deputy President of the Supreme Court, the late Justice Shneour Zalman Heshin. Once, while serving as a member of the Committee for the Appointment of Judges, he disqualified a candidate for the judiciary on the grounds that the person in question had exhibited rank ignorance of a basic concept of Jewish Law – he thought that the four shomerim (bailees) of the Talmud were the leaders of the Jewish Watchmen's Association (ha-Shomer) in the Galilee...

Addressing the elite of Israel's legal system here today, let me adjure you to return to our roots, our own sources. We shall then drink from pure waters and indeed make Jerusalem the City of Law and Justice.

GREETINGS
BY THE CHAIRMAN OF THE ISRAEL BAR

Dror Hoter-Ishai

Dear friends and colleagues of the Israel Bar, distinguished ladies and gentlemen. On behalf of The Israel Bar, I am honored and delighted to welcome all of you here, in our eternal capital, Jerusalem. The subject of this congress is illuminated by the three-thousand year long history of this city, whose unique existence symbolizes for the whole world that the quest for universal justice, the maintenance of law and order, the constant effort to resolve disputes in good faith, may lead us all to a better and peaceful world.

This congress is taking place while we here, in Israel, are trying to fulfill the memorable prophecy of a world in which bayonets will one day become spades. Our late Prime Minister, Itzhak Rabin, may his soul rest in peace, was murdered in the very midst of his struggle to achieve peace and bring security to the state of Israel. We will never forget his role as the commander of the troops that broke the siege of Jerusalem in the War of Independence, and as Chief of Staff during the Six-Day War, when the city of Jerusalem was reunited for ever.

Perhaps it is difficult for most of the world to understand why it is that here, in the center of the old world, in the cradle of civilization, people and nations are still fighting over a piece of land whose area is merely a tiny portion of that of, say, Syria or Iraq. For the Jewish people, however, there is nothing but the Land of Israel, whose area, from the Mediterranean Sea to the Jordan, is less than 28,000 square

kilometers – only 2.5% of the area of Egypt, 14% of that of Syria and one quarter that of Jordan.

The city of Ir Shalem, or as it is now called, Jerusalem, was founded on a hill not far from here, near the Western Wall. Later, it became the center of King David's kingdom. Since then, the city of Jerusalem has developed and expanded. Over the last 2,000 years, many nations and religions have done their utmost to strengthen their control on this City. Thirty years ago, we succeeded in unifying it, and since then we have been developing and rebuilding it as our eternal capital.

It has always been our ultimate goal to seek peace, to prevent wars and pointless loss of life. We believe in solving problems by peaceful means. It was our prophets who, in the Book of Books, foresaw the day when bitter enemies would "beat their swords into plowshares and their spears into pruning hooks... Nation shall not take up sword against nation, they shall never again know war." The vision of our prophets, according to which we are trying to conduct our lives here and to put this country on a firm foundation, foresaw the entire world as a pleasant place to live in – where "the wolf shall dwell with the lamb, the leopard lie down with the kid... In all of My sacred mount nothing evil or vile shall be done."

I hope that this seminar will be a step forward in the fulfillment of those prophecies, so important not only for us but for many nations all over the globe, where people are still sharpening their bayonets instead of turning them into spades.

I wish you all a pleasant stay in Israel and hope that your discussions here will be interesting and fruitful, so that this congress will satisfy your expectations. Thank you all for your participation.

Jerusalem and the Temple Mount

THRONES OF JUDGMENT AT YOUR GATES, O JERUSALEM

*Eliyahu Bakshi-Doron**

Jerusalem is first mentioned in the Torah as 'Shalem': 'And King Melchizedek of Shalem...' (*Gen.* 18:14), and Onkelos *ad loc.* translates 'And King Melchizedek of Jerusalem.' The name is indeed fitting, for the very essence of the city is perfection (Heb. *shelemut*) and peace (*shalom*).

King David, who made Jerusalem his royal capital, defined this perfection and completeness as 'a city knit together' (*Ps.* 122:2). There are two explanations of this definition. First, 'a city knit together' means that the city knits, or links, Earthly Jerusalem with Heavenly Jerusalem (*BT Taan.* 5a). Alternatively, Jerusalem is the city that brings all Israel together in friendship and partnership (*JT Hag.* 3:6). These explanations are not distinct: they complement one another, for Jerusalem, as the gate of heaven, is the spiritual center, the place where the Lord ordained blessing, the place that links and bridges the gap between Earth and Heaven, between Earthly and Heavenly Jerusalem; and that spiritual center of holiness is also the social center, bringing all Jews together in true comradeship.

As to Jerusalem being the spiritual center, uniting the nation, we read further on in the same psalm: 'There the tribes would make pilgrimage, the tribes of the Lord – as was enjoined upon Israel – to

* Rishon-Lezion, Chief Rabbi of Israel and President of the Supreme Rabbinical Court.

praise the name of the Lord. There the thrones of judgment stood, thrones of the house of David.' Here lies Jerusalem's perfection, the bond between Israel and their Heavenly Father which brings all Israel together, as we read, again in that same psalm: "Pray for the peace of Jerusalem; may those who love you prosper. May there be peace within your walls, security in your towers." Once again, King David emphasizes the perfection of Jerusalem in two aspects, religious and social: "For the sake of my kin and friends, I speak peace" – the social aspect, "for the sake of the house of the Lord our God, I seek your good" – the religious.

As a royal city and spiritual center that knits all Israel together, emphasis has always been placed in Jerusalem on social right and justice, "There the thrones of judgment stood, thrones of the house of David" – at the gates of Jerusalem, at the entrance to the Temple Mount, where the Lord ordained blessing, there stood the thrones of justice, thrones of the house of David, to make it known to all and sundry that the basis of perfection is justice, and one can neither bring all Israel together, nor reach the Gate of Heaven and unite Heavenly and Earthly Jerusalem, without establishing social right and justice. That is why the Sanhedrin and the Great Court sat in the Chamber of Hewn Stone at the Gates of Jerusalem. Namely, for us there is no difference between the Holy Temple and the Temple of Justice, so that the thrones of justice stand at the Gates of Jerusalem. But it is not just a question of location: authority, too, is indivisible, so that the thrones of justice are also the thrones of the house of David. The king, the source of authority, is also the judge, and it was the kings of the house of David who occupied the thrones of judgment – that same King David who ruled in Jerusalem presided over the Sanhedrin, and it was said of him, 'and David executed justice and righteousness among all his people' (*II Sam.* 8:15). His son Solomon followed in his footsteps: the honor, authority and power of his royal throne was vested in his judicial role, for in his wisdom he sat in judgment and dispensed justice.

Jerusalem's position as spiritual center, bringing all Israel together, gave it the name 'City of *Tzedek*,' which may be translated equally well as 'City of Justice' or 'City of Righteousness.' This was

so even before David ruled there and seated the Sanhedrin at the gates of Jerusalem: Onkelos translates 'King Melchizedek of Shalem...' (*Gen.* 18:14) as 'King Melchizedek of Jerusalem,' for 'Shalem' is identical with Jerusalem, as we learn from Scripture, 'Shalem became His abode, Zion, His dwelling-place' (*Ps.* 76:3). Nachmanides, commenting on the verse in Genesis, explains that 'Melchizedek' is not a proper name, but designates the person so named as king (*melekh*) of the place called *Tzedek*, that is, Jerusalem, as the prophet calls it, the city 'that was filled with *tzedek*... City of *Tzedek*' (Isaiah 1:21, 26). The Midrash, too, says of Jerusalem, 'Jerusalem is called *Tzedek*, as Scripture says, "...that was filled with *tzedek*"' (*Gen. Rabba* 43). The Midrash there goes on to say: 'This place (Jerusalem) makes its inhabitants just and righteous.' Let us examine this definition of Jerusalem as 'City of *Tzedek*,' in order to determine the inner meaning of *tzedek* and better to understand the perfection of Jerusalem.

At first glance, one might think that *tzedek* means the same as *din*, 'justice' in the strict, legal sense; and indeed the Torah instructs judges to 'decide justly between any man and his fellow man' (*Deut.* 1:16) and to pursue justice with all their might (*ibid.* 16:20). Closer attention, however, indicates that the word has a more profound meaning: *tzedek* also signifies honesty and integrity; and it also means not only strict justice but what we call in Hebrew *tzedakah*, that is, justice guided not by the letter of the law but by righteousness, compassion, compromise, graciousness.

Jerusalem is defined by Isaiah (1:21) as the City of *Tzedek*: "...the faithful city that was filled with justice, where *tzedek* dwelt," and when he complains of the growing injustice and social corruption that ultimately caused the destruction of the city, the prophet stresses that the very basis for Jerusalem's existence is right and justice. Consequently, redemption will come only when 'Zion shall be saved by justice, her repentant ones by *tzedakah*, righteousness' (*ibid.* v. 27). It is noteworthy that the Bible invariably speaks of Jerusalem, the City of *Tzedek*, not in terms of justice alone, but in terms of justice with compassion.

The sages of the Great Assembly formulated a special benediction

in the *Amidah* prayer, entreating the Almighty to establish justice among the people of Israel: 'Restore our magistrates as of old and our counselors as of yore.' The wording was inspired by the passage in that same chapter of Isaiah (1:26): 'I will restore your magistrates as of old and your counselors as of yore; after that you shall be called City of *Tzedek*, Faithful City.' The wording of the prayer, the style of the verse, is noteworthy. It is not enough to have our magistrates restored as of old. Besides honest judges, we specifically plead for counselors; once again, the implication is that *tzedek* does not consist merely of law and justice in the strict sense – the judge, whose task it is to dispense justice and interpret the law, must have good counsel. The benediction ends with the words, 'Blessed are You, O Lord, King Who loves righteousness and justice' – again, righteousness and justice. Indeed, very often in the Bible, *mishpat*, justice, is paired with *tzedakah*, righteousness. Thus, God says of Abraham: 'For I have singled him out, that he may instruct his children and his posterity to keep the way of the Lord by doing righteousness and justice...' (*Gen.* 18:19). We have already cited the verse 'and David executed justice and righteousness among all his people' (*II Sam.* 8:15); and, conversely, David says of the Holy One, blessed be He, 'Mighty King Who loves justice, it was You Who established equity, You Who worked justice and righteousness in Jacob' (*Ps.* 99:4). Moreover, the prophet makes redemption conditional upon 'Observe justice and do righteousness, for soon My salvation shall come...' (*Isa.* 56:1). And we have already quoted Isaiah's prophecy that 'Zion shall be saved by justice, her repentant ones by righteousness' (*ibid.* 1:27).

Human beings see justice and righteousness as distinct entities. Justice is the responsibility of society as a whole, while righteousness, *tzedakah*, is the concern of the individual. Justice observes the letter of the law, while righteousness would appear to set it aside at times. Justice is dictated by law and order, which originate in truth and integrity; while righteousness is founded on human emotion and will. In the religious view, however, the two must always be interwoven: there is no justice without righteousness, nor righteousness

without justice. 'King Who loves righteousness and justice' – God loves justice and righteousness equally.

But how should we understand such love? Righteousness is indeed a great virtue; one should cling to it and love its deeds. But what is there to be loved in justice? Justice is a necessity; perhaps we would be better off without disputes and quarrels – there would then be no need for justice. Indeed, the fact that the judges and the courts are kept busy is not necessarily a sign of a city of *tzedek*, a faithful city. On the contrary, it attests to serious social problems. Now Jerusalem is praised for being 'full of justice,' a city that creates work for the courts – what is there to love in such justice? If we are to love something, surely it is the peace and friendship that are the end result of justice, not justice itself!? The truth is that these strictures hold only when justice is considered a value in and of itself, not combined with righteousness. Such justice, in human terms, implies preservation of rights, the rights of both individual and society. Indeed, without justice the world, society, cannot exist, as Scripture tells us: 'By justice the King sustains the Earth' (*Prov.* 29:4) – justice was partner to Creation itself. But justice alone cannot build the world; besides justice, one needs righteousness, generosity, compromise, mutual compassion. And that, too, we learn from Scripture: 'The world was built with compassion' (*Ps.* 89:3).

In sum: justice, though one of the foundations of social existence, is not the sole such foundation. Our Sages have said, 'The world is founded on three things: on justice, on truth and on peace' (*M. Ab.* 1:18) – from which we learn that truth is not always compatible with justice, and surely not with peace.

In the religious view, justice is not always entrusted to man, as the Torah tells us, 'for judgment is God's.' It is incumbent upon us to do not justice alone, but justice and right together; for we can never be sure of the truth: the World of Truth is not this world of ours on Earth, but the World of Ultimate Truth. No human judge, even the most learned and honest, is capable of achieving pristine truth. A judge can – and must – endeavor to get at the truth; but we humans are limited in our vision, our perceptions, our understanding. Our knowledge of the past is incomplete; we do not even possess all data

touching on the present, and the future is surely a closed book for us. In consequence, the judge, whose information is incomplete, cannot do more than strive for the truth but can never exhaust it. The Torah commands, 'Justice, justice shall you *pursue*,' but there is no categorical imperative such as 'Do justice,' since flesh and blood can do no more than make every possible effort to achieve justice; it is not humanly accessible. On the other hand, we are enjoined, 'Keep your distance from falsehood' (*Ex.* 23:7) – only 'keep your distance,' for it would be pointless to command human beings to avoid falsehood in absolute terms; that is simply not within their power. Hence, there is only one true judgment, and that is delivered by the Lord, Who knows everything and holds everything in His hand, and therefore Scripture teaches us, 'for judgment is God's' (*Deut.* 1:17). Or, as we read elsewhere: 'The Lord of Hosts is exalted by judgment, the Holy God proved holy by righteousness' (*Isa.* 5:16), implying that even absolute truth, the very seal of the Holy One, blessed be He, is a combination of right and justice, that beside the Throne of Justice there stands a Throne of Mercy as well.

Were justice, the law, nothing but a constitution, preserving the rights of the individual and the group, it would be vital and indispensable; but there would be nothing there to love, certainly there would be no special merit in a city full of justice. Real justice, however, as a religious concept, goes hand in hand with *tzedakah*, right and righteousness. It consists above all in striving for *Tzedek* as a supreme value, not merely in upholding civil or other rights. Such justice is indeed worthy of love, it is supreme, because it involves the recognition of *tzedek* and the perfection of the entire world.

A basic principle of justice is preservation of the rights of the individual and of society as a whole, the fundamental rule being, 'What is mine is mine, and what is yours is yours' (*M. Ab.* 5:10). The very existence of society requires such notions as private ownership, modes of acquisition, territorial rights, as well as laws and regulations that define these notions. But that particular rule, 'What is mine is mine, and what is yours is yours,' basic as it is in the realm of law, is said by some to be an attribute of Sodom, as we learn from the Mishnah. Indeed, proper as it is as a legal rule, it is deficient

from the viewpoint of religious faith – it surely does not build up society or work for its benefit. In the religious view, it is not 'What is mine is mine etc.' that counts, but rather 'Give to Him of His own, for you and yours are His' (*M. Ab.* 3:7). In actual fact, even what is yours is not really yours, but it belongs to the Almighty, Who gives it to you and may take it back; He demands that you treat your possessions in a spirit of not only *mishpat*, justice, but also *tzedek*, righteousness. This is the underlying meaning of the rule, 'Judgment is God's': justice has the power to demand not only that one behave according to the letter of the law, but also that one act righteously, that strict justice and truth be integrated. When one is guided not by 'What is mine is mine and what is yours is yours,' but by 'Give to Him of His own, for You and Yours are His,' righteousness is no longer an act of grace or compassion, but a categorical imperative, in line with the criteria of the law. As our Sages teach us, 'Whosoever closes his eyes to righteousness – it is as if he were committing idolatry' (*BT Ab. Zarah* 68a). That is to say, a person who ignores righteousness is not only lacking in compassion, insensitive and inconsiderate – his faith is deficient, for he is denying the rule that everything is His, and you and yours are His, he is evading his responsibility.

In sum: The thrones of justice at the gates of Jerusalem signify not only the importance of justice; they convey the idea that the gates of holiness cannot be attained without social well-being and perfection. But we can say more: they also tell us something about the essence of justice, about the thrones of the house of David. Justice is not merely a basic value of social well-being; it must be melded with righteousness, founded on the maxim, 'for justice is God's.' Our Divine King loves right and justice and that is the very definition of *tzedek*, which embraces both justice and righteousness.

An instructive example of such true justice may be found in a Rabbinic saying about the destruction of Jerusalem. Our Sages said, 'Jerusalem was destroyed only because judgments were delivered there on the basis of the law of Torah' (*BT Baba Mezia* 30b). The Talmud indeed asks, what is wrong with 'the law of Torah' – surely that is most desirable!? Should judgments be based on laws of thievery!?

The answer is: 'Jerusalem was destroyed only because judgments were delivered on the *sole* basis of Torah law, never going beyond the letter of the law with an eye to mercy and compassion.'

In human law, strict justice is the rule; but when justice is God's, it is not the letter of the law that is binding but also truth and well-being. Mercy and compassion in justice are not a question of special piety, but a categorical imperative that may even be enforced under certain conditions and upon certain people, as we learn from the verse 'Do what is right and good' (*Deut.* 6:18). The Torah commands us to do not only what is *yashar*, 'right' – interpreted here in the sense of strict justice – but also what is good, meaning what is true and beneficent, even though not according to the letter of the law.

The *Tosafot* query the statement of the Talmud that 'Jerusalem was destroyed only because judgments were delivered on the *sole* basis of Torah law, etc.' For we are told elsewhere that Jerusalem was destroyed only because of baseless hatred (in the time of the Second Temple) or because of the grave sins of idolatry, incest and bloodshed (*BT Yoma* 9b). How, then, is it possible that the destruction occurred only because of the strict judgments delivered in the city? The *Tosafot* provide the answer themselves: the destruction was due to both factors. And the *Hafez Hayyim* explains this as follows: Jerusalem was indeed destroyed because of baseless hatred and grave sins, and strict justice would indeed decree destruction; but the Almighty is a merciful, forgiving God, and He would surely have treated us accordingly, with grace and compassion. However, a person is treated as he treats others, and since the people of Jerusalem themselves showed themselves lacking in compassion, adhering to the letter of the law, God treated us, too, in that spirit, imposing punishment in keeping with our sins.

It is our hope, therefore, that 'Zion shall be saved by justice, her repentant ones by *tzedakah*, righteousness.' In order to expedite Redemption and the rebuilding of Jerusalem, we must observe the biblical injunction, 'Observe justice and do *tzedakah*, what is right, for soon My salvation shall come, and my deliverance will be revealed' (*Isa.* 56:1). Jewish Law must be guided by both justice and right-

eousness. Justice as truth is indispensable and basic for society. However, it is certainly not a supreme, exclusive value, for, as we have said, the world is founded on three things: on justice, on truth and on peace, so that righteousness must be interwoven with justice and truth, peace with law, and that is *tzedek*. The democratic basis of the legal system and of Israeli society is undoubtedly also an important, indispensable value, and it is dependent on strict justice; but that does not always go hand in hand with truth, and surely not with peace. One cannot base the legal system, government, solely on the rights of the individual and of society, on 'What is mine is mine and what is yours is yours.' Let us strive for *tzedek*, that is, for the ideal combination of truth, justice and peace, as the prophet enjoined us: 'Render in your gates judgments that are true and make for peace' (*Zech.* 8:16).

THE TEMPLE MOUNT – ACCESS AND PRAYER

*David D. Frankel**

I would like to discuss a few aspects of the question of the access to and prayer on the Temple Mount over the last few decades.

The Legal Situation

The State of Israel gained control of the site in June 1967. From the start, the Israeli government took a very liberal approach, allowing the Moslem population freedom to pray and conduct their religious affairs. Thousands of Moslems pray in the El-Aqsa mosque weekly, especially on Fridays, and on special holidays the number of worshipers may be counted in tens of thousands. In practice, the Islamic Waqf controls the area, whereas the Israeli police has only a small unit on duty on the Mount.

As far as Jews are concerned, it would seem logical that Jews should have no problem praying on the Temple Mount, since it is sovereign Israeli territory, as stated in Chapter One of the Basic Law: Jerusalem, the Capital of Israel, 1980. The fact is, however, that the situation is not so simple. If Jews entering the Temple Mount appear to be tourists, they are allowed access during certain hours

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I would like to express my thanks to Profs. Y. Englard, N. Rakover, M. Halberstam and Sh. Slonim for their most helpful remarks, and to Mrs. R. Budd-Kaplan for her assistance.

along with other visitors. But if the Waqf guards and Israeli policemen suspect that the Jews are coming to pray, their entrance is prohibited. For example, if Jews wearing skullcaps approach the gate, they are immediately stopped by the Israeli police and required to give their particulars, such as name and address, and are not allowed to enter.

This approach in fact contradicts Chapter 5 of the Basic Law: Human Dignity and Freedom, 1992, which states that the state is not allowed to limit the freedom of any person. As the president of the Israel Supreme Court, Justice Prof. Aaron Barak, has explained,[1] the above-mentioned Chapter 5 also includes a person's freedom to move about freely in his own country, this being an integral constituent of his honor and liberty.

In Petition 222/68 to the High Court of Justice,[2] members of a certain national society demanded that the Ministry of Police permit them to enter the Mount. The Court, in its decision, stressed that it was not concerned with the question of the Temple Mount's sanctity for Jews. That sanctity is eternal and is therefore beyond discussion. However, the time at which Jews will be able to exercise their right to pray on the Mount will be determined by the authorities responsible for the security of the place, namely, the Israeli government. The petition was accordingly dismissed.

In 1983 another question was brought up before the High Court of Justice. Members of a group known as the Temple Mount Loyalists requested permission to pray near the Western Gate of the Mount (*Sha'ar HaMugrabim*) on the eve of Jerusalem Day (an Israeli holiday celebrating the reunification of Jerusalem in 1967). The chief of police in Jerusalem refused such permission, and the group appealed to the Supreme Court. The Court, in its decision, referred to an American precedent written by Justices Douglas and Black,[3] interpreting the First Amendment of the U.S. Constitution, which is concerned with freedom of religion. In accordance with that interpreta-

1 In his book *Legal Interpretation,* Vol. 3 (Jerusalem, 1995), 428.
2 24 P.D. (2) 141.
3 *West Virginia State Board of Education v. Barnett,* 319 U.S. 62Y; 63 S. Ct. 1178 (1943).

tion, the Court ruled that the plaintiffs should be permitted to pray by the gate.[4]

In the beginning of 1993, another petition was brought to the Court by the Jewish Defense League, against the late Prime Minister Yitzhak Rabin and a few other ministers. This group wanted Rabin, and other government officials, to explain why they allow the sanctity of the Temple Mount to be desecrated. For example, they noted that Arabs are permitted to picnic and play soccer there, whereas Jews are not allowed even to enter the premises with prayer-books and other religious articles. After the police promised the court to ensure that sports activities would no longer take place on the Mount, the petition was dismissed; the Supreme Court's position not to allow Jewish public prayer on the Temple Mount remained unchanged.[5]

An interesting question came before the High Court of Justice in March 1992. Baruch Ben-Yosef wanted to offer the Passover sacrifice on the Temple Mount. He approached the Minister of Religious Affairs, both Chief Rabbis, Moslem representatives and the Minister of Justice, but was refused. In light of this situation, he filed a petition to the High Court of Justice.[6] The petition was dismissed and the Court emphasized that even if the petitioner's intention were positive, the act would still be undesirable. Justice Cheshin (who delivered the Court's opinion) stated:

> The subject of the Temple Mount, and the rights of Jews to pray on it, has been raised before this court several times and has been discussed from all angles... [I]t was held time after time that the decision in such cases should be given solely to the executive branch, headed by the Israeli government. This view has already been expressed in petition No. 537/81, *Shtanger v. the Government of Israel,* P.D.I. 35 (4), p. 673, which interpreted Chapter 3 of the Basic Law; Jerusalem, the Capital of Israel, which is identical to Chapter 1 of the Holy Sites Defense Law, 1967.

4 See Petition 292/83, *Temple Mount Loyalists v. Jerusalem Police commander,* 38 P.D. (2) 449.
5 See Petition 67/93 47 P.D. (2) 1.
6 See H.C. 33/92, 46 P.D. (1) 858.

A similar judgment was delivered when the Jewish Defense League filed a petition to the High Court of Justice against the Israeli police.[7] The petitioners were denied access to the Temple Mount with Torah scrolls in their hands. The Court accepted the police's argument that such restrictions were necessary in order to maintain civil order and to prevent violent outbursts.

Without question, the most all-inclusive judgment on this subject was handed down in the petition of *The Temple Mount Loyalists, Gershon Solomon and others v. the Government Legal Advisor, The Head of the Police, and Others;* it was delivered by Justice Professor Elon.[8] In this case, the court was dealing with questions as to whether the Waqf had the right to build illegally on the Temple Mount and why they were not prevented from damaging archeological sites there. After examining the religious, historical and legal aspects of the Mount, the Court decided to overlook illegal construction by the Waqf, in the hope that Moslem religious authorities would respect the law in the future. Accordingly, the petition was dismissed.

Only a few months ago, judgments were handed down regarding two separate petitions, filed in 1993 by Gershon Solomon, the leader of the Temple Mount Loyalists group. In both cases, a police permit to allow Jewish worshippers to enter the Temple Mount was denied. The first case concerned a Jerusalem Day parade, the second, a similar procession on the occasion of the fast of the Ninth of Av, involving 150 persons.[9] It is interesting that in both cases the judgments were not delivered unanimously. In both cases, President Barak delivered the majority opinion and Justice Goldberg represented the minority opinion; in the second case, Justice Shlomo Levine supported Justice Goldberg. The majority ruled to dismiss both petitions.

Recently there has been a further development, in connection with a person named Yehuda Etzion and some of his followers. Since the

7 Pet. 1633/93, *Takdin*, 1993.

8 H.C. 4185/90, 47 P.D. (5) 221.

9 The first was H.C. 2725/93, in which three judges presided, President Barak and Judges Goldberg and Or; *Takdin* 1996 (1) 370, Judgment given on 19/2/96. The second was H.C. 4044/93, the judgment given by five judges, including President Barak; *Takdin*, 1996 (1) 477, Judgment given on 20/2/96.

authorities wish to prevent them from entering the Temple Mount, the police obtained a lower court order restricting them to a certain distance from the Western Gate. According to the police, Etzion failed to obey the court order, and as a result criminal proceedings were held against him. Among his many pleas, he claimed that this type of court order was illegal because it denied his right of freedom of movement as guaranteed by Chapter 5 of the Basic Law: Human Dignity and Freedom, 1992. The magistrate court of Jerusalem accepted his defense, and he was acquitted.[10]

Lately a different view has been expressed by Supreme Court Justice Dorit Beinish, in the case of *Hershkovitz and 9 others v. The State of Israel,*[11] allowing the police to make such restrictions.

The Temple Mount in Jewish Tradition

The Temple Mount is the most sacred place for the Jewish nation: it is the site of both temples, also known as Mount Moriah, as we read in the Bible: "Then Solomon began to build the House of the Lord in Jerusalem on Mount Moriah, where [The Lord] had appeared to his father David" (*2 Chron.* 3:1).

The religious duty of building a temple is already made explicit in the Torah: "And let them make Me a sanctuary, that I may dwell among them"(*Ex.* 25:8). Once Solomon had built the Temple on the Temple Mount, as already noted above, it was believed that this sanctuary would last for all eternity: "I have now built for you a stately House, a place where You may dwell forever" (*1 Kgs.* 8:13). Ascent to the Temple was considered a noble ideal, as expressed by King David in one of his poems: "Who may ascend the mountain of the Lord? Who may stand in His holy place?" (*Ps.* 24:3). And the prophet Isaiah linked his eschatological expectations with the Temple Mount: "In the days to come, the Mount of the Lord's House shall stand firm above the mountains and tower above the hills" (*Isa.* 2:2).

Later, in the Oral Law, we find the following description of the Temple Mount: "The Temple Mount was five hundred cubits by five

[10] Criminal Case 1332/95 (Jerusalem), *The State of Israel v. Etzion,* and see the interesting judgment given in the same spirit by Justice Rubinstein in motion 108/96 Friedman.

[11] Criminal Motion 2712/96, decision given on 25/4/96.

hundred. The greater part of it was on the south, the second largest part was on the north and the smallest part on the west. The part which was most extensive was the part most used" (*M. Middot* 2:1).

The twelfth-century Jewish scholar Maimonides refers to the Temple Mount in his famous legal code *Mishneh Torah,* in *Hilkhot Bet HaBehirah* (The Laws of God's Chosen House): "Mount Moriah, the Temple Mount, measured 500 cubits by 500 cubits. It was surrounded by a wall" (*Hilkhot Bet HaBehirah* 5:1). And he continues:

> ...[If so,] how was [the Second Temple] consecrated? – By virtue of the first consecration, performed by Solomon, for he consecrated the Temple Court yard and Jerusalem for that time and for all eternity... . For through its original consecration it was consecrated for that time and for all eternity. And why do I say with regard to the Temple and Jerusalem that their original consecration is effective for all eternity?... Because the sanctity of the Temple and Jerusalem stems from the Divine Presence, and the Divine Presence can never be nullified (*ibid.* 6:14-16).

And he adds: "It is a positive commandment to venerate the Temple, as Scripture says (Lev. 19:30), 'You shall venerate My sanctuary.' But it is not the Temple which must be venerated, but rather He who commanded that it be venerated" (*ibid.* 7:1).

However, R. Abraham b. David (the Raavad), commenting on the above passage, disagrees with Maimonides as to the eternal sanctity of the Temple Mount: "This is his own idea, and I do not know his source... Therefore, a person who enters it [the Temple Mount] in the present is not punished by *karet.*" R. Joseph Caro, in his commentary *Kesef Mishneh (loc. cit.)* defends Maimonides' view, questioning Raavad's categorical statement that a person entering the place today is not punished by *karet* and challenging him to prove his opinion.

It should be noted that the medieval commentator R. Menahem HaMeiri states that, "according to what we have heard," the accepted custom during his time was to enter the Mount.[12] However, it was

[12] Meiri to *BT Shevu.* 16a (= *Bet HaBehirah, Massekhet Shevu'ot,* ed. Abraham Liss [Jerusalem, 5733], p. 34).

the prohibition that prevailed, and thus we find two authorities in the first half of the twentieth century, the Chief Rabbi of Eretz-Israel, R. Abraham Yitzhak Kook,[13] and the Chief Rabbi of Jerusalem, R, Zvi Pesah Frank,[14] repeating the view that ascent to the Temple Mount was punishable by *karet*.

After the Israeli occupation of East Jerusalem in the Six-Day War, the old debate whether Jews are allowed to enter the Temple Mount or not was reopened. The vast majority of orthodox rabbis, including Chief Rabbis Unterman and Nissim, with many others, such as Rabbis Shlomo Zalman Auerbach, Yosef Eliashiv, A. Waldenberg, Bezalel Zolty, Shlomo Yosef Zevin, Shaul Yisraeli, Ovadiah Yosef, Yizhak Mashash, S. Aboudi, Zvi Yehudah Kook, S. Karelitz, and Yizhak Koolitz, strongly prohibit entering the Temple Mount. A different view has been expressed by a few rabbis, such as the late Chief Rabbi Shlomo Goren, who held that Jews are permitted to enter some parts of the Mount, mainly its southern part.[15]

Conclusion

The present legal policy of the High Court of Justice, as decided previously in the early petitions of 1968, would seem to be motivated by the following considerations:

a. The maintenance of civil order on the Temple Mount, in view of the fear that radical Moslem and Jewish elements might clash at the site, causing violence; such events have already occurred in the past.
b. The presumption that, according to the ruling of the vast majority of orthodox rabbis, Jews are not allowed to enter the Temple Mount today, for religious reasons rooted in the supreme holiness of the place. Moreover, since the Western Wall has become the major focus of Jewish worship, Jews wishing to pray are not "deprived."

I leave it to the reader to decide whether these considerations are

[13] *Mishpat Kohen,* p. 96.
[14] *Mikdash Melekh,* Vol. 5, Chap. 9.
[15] See his study of the Temple Mount (Jerusalem, 1992) 17-24. See also R. Ovadiah Yosef, *Yehavveh Da'at,* vol. 1, chap. 25, and R. Yizhak Shilat, 7 *Tehumin* (5746) 489.

reasonable, or whether a special effort should be made to allow not only Moslem but also Jews to observe their rituals on the Temple Mount without disturbing one another. For the time being, practically speaking, the Islamic interest in maintaining its hold over the site is made possible by the majority of orthodox Jews, who, following rabbinic rulings, refrain from entering the Mount. This case clearly illustrates the difficulty in maintaining a balance between religious, political, legal and security considerations.

I would like to conclude with the prophecy of the prophet Isaiah:

> I will bring them to My sacred mount, and let them rejoice in My house of prayer... for my house shall be called a house of prayer for all peoples (*Isa.* 56:7).

A CONCISE LEGAL HISTORY OF JERUSALEM

*David A. Thomas**

Perhaps there is no such thing as a *concise* legal history of anything, but the title for this chapter comes from Professor Theodore Plucknett's classic one-volume work of the 1950's, *A Concise History of the Common Law*. In that work he used over 500 pages to give a wonderfully lucid account of nine centuries of common law development. My task here is, in only a few pages, to say something meaningful about thirty centuries of legal developments in the city of Jerusalem.

Jerusalem's Legal Prehistory

For thousands of years before written histories, ancient peoples and societies inhabited the land in and around Jerusalem. Almost nothing is known of their customs of law, government and social organization. From the archaeological work at Jericho, which in the 7th millennium BCE was perhaps the earliest fortified city of which we know, we assume that some of these prehistoric societies were characterized by powerful leadership and coordination of labor resources. Material culture was strongly affected by immigration from other regions, and presumably so was social structure.[1]

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1 E. Anati, "The Prehistory of the Holy Land (Until 3200 BC)," in M. Avi-Yonah

Topography played an important role. Among the prehistoric Canaanites, the fragmented terrain led to the forming of small, independent political entities.

Semitic and Egyptian influences

Around the second millennium BCE, nomadic western Semites gained control of Canaan and inevitably came under the scrutiny and influence of Egypt. Texts inscribed on pottery bowls and clay figurines of the 19th century BCE mention Egyptian-sponsored governors of Jerusalem, which by now had developed into a city. It appears that by the eighteenth century BCE, "Jerusalem, like the rest of Canaan, had evolved from a tribal society with a number of chieftains to an urban settlement government by a single king."[2]

Egyptian civil and criminal legislation were apparently highly developed, and by the Fifth Dynasty the laws of private property and of bequest were detailed and precise. Court cases were presented at great length but almost always only in writing. The pharaoh was the source of law and final judge, and the vizier was the chief administrator.[3]

A dynasty of foreign rulers established themselves in Egypt at the end of the 18th century BCE Collectively known as Hyksos, these non-Semitic peoples entered Egypt through Canaan and profoundly affected every aspect of life in Canaan as they passed through, including creation of a sort of feudal society under a ruling class of chariot warriors.

The Beginning of Jerusalem's Historical Period

Entry of the Patriarchs into Canaan

The entry of the Patriarchs into Canaan, as told in the book of Genesis, signaled the arrival of a nomadic society, which only hesitatingly entered into such transactions as the purchase of land, exemplified by Abraham's purchase of the cave of Machpelah for a burial

(ed.), *A History of the Holy Land* (New York, 1969), 27-28.

2 G. W. Ahlstroem, *The History of Ancient Palestine* (Sheffield UK, 1993), 169-172; B. Mazar, *The Mountain of the Lord* (Garden City NY, 1975), 45-46.

3 W. Durant, *Our Oriental Heritage (Story of Civilization: Part I)* (New York, 1954), 161-164.

place (*Gen.* 23). In about 1580 BCE, native Egyptian forces expelled the Hyksos and began once again establishing their dominance over Canaan. Jerusalem emerged in the 14th century BCE as one of the city-states of Canaan that was under Egyptian domination. Jerusalem remained completely loyal to Egypt even as Egyptian control in Canaan waned. Nevertheless, many of the internal political, administrative and legal arrangements that had been introduced into Canaan by the earlier Hyksos invaders were left in place. Thus, the basic unit of a city kingdom persisted, headed by a ruler with broad powers. Citizens, merchants, artisans, landowners and others had well-defined "obligations" to the state.[4] And by this time, a significant presence had been achieved in Jerusalem by an Aryan people known as the Hurrians from Mitanni in northern Mesopotamia, referred to in the Bible as the Hivites or Horites.

Melchizedek and Salem

At some point of time during this long, pre-Davidic interlude occurred the Biblical account of Abraham's encounter with Melchizedek, king of Salem (*Gen.* 14:18-20), a city or settlement believed by many to be identified with Jerusalem.[5] Abraham is depicted as paying a tithe to this ruler, who is credited in some sources with the founding of Jerusalem, and of receiving a divine blessing in return. Davidic kings of Judah were later considered to be priests after the order of Melchizedek,[6] and this same office is mentioned in the Christian New Testament (*Epistle to the Hebrews* 5:6, 7:1-3).

Davidic Jerusalem

According to the Biblical account, when the tribes of Israel entered Canaan, Joshua divided the land between the tribes. Judah captured Jerusalem but lost it to the Jebusites, a people of unknown (possibly Hittite) origin, who held it until the time of David in the 11th century BCE. David conquered Jerusalem with his own troops and made it

4 H. Reviv, "The Canaanite and Israelite Periods (3200-332 BC)," in Avi-Yonah, *op. cit.* (above, n. 1), 40-48.

5 D. B. Galbraith *et al.*, *Jerusalem, The Eternal City* (Salt Lake City UT, 1996), 26, 34 nn. 6-7.

6 K. Armstrong, *Jerusalem, One City, Three Faiths* (New York, 1996), 30.

his city, the city of David, aligned with neither Judah of the south nor Israel of the north. It is quite possible that the Jebusites were not slaughtered, and that they and the Israelites coexisted in the city. David probably took over the old Jebusite administration and kept the old municipal officials. The courts of David and Solomon exhibited many Egyptian characteristics, such as a grand vizier, a secretary for foreign affairs, a recorder in charge of internal matters, and a "king's friend." Virtually all of David's policies and activities were designed to reinforce – or had the effect of reinforcing – Jerusalem's position of primacy as a capital or as the seat of government and worship.[7]

Jerusalem under Judah and Israel

As described in the Bible, Solomon's enormous building program in Jerusalem, strengthening the fortifications and erecting the Temple and palace, combined with the abolition of religious centers elsewhere in Israel, pointed up Jerusalem's position as the religious and political center of the country. However, the emergence of two kingdoms after Solomon's death diminished Jerusalem's importance. Jeroboam, king of the ten northern tribes, built his capital at Shechem and established shrines at Dan and Bethel, the northern and southern limits of his domain, to divert religious attention from Jerusalem. Jerusalem, meanwhile, remained under the unpopular kingship of Rehoboam and after a few years suffered a plundering raid by the Egyptian Pharaoh Shishak. For the next two hundred years, from Solomon to Hezekiah, the two Israelite kingdoms quarreled and intrigued against one another; Jerusalem lost its standing as the political and religious center for all Israel.

Assyrian Law in Jerusalem

Early in the 8th century BCE, while Assyria was capturing Damascus, Judah under Uzziah and Israel under Jeroboam momentarily cooperated to expand Israelite territories to the extent of the old Davidic kingdom. At the same time, Jerusalem itself was also expanded, adding about 150 acres to the northwest of the site it then occupied.

[7] Armstrong, *op. cit.* (above, n. 6) 37-47; Galbraith *et al., op. cit.* (above, n. 5), 38-50.

In 722 BCE the Assyrians captured Samaria, deported most of the northern Israelites (the so-called "lost" ten tribes) and inserted in their place other peoples from distant parts of the Assyrian empire, who eventually mixed in and became the Samaritans of later Biblical times. The southern kingdom of Judah, including Jerusalem, became a vassal kingdom of the Assyrian empire.

Assyrian law of this period was distinguished by a "martial ruthlessness." In addition to the most atrocious punishments prescribed for serious offenses, trial by ordeal was sometimes used for more ordinary misconduct. Local administration was originally in the hands of feudal barons, but eventually came under the control of governors appointed by the king, a form passed on to Persia and Rome.[8]

Jerusalem under Babylonian Law

During this period, Isaiah delivered powerful condemnations of Jerusalem's society and stirring visions of a holier future. Beginning in 715 BCE, King Hezekiah reasserted Judah's independence from Assyria, responded to the call for a religious cleansing and also fortified and prepared Jerusalem for the expected retaliatory assault. Walls were strengthened and the famous water tunnel from the Gihon spring was created. According to the Bible (2 *Kgs*. 19:35), the Assyrian siege was broken off when the army was decimated by a plague, and Jerusalem enjoyed a few more years of independence. Egypt imposed authority over Judah for a few years (609-605 BCE) before Egypt's enemy, Babylon, brought Judah into its domain and destroyed Jerusalem. The Babylonians attacked Judah and deported Judean Israelites in 605, 597 and 586 BCE. In the last year mentioned, Jerusalem and the Temple were destroyed and most of the population deported. The Babylonian conquerors governed from Mizpah, a few miles north of Jerusalem.

The Babylonian system of government featured central and local lords or administrators appointed by the king; these were advised by provincial or local assemblies of elders, which maintained a measure of local self-government. Substantively, the law of Hammurabi was still revered. Priests were the early judges and courts were in the

[8] Durant, *op. cit.* (above, n. 3), 272.

temples, but secular personnel and settings eventually replaced them. Babylonian law included the *lex talionis*, related to our English word "retaliatory," simplistically summarized by the phrase "eye for eye, tooth for tooth." Eventually, even these punishments in kind were replaced by money damages. Private property rights were recognized. We marvel at this code even today.[9]

By the time the first groups of Jews began returning from exile in Babylon, now under Persian rule, about 70 years later, Samaritans had moved into Jerusalem and opposed both the rebuilding of the Temple and the restoration of the city administration to the returnees. Nevertheless, a new Temple was built and dedicated in 515 BCE, and the city enjoyed considerable autonomy from the Persian imperial overlords. During the 5th century BCE, Ezra and Nehemiah obtained both religious and administrative authority from the Persian government to carry out assignments in the Judean province, helping to establish religious reforms and restore the walls and some prosperity in Jerusalem. Under Nehemiah, ten percent of the province's population were moved into Jerusalem to defend it. Ezra was sent from Babylon to Judea, among other reasons, to instruct the Jews in the law of their God. In Jerusalem, he read and explained the Torah, or some part of it, and took vigorous action to implement its tenets.

Persian Law in Jerusalem

Persian law, meanwhile, was the will of the king (itself a reflection of divine will), and a royal decree was irrevocable. Nevertheless, a complex system of courts and litigation evolved, including "speakers of the law" to assist litigants. A satrap governed each province, aided by a form of permanent civil service. "Each region retained its own language, laws, customs, morals, religion and coinage, and sometimes its native dynasty of kings."[10]

Jerusalem under Alexander the Great, the Ptolemies and the Seleucids: Hellenistic Law

Little is known of Jerusalem while it remained under the Persians. Only when Alexander the Great ended that reign does the history of

[9] *Ibid.*, 230-232.
[10] *Ibid.*, 361-364.

Jerusalem reemerge from obscurity. In 322 BCE Alexander was welcomed peacefully into the city, and he offered symbolic sacrifice in the Temple. In response, Alexander allowed not only the inhabitants of Jerusalem but all other Jews in Babylon and Medea to enjoy their own unique laws and customs.[11] Thus the Torah continued to be the official law, and the administration that had operated under the Persians probably remained in place.

Next year, Alexander died and Jerusalem entered a period of changing fortunes under the competing Ptolemies and Seleucids, parties associated with Alexander's principal generals who took over the conquered territories. At first, the Ptolemaic rulers from Egypt prevailed, and once again Jerusalem resumed administrative and religious leadership and enjoyed broad autonomy in domestic affairs. The city's administration was headed by an Aaronic high priest and assisted by a council, called the *Soferim*, or Men of the Great Assembly, and comprising powerful teachers in the class of scribes that developed in the late Persian period. In 275 BCE, the Greek Seleucids from Syria contended for hegemony in Judea, inaugurating the so-called Syrian wars of the next 75 years; during this time the *Soferim* declined and disappeared.

The Seleucid Antiochus III, the first Syrian ruler of Judea, permitted the Jews of Jerusalem to live according to their unique laws and customs, as Alexander had done, and so the Torah still continued as the official law. The old institution of the *Soferim* was revived, in the form of the *Gerousia* or Council of Elders, later known as the Sanhedrin. This body attended to the general administrative, political, judicial and social affairs of Jerusalem and the surrounding area. This council was headed by two teachers, one known as Prince or President, the other, as "Father" (or Head) of the Court. Political stability and legal privileges were disrupted by factional strife between Jews opposed to advancing Hellenistic culture and those who accepted it (sentiments which tended to divide along Ptolemaic and Seleucid lines).

Hellenistic law was classical Greek law. "Greek legislation is the basis of that Roman law which in turn has provided the legal foun-

[11] Josephus, *Antiquities* XI, viii, 4-5.

dations of Western society." At this time it still retained numerous "primitive" elements, but the rule of law, increasingly secular law, was nowhere more faithfully followed. Municipal autonomy was permitted by the Seleucids, although the Seleucid monarchy, following Asiatic tradition, was absolute.[12]

The Hellenizers prevailed for a time, and Jerusalem was reorganized as a new Greek *polis* named Antiochia; as one writer put it, the abrogation of the Torah became Jerusalem's constitution. Civil unrest between the Jews themselves invited repression by the Syrians, loss of governing privileges and an attempt by Antiochus IV, in 168 BCE, to destroy the Jewish religion altogether.

Jerusalem Ruled by the Hasmoneans

This provoked the Hasmonean, or Maccabean, revolt, to restore the true worship. In 165 BCE the rebels succeeded in gaining control of the Temple Mount, but could make no further gains in Jerusalem, which remained a divided city until a peace treaty guaranteeing religious liberty was concluded three years later. Revolt continued thereafter, with the rebels seeking full political independence; Jonathan the Hasmonean was appointed high priest and governor by the Syrians in 152 BCE, governing all Jerusalem except the Acra, the fortress of the Syrian king's garrison. In 142 BCE, his successor Simeon expelled the Syrians, won immunity from taxes and confirmed independence for the Jews. The high priesthood of the Aaronic order was now made hereditary in the Hasmonean line and Jerusalem eventually became the capital of an independent Hasmonean kingdom. Under the Hasmoneans, Judea once again became a theocracy and, like other Semitic societies, closely associated spiritual and temporal powers.

Opposition to the worldly and somewhat Hellenistic ways of the Hasmoneans and the religious party known as the Sadducees led to formation of the religious party known as the Pharisees. The Pharisees increased their civil and religious powers so as to impose their positions on all Jews from their center in Jerusalem. All of this ac-

[12] W. Durant, *The Life of Greece (Story of Civilization: Part II)* (New York, 1966), 257-259.

tivity, especially as it relates to law and government in Jerusalem, came to an abrupt end in 63 BCE, when Pompey's armies imposed the rule of Rome on Judea.

Roman Law in Jerusalem

Pre-Christian Roman administration

Pompey left Judea and other areas under Jewish rule, including the non-contiguous Galilee, but razed Jerusalem's walls to the ground. However, when Julius Caesar succeeded to power in Rome, permission was given to rebuild the walls. Then, in a brief but violent interlude, the Parthians invaded Jerusalem, which Herod retook by siege three years later after a horrible massacre of the inhabitants. Herod was then installed as king of the Jews in Palestine with virtually total control. After Herod's death, the rule of his son Archelaus was so brutally disastrous that Judea and Jerusalem were brought under direct Roman administration, with a provincial governor as chief executive. Caesarea continued as the seat of government, but in Jerusalem the

> Council of Elders and its successor, the Sanhedrin, ruled as a Jewish law court in matters of faith, manners and law in which Roman interests were not directly affected. The Council possessed no powers of capital jurisdiction (without confirmation of the imperial magistrate), except against a pagan who trespassed into the inner courts of the Temple beyond the permitted Court of the Gentiles. The Council consisted of members of the Sadducean aristocracy and more moderate Pharisees and scribes.[13]

As is illustrated by the well-known encounters of Paul with both Jewish and Roman authorities, Roman law and civil rights applied to those holding full Roman citizenship, while the indigenous folk were governed in most matters by their own local laws and customs. Little is known about what local law was applied, because the Jews themselves were bitterly divided about which law should be applied. The Pharisees hoped that all aspects of life could be governed by The

[13] Galbraith *et al.*, *op. cit.* (above, n. 5), 155.

Law, the Torah, and urged all Jews to observe the purity regulations originally prescribed in the Torah only for priests officiating in the Temple. With that attitude, it made little difference to the Pharisees what government was in power, as long as they were free to manage their own domestic affairs. Unfortunately, persistent guerrilla violence by parties of zealots exploded into full revolt, provoking Rome to suppress the revolt, with resulting horrible loss of Jewish life and freedom and the utter destruction of the Temple in 70 CE. As described by historian Will Durant:

> Judea was almost shorn of Jews, and those that remained lived on the edge of starvation... The high-priesthood and the Sanhedrin were abolished. Judaism took the form that it has kept till our own time: a religion without a central shrine, without a dominant priesthood, without a sacrificial service. The Sadducees disappeared, while the Pharisees and the rabbis became the leaders of a homeless people that had nothing left but its synagogue and its hope.[14]

During the siege of Jerusalem, Johanan ben Zakkai, an elderly pupil of Hillel, escaped from the city and set up an academy near the Mediterranean coast, organizing a new Sanhedrin, the *Bet Din* (law court), after the fall of Jerusalem. The new council, composed mostly of Pharisees and rabbis, chose a patriarchal leader, who appointed administrative officers over the Jewish community, and who had power to excommunicate recalcitrant Jews. Under the forceful leadership of the Patriarch Gamaliel, contradictory interpretations of the Law were reviewed and resolved and made binding upon all Jews.

Continuing disturbances, allegedly touched off by Jews all around the Mediterranean, prompted Hadrian, in 130 CE, to order a shrine to Jupiter built on the temple site, and in 132 to prohibit circumcision and public instruction in Jewish Law. After suppression of the Second Revolt in Palestine, the Bar Kochba Revolt, Hadrian further forbade observance of the Sabbath or any Jewish holy day and the public

[14] W. Durant, *Caesar and Christ (Story of Civilization: Part III)* (New York, 1972), 545.

performance of any Jewish ritual. Jews were allowed in Jerusalem only on one certain day each year. The pagan city of Aelia Capitolina, with its imperial shrines on the Jewish temple site, was erected on the ruins of Jerusalem, and its layout defines most of the old city today. Judea became Palestine.

Jerusalem under Christian Roman administration

For the next two centuries, Jerusalem was ruled by Roman officials as an ordinary, sub-provincial municipality. Public law was Roman; private law was Roman if one was a Roman citizen; otherwise, the law applicable to one's own ethnic group applied. Even when the pagan Roman character of Aelia was suddenly swallowed up in Constantine's embrace of Christianity early in the 4th century BCE, when the imperial capital was no longer at Rome and the Byzantine empire was commenced, little of Jerusalem's law changed. The religious life of the city, however, began a profound transformation as Christian shrines, pilgrimages and doctrinal disputes began increasingly to focus on Jerusalem.

Law has been described as the most characteristic and lasting expression of the Roman spirit. Without a written constitution, the Roman legal system nevertheless became marvelously complex and sophisticated. Roman jurisprudence continues as a living force in many Western jurisdictions today.[15]

Jerusalem under the Byzantines

Indeed, with the growing power of the Christian churches and officials in Byzantine Jerusalem, the line between municipal and ecclesiastical authority was often crossed. For example, in 438 CE, Eudokia, wife of Emperor Theodosius II, made a pilgrimage to Jerusalem. While there, she gave permission for Jews to pray at the Temple Mount on several days in addition to the one day previously allowed. In 444 CE she returned as ruler of Palestine and while in Jerusalem became involved in doctrinal disputes about the person and nature of Christ. Consequently, Jerusalem became a patriarchate that outranked other Christian jurisdictions in Palestine.

[15] *Ibid.*, 391-406.

Byzantine law, of course, is Roman law in its declining days, but it has retained prominence through the codes of Theodosius and Justinian. These codes were intended to absorb and reconcile the influence of Christianity and the conflicting laws of regions absorbed into the empire, and to turn the accumulations of Roman law into a logical code. Both codes enacted orthodox Christianity into law. Significant changes were made in civil rights, laws of property and inheritance, slavery and in the Augustinian laws for moral reformation.

Dissension weakened the Byzantine Empire, encouraging Persian attacks. Christian Byzantine Jerusalem was overcome by Persian siege in 614 CE, and Persian Jerusalem was left under the rule of the Jews who had been the Persians' allies in the siege. However, the Persians resumed direct control of the city two years later, in 616 CE. Persian law at this time was still based on its ancient code and was stable. Much local autonomy was still observed.

Soon, however, Byzantium and Persia became reconciled and evacuated each other's territories, so that Jerusalem was returned to Christian control in 629 CE.

Jerusalem under Islamic Rule

After a siege of only a few months, Byzantine Jerusalem surrendered to Islamic forces in 638 CE. Both Christians and Jews in the city were thereafter treated as "protected minorities," who paid a poll tax, could not bear arms, and had to surrender their means of self-defense; they were granted religious freedom but not equality with Islam. This is best illustrated by a decree attributed to the conquering Caliph Umar, which, while perhaps not authentic, does accurately express Muslim policy in Jerusalem:

> [The caliph] grants [to the Christians in Jerusalem] security, to each person and their property: to their churches, their crosses, to the sick and the healthy, to all the people of their creed. We shall not station Muslim soldiers in their churches. We shall not destroy their churches nor impair any of their contents or their property ... or anything that belongs to them. We shall not

> compel the people of Jerusalem to renounce their beliefs and we shall not do them any harm.[16]

In addition, houses of worship of other faiths were required to be lower and smaller than Muslim religious buildings.

At first continuing the Christian ban on Jews living in Jerusalem, the Muslims later revoked the prohibition and invited Jewish families from Tiberias to live in a designated area. Jerusalem, however, did not become the capital of Muslim Palestine, a fact which retarded the city's development.

Under the Arabs, the old order of life continued. Law was deduced from the Koran. As Muslim jurists formulated responses to new situations, their traditions, the *hadith*, became a second source of Islamic law, often reflecting the principles of Roman, Byzantine and Jewish law. Minute regulation of conduct and ritual became as characteristic of Islamic law as it is for Jewish law. Under Islamic administrations, "government lands were measured, records were systematically kept, roads and canals were multiplied or maintained, rivers were banked to prevent floods; ...Palestine... was fertile, wealthy and populous."[17]

The Islamic world was in constant turmoil. In 868 CE a Turkish commander took power in Egypt, also assuming control of Syria and Palestine. He restored law and order and improved trade and the economy. Both Christians and Jews were permitted to inhabit Jerusalem.

Islamic rule in Jerusalem was violently interrupted by the Crusaders in 1099, and during their rule, until 1187, most of the inhabitants of Jerusalem were European. French was the official language and extensive attempts were made to recreate continental European feudalism in the Crusader-dominated areas of Palestine.

The structure and law of the Kingdom of Jerusalem were contained in the Assizes of Jerusalem, described as "one of the most logical and ruthless codifications of feudal government." The barons as-

[16] Tabari, *Ta'rikh ar-Rusul wa'l-Muluk* I:2405.

[17] W. Durant, *The Age of Faith (Story of Civilization: Part IV)* (New York, 1950), 225-227.

sumed all ownership of land and reduced the former owners to feudal serfs, with heavier burdens than European serfs.[18]

Saladin's splendid victory in 1187 reintroduced Islamic rule in Jerusalem. Just when it appeared that the Third Crusade, under Richard the Lionhearted, might win back Jerusalem for the Europeans, Richard was forced to return to England and deal with domestic disturbances. The Christians resumed rule in Jerusalem from 1229 to 1239, largely because no other party had sufficient interest to oppose it. Then, from 1244 to 1517, Jerusalem was ruled by Egyptian-based military rulers, known to us as the Mamluks, who for the most part neglected the city. The transition to Ottoman Turkish rule in 1516-1517 at first produced little change in the city, even with a governor appointed to administer municipal affairs. The second sultan, Suleiman ("The Magnificent"), revised the legal system of the Ottoman empire and undertook grand building programs in all his domains, including Jerusalem.

Under the Ottomans, church and state were one, and the Koran and the traditions were the basic law. The same association of scholars that interpreted the Koran also provided the empire's teachers, lawyers, judges and jurists. It was such scholars who compiled the definitive codes of Ottoman law. Christians and Jews enjoyed considerable religious freedom under the Ottomans and were permitted to rule themselves, by their own laws, in matters not involving Muslims. Tenant farming and feudalism were widespread.

In 1831, under the Egyptian viceroy Muhammad Ali, significant improvements were introduced in the administration of Jerusalem. A centralized administrative system supervised improvements in the city, religious freedoms were expanded, the town council was revitalized and, for the first time in centuries, rights to life and property were guaranteed to all inhabitants.

Jerusalem Law in Modern Times

Ottoman rule in Jerusalem ended in 1917, and the British Mandate for Palestine commenced in 1922. At that time, the law of Palestine was based to a large extent on a codification of Muslim civil juris-

[18] *Ibid.*, 592-594.

prudence and on Turkish adaptations of French law. The Mandate administration enacted early legislation on companies, partnerships and bills of exchange, and a steady stream of further legislation continued until 1947, all following British legislative prototypes. Land law, for example, was Ottoman, with two important legislative additions, the Land (Settlement of Title) and Land Transfer Ordinances. Also, English Common Law and doctrines of equity penetrated local jurisprudence, especially when there was a lacuna in Palestinian law.

Jerusalem was divided after the 1948 war, then unified again in 1967 and, by act of the Knesset, officially declared the capital of the State of Israel in 1980.

Today, Jerusalem is the name of one of Israel's districts, and this district includes the municipality of Jerusalem, whose council bylaws are subject to approval by the Ministry of the Interior. Municipal courts generally have the jurisdiction they exercised during the Mandate.[19]

[19] In addition to the specific sources cited above, the following were also consulted for the writing of this article: E. Benvenisti, *Legal Dualism: The Absorption of the Occupied Territories into Israel* (Boulder CO, 1990); H. Cohn, *Jewish Law in Ancient and Modern Israel* (Jerusalem, 1971); Z. Falk, *Hebrew Law in Biblical Times* (Jerusalem, 1964); D. Kretzmer, *The Legal Status of the Arabs in Israel* (Boulder CO, 1990); D. Lankin, *Israel Today, The Legal System* (Jerusalem, 1964).

JERUSALEM THE HOLY CITY IN JUDAISM, CHRISTIANITY AND ISLAM

*Menashe Har-El**

Scholars are divided in their opinions as to the sanctity of Jerusalem, though the basic idea that Jerusalem is holy to the three monotheistic religions of the world: Judaism, Christianity and Islam, is widely accepted.

The Jewish claim to the holiness of Jerusalem is based on the fact that it was the one and only capital city of the Jews in the Land of Israel, the sole site of their Temple. The city is holy to the Christians because Jesus spent part of his life there, and died and was buried in the Upper City. It is assumed that Jerusalem is holy to the Muslims because the Umayyads, who were related to Uthman (Muhammad's father-in-law), ruled over the Land of Israel in the years 660-750. They built a mosque on the Temple Mount, which was later called *El-Aqsa* ("The Farthest Edge"), because of the tradition, reported in the Koran, that Muhammad, in a dream, ascended to heaven on his legendary steed from the mosque of El-Aqsa, then in the seventh heaven of the city of Medina in Arabia.

In this article we will examine four basic themes:

a. Which nation planned and built up the Holy Land through the generations and which nations caused its destruction?

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b. Who conquered the Holy Land, and the land of which nation fell into enemy hands?
c. Jerusalem is a Holy City to Jews, Christians and Muslims – fact or fiction?
d. Which nation has historical, national and religious claims to the Holy Land?

The subject will be divided into the following five headings:

1. The names of the Holy Land in Hebrew, Christian and Islamic sources;
2. the names of Jerusalem in Jewish, Christian and Islamic sources;
3. shaping the landscape of the mountain and desert resources in the Holy Land and the building of Jerusalem by Jews, Christians and Muslims;
4. is Jerusalem the capital city of Jews, Christians or Muslims?
5. the sanctity of Jerusalem in the three monotheistic religions.

1. The Names of the Holy Land

Jewish Sources

The Hebrew name *Yehudah* (Judah), from which the word *yehudi* (Jew) is derived, occurs 800 times in the Bible. Thus, during the period of Persian, Greek and Roman occupation the Land of Israel was known as *Yehud* or *Judea*.

The name *Yisrael* (Israel) occurs 2,512 times in the Bible; of these occurrences, 1,880 are in the combination *Am Yisrael* (the people of Israel), and 636 of these, in turn, possess a religious connotation. The Jewish people is the only nation that has left imprints of its name, language, religion, culture and national home in the Holy Land.

Christian Tradition

Christianity originated in the Holy Land, which was called Syria-Palaestina during most of the Roman-Byzantine period. The religious center of the Christians moved to Rome and from there, in the Byzantine period, to Constantinople. The Crusaders called the land *Terra Israel*, the "Land of Israel." The Holy Land was the birth-

place of Jesus Christ, the founder of their religion, rather than a place of ethnic, national or historical significance to the Christians.

Islamic Tradition

No name was given to the Holy Land during the whole period of Muslim rule, because it was considered part of Syria. The name *Filastin*, from the district of Philistia, a coastal strip of Judea, is translated in the Septuagint as *Alofilos,* meaning "stranger, foreigner." The "Filastinians" are Arabs and their homeland is Saudi Arabia, just as the country of the *Yehudim* is *Yehudah*, Judea. A people which takes on the name of another nation, especially a Semitic nation taking the name of the Philistines – a non-Semitic nation which came to the Land of Canaan from the island of Crete in the Mediterranean – has assumed a false identity. To quote the noted Jewish historian B. Z. Dinur: "There is not and never has been a Filastinian 'nation' – not in fact and not in fiction; but if the Jews will it, it will come about... and if it does come about we will face the problem of where we stand regarding our historical claims." It is a fact that there was no Filastinian nation in the Holy Land during the period of Muslim rule, whether under the Umayyads, the Abbasids, the Fatimites, the Ayyubids, the Mamluks, the Turks or even, more recently, the Hashemite Kingdom of Jordan. And most significant: The name *Filastin* is not mentioned at all in the Koran.

2. The Names of Jerusalem

Jewish Sources

The names "Jerusalem" and "Zion" are mentioned a total of 821 times in the Bible, indicating the national and religious significance of the city to the Jewish people. Jerusalem is called "City of David." David, who was born in Bethlehem, is mentioned 1,023 times in the Bible.

Christian Sources

During the Roman and Byzantine periods and later, Jerusalem was renamed "Aelia" (from the full name, Aelius Hadrianus, of the Emperor Hadrian, who quashed the Bar Kokhba Revolt), in order to blot out any memory of Jewish presence in the Holy Land. The Byzan-

tines, who called themselves "the inheritors of the Jews," barred Jews from living and trading in Jerusalem. The famous 6th-century Byzantine mosaic map of Jerusalem in the town of Madaba, Transjordan, does not show the Temple Mount – at a time when the Temple Mount was definitely still in existence.

Islamic Sources

Jerusalem is not mentioned at all in the Koran. Muslim sources also referred to the city as "Aelia" until the 10th century, as may be seen, among other things, in coins minted during that period. In the year 750, when the Abbasid Muslims took Jerusalem from the Umayyads, Arab sources relate that "In Khorasan [Persia] they took out black flags [the national color] and would not rest until they had planted them in Aelia." In the 9th century, Jerusalem was referred to as *bayt al-maqdis* and in the 11th century as *al-Quds*, from the original Hebrew words for the Temple, בית המקדש, and the Holy City, [עיר] הקודש; the name *Sahyun*, Zion, from the original Hebrew ציון, was also used Incidentally, according to an ancient tradition, Muhammad called the Ka'ba in Mecca *Sahyun*, in order to attract Jews to Islam.

3. The Shaping of the Landscape of Jerusalem and the Holy Land

Israelites and Jews

The only people who put thought and effort into the shaping of Jerusalem and the surrounding desert and mountains were the Israelites and, later, the Jews. They lovingly built up their city and its outer areas with many original ideas, excelling in five areas:

a) Sixty percent of the land in the Jerusalem Hills was cultivated by the construction of agricultural terraces. In the mountains of the northern part of the country, grain and fruit trees were produced by dry farming. In the hills of Ein Gedi in the Judean Desert, herbs, spices and dates were produced by irrigation agriculture. In the hills of the Northern Negev, flood water conservation was used to raise crops and fruit, a method learned and adopted by the neighboring nations.

b) The technology of water conservation was developed in Jerusalem and the surrounding hills and deserts. In Jerusalem, in particular, five innovative methods were introduced: 1) Cisterns were built,

initiating the digging of cisterns in the cities of Israel; 2) a well was sunk to a depth of 37 m at Ein Rogel – the first of its type in Antiquity in the mountain area; 3) channels were dug from the Jerusalem springs, in the heart of the hilly area, at a pitch of 10-120 m, in order to strengthen the flow of the water; 4) fifteen reservoirs for the storage of rainwater were built in Jerusalem, by damming valleys; and 5) two water tunnels and aqueducts were built, the first being Hezekiah's tunnel, which is 533 m long at an inclination of 0.6/1000, and the second, the aqueduct of En Arub in the Hebron Hills, 68 km long at an inclination of 1/1000. Such a variety of projects enabled the inhabitants to build settlements in places which lacked natural water supply, in both mountainous and desert areas.

c) Industries using wood, stone and metal were established in the uninhabited, wooded hills. King Solomon built chariots and traded them with four kingdoms and empires: Egypt, the Hittites, Syria and Que (north of the kingdom of Tyre).

d) Impressive architectural projects were undertaken, such as the building of fortifications and of the Temple in Jerusalem. The Second Temple, built by Herod, was one of the largest buildings in the ancient Orient, extending over an area of approximately 36 acres. An idea of its size may be gained from the fact that its southeastern wall was 48 m high, and the weight of one of the ashlar blocks in the Western Wall has been estimated at 400 tons. It was said that "He who has not seen the Temple building has not seen a magnificent building" (*BT Sukk.* 51b).

e) The Jews were pioneers in the art of road construction through mountainous and desert areas. We know of eight ascents with steep inclines constructed in the mountainous parts of the Land of Israel in biblical times. Three led to Jerusalem: the ascent of Beit Horon to the west, the ascent of the Mount of Olives to the north and the ascent of Ma'aleh Adummim to the east. Built by skilled road engineers during Israelite Monarchy, these mountain roads served as a basis for the work of later Roman and Byzantine engineers.

Christians

Large churches were built in Jerusalem during the Byzantine period, when the city was considerably smaller than it had been in the Second

Temple period. Churches and monasteries were built both in Jerusalem and elsewhere, with the aid of the Byzantine rulers. The Negev was found suitable for the construction of monasteries, and Eilat and the Red Sea were economically important as a gateway for the transportation of luxury goods (spices and silk) from Southeast Asia to the west. In Crusader times fortifications and churches were built near the main roads and the borders – to defend the land from potential Muslim attack, as the land was very sparsely populated, and to control the coastal road and the main inland road, which were important for defense and international trade.

Muslims

In the course of more than a thousand years of Muslim rule in the Holy Land, not a single new city was built on a previously unpopulated site. Even in Ramleh, capital of the district of Filastin, remains of previous Jewish settlement have been found. Some construction was initiated by the Muslim rulers for political reasons, mainly under the Umayyads, who built the Dome of the Rock, the El-Aqsa Mosque and the government buildings south of the Temple Mount. The Umayyads were in conflict with the clan of Ali, Muhammad's successors in Mecca. However, the Umayyads never completed their palace in Jerusalem, and during their rule the country was completely neglected.

M. Gil[1] has pointed out, on the basis of the *hadith* literature, that the Muslims considered farming to be an ignominious profession, to be opposed and rejected: "Do not settle in villages, for whoever inhabits villages is alike to one inhabiting tombs." According to Ibn Khaldun, the Prophet Muhammad, upon seeing the blade of a plow in the home of a supporter in Medina, said: "Such a thing never came into the home of human beings, except when they were humiliated." It was Ibn Khaldun's thesis that "the remoteness of nomads from the village centers guarantees the preservation of the pure lineage, for farming the land impairs the nomad's freedom."[2]

1 M. Gil, *Eretz-Israel in the First Muslim Period*, I (Jerusalem, 1983), 113 (Heb.).

2 Abd al-Rahman Ibn Khaldun, *The Muqaddimah: Prolegomena to History*, Hebrew translation by I. Koplewitz (Jerusalem, 1966), 100, 281.

Why did the Muslims refrain from building up Jerusalem and the rest of the country for the 1,065 years of their rule – as the Umayyads, for example, made Damascus into a magnificent city, the Mamluks built the beautiful city of Cairo and the Abbasids the great city of Baghdad? The reason is that, according to an ancient Islamic *hadith* about Jerusalem, "The building of the Temple will bring about the destruction of Yathrib [= Medina]."[3]

Settlements on both hill and plain were destroyed and abandoned; the valleys became malaria-infested swamps and a Bedouin population, which thrived on highway robbery and theft, took over. All the roads painstakingly paved during the First and Second Temple periods and during the Roman and Byzantine periods were destroyed: there was not a carriage to be found in the whole of the country until 1860 and the camel reigned supreme, as in the days of the pre-Canaanites around 5000 BCE, before the introduction of the wheel.

4. Jerusalem – Whose Capital?

Under Israelite and Jewish rule

Jebusite Jerusalem was a town of some 10-12 acres. Under King David (10th century BCE) Jerusalem first became the capital of the whole country, and his son Solomon built the First Temple. By the time of King Hezekiah (8th century BCE), Jerusalem extended over more than 160 acres. In the Second Temple period, Jerusalem occupied an area of *c.* 450 acres and was the largest and most fortified city in the land. It took 46 years to build (*John* 2:20). The Temple Mount was constructed by 10,000 Jewish workers over a period of 10 years; the Second Temple itself was built in 1.5 years by 1,000 priests (Josephus, *Antiquities of the Jews* XV,xi,2). With the exception of a short period in Crusader times, Jerusalem was the capital city of the people of Israel, and only of the people of Israel.

Under Christian rule

Jerusalem was never considered the capital of the Byzantine Christians, whose capital was Caesarea. Their purpose in the Holy Land was political and commercial; their religious capital was Catholic

[3] Wasiti Abu Bakr Muhammad, *Fada'il Bayt al-Maqdis* (*Praises of Jerusalem*), ed. Y. Hasson (Jerusalem 1979), p. 54 no. 81.

Rome, called "the Holy City" in their manuscripts. In the year 536 Jerusalem was fifth in the patriarchal hierarchy of the Byzantine Empire, after Constantinople, Rome, Alexandria and Antioch. Later, Constantinople was the holy city of the Greek Orthodox church.

Jerusalem might perhaps have been considered the religious and political capital of the Crusader kingdom, which extended from the border of Egypt in the south to the Bay of Alexandretta on the north-eastern shore of the Mediterranean in Southern Turkey, were it not for the fact that it was under the dominion of Catholic Rome. In fact, Acre was the main fortified city of the Crusaders for political, administrative and commercial purposes, especially in the latter half of their 200-year rule. The Crusaders differed in language, culture and religion from the majority of the population of their time; during their rule, the population of Jerusalem was lower than at any other time in the history of the country.

Under Islamic rule

Jerusalem has never been the capital city of the Muslims or the Arabs. It never even attained the status of chief district city of Filastin in Syria. In fact, Jerusalem was second to the capital city of Ramleh in the district of Filastin.

5. The Sanctity of Jerusalem in the Three Monotheistic Religions

In Judaism

Jerusalem is the only holy city of the Jewish people; it was the Israelites who chose that location in the desolate, rugged and wooded hills of Judea. They shaped its landscape in line with the biblical verse, "The Lord is a God of mountains" (I *Kgs.* 20:28). Three times a year, all the tribes of Israel made a pilgrimage to Jerusalem, bringing the produce of their land and the fruit of their trees to the Temple – a unique custom not to be found in any other place in the world. The Jews fortified and beautified their capital city – nowhere in the ancient Middle East was there any city like it.

In Christianity – supraterrestial

The Byzantine Christians made great efforts to erase Jerusalem and the Temple as the focal point in the Jewish religion. Thus, the bib-

lical Mount Zion, the Temple Mount, is missing in the famous Byzantine mosaic map of Madaba. They made it into a garbage dump, unashamedly replacing the Jewish tradition of the sanctity of the Temple Mount by a Christian tradition of sanctity, relocated to the hill of Golgotha and the Church of the Holy Sepulcher, where Jesus was said to have been buried, which they had the effrontery to name "Mount Zion." According to Jewish tradition Mount Zion was the place of Adam's birth and of the binding of Isaac; these events, too, were "relocated" to the hill of Golgotha, and the Zion mentioned in *Isa.* 2:3, "For out of Zion shall go forth the Torah and the word of the Lord from Jerusalem," was relocated to the Church of the Holy Sepulcher.

The Christians claimed that the visible, physical Mount Zion had been destroyed together with the Second Temple. For them it no longer existed. Instead, there was an incorporeal extra-terrestrial Jerusalem above the church of the Holy Sepulcher, not on the Temple Mount. An incorporeal Mount Zion also hovered above Rome and above Constantinople. In the course of time, Rome, the seat of the Pope, became the focal point of the Christian religion. The sanctity of Jerusalem for Christians is based solely on the sanctity of Jesus' burial place in the Upper City. It is significant that most of the Church Fathers objected to Christian believers going on pilgrimage to Jerusalem.

The Crusaders, too, believed that the Temple Mount was holy but not related to the Jewish religion. They converted synagogues and mosques into churches and mercilessly slaughtered Jews and Muslims, in spite of the sanctity of *Terra Israel.* The first palace of the Crusader rulers was the El-Aqsa mosque, which they called *Templum Solomonis*; later they moved the palace to the Citadel of David, near Jaffa Gate. The Dome of the Rock was renamed *Templum Domini* - the temple of the Lord, signifying the biblical location of the temple.

In Islam – fact or fiction?[4]

No special status of sanctity was accorded Jerusalem when Muslims

[4] The following material is taken from M. Gil's chapter, "Political History of Jerusalem in the Early Islamic Period" (Heb.), in *Sefer Yerushalayim* [*The*

first came to rule the Holy Land; in fact, any such belief would have negated the principles of Islam. The Umayyad Khalif Abd al-Malik, who moved his capital city from Mecca to Damascus, built the magnificent Dome of the Rock in Jerusalem in the years 692-697, intending to belittle the importance of Mecca as a pilgrimage city, as it was under the control of his rival Abd-Allah ibn Zubayer, and to enhance the importance of the new shrine in Jerusalem, close to Damascus, the Umayyad capital. According to M. J. Kister, the Khalifs Uthman and Umar, who edited the Koran, commanded the Muslims to pray in Mecca and Medina *and not* in Jerusalem, in accordance with Muhammad's wishes. Kister points out that *ard es-Sahyun* ("the Land of Zion") is mentioned in a *hadith* (islamic tradition) as being in the vicinity of Mecca and Medina.

According to Hasson, Jerusalem does not qualify for the status of *Haram* – a holy place. Only Mecca qualifies for that status. The sanctity of Mecca is mentioned in the Koran, while that of Medina appears only in Muhammad's sermons and for that reason is not accepted by all Muslims. Jerusalem, however, is considered merely as a place of prayer, a mosque, possessing the same sanctity – *qudusiya* – as any mosque, anywhere outside Jerusalem. The notion *El-Haram el-qudsi el-sharif* (the revered Temple of Jerusalem) negates Muslim religious law according to Ibn Taimiyah, who opposed the idea in the 14th century, but without success. The building of the Umayyad Mosque El-Aqsa in Jerusalem was, as already mentioned, a politically motivated act; in the original writings, the El-Aqsa mosque is mentioned in the Koran as being in the seventh heaven of El-Medina and not on this earth.

In the year 765, the Shi'ite Imam Ja'far el-Saddeq, the sixth Imam of Iraq, was questioned about the sanctity of the mosques. He replied, "The mosque of Mecca and the Mosque of the Prophet (Medina) are holy"; of El-Aqsa he replied, "It is in heaven," noting moreover that "The Kufa mosque (in Iraq) is better than the one in Jerusalem." Indeed, the El-Aqsa Mosque, built in the year 705, sixty

History of Jerusalem: The Early Islamic Period (638-1099)] (Jerusalem, 1987), 1-31, and from Y. Hasson's chapter, "Jerusalem in the Muslim Perspective: The Qur'an and Tradition Literature" (Heb.), *ibid.*, 283-313.

years after Muhammad's dream, is nowhere mentioned in the abundant quotations from the Koran (totaling a length of 240 meters!) that decorate the walls of the Dome of the Rock, which was built in 692.

Taqiya el-Din ibn Taimiyah, a fanatic north-Syrian cleric (1263-1328), wrote as follows about the El-Aqsa in Jerusalem:

> It is forbidden to walk around the Rock of the Dome and El-Aqsa. It is forbidden to face the Rock in prayer. It is forbidden to slaughter animals for sacrifices near the Rock or near El-Aqsa. It is forbidden to visit the prayer houses of the infidels. There is no *Haram* in Jerusalem. Moreover, the traditions of Muhammad's famous nocturnal journey to visit the graves of Moses and Aaron are false. Anyone who transgresses these prohibitions becomes an infidel who sins against Islam and is excommunicated; he is asked to repent. If he repents, his repentance is accepted; if not, his punishment is death.

In the early works of the Islamic literary genre known as *Fada'il al-buldan* (The Praises of Cities), written in the 9th century, we find essays referring to Mecca, Medina, Baghdad, Wasit, Merv, Homs and Qazwin. There is no mention of Jerusalem until the 11th century, when a *Book of Praises of Jerusalem* was written for political as well as religious reasons. Indeed, after the fall of the Umayyads, Jerusalem was neglected by the Muslims, who lost interest in it because of its distance from their capital cities. With the Fatimite conquest of the Holy Land in 969, the interest of the Muslim world in Jerusalem was reawakened in view of its proximity to the Fatimite seat of government in Egypt. Other factors of importance were the suppression of the Sunni Muslims and the Christians in Egypt and in the Holy Land by the ruler El-Hakim, as well as, later, the Crusader conquest of the Holy Land. Nevertheless, we find the Muslim geographer Yaqut (1179-1229) referring to various sacred cities as follows: "The Indian city Multaan was holy to the Indians and the Chinese, in the same way as Jerusalem was holy to the Christians and the Jews, and Mecca was sacred to the Muslims."

Summary and Conclusions

We can now go back to the four basic headings mentioned at the beginning of this article:

A. Which nation planned and built up the Holy Land throughout the generations and which nations caused its destruction?

Only the Jewish people, who had received the biblical message with love and considered it the true way of life could shape, build and fortify the landscape of the hills and the deserts of the Land of Israel, starting from the time that the Children of Israel, led by Joshua, entered the land and began to cultivate it, until the Zionist conquest of the desert in our time. No such feat has ever been accomplished by any other nation, right up to our times. To quote *Ezekiel* 36:34-35:

> And the desolate land, after lying waste in the sight of every passerby, shall again be tilled. And men shall say, "That land, once desolate, has become like the Garden of Eden; and the cities, once ruined, desolate, and ravaged, are now populated and fortified."

Quoting the above, David Ben Gurion, the founder of the State of Israel, said at the 20th Zionist Congress: "The Bible is our mandate to the Land of Israel... It establishes our rights to the land, the whole of it, for all time."

During the Muslim conquest, however, until the end of Ottoman rule in 1917, the most fruitful parts of the land, the fertile valleys and the plains whose produce had been proverbial, gradually turned into fetid swamps; the neglected roads fell into disuse and carriage transport ceased. As Ibn Khaldun comments: "The Arabs of the desert, because of their wild nature, are men of banditry and destruction, who plunder whatever they can... When the Arabs of the desert occupy developed lands, these lands are soon made desolate."[5] The hills and the deserts, which had been shaped and populated by the Children of Israel, were neglected and became wasteland under Muslim rule. Jerusalem, the city that was so "holy" to them, was left to

[5] Ibn Khaldun, *op. cit.*, 108-109.

crumble. In fact, the walls of Jerusalem were destroyed three times during the period of Muslim domination:

1. The Umayyad Khalif Marwan II destroyed the walls of the city in the year 745, out of fear that the Beduin Ali, Muhammad's son-in-law, then besieging Jerusalem, would conquer it and use the walls as fortifications.
2. In 1187, the Ayyubid ruler Saladin, having captured Jerusalem from the Crusaders, destroyed the walls and left them in ruins, lest the Crusaders retake the city and take advantage of its fortifications.
3. In 1212, the Ayyubid Al-Mu'atham Isa (Saladin's nephew) rebuilt the walls of Jerusalem but afterwards destroyed them. Jerusalem was then left without walls for 320 years, until the Ottoman conquest.

In sum, since the Canaanites, Jerusalem was never unwalled, except during the rule of three Muslim dynasties: the Umayyads, the Ayyubids and the Mamluks.

B. Who conquered the Holy Land and the land of which nation fell into enemy hands?

When the Children of Israel entered their Promised Land, it was inhabited by a number of tribes and clans, originating in various lands. These tribes were the Philistines, the Hittites, the Hivites, the Jebusites and the Emorites, all known to us from the Bible. The Israelite settlement of the Holy Land essentially dates back to the time when the Patriarchs came to the Promised Land at God's command. From the time of the first settlement until the First and Second Temples were destroyed, the Israelite tribes and their kings settled the land. They first settled in the hills and the sparsely inhabited desert areas, while the Canaanites lived in the easily accessible fertile plains and valleys. Thus the Israelites were the first to "bring forth bread from the earth," after the painstaking labor needed to terrace the barren land and thus to "bring forth earth from rock," both on hilly and in desert areas. It is estimated that from one to three years were needed to prepare 1,000 square meters of land for agricultural use.

The Israelites were the first nation in history to unite all parts of

the Holy Land and establish it as an independent entity, governed from one capital city, Jerusalem. They fortified the cities and the borders, trying to maintain their freedom from the empires of Assyria, Babylon, Egypt, Greece and Rome, who used their mighty armies to conquer the Holy Land.

The Arab-Muslim conquest of the Land of Israel was a conquest by Islamic empires, which sought to enlarge their territory in order to impose Islam on the Christian, Jewish and pagan populations and to dominate the economies of the parts of Asia, Africa and Europe that they had conquered. During the 1065 years of Muslim rule over the Land of Israel it was never regarded as a separate entity but as part of Syria, since the Umayyads had their capital at Damascus. It did not even have a name: the southwestern part of the country was called *Filastin*, derived from the Hebrew *Peleshet* (= Philistia), and its capital was at Ramleh. The Muslim rulers exploited the soil and its resources, cut down the forests, neglected the fertile lands and turned the rivers into swamps. The unpopulated settlements in the mountains became the dwellings of Beduin shepherds who streamed into the country from Egypt, Arabia and Syria. They plundered and removed the vegetation. Thus the land which, through the efforts of Jews and Christians had become an agricultural paradise, was robbed and denuded of all its natural resources; it became a deserted land, lonely and unpopulated. By the 17th century, the population of the Land of Israel on both sides of the Jordan was estimated at about 200,000. As Dinur said of the rights of the Arabs in the land: "The Arabs have full rights to live in the Land of Israel, but no right to the Land of Israel."

In 1882 *Hovevei Zion*, the "Lovers of Zion," began to reclaim their ancestral heritage which, after more than a thousand years of Muslim rule was desolate and barren. Once again the Jews have turned the land into a fertile haven, just as they did in the days of the First and Second Temples. The Jewish "conquest" of the Land of Israel was a conquest in two senses of the word: it was a conquest of the wilderness, and a return to national roots by restoring settlements in the only homeland the Jews had ever called their own.

C. Jerusalem as a Holy City to Jews, Christians and Muslims – fact or fiction?

According to the Bible, the Book of Hasmoneans, the writings of Josephus, the Mishnah and the Talmud – not to speak of archaeological discoveries – there can be no doubt that the magnificent Temple on the Temple Mount was not only the one and only Temple of the people of Israel, but there has never been such a splendid building in the Holy Land nor, indeed, anywhere else in the world. It was built by the Jews and destroyed by their enemies several times. The original Temple was built by King Solomon and rebuilt when the exiles returned, led by Ezra and Nehemiah, in the 6th century BCE; it was later restored by the Hasmoneans and rebuilt by Herod and his heirs in the 1st century BCE. The Babylonians, Greeks, Romans, Byzantines and Muslims all tried to destroy it in their turn. There is no doubt that the sanctity of Jerusalem made it the one and only real and true capital city of the people of Israel and the Land of Israel from the time of the First Temple until the present day. Only Jews turn toward Jerusalem when they pray.

As to the Christians – we have already noted how the Byzantines expunged the Temple Mount from the Madaba map, insisting that the physical presence of Jerusalem was no longer significant for religious worship but that a heavenly, spiritual Jerusalem could exist in the mind of the believer anywhere in the world. Thus Rome became, and has remained, the Christian world's major spiritual capital. Even though the Temple had been destroyed by their enemies, the Temple ruins still remained the most holy place for Jews. In their churches the Christians turn in prayer to the east, to the rising sun and not towards Jerusalem.

Somewhat later, the Christians swept into Anatolia in Turkey and founded the Byzantine Empire, which lasted 1,123 years. They made Constantinople their capital and built their magnificent church, *Hagia Sofia*, and thus Constantinople became the major holy city of the Orthodox Church. After the Turks had successfully driven the Byzantines out, however, no Orthodox Christian anywhere would think of claiming possession of Byzantium and Constantinople. The *Hagia Sofia* was not destined to be a Christian place of worship for all eter-

nity: today it is a Muslim mosque, in spite of its Byzantine Christian origins.

We have already pointed out that the sanctity of Jerusalem for the Muslims has a political rather than a spiritual significance. It is not truly *haram* (holy) for them; here are four points that demonstrate this:

1. Nowhere in the Muslim world was a *haram* established, toward which Muslims turn in prayer, except at Mecca.

2. The Jerusalem geographer El-Muqaddasi described the lack of importance of Jerusalem to the Muslims in his time, the Fatimite period (985), as follows:

> There are but few Muslims learned in religion; much of the population is Christians, who lack manners... No-one seeks justice, one sees no learned people, there is no place of discussion and of learning. The Christians and the Jews have taken over and in the mosques there is no multitude of people and there are no places for learned people.[6]

More than one hundred years later, in 1095, a Muslim traveler from Seville (Abu Bakr Muhammad b. Abd Allah al-Ma'afiri) wrote, in connection with his visit to Jerusalem:

> We had arguments with the Christians. The land is theirs, for it is they who cultivate its estates, they who live permanently in its settlements and they who frequent its churches.[7]

3. That the Land of Israel and Jerusalem were of no significance to the Ayyubid Muslims we learn from events during the Sixth Crusade, led by Frederick II in 1139, who besieged Cairo. The besieged Ayyubids begged Frederick to halt the siege of their capital, in return for the Muslim surrender of Jerusalem and the western hills of the Land of Israel, then in their hands.

4. Furthermore, the Muslims ruled Southern Spain for 480 years,

[6] Al-Muqaddasi, *Ahsan al-Taqasim fi Ma'rifat al-'Aqalim*, ed. F. De Goeje (Leiden, 1906), 167.

[7] A. Abbas, *Rahlat ibn al-Arabi ila al-Mashraq kama Suraha, "Qanun al-Tawil"* (1968), *abhat* 21, cited by M. Gil, in *The History of Eretz Israel under Moslem and Crusader Rule (634-1291)*, vol. 6 (Jerusalem, 1981), 19 (Heb.).

making Cordoba their capital and building the Great Mosque, one of the most splendid mosques in the Islamic world. After the Muslims had been driven out of Christian Spain – a land which was not theirs – no Muslim anywhere would think of claiming any part of Spain, and today no Muslim claims that the Great Mosque is holy. It would therefore be logical to conclude that the same should apply to the Dome of the Rock and the El-Aqsa Mosque in Jerusalem. They were built on the very site of the Holy Temple, which was expropriated with an impudence unparalleled in human history.

D. Historical, national and religious claims to the Holy Land

Every nation has its own territory, its own capital city and its own holy places. The Land of Israel has been named for the people of Israel ever since the time of King David, through the First and Second Temple periods, right up to the present-day State of Israel. The Jews have been the only people to undertake the cultivation of the stony hillsides and wide, empty deserts that form the greater part of the country. They pioneered settlements in places where none had hitherto existed and they were the only nation who built a capital city and a splendid and magnificent temple of gigantic proportions in Jerusalem, in the heart of the Judean Hills. "Their God is a God of mountains... let us fight them in the plain..." (*I Kgs.* 20:23-25) was the reaction of the servants of the King of Aram after a resounding Israelite victory. Moses blessed the Children of Israel as follows: "You will bring them and plant them in Your own *mountain*, the place You made to dwell in, O Lord, the sanctuary, O Lord, which Your hands established" (*Ex.* 15:17). And Isaiah (65:9) prophesies concerning the inheritance of the people of Israel: "I will bring forth offspring from Jacob, from Judah heirs to My *mountains*; My chosen ones shall take possession, My servants shall dwell thereon." The Israelite refugees, after the destruction of the First Temple, sitting at the rivers of Babylon, swore:

> If I forget you, O Jerusalem, let my right hand forget its cunning; let my tongue stick to my palate if I cease to think of you, if I do not keep Jerusalem in memory even at my happiest hour (*Ps.* 137:5-6).

So we see that the Jews were the only nation in the history of the Holy Land which shaped and built up the hills and the deserts. The Land, in turn, molded the special characteristics of the people of Israel. It was in the desert that they received their spiritual heritage, the Torah. The mountain of the Lord became the focal point of the Jewish nation; they were able to achieve physical and spiritual strength known to no other nation. This spiritual heritage has left its impact on all the nations of the world. The secret of the intellectual success and the exceptional spiritual boldness of the Jewish nation should be sought in the joy of original thinking and pioneering creativity characteristic of the Jews throughout their history.

The people of Israel alone can claim an undisputed historic, national, moral and religious right to the Land of Israel.

JERUSALEM: THREE-FOLD RELIGIOUS HERITAGE FOR A CONTEMPORARY SINGLE ADMINISTRATION

*Abdul Hadi Palazzi**

Any discussion of the problem of sovereignty over Jerusalem necessarily means involvement in a kind of investigation that has political, cultural, psychological and religious implications. For a Jew or a Muslim, religious or secular, thinking of Jerusalem means to feel reason and sentiment mingled together. In this paper I do not want to enter into specific features directly connected with politics but, as a Muslim scholar and a man of religion, only to try and determine whether, from an Islamic point of view, there is some well-grounded theological reason that makes it impossible for Muslims to accept the idea of recognizing Jerusalem both as an Islamic holy place and as the capital of the State of Israel.

First, I would like to underline that the idea of considering Jewish immigration to Eretz Israel as a western 'invasion' and Zionists as new 'colonizers' is very recent and has no relation to the basic features of Islamic faith. According to the Qur'ân, no person, people or religious community can claim a permanent right of possession over a certain territory, since the earth belongs exclusively to God, Who

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is free to entrust sovereign right to everyone He likes and for as long as He likes:

> Say: "O God, King of the kingdom, Thou givest the kingdom to whom Thou pleasest, and Thou strippest off the kingdom from whom Thou pleasest; Thou enduest with honour whom Thou pleasest, and Thou bringest low whom Thou pleasest: all the best is in Thy hand. Verily, Thou hast power over all things."[1]

From this verse one can deduce a basic principle of the monotheistic philosophy of history: God can choose as He likes as to relationships between peoples and countries; sometimes He gives a land to a people, and sometimes He takes His possession back and gives it to another people. In general terms, one might say that He gives as a reward for obedience and takes back as a punishment for wickedness, but this rule does not permit us to say that God's ways are always plain and clear to our understanding.

The idea of Islam as a factor that prevents Arabs from recognizing any sovereign right of Jews over Palestine is quite recent and can by no means be found in Islamic classical sources. To see anti-Zionism as a direct consequence of Islam is a form of explicit misunderstanding which implies the transformation of Islam from a religion into a secularized ideology. This was originally done by the late Mufti of Jerusalem, Amîn al-Husseinî, who was responsible for most of the Arab defeats and during World War II collaborated with Adolf Hitler. Later, Jamâl el-Dîn Abd el-Nâsser based his policy on Pan-Arabism, hate for the Jews and alliance with the Soviet Union. All these doctrines were the real cause of Arab backwardness, and most of Nasser's mistakes were afterwards corrected by the martyr Anwar Sadat. After the defeat of Nasserism, the fundamentalist movements made anti-Zionism an outstanding part of their propaganda, trying to describe the so-called "fight for liberation of Palestine" as rooted in Islamic tradition and derived from religious principles.

This plan for ideologization of Islam as an instrument of political struggle nevertheless encounters a significant obstacle, since both Qur'ân and Torah indicate quite clearly that the link between the

[1] *Sura* III v. 26.

Children of Israel and the Land of Canaan does not depend on any kind of colonization project but directly on the will of God Almighty. As we learn from Jewish and Islamic Scriptures, God, through His chosen servant Moses, decided to free the offspring of Jacob from slavery in Egypt and to make them the inheritors of the Promised Land. Whoever claims that Jewish sovereignty over Palestine is something recent and dependent on political machinations is in fact denying the history of revelation and prophecy, as well as the clear teaching of the Holy Books. The Qur'ân cites the exact words in which Moses ordered the Israelites to conquer the Land:

> And [remember] when Moses said to his people: "O my people, call in remembrance the favour of God unto you, when he produced prophets among you, made you kings, and gave to you what He had not given to any other among the peoples. O my people, *enter the Holy Land which God has assigned unto you*, and turn not back ignominiously, for then will ye be overthrown, to your own ruin."[2]

Moreover – and fundamentalists always forget this point – the Holy Qur'ân quite openly refers to the reinstatement of the Jews in the Land before the last judgment, where it says:

> And thereafter We said to the Children of Israel: "*Dwell securely in the Promised Land.*" And when the last warning will come to pass, *We will gather you together* in a mingled crowd.[3]

The most common argument against Islamic acknowledgment of Israeli sovereignty over Jerusalem is that, since al-Quds is a holy place for Muslims, they cannot accept its being ruled by non-Muslims, because such acceptance would be a betrayal of Islam. Before expressing our point of view about this question, we must reflect upon the reason that Jerusalem and the al-Aqsâ Mosque hold such a sacred position in Islam. As everyone knows, the definition of Jerusalem as an Islamic holy place depends on *al-Mi'râj*, the Ascension of the Prophet Muhammad to heaven, which began from the Holy Rock.

2 *Sura* V vv. 22-23.
3 *Sura* XVII v. 104.

While remembering this, we must admit that there is no real link between *al-Mi'râj* and sovereign rights over Jerusalem, since when *al-Mi'râj* took place the City was not under Islamic, but under Byzantine administration. Moreover, the Qur'ân expressly recognizes that Jerusalem plays the same role for Jews that Mecca has for Muslims. We read:

> ...They would not follow thy direction of prayer (*qibla*), nor art thou to follow their direction of prayer; nor indeed will they follow each other's direction of prayer...[4]

All qur'ânic commentators explain that "thy *qibla*" is obviously the Kaba of Mecca, while "their *qibla*" refers to the Temple Area in Jerusalem. To quote just one of the most important of them, we read in Qâdî Baydâwî's *Commentary*:

> Verily, in their prayers Jews orient themselves toward the Rock (*sakhrah*), while Christians orientated themselves eastwards...[5]

As opposed to what "Islamic" fundamentalists continuously claim, the Book of Islam – as we have just now seen – recognizes Jerusalem as the Jewish direction of prayer; some Muslim exegetes also quote the Book of Daniel as a proof of this. After exhibiting the most relevant qur'ânic passages in this connection, one easily concludes that, as no one wishes to deny Muslims complete sovereignty over Mecca, from an Islamic point of view there is no sound theological reason to deny the Jews the same right over Jerusalem.

If we consider ourselves as religious men, we must necessarily include justice among our qualities. As regards our argument, we have to admit that the same idea of justice requires that we treat Jews, Christians and Muslims equally. No community can demand for itself privileges that it is not ready to recognize to others. We know that Roman Catholics consider Rome their own capital, and the fact that that city has the largest mosque in Europe and an ancient Jewish community does not alter its role as the center of Catholicism. Even more

[4] *Sura* II v. 145.

[5] M. Shaykh Zâdeh, *Hâshiyya' ala tafsîr al-Qâdî al-Baydâwî* (Istanbul, 1979), 1:456.

can be said of Mecca: it is the main religious center for Muslims the world over and is completely under Islamic administration. Respecting this principle of fair-mindedness, we necessarily conclude that the Israelis as a nation and the Jews as a religion must have their own political and ethical capital, under their sole administration, even though it contains certain places regarded as sacred by the other two Abrahamic faiths.

To my mind, this is the only realistic ground for any discussion of the future of the Holy City. The other parties must understand that Jews will never agree to have less rights than the other religions, and that Israelis will never agree to see David's City divided into two parts. If everyone was happy to see the Berlin Wall destroyed, it was because the very idea of forced separation within a single city is something offensive to human sensitivity. We cannot even think of creating another Berlin in the heart of the Middle East. Of course, the idea of "two Jerusalems," if ever realized, will by no means be a solution, but a source of new troubles and conflicts.

It is quite clear that the future of Jerusalem must depend on a general agreement, and in our opinion the only reliable partners for Israel seem to be the Holy See and the Hashemite Kingdom of Jordan. They must understand that Israelis will never agree even to discuss the possibility of dividing their capital and spiritual center, while Israel must grant them considerable autonomy in the administration of their respective Holy Places. Those who speak of Jerusalem as the future capital of "two different states" know very well that this kind of proposal has no basis in reality. It is time to suggest imaginative solutions, to become involved in a global project for the development of the Middle East as a whole, so that peaceful coexistence with Israel can make a real contribution to overcoming the backwardness of most of the Islamic countries.

The administration of the Holy Places in Jerusalem is a quite complicated issue, and it is not possible here to enter into details. We would nevertheless like to mention something that appears unbearable for any person of religious consciousness: the fact that at present the Islamic administration of *bayt al-maqdis* permits Jews to visit the Temple Mount, but not to pray there. There are special officials in

the area whose task is to ensure that Jewish visitors on the Temple Mount are not moving their lips in prayer. To my mind, this is clearly opposed to Islamic prescriptions and rules. We have seen that the Holy Qur'ân declares the Rock a *qibla* for Jews; how, then, is it possible that – in the name of Islam – someone dares forbid Jews to pray in the place that God has appointed as their *qibla*? This is a clear example of a case in which pseudo-religious principles may work against the real spirit of the religion. Moreover, we must ask: is it possible for someone who believes in God to forbid another human to pray? What kind of religion can let us interfere in the relationship between the Creator and His creature? On this point the Qur'ân says:

> When My servants ask thee concerning Me, I am indeed close to them: I answer the prayer of every suppliant who calleth on Me...[6]

This verse explains that God is always close to His servants when they are praying. Wherever we are and whoever we are, according to the Qur'ân we can be sure that God is listening to our prayers and will answer them, although, of course, we are not always able to understand His response. This being the case, no-one who believes in God can possibly prevent others praying, notwithstanding the fact that they belong to another religious tradition. The very idea of opposing someone's prayers reveals a really deep lack of faith.

As to Jewish-Muslim relationships, we heartily agree with the declaration of Samuel Sirat, President of the Council of European Rabbis: till now inter-religious dialogue has been hampered by political reasons; but, from a theological point of view, dialogue between Jews and Muslims is easier than, say, dialogue between Jews and Christians.

In the past, Ibn Gabirol [Avicebron], Maimonides, Ibn Sina [Avicenna] and Ibn Rushd [Averroes] were not isolated intellectuals, but part of an intercommunication game that went beyond confessional links. If we reflect on the level of inter-religious dialogue in past centuries, we must frankly admit that in this respect we have been moving backwards. True, one can blame this on the political situa-

6 *Sura* II v. 186.

tion, but that does not free intellectuals and men of religion of their responsibility. Today, looking toward the future, we must again create the same kind of intellectual atmosphere, till it will become common for Islamic theologians to read Buber and Levinas, and for Jewish scholars to study the works of Sha'râwî and Ashmâwî.

Israeli intellectuals, for their part, must be ready to understand that a new attitude is emerging among some Islamic thinkers. Many of us are now ready to admit that hostility for Israel has been a great mistake, perhaps the worst mistake Muslims have made in the second half of this century. For those Muslims leaders who live in Europe, in democratic countries and not under dictatorship, this declaration is not so dangerous as for those of our brothers who live in the Arab countries. We know that, in those countries too, there is a certain part of the educated population that does not blindly accept anti-Israeli propaganda; but freedom of expression is considerably limited in those countries. It is very important for us to verify that we are not alone in our cultural activity, in our efforts not to repeat past mistakes; we must know that there is someone else who appreciates and shares our goals.

Readiness to understand the signs of the times means that we must recognize that times are ready for Jews and Muslims to recognize each other once again as a branch of the tree of monotheism, as brothers descended from the same father, Abraham, the forerunner of faith in the Living God. In the field of comparative studies, there are broad prospects for common work. We can investigate the past and understand the common features in the development of Kabbalah and *Tasawwuf*, or study the mutual influence of Jewish Halakhah and Islamic *Sharîa*. Apart from these examples, our general guideline must be the principle that, the more we discover our common roots, the more we can hope for a common future of peace and prosperity.

CHANGES IN THE ATTITUDE OF THE VATICAN ON THE ISSUE OF JERUSALEM

*Shlomo Slonim**

On December 30, 1993, the Holy See and the State of Israel signed an agreement which formalized diplomatic relations between the two parties and provided for the immediate appointment and exchange of ambassadors.[1] A commitment was also made to regulate and settle outstanding issues between the parties in such areas as property rights, education, and freedom of religious practice. Thus, some 45 years after the establishment of the Jewish state, the Catholic Church was prepared to do what it had desisted from doing all along, namely, to acknowledge the fact of Israel's existence through the institution of normal diplomatic relations.

Following this preliminary step, full diplomatic ties were established on June 15, 1994, when the 1993 agreement was formally ratified by both parties.[2] This development constituted a revolutionary change in the policy of the Vatican during the course of the present century, both with regard to the issue of Jerusalem and with regard to the status of Israel generally. The 1993 agreement does not contain any specific clause relating to Jerusalem, but one clause, Article 11(2), strongly suggests that the Vatican has abandoned its tradi-

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1 See *New York Times*, Dec. 30, 1993.

2 *Ibid.*, June 16, 1994.

tional support for territorial internationalization and has adopted a hands-off policy on the whole issue of the legal status of Jerusalem. That clause provides:

> The Holy See, while maintaining in every case the right to exercise its moral and spiritual teaching-office, deems it opportune to recall that, owing to its own character, it is solemnly committed to remaining a stranger to all merely temporal conflicts, which principle applies specifically to disputed territories and unsettled borders.[3]

The revised attitude of the Vatican on this question was also reflected in the remarks of its representative, Msgr. Celli, in a news conference following the signing ceremony. His comment was delivered in response to a question regarding the desired solution of the Vatican for the future status of Jerusalem. He said:

> It is, I think, a delicate matter, that was mentioned by the Holy See on many occasions.... [W]e were stressing the peculiarity of Jerusalem.... [W]e perceive a status recognized internationally. We need... an umbrella, that can protect the peculiarity of this Holy City. We need such an international warranty in order to protect, to save, to recognize the peculiarity of the city for the three monotheistic religions.[4]

In order to appreciate the change which is now reflected in Vatican policy, it is necessary to refer back to the beginning of the century, when the Zionist enterprise was first launched. Theodor Herzl, the founder of the Zionist movement, sought an audience with the Pope, in the hope of eliciting his support. Upon arriving in Rome, he was first received by Rafael Cardinal Merry del Val, the secretary of state, on January 22, 1904. The Cardinal responded in the following terms to Herzl's request:

> I do not quite see how we can take any initiative in this matter. As long as the Jews deny the divinity of Christ, we certainly cannot make a declaration in their favor. Not that we have any

[3] The text of the agreement is reprinted in 3 *Christians and Israel* (1993-94), 8-9.
[4] Israeli Foreign Ministry release.

> ill will toward them. On the contrary, the Church has always protected them.... But they deny the divine nature of Christ. How then can we, without abandoning our own highest principles, agree to their being given possession of the Holy Land again?...
> Certainly, a Jew who has himself baptized out of conviction is for me ideal.... But in order for us to come out for the Jewish People in the way you desire, they would first have to be converted.... Still, I see no possibility of our assuming the initiative.[5]

Several days later, Herzl met with Pope Pius X. This conversation was no less revealing for its frankness:

> **The Pope**: We cannot encourage this movement. We cannot prevent the Jews from going to Jerusalem – but we could never sanction it.... The Jews have not recognized our Lord, therefore we cannot recognize the Jewish people....
> I know it is not pleasant to see the Turks in possession of the Holy Places. We simply have to put up with that. But to support the Jews in the acquisition of the Holy Places, that we cannot do....
> And so, if you come to Palestine and settle your people there, we will be ready with churches and priests to baptize all of you.[6]

Herzl sums up the position of the Pope as follows: "*Gerusaleme* was not to get into the hands of the Jews."[7]

Thus, theological convictions combined with temporal considerations to preclude Vatican support for the establishment of a Jewish homeland in Palestine. The Church could not endorse such a program, since it would conflict with Church belief and would endanger the sites holy to Christendom which conceivably could fall under Jewish control. In sum, the Vatican opposed not only the possibility

5 Entry for January 23, 1904: Theodor Herzl, *The Diaries of Theodor Herzl*, ed. M. Lowenthal (New York, 1956), 1591-1595. Cited in S. I. Minerbi, *The Vatican and Zionism: Conflict in the Holy Land, 1895-1925* (New York, 1990), 98.

6 Minerbi, *op. cit.*, 100-101.

7 *Ibid.*, 100.

of Jewish control of Jerusalem, but the notion of Jewish sovereignty in the Holy Land altogether.

Two events in 1917 filled the Vatican with concern, even consternation: the Balfour Declaration, issued in November, and the conquest of Jerusalem by General Allenby a month later. The latter, of course, made the former realizable. There loomed the danger that the Jews would not only be able to establish an independent state but that Jerusalem, with its Holy Sites, would come under their control. The then Papal Secretary of State, Pietro Cardinal Gasparri, remarked: "We are very worried about Palestine. Zionism is threatening to invade every place, to take everything, actually to buy up Palestine.... I have written to Balfour about this and await his reply. Balfour's speech the day after the conquest of Jerusalem has worried us, and it is easy to understand why we cannot be too happy about that conquest."[8] At another point, he said: "The transformation of Palestine into a Jewish state would not only endanger the Holy Places and damage the feelings of all Christians, it would also be very harmful for the country itself."[9] British Cardinal, Francis Bourne, while visiting Palestine in 1919, wrote the following in a letter to Prime Minister Lloyd George:

> The whole [Zionist] movement appears to be quite contrary to Christian sentiment and tradition. Let Jews live here by all means, if they like, and enjoy the same liberties as other people; but that they should ever again dominate and rule the country would be an outrage to Christianity and its divine founder.[10]

All along, the Vatican had hoped to assume a seat at the peace conference, where it would be free to express its opposition to the Zionist program.[11] This hope was dashed by the opposition of Italy, which wished to avoid having an international conference address issues related to the Vatican, and especially its status in Rome.[12] Being thus excluded from the great power deliberations, the Vatican felt it

[8] *Ibid.*, 127.
[9] *Ibid.*, 119.
[10] *Ibid.*, 123.
[11] *Ibid.*, 21-22, 197.
[12] *Ibid.*, 10, 197.

necessary to address the issue of Jewish settlement in Palestine publicly. On March 10, 1919, before the Versailles Peace Conference formally allocated the mandates, Pope Benedict XV delivered a consistorial allocution which contained the following remarks:

> Our anxiety is most keen as to the decisions which the Peace Congress at Paris is soon to take.... For surely it would be a terrible grief for Us and for all the Christians faithful if infidels were placed in a privileged position, much more if those most holy sanctuaries of the Christian religion were given into the hands of non-Christians.[13]

Papal opposition to the League of Nations scheme for granting the Jews a homeland in Palestine in fulfillment of the Balfour Declaration was officially voiced in a letter to the secretary general of the League of Nations by Cardinal Gasparri on May 15, 1922. He wrote:

> The Holy See is not opposed to the Jews in Palestine having civil rights equal to those possessed by other nationals and creeds, but it cannot agree to:
> 1. The Jews being given a privileged and preponderant position in Palestine *vis-à-vis* other confessions....
> [T]he proposed draft... conveys the impression of wishing to set up an absolute preponderance – economic, administrative, and political – in favour of the Jewish element to the detriment of the other nationalities.[14]

The efforts of the Vatican to derail, or at least modify, the commitment undertaken by Great Britain under the Balfour Declaration proved unsuccessful, and the Vatican accordingly adjusted itself to the reality of Jewish immigration and settlement in Palestine. The fact that the British went out of their way to ensure that the security and sacredness of the Holy Places were faithfully preserved helped attenuate Vatican criticism.

Nonetheless, when it became apparent during World War II that that conflict would be followed by radical changes in the constella-

[13] *Ibid.*, 131.
[14] *Ibid.*, 178-179.

tion of states in the Middle East, the Catholic Church once again began to agitate for a regime in Palestine that would ensure it a preeminent voice in the affairs of Jerusalem. Most particularly, it objected to any scheme that would result in Jewish domination of Palestine. Thus, in 1943, the Apostolic Delegate in Washington was instructed to notify the U.S. government that Catholics throughout the world "could not but be wounded in their religious pride should Palestine be handed over to the Jews or placed virtually under their control."[15]

Similar considerations prompted opposition to the notion of partition. In the words of Francis Cardinal Spellman of New York: "The Catholic Church strongly opposes any form of partition, primarily on the ground that the whole of the land is sacred to Christ."[16] For the Vatican, third-party control of Palestine, rather than Jewish or Muslim rule, was clearly the preferred option.[17] However, given the realities of the Palestine situation in the aftermath of World War II, such an alternative was not feasible, and the Vatican reluctantly moved to acquiesce in the notion of partition.

Strangely enough, only belatedly did the Vatican come to view partition as a means of providing Jerusalem with a separate regime that would more readily accommodate Catholic interests. UNSCOP (United Nations Special Committee on Palestine), set up in 1947 to seek a solution to the Palestine problem, made the internationalization of Jerusalem an integral part of the partition scheme, which called for the creation of an independent Arab state and an independent Jewish state in Palestine. The character of Jerusalem, sacred to three religions, prompted the UNSCOP delegates to devise a formula which would be acceptable to the diverse states composing the General Assembly, where a two-thirds majority was required for the adoption of any plan.

[15] See, on this topic, S. Ferrari, "The Vatican, Israel and the Jerusalem Question (1943-1984)," 39 *Middle East Journal* (1985) 316-319.

[16] Memorandum of U.S. Ambassador to Iraq, George Wadsworth, to Loy Henderson, Jan. 13, 1947. NA 867N.01/1/-3047. Cited in Ferrari, *op. cit.* 318.

[17] See message of John Victor Perowne, British plenipotentiary at the Holy See, to Prime Minister Atlee, Aug. 8, 1949, FO371/WV1011/1, cited in S. Ferrari, "The Holy See and the Postwar Palestine Issue: The Internationalization of Jerusalem and the Protection of the Holy Place," 60 *International Affairs* (1984) 261.

The Vatican came progressively to see in partition and the scheme for the internationalization of Jerusalem an ideal arrangement for safeguarding the Holy Sites and for preserving its status in the Holy City. Nonetheless, this did not prevent certain Vatican voices from urging, in early 1948, the abandonment of partition in favor of a United Nations trusteeship.[18] The United States, for its part, actually adopted this course at that time and announced, on March 19, 1948, that it was withdrawing support from the partition resolution of November 29, 1947.[19] There is no evidence that the American decision was in any way influenced by Vatican opinion, but a significant result of this exercise was that internationalization was effectively undermined as an integral part of the partition scheme. With partition sidetracked, its concomitant, an internationalized Jerusalem, became unnecessary and, in fact, obsolete. Thus, by taking partition to the grave, the United States buried the scheme for the internationalization of Jerusalem.[20]

On May 15, 1948, the day when the British mandate in Palestine came to an end, only one entity out of the three slated to arise under the partition plan emerged in fact. Israel proclaimed its independence, while neither the proposed Arab state nor an internationalized Jerusalem arose. The World Organization made no move to institute its authority in Jerusalem, and no outside force came to the rescue of the beleaguered Jewish population of Jerusalem. The Jewish community in the Holy City was threatened with decimation, not only from the shellfire of the invading Arab armies, but from hunger and thirst as a result of the vice-like grip which the Transjordanian and Egyptian armies imposed on the City. Repeated calls by the heads of the Israeli government for the United Nations to institute its authority and save holy lives as well as holy sites, evoked no response. The

[18] Ferrari, *op. cit.* 266.

[19] *Foreign Relations of the United States*, 1948, vol. 5, part 2: *The Near East, South Asia and Africa* (Washington DC, 1976) 742-744. Reprinted from UN Security Council Official Records, 3rd Year, nos. 36-51, 1948, pp. 157-168. See on this topic S. Slonim, "President Truman, the State Department and the Palestine Question," 34 *Wiener Library Bulletin* (1981) 15-23.

[20] See S. Slonim, "United States Policy on Jerusalem, 1948," 45 *Catholic University Law Review* (1996) 817.

United States was fearful that UN intervention would provide the Soviet Union or one of its satellites a grand opportunity to ensconce themselves in Palestine, and it therefore refused to sanction any international intervention.[21]

Throughout the period of May to September 1948, Israel struggled alone to ensure its survival, and no voice was heard from the Holy See calling for action. Only after the battle was won and Israel's survival as a state ensured, did the Vatican bestir itself to call for an internationalized Jerusalem. By then, however, the die was cast and Jerusalem was, in fact, a city divided between Transjordan and Israel. Internationalization was no longer a feasible proposition.

The Vatican pronouncement had been delivered by Pope Pius XII on October 24, 1948, in the form of an encyclical, *In multiplicibus curis*.[22] In it he urged that Jerusalem and vicinity be given "an international character... as a better guarantee for the safety of the sanctuaries under the present circumstances." This pronouncement evoked no change in the situation. Israel was now set on a course of incorporating the western part of Jerusalem into the Jewish state and was not to be deterred by the Pontiff's call.[23] Only the intervention of the Israeli armed forces had saved the Jewish community of Jerusalem from annihilation, and Israel was not prepared to expose that community once again to the perils from which it had been so arduously rescued. Nor was Transjordan any more inclined to accept international control. King Abdullah proclaimed, in unmistakable terms, that eastern Jerusalem would be taken from him only over his dead body.[24]

Thus, Vatican efforts to modify the status quo of a divided city and bring about an international regime for Jerusalem encountered the reality of two states in possession, neither of which was prepared to countenance any alteration in the status of the city. The Pope's encyclical was successful in enlisting an array of forces, inside and

[21] On this subject generally, see S. Slonim, "The United States and the Status of Jerusalem, 1947-1984," 19 *Israel Law Review* (1984) 184-185.

[22] For the text see *New York Times*, Oct. 25, 1948.

[23] See S. Slonim, "Israeli Policy on Jerusalem at the United Nations, 1948," 30 *Middle Eastern Studies* (1994) 588-593.

[24] *Jerusalem Post*, Dec. 12, 1949.

outside the United Nations, on behalf of internationalization; but the years of campaigning for internationalization which followed proved to be an exercise in futility. Transjordan (later Jordan) and Israel were unwilling to forego control over their respective sectors, and there was no power capable of making them relent. As James G. McDonald, former U.S. Ambassador to Israel, subsequently wrote: "The [Vatican's] victory was only diplomatic: Israel was still in the New City, and Jordan in the Old."[25]

The Papal representatives spearheading the campaign for internationalization were Francis Cardinal Spellman and his close associate, Msgr. Thomas J. McMahon, director of the Catholic Near East Welfare Association, centered in New York. In December 1948, the UN General Assembly adopted a resolution which provided that the Jerusalem area should "be accorded special and separate treatment from the rest of Palestine and should be placed under effective United Nations control with the maximum feasible local autonomy for the Arab and Jewish communities."[26] Final determination of the question, however, was postponed to the next General Assembly session in 1949, by which time the Palestine Conciliation Commission (established by the same resolution) was to submit "detailed proposals for a permanent international regime for the Jerusalem area."

The formulation of this resolution (adopted with the acquiescence of the United States) apparently left Cardinal Spellman less than satisfied. Clearly enough, he felt that it attenuated, to some degree, the firm requirement of territorial internationalization as formulated in the original partition resolution of November 29, 1947. This consideration prompted him to write to President Harry Truman on April 29, 1949 and inquire whether the United States had modified its position on internationalization.[27] The Cardinal reminded the President that it had been envisaged that Jerusalem would constitute "an international enclave under United Nations rule."

In reply, the President noted the difficulties that were associated

[25] J. G. McDonald, *My Mission in Israel* (New York, 1951), 207.
[26] G. A. Res. 194 (III).
[27] See *Foreign Relations of the United States 1949*, vol. 6: *The Near East, South Asia and Africa* (Washington DC, 1977) (hereinafter cited as *FRUS 1949*), 1015-1017.

with strict territorial internationalization, including the financial burden that would fall on the international community (i.e., the United States) and the need to accommodate local administration.[28] This reply failed to satisfy the Cardinal who, in a further letter, maintained that financial considerations alone should not govern U.S. policy. He was also concerned to know whether granting Transjordan and Israel "local autonomy" might not enable these states to invoke Article 2(7) of the UN Charter, which denies the United Nations authority to intervene in the domestic affairs of states.

Secretary of State Dean Acheson was delegated by the President to respond to the Cardinal's second letter and assuage his fears.[29] Whether Acheson's letter had the desired effect is not clear, but just two days after Acheson's letter was dispatched, the Vatican, on August 11, 1949, delivered a message to the Secretary of State which reaffirmed the Vatican's firm stand in favor of territorial internationalization. "In the opinion of the Holy See," it said, "only complete internationalization of Jerusalem, its environs and all the Holy Places in Palestine can bring a true, fair, and lasting peace to the Holy Land and... all other proposed solutions are inadequate..."[30]

Around the same time, in August 1949, Msgr. McMahon visited Israel and met with senior Israeli officials, warning them of dire consequences if the scheme for territorial internationalization was not enacted by the General Assembly during the forthcoming session and not applied in practice during the course of the forthcoming year. The following reports of his meeting with Israeli Foreign Minister Moshe Sharett reveal the tense atmosphere in which the talks were held:

> Long grim conversation McMahon.... He urged full-blooded international regime as official Vatican policy from which Pope never swerved. Vatican regards this as U.N. pledge reaffirmed December 1948.... Repeatedly referred forthcoming Assembly as climactical implying that they marshalling all forces achieve decision.... Made references interpretable as veiled threats such

[28] *Ibid.*, 1015-1016.
[29] *Ibid.*, 1293-1294.
[30] *Ibid.*, 1308-1309.

> as they never opposed Jewish State nor our admission U.N. also reference Catholic attitude Jewish communities abroad.[31]

What he obviously meant to convey was that the Catholics had not originally objected to one portion of the Holy Land being given to the Jews and another to the Arabs provided they themselves got Jerusalem, but as things had now turned out, they found themselves cheated out of their rightful heritage.[32]

Needless to say, McMahon came away empty-handed from his meetings with the Israeli leaders. They were not about to surrender Jewish Jerusalem with its 100,000 inhabitants to the United Nations, after that body had failed to raise a finger to save the City from destruction. Jewish blood had been shed in the defense of that community, and the Israeli government would not allow either the fiat of the Vatican or that of the United Nations to detach western Jerusalem from Israel. Nor was McMahon any more successful in persuading Transjordan to relinquish its control of East Jerusalem. King Abdullah was ready for a life-and-death struggle to preserve his control of the city.

These realities in no way deterred the General Assembly from adopting a resolution which was, on its face, quite preposterous. Under the resolution, adopted on December 9, 1949, the Trusteeship Council was called upon to institute Jerusalem as a *corpus separatum*.[33] The Council was requested at its next session to complete preparation of the Statute of Jerusalem which had been suspended in 1948, to approve that Statute, and to "proceed immediately with its implementation." The Trusteeship Council was instructed not to allow "any actions taken by any interested Government... to divert it from adopting and implementing the Statute of Jerusalem." Nothing could better illustrate the Assembly's detachment from reality than the adoption of a resolution which had no possibility of implementation, given the absolute opposition of the two states actually exercising control in Jerusalem. The Assembly resolution only

[31] Israel State Archives, *Documents on the Foreign Policy of Israel*, vol. 4: *May-Dec. 1949* (Jerusalem, 1986), 288.
[32] *Ibid.*, 350.
[33] G. A. Res. 303 (IV), Dec. 9, 1949.

spurred Israel to move its government offices from Tel Aviv to Jerusalem and to consolidate its grip on the western sector of the City.[34] Transjordan, likewise, spurned the UN resolution and reaffirmed its determination to exercise exclusive control of its sector.[35]

In 1950, the Vatican moved to obtain yet another General Assembly resolution calling for the institution of territorial internationalization in Jerusalem.[36] This time it was spared from proceeding with this farcical exercise by the withdrawal of the Soviet bloc from supporting sterile resolutions lacking any chance of implementation. Of the three groups which had hitherto supported the adoption of these resolutions, only the Catholic and Arab blocs remained, and they alone could not muster the two-thirds vote required for adoption. From 1950 to 1967 the United Nations adopted no resolutions on the subject of Jerusalem, and the earlier resolutions remained unimplementable.

The moral of the lesson was not lost on the Vatican. UN resolutions could not alter the reality of the situation. Neither Israel nor Jordan would surrender control, and the Vatican could not bring any significant measure of influence to bear on the affairs of the city. The holy sites sacred to Christianity were subject to no international agreement binding the states actually exercising control in the area. If the Vatican wanted to gain a voice in matters bearing on its interests in Jerusalem, it would have to arrange the terms with the powers that be.

Israel's action in the aftermath of the 1967 Six Day War, of uniting both east and west Jerusalem under its exclusive authority, sharpened the Vatican's predicament. Jerusalem, in its entirety, was now in the hands of a state with which it had no diplomatic ties. Now, not only a few selected sites, but the entire gamut of holy sites in the Holy Land had come under Israeli jurisdiction.

Initially, there were still voices emanating from the Vatican which proclaimed that only the internationalization of the city could guar-

[34] See *FRUS 1949*, 1542, 1551. See also H. E. Bovis, *The Jerusalem Question* (Stanford CA, 1971), 80.

[35] See *New York Times*, Dec. 11, 1949. See also Bovis, *op. cit.* 80, and *FRUS 1949*, 1553.

[36] See Slonim, "The United States..." (above, n. 21), 199-201.

antee sufficient protection of Jerusalem and its holy sites. There was even talk of a *corpus separatum* for the city. These notions prompted a group of Latin American states to present a draft resolution to the General Assembly on June 30, 1967 in support of internationalization.[37] Defeat of the proposal showed that most states did not regard internationalization as a viable proposition.[38] The only draft resolution on the subject of Jerusalem to be adopted was that of Pakistan, which called for restoration of the *status quo ante*.[39]

The Pakistani resolution in no way modified Israeli policy. Jerusalem, in its entirety, was now the capital of Israel; and before too long that status was to be officially confirmed by the Knesset in legislation.[40] Clearly, the adoption of international resolutions, even when supported by sufficient majority, was not the solution to the issue of Jerusalem.

In 1965, Pope John Paul II convened the Second Vatican Council, which issued a declaration, *Nostra Aetate*, revising Catholic doctrine on non-Christian religions, including Judaism. This event, some thought, might contribute toward an improvement in Vatican-Israeli ties, but in fact those ties were little affected by such change in theological doctrine as may have occurred.[41] So long as the *de facto* sit-

[37] UN Doc. A/L.523/Rev.1.

[38] See Slonim, "The United States" (above, n. 21), 213 n. 126.

[39] G. A. Res. 2253 (ES-V), July 4, 1967.

[40] In 1950, the Knesset had declared: "With the creation of a Jewish State Jerusalem again became its capital." *Divrei haKnesset*, 2nd Sess., Vol. 4/11 (1950), p. 603. In 1980, in reaction to a UN resolution on Jerusalem (adopted by the Security Council), the Knesset confirmed legislatively that "Jerusalem in its entirety" was the capital of Israel: Basic Law: Jerusalem, Capital of Israel (July 31, 1980), *Laws of the State of Israel*, vol. 34, 5740-1979/80, p. 209; reproduced in R. Lapidoth and M. Hirsch (eds.), *The Arab-Israel Conflict and Its Resolution: Selected Documents* (Dordrecht, 1992), 255.

[41] On *Nostra Aetate* from a Catholic perspective see, in particular, the following contributions of E. J. Fischer: "Interpreting *Nostra Aetate* through Postconciliar Teaching," 9 *International Bulletin of Missionary Research* (Oct. 1985) 158-165; "The Evolution of a Tradition: From *Nostra Aetate* to the 'Notes,'" 18/4 *Christian-Jewish Relations* (Dec. 1985) 32-47; "The Holy See and the State of Israel: The Evolution of Attitudes and Policies," 24 *Journal of Ecumenical Studies* (Spring 1987) 191-211. But cf. the critical comments of E. Berkovits, "Facing the Truth," 27 *Judaism* (1978) 324-326; and C. L. Klein, "Guidelines 1967-1982: A Preliminary Balance Sheet," 17/1 *Christian-Jewish Relations* (Mar. 1984) 30-36.

uation continued to operate in Jerusalem, with Israel faithfully preserving the sacredness of the holy sites and ensuring freedom of access and worship, there was no great urgency for the Vatican to alter its policy of non-recognition.

No doubt, the Vatican's concern over a possible adverse reaction in Arab capitals had restrained its hand in its dealings with Israel. However, the Middle East peace process, launched with the convening of the Madrid Conference in October 1991, signified that the Middle East map was in a state of flux and that determinations were to be made which could fix the contour of things for years to come. The Vatican strove valiantly to be represented at the Madrid Conference, but to no avail. Israel, for one, had no reason to admit the participation of an entity which had refused to extend it diplomatic recognition for over 40 years. If the Middle East peace bus was going somewhere, it seemed to be going there without the Vatican on board. There was a genuine danger that the Holy See might, in fact, miss the bus entirely. It was this somber thought which, apparently, induced a revised appreciation in the Vatican of the need to establish diplomatic ties with all Middle Eastern states due to resolve the problems of the region, among which would certainly be the vexed issue of Jerusalem.

The foregoing review demonstrates that during the course of this century Vatican policy on a Jewish state and on Jewish control of Jerusalem has proceeded through three phases. In the first phase, which might be called the theological phase, the Church was opposed to the creation of a Jewish state in Palestine because such a development would clash with Church belief that the Jews were condemned to exile, never to return to their homeland and certainly not to be granted statehood therein. This attitude prompted objections by Vatican representatives to Britain's issuance of the Balfour Declaration in 1917 and criticism of the League of Nations award of the Palestine mandate to Great Britain, which from the beginning was dedicated to the ideal of a Jewish homeland in Palestine. This phase ended with the failure of the Vatican to effect any change in the international commitment to the Jewish people.

The second phase opened with Vatican efforts, in the wake of World War II, to ensure that the creation of a state, or states, in Palestine would not compromise what the Vatican regarded as its inalienable rights in Jerusalem. The primary aim was to ensure that the sites holy to Christendom not come under alien jurisdiction, i.e., under the control of either of the other two monotheistic faiths, Judaism or Islam. This phase can be appropriately labeled the ideological phase, since it was a question of ideology more than anything else that spurred the Church to campaign for a Jerusalem detached from the state/s surrounding it. In this regard, the Vatican's policy bore something of the spirit of the Crusades. Repeatedly, the Vatican strove to convert Jerusalem into a *corpus separatum* under the auspices of the United Nations. It was only in this way, the Vatican felt, that freedom of access and worship would be safely protected for the Christian faithful.

The concept of territorial internationalization was incorporated in the Partition Plan for Palestine adopted by the General Assembly in November 1947, and regularly advocated by the Church thereafter, even when its implementation was no longer realistic. By the end of 1948, Jerusalem was a city divided between two sovereign states, Israel and Transjordan, neither of which was prepared to surrender control of its sector to the World Organization. Only the defection of the Soviet bloc from the pro-internationalization camp in 1950 put an end to the Vatican's vain efforts to impose a *corpus separatum* through the force of UN resolutions. The Catholic and Arab states alone could not command sufficient votes in the General Assembly to secure the adoption of resolutions by the necessary two-thirds majority. This ended the ideological phase of Vatican efforts on Jerusalem. During this period, it might be noted, every effort by Israel to elicit mutual diplomatic recognition was rebuffed by the Vatican.

The third phase commenced with Israel's gaining control of both east and west Jerusalem in the aftermath of the 1967 Six Day War. Whereas previously Vatican contacts with Israel over holy places were limited basically to Nazareth, since there were very few sites in the western part of Jerusalem, now the entire range of holy places in the walled Old City of Jerusalem, Bethlehem, and elsewhere all

came under Israeli jurisdiction. The Vatican continued to deal with Israel as the administering state, *de facto*, as it had in the past, regardless of the absence of any formal diplomatic relations. This phase can be properly called the pragmatic stage, when the Vatican limited its sights to ensuring freedom of access to the Holy Places, freedom of worship and education, etc., without seeking to impart thereto a territorial dimension. Revision of Catholic doctrine on relations with the Jews in 1965, possibly helped modify theological opposition to improved Vatican-Israeli ties.

With the launching of the Middle East peace process in 1991, when the Madrid Conference was convened, the Vatican felt compelled to take the ultimate pragmatic step and establish diplomatic relations with Israel, the state exercising uncontested control in Jerusalem. The failure of the Vatican to be invited to the conference, at least as an interested observer, generated fears that discussions on the future status of Jerusalem might take place without the Vatican being consulted or given an opportunity to state its case. Thus, pragmatic considerations dictated that the Vatican undertake what it had refused to do for some 45 years. And what pragmatic considerations dictated, a somewhat revised theological approach now permitted. The Oslo Accords of September 1993 only helped accelerate a process of diplomatic recognition that was already underway. The lesson of close to a century of diplomacy on the subject of Jerusalem demonstrated that a condition precedent for effectively safeguarding Vatican interests there was the absolute need to come to terms with the reality of the situation on site.

THE JERUSALEM EMBASSY ACT: U.S. RECOGNITION OF JERUSALEM AS THE CAPITAL OF ISRAEL*

*Malvina Halberstam***

I. The Centrality of Jerusalem

על נהרות בבל שם ישבנו גם בכינו בזכרנו את ציון. על ערבים בתוכה תלינו כנרותינו. כי שם שאלונו שובינו דברי שיר ותוללינו שמחה שירו לנו משיר ציון. איך נשיר את שיר ידוד על אדמת נכר. אם אשכחך ירושלם תשכח ימיני. תדבק לשוני לחכי אם לא אזכרכי אם לא אעלה את ירושלם על ראש שמחתי.

It is generally stated that Jerusalem is holy to three major religions: Judaism, Christianity and Islam. While the statement is correct, it is misleading. The implication is that Jerusalem is *equally* important in these three religions. That is not correct. Jerusalem is preeminent only in Judaism.

* Several earlier versions of this paper have been presented and published, including a presentation at the 2nd Annual Conference of American Academics for Israel's Future, held in New York City, May 5, 1996, an article in the *Washington Legal Times*, Oct. 9, 1995 at 46, entitled "Can Congress Move An Embassy?," reprinted in the Congressional Record, 141 *Cong. Rec.* S 15177-9 (daily ed. Oct. 10, 1995), and an article entitled "The Jerusalem Embassy Act," 19 *Fordham J. Int. L.* (1996) 1379.

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The relationship between the Jewish religion, Jewish history and Jerusalem is unique. Some twenty-five hundred years ago, on the shores of Babylon, the Jewish people, facing the first exile, proclaimed, "If I forget you, O Jerusalem, let my right hand wither; let my tongue stick to my palate if I cease to think of you" (*Ps.* 137:5-6). It is an oath that Jews have kept faithfully ever since. Numerous holidays, fast days and religious ceremonies revolve around or refer to Jerusalem. It is the subject of many psalms and countless songs throughout the ages.[1] Jerusalem permeates every aspect of Jewish life, happy or, God forbid, sad.

For over two thousand years we have prayed three times a day for the return to Jerusalem. Traditional wedding invitations include as a heading the words "*na'ale et yerushalayim al rosh simhatenu*," "We will remember Jerusalem even at our happiest hour." A glass is broken during the wedding ceremony to commemorate the destruction of Jerusalem. We take leave of a mourner with the words, "May God comfort you with the other mourners of Zion and Jerusalem." Three times a year – on the Tenth of Tevet, the Seventeenth of Tammuz and the Ninth of Av – we fast and mourn the destruction of Jerusalem, and for three weeks between the Seventeenth of Tammuz and the Ninth of Av we refrain from making weddings, parties, going to the theater, the movies, concerts or engaging in most joyful activities, to commemorate the three weeks that Jerusalem was under siege. It is reported that Napoleon entered a synagogue in Poland on the eve of the Ninth of Av. Seeing the people sitting on the ground, chanting *Lamentations* and the *Kinot*, he asked what was going on. When it was explained to him, he said, "A people that remembers to mourn so long the loss of its homeland is sure to regain that homeland."[2]

No other people have a claim that is comparable, politically or religiously. Although Christians and Muslims have holy sites in Jeru-

[1] A concert held at Lincoln Center's Avery Fisher Hall in New York City, on June 2, 1996, to commemorate Jerusalem 3000, lasting some three hours, was devoted almost entirely to songs of Jerusalem. Moreover, all the songs were clearly well known by the audience.

[2] Quoted in Moshe Kohn, "Why Messiah Hasn't Arrived," *The Jerusalem Post*, International Edition, April 20, 1996, p. 30.

salem, Jerusalem is central only in Judaism. The Center of Islam is Mecca; the Koran does not even mention Jerusalem. And, as Professor Fackenheim, the renowned philosopher, noted recently, even the PLO Covenant, adopted in 1964 and amended in 1968, does not mention Jerusalem.

Although Jerusalem was captured by the Roman Empire some two thousand years ago and has been ruled by a number of states and empires since then, it has – incredibly – never been the capital of any other state.[3] Nor was it always the beautiful city it is today. A little over a century ago, it was barren, sparsely populated and in disrepair. Thus, Mark Twain wrote in *Innocents Abroad* (1869):

> We pressed on toward the goal of our crusade, renowned Jerusalem.
> ...There was hardly a tree or a shrub anywhere.... No landscape exists that is more tiresome to the eye than that which bounds the approaches to Jerusalem....
> ...Jerusalem numbers only fourteen thousand people.
> ...The population of Jerusalem is composed of Muslims, Jews, Greeks, Latins, Armenians, Syrians, Copts, Abyssinians, Greek Catholics, and a handful of Christians.... Rags, wretchedness, poverty and dirt, those signs and symbols that indicate the presence of Muslim rule more surely than the Crescent flag itself, abound.... Jerusalem is mournful, and dreary, and lifeless. I would not desire to live here.

Jerusalem has had a Jewish majority since 1830.[4] It was formally reestablished as the capital of Israel by a Knesset resolution, adopted January 23, 1950. The resolution stated, "with the creation of a Jewish state, Jerusalem *again* became its capital."[5] This language, rather than a proposed resolution that would have simply declared Jerusalem as the capital of Israel – prospectively – was insisted upon by

[3] For a brief historical and legal survey of the status of Jerusalem since 1517, see R. Lapidoth and M. Hirsch, eds., *The Jerusalem Question and Its Resolution: Selected Documents* (Dordrecht, 1994), xix-xxix; R. Lapidoth, "Jerusalem and the Peace Process," 28 *Israel L. Rev.* (1994) 402.

[4] *Ibid.*

[5] *Divrei haKnesset*, 2nd Sess., Vol. 4/11 (1950), p. 603.

David Ben Gurion. Ben Gurion stated, "[f]or the State of Israel there has always been and always will be one capital only – Jerusalem the eternal. Thus it was 3,000 years ago – and thus it will be, we believe, until the end of time."[6]

In 1882, Samuel Cox, a Christian and a member of the U.S. Congress from 1857 until his death in 1889, stated, after observing the Ninth of Av services at the Western Wall:

> ...one cannot help but feel that this is especially the city of the Jews. Christians may fight for and hold its holy places; Moslems may guard from all other eyes the tombs of David and Solomon; the site of the temple on Mount Moriah may be decorated by the Mosques of Omar and Aksa; but if ever there was a material earth closely allied with a people, it is the city of Jerusalem with the Jews.[7]

II. The Jerusalem Embassy Act

The United States has now formally recognized this unique relationship between Jerusalem and Israel. In a fitting tribute to the celebration of the 3000th anniversary of Jerusalem, the United States has enacted the Jerusalem Embassy Act of 1995.[8] The Jerusalem Embassy Act makes a number of findings, including that Jerusalem has been the capital of Israel since 1950[9] and that the United States maintains its embassy in the functioning capital of every country except Israel.[10] It declares it to be the policy of the United States that "Jerusalem shall remain an undivided city in which the rights of every ethnic and religious group are protected";[11] that "Jerusalem should

6 *Divrei haKnesset*, Vol. 3, p. 281, reprinted in M. Medzini, ed., *Israel's Foreign Relations: Selected Documents, 1947-1974* (Jerusalem, 1976), 1:226. This information was provided to me by Professor Shlomo Slonim, who is writing a book on Jerusalem.

7 See *supra*, n. 2.

8 *Jerusalem Embassy Act of 1995*, 104 Pub. L. No. 45, 109 Stat. 398 (1995). Originally introduced by Senators Dole and Kyl on May 25, 1995, it was adopted by Congress on October 24, 1995, and became law on November 8, 1995.

9 §2(2).

10 §2(15).

11 §3(a)(1).

be recognized as the capital of Israel";[12] and "that the United States embassy in Israel should be established in Jerusalem no later than May 31, 1999."[13]

It provides that not less than $25,000,000 in 1996 and $75,000,000 in 1997, of the funds authorized to be appropriated for Acquisition and Maintenance of Buildings Abroad for the State Department, shall be made available for the construction and other costs associated with the relocation of the United States embassy in Israel to Jerusalem,[14] and that not more than 50% of the funds appropriated in 1999 may be obligated until the Secretary of State determines and reports to Congress that the United States embassy in Jerusalem has officially opened.[15] The President may, however, suspend the 50% limitation for successive six month periods "if [he] determines and reports to Congress . . . that such suspension is necessary to protect the national security interests of the United States."[16] The Act further requires the Secretary of State to report to Congress within 30 days of its adoption on the State Department's plans to implement the Act[17] and every 6 months thereafter on the cost of implementing its various phases and on the progress made toward opening the U.S. embassy in Jerusalem.[18]

The Jerusalem Embassy Act had overwhelming support in Congress. It was adopted by a vote of 93 to 5 in the Senate[19] and a vote of 374 to 37 in the House.[20] It was not signed by the President, how-

12 §3(a)(2).
13 §3(a)(3).
14 §§4(a), 4(b).
15 §3(b). A provision in the Dole-Kyl bill that required construction of the embassy in Jerusalem to commence in 1996 was deleted.
16 §7(a)(2). This provision was not in the bill initially introduced by Senator Dole. Senator Dole said that he agreed to add the waiver provision, "despite having the votes to prevail," without it, in "the interest of getting the broadest possible support – we hope, even including the support of the White House...." See 141 *Cong. Rec.* S 15522, at 515527 (daily ed. Oct. 24, 1995) (statement of Sen. Robert Dole).
17 §5.
18 §(6).
19 141 *Cong. Rec.* D1242-02 (daily ed. Oct. 24, 1995).
20 141 *Cong. Rec.* H10680 (daily ed. Oct. 24, 1995).

ever. It became law without the President's signature[21] by operation of Article I, Section 7 of the U.S. Constitution, which provides that if a bill is not returned by the President within 10 days after it has been presented to him, and Congress is in session, it shall "be a Law, in like Manner as if he had signed it."

When Senators Dole and Kyl first introduced the bill that became the Jerusalem Embassy Act, it was not met with the universal rejoicing among Jews that one would have expected. Incredibly, some Jewish organizations and leaders opposed the bill.[22] They argued (1) that the bill was a partisan political ploy by Senator Dole and (2) that it would interfere with the "peace process." (It should be noted parenthetically, that "peace process" is a misnomer; more Jews and Arabs have died since the late Mr. Rabin declared when signing the Oslo Accords on the White House lawn on September 13, 1993, "Enough of blood and tears. Enough!," than during any comparable period since the founding of the State of Israel, other than in time of outright war.)

Neither argument is sound. Members of Congress generally vote for bills for political reasons. Proponents of legislation try to per-

[21] Although the Congressional Record states that it was signed, see *Cong. Rec.* D1385 (daily ed. Nov. 8, 1995), that is apparently an error. After the bill was submitted to the President on October 26, 1995, he had ten days, starting October 27, 1995, in which to act on the legislation. Since he did not sign the bill within that period and Congress was in session, it automatically became law on November 8, 1995. *See U.S. Const.* art. 1, §7 ("If any Bill shall not be returned by the President within ten Days [Sundays excepted] after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law").

[22] This was not the first time that some Jewish organizations and leaders have taken positions harmful to Jews. In 1947 the American Council for Judaism opposed the establishment of a Jewish state and urged President Truman to vote against the partition plan. Fortunately, President Truman had the vision and courage to ignore their advice, as well as the advice of those in the State Department who opposed partition. He personally called the U.S. representative to the U.N. to make sure that his instructions to vote for partition were carried out. Hopefully, now that the bill has been overwhelmingly adopted by Congress, President Clinton, who has often invoked President Truman as a model, will have the vision and the courage to ignore those who would further delay moving the embassy and implement the Jerusalem Embassy Act.

suade legislators that it is in their political interest to vote for that legislation; opponents, that it is in their political interest to vote against it. That is the essence of the democratic process. In international relations, too, states generally act for political reasons. Had Jews in 1947 rejected the votes of those states in the U.N. that voted for partition for their own political reasons, the state of Israel might never have come into existence.

The argument that it will undermine the "peace process" is equally untenable. Soon after the signing of the Oslo Accords, Mr. Peres said in a speech that Jerusalem will always remain united and the capital of Israel. It is a statement that he and Mr. Rabin repeated many times since then. Whatever the parties intended by including Jerusalem in the list of issues to be negotiated in the permanent status negotiations, they clearly did not contemplate that Israel would move its capital from Jerusalem. Moreover, the land on which the U.S. embassy is to be built is in the Western part of Jerusalem, which has been part of Israel since 1948. There is only one outcome of the negotiations under which the presence of the U.S. embassy in Western Jerusalem would be inappropriate: if Israel were to relinquish all of Jerusalem. For most Jews, even those on the left politically, that is unthinkable.

Some commentators have argued that the refusal to move the embassy would undermine the prospects for peace by falsely suggesting that sovereignty over Jerusalem might be negotiable.[23] Thus, one wrote, "No process that falsely raises Arab hopes to divide Jerusalem can bring peace when its conclusion is certain to dash those hopes. To invite Palestinians to entertain that impossible dream is to invite resentment to fester, no matter who signs what."[24]

III. Constitutionality

President Clinton opposed the Dole-Kyl bill on policy grounds[25] and

[23] See William Safire, "Move the Embassy," *N. Y. Times*, July 1, 1996, p. A13; Douglas J. Feith, "To Promote Peace, Move the Embassy," *N.Y. Times*, May 29, 1995, p. A21.

[24] Safire, *supra*, n. 20.

[25] See Thomas W. Lippman, "Dole Seeks to Make Jerusalem Home of U.S. Embassy in Israel," *The Washington Post*, May 10, 1995, p. A29; Hillel Kuttler,

the Justice Department prepared a memorandum challenging it on constitutional grounds.[26] The memorandum argued that the bill (1) interfered with the President's power to conduct foreign affairs and make decision pertaining to recognition, and (2) is an inappropriate exercise of Congress' appropriations power because it includes an unconstitutional condition. Neither of these arguments is tenable.

A. The foreign affairs power

Contrary to popular impression, the U.S. Constitution does not vest the "foreign affairs" power in the President. It does not vest the "foreign affairs" power in any branch. Indeed, it makes no reference to "foreign affairs." It vests some powers that impact on foreign affairs in the President, others in the President and the Senate jointly, and still others in Congress. The Constitution provides that the President "shall receive ambassadors."[27] It gives him the power to appoint ambassadors, but only with the advice and consent of the Senate,[28] and to make treaties, provided two thirds of the senators concur.[29] The Constitution gives Congress a number of powers affecting the conduct of foreign affairs, including the power to "regulate commerce with foreign nations," to "establish uniform rules of naturalization," to "coin money and regulate the value thereof, and of foreign coin," to "provide for the punishment of counterfeiters," to "define and punish piracies and felonies committed on the high seas, and offenses against the Law of Nations," to "declare war, grant letters of Marque and Reprisal, and make rules concerning capture on land and water," to "raise and support armies," and to "provide and maintain a

"Administration fighting Dole Embassy Bill," *The Jerusalem Post*, May 11, 1995, p. A1.

26 Memorandum from Walter Dellinger, Assistant Attorney General, U.S. Dept. of Justice to Abner J. Mikva, Counsel to the President (May 16, 1995). Although the provision authorizing the President to postpone opening the embassy in Jerusalem by successive six-month increments was added after the Justice Department had issued its memorandum, in the hope of gaining White House support, see *supra*, n. 16, the amendment has no bearing on the question of Congress's constitutional authority to legislate on this subject.

27 *U.S. Const.* art. II, §3.

28 *Ibid.*, §2, cl. 2.

29 *Ibid.*

navy."[30] In the words of one prominent commentator, "the Constitution... is an invitation to struggle for the privilege of directing American foreign policy."[31]

If one looks at the specific grants of power, Congress has by far the greater share. Nevertheless, it has long been recognized that the President has a special role in the conduct of foreign affairs. John Marshall stated, in a speech made when he was a member of the House of Representatives, "the President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[32] Similarly, Jefferson stated, "the President [is the] only channel of communication between this country and foreign nations." Both, it should be noted, however, were speaking of *communication* with foreign nations, not of the power to *make* foreign policy.[33]

Probably the most comprehensive Supreme Court discussion of the foreign affairs power is Justice Sutherland's opinion in *United States v. Curtiss-Wright*.[34] In that case, decided in 1936, the Court sustained a statute authorizing the executive to order an embargo on arms to Bolivia, a delegation of Congressional authority that would have been unacceptable at that time with respect to domestic regulation. Justice Sutherland discussed various bases for federal authority over foreign affairs, and argued that in foreign affairs, as distinct from domestic affairs, the authority of the federal government does not depend on a grant of power by the states. Turning to the specific issue before the Court in that case, the President's authority to declare an embargo, Justice Sutherland stated, "[w]e are dealing here not alone with an authority vested in the President by exercise of legislative power, but with such an authority plus the very delicate plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[35]

[30] *Ibid.*, art. I, §8.
[31] E. Corwin, *The President: Office and Powers, 1787-1984* (New York, 1984), 201.
[32] *Ibid.*, 207.
[33] Louis Henkin, *Foreign Affairs and the Constitution* (Mineola, 1972), 221 (emphasis added).
[34] 299 U.S. (1936) 304.
[35] *Ibid.*, 320.

The Constitution also makes no reference to recognition. The provision that the President "shall receive ambassadors," now considered the basis of the president's power over recognition, is included in section 3, listing what the President may or shall do, not in section 2 which lists "presidential powers."[36] It was described by Hamilton in the Pacificus-Helvidius debates as, "more a matter of dignity than of authority" and "a circumstance which will be without consequence in the administration of the government...."[37] Historically, however, presidents have made decisions concerning recognition, starting with Washington's recognition of the French Republic. In *U.S. v Belmont*[38] and *U.S. v Pink*,[39] the Supreme Court held that an executive agreement recognizing the Soviet government and providing for the settlement of claims between the U.S. and the Soviet Union superseded inconsistent state law, implicitly accepting the executive's authority over recognition.

The Court's reference to the President's broad powers in foreign affairs in *Curtiss-Wright* and other cases cited in the Justice Department's memorandum,[40] and its implied acceptance of the executive's authority to recognize foreign governments in *Belmont* and *Pink*, were made in situations in which Congress either delegated authority to the executive or in which Congress was silent. None involved a conflict between Congress and the President.

The Supreme Court has never held that Congress could not exercise one of its constitutional powers because doing so would interfere with the President's powers in the conduct of foreign affairs.[41] The

[36] Henkin, *supra*, n.33, p. 41 ("while appointing ambassadors and making treaties are described as presidential powers (Article II, section 2), receiving ambassadors is included in section 3 which only lists things the President 'may' and 'shall' do but does not speak in terms of power").

[37] *The Federalist*, no. 69, p. 420 (Hamilton; quoted in Henkin, *supra*, n. 33, p. 41).

[38] 301 U.S. (1937) 324.

[39] 315 U.S. (1942) 203.

[40] See *Department of Navy v. Egan*, 484 U.S. (1988) 518, 529; *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. (1976) 682, 705-706 n.18; *United States v. Louisiana*, 363 U.S. (1960) 1, 35 (cited in Memorandum from Walter Dellinger, *supra*, n. 26).

[41] In *United States v. Klein*, 13 Wall (1872) 128, the Court made clear that legislation that impaired the effect of a Presidential pardon would be an

Court has held the converse: that Presidential action, which might have been constitutional if Congress had not acted, was unconstitutional because it was inconsistent with legislation enacted by Congress. In *Youngstown Sheet and Tube v. Sawyer*,[42] the Court held that notwithstanding the President's Constitutional power as commander-in-chief, President Truman's seizure of the steel mills during the Korean War, to ensure that a threatened strike did not stop the production of steel needed for the conduct of the war, was illegal, because it was inconsistent with the Taft-Hartley Act for resolving labor disputes. Justice Jackson, who had been President Franklin Delano Roosevelt's Attorney General and was a strong proponent of broad executive authority, concurred in an opinion that has become the classic statement on executive-legislative power. He wrote:

> A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.
>
> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate,

unconstitutional infringement on the powers of the executive.

[42] 343 U.S. (1952) 579.

depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all the Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what it is at

> stake is the equilibrium established by our constitutional system.[43]

Jackson cited *Curtiss-Wright* as an example of the first class of cases, in which, he said, "we find the broadest statements of presidential power," and noted that "that case involved not the President's power to act without Congressional authority, but the question of his authority to act under and in accord with an Act of Congress."[44] He concluded, "*It was intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress.*"[45]

Although the Jerusalem Embassy Act does not explicitly require the President to relocate the embassy to Jerusalem, the findings that Jerusalem is the capital of Israel and that Israel is the only state in which the U.S. does not have its embassy in the capital, the assertion that it is the policy of the U.S. that the embassy be in Jerusalem, the allocation of funds for the relocation and construction of an embassy in Jerusalem, and the prohibition on the use of some of the funds appropriated to the State Department for the acquisition and maintenance of buildings abroad if the embassy is not opened by May 1999, clearly indicate the purpose of Congress to commence construction on a U.S. embassy in Jerusalem in 1996 and to open the embassy no later than May 31, 1999.

Under the Jackson analysis, were the President to take "measures incompatible with the expressed or implied will of Congress," his power would be "at its lowest ebb." He could "rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." Such exclusive presidential control could be sustained "only by disabling Congress from acting upon the subject." As Jackson noted, "Presidential claim to power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." While the question has never been decided, it is unlikely that a court would hold that the President's authority to receive ambassadors – his

[43] *Ibid.*, 634-638.
[44] *Ibid.*, 637.
[45] *Ibid.* (emphasis added).

power to appoint ambassadors requires the advice and consent of the Senate – minus the power of Congress over appropriations and under the necessary and proper clause, is sufficient to sustain exclusive presidential control, disabling the Congress from acting upon the subject.

B. Congressional authority under the necessary and proper and spending provisions of the Constitution

Both the necessary and proper clause and the spending clause have been broadly interpreted to permit Congress to legislate on a wide scope of matters. Neither limits Congressional action to the matters enumerated in Article I, Section 8. The necessary and proper clause authorizes Congress not only to make all laws necessary and proper to implement the enumerated powers of Congress, but all laws which shall be necessary and proper for carrying into execution all powers vested "*in the government of the United States or in any department or officer thereof.*"[46] Thus, even if recognition is considered an executive power – on the basis of historical precedent, if not constitutional provision – Congress has the power under the necessary and proper clause to enact legislation concerning the location and construction of U.S. embassies abroad.

The bill is also clearly a proper exercise of Congress's spending power. That the use of the spending power is not limited to those areas that Congress could otherwise regulate was made clear by the Supreme Court in *United States* v. *Butler*.[47] Justice Roberts, writing for the majority, stated:

> [the first clause of article I Section 8] confers a power separate and distinct from these later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, *limited only by the requirement that it shall be exercised to provide for the general welfare of the United States*.[48]

Admittedly, Congress cannot use the spending power to impose un-

[46] *U.S. Const.*, Art. I, §8 (emphasis added).
[47] 297 U.S. (1936) 1.
[48] *Ibid.*, 65-66 (emphasis added).

constitutional conditions. Thus, the Supreme Court has held that Congress cannot use the appropriations power to violate the establishment clause of the first amendment,[49] the compensation clause in Article III,[50] or the prohibition on bills of attainder in Article I, Section 9.[51] The principle that has emerged from these cases is that Congress cannot use the spending power to achieve that which the Constitution prohibits. Appropriating funds for the relocation and construction of an embassy and limiting the expenditure of funds appropriated for the acquisition and maintenance of buildings abroad if construction is not started and completed on specified dates does not violate any prohibition of the Constitution.

Butler, decided over half a century ago, is the only case in which the Court held a federal appropriation invalid because of the unconstitutionality of a condition that did not involve infringement of individual rights.[52] In that case, the majority took the position that Congress could not use federal funds to induce states to enact regulations that Congress could not enact under its enumerated powers. Within a year of that decision, the Court sustained conditional appropriations in areas outside the scope of Congress' enumerated legislative authority.[53] Since then Congress has enacted numerous statutes in which it has used the spending power to achieve results that it could not have achieved by regulating the conduct directly.

Most recently, in *South Dakota v. Dole*,[54] the Supreme Court rejected a state argument that Congress could not use federal highway

[49] *Flast v. Cohen*, 392 U.S. (1968) 83.

[50] *United States v. Will*, 449 U.S. (1980) 200.

[51] *United States v. Lovett*, 328 U.S. (1946) 303. In that case, Congress provided by an amendment in an appropriations bill that no salaries should be paid to certain individuals out of monies appropriated unless they were reappointed by the President with the advice and consent of the Senate. Although those denied compensation and the Solicitor General of the United States argued that the provision was an unconstitutional interference with the powers of the President to remove executive employees, 328 U.S., 304-305, the Court did not consider the question; it held that the provision constituted a bill of attainder. *Ibid.*, 315.

[52] See Comment, "The Federal Conditional Spending Power: A Search for Limits," 70 *N.W. L. Rev.* (1974) 293, 307.

[53] See *Stewart Machine Co. v. Davis*, 301 U.S. (1937) 548; *Helvery v. Davis*, 301 U.S. (1937) 619.

[54] 483 U.S. (1987) 203.

funding to achieve a national minimum drinking age because the Twenty-First Amendment gave the states the power to make that decision. The Court stated:

> [T]he "independent constitutional bar" limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power. But no such claim can be or is made here. Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone.[55]

Moreover, in *Butler* the Court held that Congress could not use the spending power to limit states' rights. The Court has never held that Congress cannot limit the proper exercise of power by another branch of the federal government by the use of its appropriations authority unless the matter falls within one of the enumerated powers of Congress. Such a holding would vitiate what has been considered one of the most important – if not the most important – of the checks and balances: Congress' power of the purse. As a recent district court decision stated,

> [t]hough the parameters of Congress' powers may be contested, Congress surely has a role to play in aspects of foreign affairs, as the Constitution expressly recognized and the Supreme Court of the United States has affirmed. The most prominent among these Congressional powers is of course the general appropriations power.[56]

[55] *Ibid.*, 210.
[56] *United States v. Oliver North*, 708 F. Supp. 380, 382, n. 3 (U.S.D.C. D.C.

That Congress can use the spending power to limit the executive's constitutional powers is well established.[57] Consider, for example, the President's power as Commander-in-Chief. Although the Constitution provides that the President shall be Commander-in-Chief, and the Supreme Court stated almost 150 years ago that that encompasses the power "to direct the movements of the naval and military forces at his command and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy,"[58] Congress has repeatedly used its funding power to limit military action by the President.[59] Indeed, in some of the cases involving challenges to the Viet Nam War, courts have stated that Congress' failure to prohibit the President from using funds for the Viet Nam conflict, or for certain aspects of it, constituted Congressional authorization for the action in question.[60] If Congress can exercise its appropriations power to limit the President's power as Commander in Chief – a power specifically provided for in the Constitution – *a fortiori* it can exercise the appropriations power to limit the President's foreign affairs power – a power that is not expressly vested in the President but implied from other powers and that is shared with Congress.

Since World War II Congress has consistently used appropriations as a means of controlling some aspects of foreign policy.[61] One prominent commentator characterized the assertion that Congress cannot control foreign affairs by withholding appropriations as "*the* most startling constitutional claim emanating from the Iran contra hearings".[62] Or, as another prominent publicist put it, assertions "that foreign affairs just aren't any of Congress's business... bear no

1988).

57 Corwin, *supra*, n. 31, 222 (Congress can refuse to appropriate funds or enact inconsistent legislation).

58 *Fleming v. Paye*, 50 U.S. (9 Hav.) (1850) 602, 615.

59 See L. Fisher, "How Tightly Can Congress Draw the Purse Strings," 83 *AJIL* (1989) 758, 763.

60 See, e.g. *Holtzman v. Schlesinger*, 484 F. 2d (2d Cir. 1973) 1307, 1313, 1314, *cert. denied*, 416 U.S. (1974) 936. See also John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton, NJ, 1993) 33 ("Congress had by then, by a number of appropriations measures, quite pointedly reiterated its authorization of the war").

61 See K. Stith, "Congress' Power of the Purse," 97 *Yale L. J.* (1988) 1343, 1360.

62 Fisher, *supra*, n. 59, 758.

relation to the language or purposes of the founding document, or the first century and a half of our history."[63]

IV. Conclusion

It is now the law of the United States:

* that Jerusalem remain undivided;
* that Jerusalem be recognized as the capital of Israel;
* that the U.S. Embassy in Israel be moved to Jerusalem.

Even strong proponents of broad executive power in foreign affairs agree that Congress can use the appropriations power to effect the conduct of foreign affairs. Secretary of State Kissinger conceded, following the executive confrontations with Congress during the Viet Nam war:

> The decade long struggle in this country over executive dominance in foreign affairs is over. The recognition that Congress is a coequal branch of government is the dominant fact of national politics today. The executive accepts that Congress must have both the sense and the reality of participation: foreign policy must be a shared enterprise.[64]

Professor Henkin, the Chief Reporter for the latest Restatement of U.S. Foreign Relations Law,[65] and one of the leading authorities in the field, stated, "Congress has insisted and presidents have reluctantly accepted that in foreign affairs as in domestic affairs, spending is expressly entrusted to Congress...."[66]

Whatever the respective powers of Congress and the President to decide whether to recognize a foreign state – a question on which the Constitution is silent and the Court has never ruled – that issue is not raised by the Jerusalem Embassy Act. The United States recognized Israel when it was established in 1948. It was the first state to do so. Rather, the issue is whether Congress can enact legislation that may effect U.S. foreign policy interests, and whether it can do so by use of the appropriations power. Long established practice, the writings

[63] Ely, *supra*, n. 60, 62.
[64] Fisher, *supra*, n. 59, 760 (quoting State Dept. Bulletin).
[65] *Restatement (Third) of the Foreign Relations Law of the U.S.* (1987).
[66] Henkin, *supra*, n. 33, 114.

of scholars and statesmen, and judicial decisions, all indicate that the answer to both is clearly yes.

Hopefully, the President, who has the constitutional obligation to implement the law, will comply with the requirement that "not less than $25,000,000 of the funds appropriated for acquisition and maintenance of buildings abroad" for the State Department in 1996 be "expended only for the construction and other costs associated with the establishment of the United States Embassy in Israel in the capital of Jerusalem" and commence construction on the U.S. embassy in Jerusalem at once. But the significance of the Jerusalem Embassy Act goes far beyond the timing of the transfer of the U.S. embassy to Jerusalem. For the first time in history, a major world power – the major world power – has enacted a law declaring that Jerusalem must remain undivided and that it must remain the capital of Israel.

The theme of this conference is Sources of Contemporary Law. God's promise to Abraham, translated into fact by David 3,000 years ago, is now the law of the United States. It is a truly wonderful example of biblical sources of contemporary law.

V. Epilogue

In the little more than a year since the Jerusalem Embassy Act came into effect, the Secretary of State has submitted three reports to Congress. The very fact that the Secretary of State has submitted the reports, stating that they were being submitted "in accordance with" sections 5 and 6 of the Act,[67] respectively, rather than refusing to submit reports on the ground that the Act was unconstitutional, or submitting the report with a statement that the President decided to submit the report even though he considered the Act unconstitutional (as several Presidents have done with reports required by the War Powers Act), is encouraging. It would seem to indicate that the President does not take the position that the Act is unconstitutional, as the Justice Department memorandum had argued.[68] The reports,

[67] Section 5 requires the Secretary of State to submit a report within 30 days of enactment "detailing the Department of State's plan to implement this Act" and section 6 requires a report every six months thereafter on the progress made towards that end.

[68] See *supra*, n. 26, and accompanying text.

however, are not at all encouraging and are clearly not what Congress intended.

The first report briefly describes the Oslo Accords, and the extent of their implementation up to that point. It states that "support for this historic process of Israeli-Palestinian reconciliation ... has been the centerpiece of the Administration's efforts to promote a comprehensive regional settlement to provide lasting peace for Israel and its Arab neighbors," and that "[a]ny planning for adjusting U.S. diplomatic representation in the area must take place within this evolving political context." It then proceeds to list seven options for the establishment of a new embassy, varying from the purchase of land and the construction of an embassy, to the use of existing U.S. government owned properties, and the time and costs involved for each option, in very general terms without any reference to Israel whatsoever.

Following receipt of the report, Senator Kyl wrote a letter to the Secretary of State, joined in by several other senators, stating:

> We are writing to express our disappointment in the report submitted by you to Congress in accordance with the Jerusalem Embassy Act. We do not believe the report reflects an understanding of how seriously Congress intends to see the United States Embassy to Israel established in Jerusalem by 1999.
>
> ...The Department's report is written as a primer on how embassies *may* be established; the generalities offered in the report fall well short of complying with the intent of the reporting requirements of the law.[69]

The second report repeats in almost identical language the U.S. "support for the historic process of Israeli-Palestinian reconciliation," notes that further agreements between Israel and the Palestinians have been concluded, that "Israeli military personnel [has been] redeployed from six major West Bank towns and surrounding villages," that "Palestinian elections successfully took place on January 20," and describes U.S. efforts to promote negotiations between Is-

[69] Letter dated January 31, 1996, on file with the author (emphasis in original).

rael and Syria. It then proceeds to discuss the options for establishing an embassy described in the earlier memo. It states that these options can be divided into two categories: those that involve construction of a new embassy and those that involve use of existing facilities.[70] It states that the time required for construction of a new embassy is "approximately six years," which is "beyond the time frame referred to in the Act," whereas with the other options, "it is possible to open an embassy in Jerusalem within months." The conclusion states that "the Department could open an embassy in Jerusalem in a very short span of time," but that "[i]t is essential to bear in mind that sensitive negotiations are actively underway between Israel and the Palestinians and between Israel and Syria" and that the President "would take no action which would undermine the peace process."

The third report states that the "Administration considers the pursuit of a comprehensive peace in the Middle East to be a top priority" and that "a key component for this undertaking" is its "support for the Israeli-Palestinian track of the Peace Process." It proceeds to summarize the negotiations and events since the last report, including a description of meetings between Israeli and American officials and various Arab leaders. It states, incorrectly, that "[o]n April 27, the Palestinian National Council amended the PLO Covenant to revoke the section that called for the destruction of the State of Israel."[71]

[70] The Act clearly contemplated construction of an embassy. The Dole-Kyl bill originally required *construction* of the embassy to begin in 1996. Although that provision was deleted, see n. 15 *supra*, the provisions requiring that $25,000,000 in 1996 and $75,000,000 in 1997 of the funds appropriated for Acquisition and Maintenance of Buildings abroad for the State Department, shall be made available for the "construction" and other costs associated with the relocation of the U.S. embassy in Israel to Jerusalem, remain. See n. 14 *supra* and accompanying text.

[71] The statement is incorrect in two respects. First, the resolution adopted by the Palestinian National Council did not amend the Covenant; it established a committee to determine which clauses of the Covenant needed to be amended to comply with the PLO undertaking to delete the provisions of the Covenant calling for the destruction of Israel. Second, there are a *number* of provisions (*not one section*) that call for the destruction of Israel. See articles 9 ("armed struggle is the only way to liberate Palestine"); 15 ("the liberation of Palestine ... is a national duty ... and aims at the elimination of Zionism in Palestine"); 19 ("The partition of Palestine in 1947 and the establishment of the state of Israel are entirely illegal, regardless of the passage of time"); 21 ("The Arab Palestinian

In a section titled "arrangements" the report refers to the options discussed in its earlier reports, reiterates that "it is possible to open an embassy in Jerusalem quickly once a specific option [in the non-construction category] is chosen"; notes that "the U.S. opened new embassies in four months during 1992"; and gives comparative cost figures on leasing and purchasing property.

The conclusion states that the "Department could open an embassy in Jerusalem in a short span of time," but cautions that "[i]t is essential to bear in mind that sensitive negotiations are actively underway between Israel and the Palestinians," that "since Jerusalem will be a subject of these negotiations, the political profile of this subject in the period ahead will remain high," and again states that the "Administration ... would take no action which would undermine the peace process."

These reports make it clear that while the President did not veto the Act and is not claiming that he need not abide by it on constitutional grounds, the State Department has done nothing to implement it and has no intention of implementing it as long as the Israeli-Palestinian negotiations are pending, lest doing so "would undermine the peace process."

There is no provision in the Jerusalem Embassy Act authorizing the President to suspend implementation of the Act if he determines that establishing the U.S. embassy in Jerusalem might undermine the "peace process" or in any way linking the establishment of the U.S. embassy in Jerusalem, mandated by the Act, with "the peace process." As noted earlier, when the bill which became the Jerusalem Embassy Act was introduced, numerous commentators opposed it on the ground that it "would undermine the peace process." Congress rejected that argument and adopted the Act by an overwhelming vote

people, expressing themselves by the armed Palestinian revolution, reject all solutions which are substitutes for the total liberation of Palestine and reject all proposals aiming at the liquidation of the Palestine problem"). Article 2 provides that "Palestine, with the boundaries it had during the British mandate, is an indivisible territorial unit" and article 33 provides "This Charter shall not be amended save by (vote of) a majority of two-thirds of the total membership of the National Congress of the Palestinian Liberation Organization (taken) at a special session convened for that purpose."

in the House and in the Senate. The only exception permitted in the Act is if the President determines that moving the embassy to Jerusalem would be a threat to U.S. national security.[72] None of the reports suggest that it would.

On October 31, 1996, Senator Kyl wrote a letter to the Secretary of State, stating:

> The State Department's most recent report is essentially non-responsive. Unfortunately, it demonstrates the disregard your department has for the Jerusalem Embassy Act. This report is tantamount to announcing you don't intend to comply with the law.
>
> ...Apart from offering a cursory observation that a new embassy will take six years to build, your department has failed to seriously begin planning for constructing an American embassy in Jerusalem. Although Public Law 104-45 does contain a presidential waiver, the President cannot lawfully invoke this waiver simply because he thinks it would better to relocate the embassy in Jerusalem at a later time. The waiver is designed to be read and interpreted narrowly. It was included to give the President limited flexibility – flexibility to ensure that Public Law 104-45 will not harm U.S. national security interests in the event of an emergency. The law states that the President "shall" implement the embassy move; the waiver does not change the "shall" to "may, if he chooses to." This position is clear in the legislative record.
>
> Actions taken by members of your department and the office of Ambassador Madeleine Albright are disturbing to me. American foreign policy officials have: (1) failed to defend the policy statement of Public Law 104-45 before the United Nations General Assembly, which passed a resolution calling for the removal of foreign embassies from Jerusalem; (2) failed to communicate to Palestinian and Israeli officials the true meaning of Public Law 104-45 (this I have deduced from discussion with Ambassador Indyk and Israeli officials); and (3) actively sought to prevent legislation from being enacted to further the goals of

[72] See text at n. 16, *supra*.

> Public Law 104-45. For example, your department objected to, and worked strenuously against, provisions in the fiscal year 1997 omnibus spending bill that would have required the State Department to identify, in official documents, Jerusalem as the capital of Israel.
>
> In my opinion, it clear that by these actions and omissions your department comes dangerously close to violating both the letter and the spirit of the law. I would counsel you to reconsider this path and begin implementing Public Law 104-45 in earnest.[73]

To this date there has been no response to Senator Kyl's letter.

[73] Letter dated October 31, 1996, on file with the author.

Israel as a Jewish and Democratic State

ISRAEL AS A JEWISH-DEMOCRATIC STATE: HISTORICAL AND THEORETICAL ASPECTS

*Eliezer Schweid**

The debate surrounding the argument that Israel's Jewishness is not consistent with its democratic regime takes place entirely at the political and legal-constitutional levels. Oddly, even at those levels, the historical aspects of the issue are disregarded. As to its theoretical aspects – the essence of democracy and the attitude of Jewish sources to it – these are mentioned only incidentally and not discussed in depth. This is actually quite typical of debates involving political parties, where the goal is immediate "achievement," in the form of legislation in a specific area that time-related factors have placed on the public agenda. The tactics of sharp politicians focus on the short-term, and they prefer to obscure the overall perspective of the problem together with the implications of the issue. However, a very heavy price is paid for this tactical convenience: Distortions and deceptions are created, intentionally and unintentionally. These inaccuracies accumulate and facts are established – facts that have not received proper consideration themselves, let alone their consequences. The public also loses its direction in this field of obstacles. It sees obstacles and bypasses but does not see where the path is leading. In any case, the public is not given an opportunity to express an

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opinion and to decide whether it wants to reach the destination that will be revealed *ex post facto*.

It is therefore worth repeating something that should be obvious: Judaism is not a platonic idea, fixed in its eternal sources. Rather, it is the process of the cultural-historical life of the Jewish nation. Similarly, democracy is not a fixed constitutional formula. Rather, it is the structuring of complex social-political processes in the lives of various nations, each with its own developing and changing version of democracy. Furthermore, the regime of any nation – democratic or not – is not equivalent to the historical totality of the culture that has shaped its identity. It is only one component of that totality – no doubt a central component, but in order to have its effect so it must take into account, reflect and express other components. Some of these components are more important than the regime, and it must serve them: material culture, social institutions (familial, communal and national), morality, spiritual and scientific creativity, philosophy, art and, yes, religion as well (in fact, religion is one of the most central components). The political regime is an institutionalized political process, which provides a framework that unifies all of these components. They depend on it and it depends on them. Democracy, as a type of regime, provides a historical path that permits one type of solution to problems that arise in social relations within the country and in political relations with other countries. Therefore, when one disregards the historical aspect – with regard to both the past from which the nation has come as a group and the future to which the nation wants to go forward, still as a group – and focuses only on the present and the interests of individuals as individuals, the group disappears, as does the historical path taken by the group. When the historical aspect is overlooked, the issue in question loses its overall definition and breaks down into dissonant components.

The thesis, presented as fact, that there is a contradiction between Israel's Jewishness and its democratic character, is today almost an axiom for the various parties to the debate. The only point of contention is the question of the conclusions to be drawn. On the right, it is concluded that Judaism takes precedence and democracy must be subordinate to it. The left draws the opposite conclusion: democracy

takes precedence and Judaism must subordinate itself to it. Neither view pays any attention whatever to the fact that the premise of the argument is of recent vintage. It merely reflects a temporary situation of social consciousness in a lengthy, ongoing historical process.

Prior to the Yom Kippur War, only a tiny minority of extreme anti-Zionist leftists (whose attitude to democracy was also dubious) raised the argument that there was a contradiction between Israel's Jewishness and its democratic character. At the time, it seemed like a provocative comment, on the margin of the public debate, which was always stormy. Of course, the argument focused on the same problems that are debated today: the relationship between religion and state, "religious coercion" and "Jewish pluralism," the attitude of the state to its Arab citizens, the Palestinian refugee problem, peace with the Arab states, etc. These arguments actually predate the establishment of the State of Israel; these issues were discussed long before it was established in the Declaration of Independence that Israel would be a Jewish and democratic state. Nonetheless, it seems amazing that those who drafted the declaration and those who signed it, who came from all parts of the political map, did not sense any contradiction between these concepts. The opposite is true. They felt that Judaism and democracy complemented each other and were necessary for each other. The debate that erupted immediately thereafter with regard to the Law of Return, the question of a constitution and the religious *status quo* was conducted as part of the democratic process, with the intention of shaping the state's Jewish identity. Neither party to the debate accused the other of being "anti-democratic" or "undemocratic" because of its views. The debate was held in a democratic manner and aimed at somehow resolving those issues; these were indeed issues concerning which people held views that were opposed, but legitimate in the framework of the law.

After the Yom Kippur War, however, it began to be rumored that there was a contradiction between a "Jewish State" and a "democratic state." Intellectuals from the academic world brought this view from the anti-Zionist periphery to the secular Zionist center. The argument was used to strike at the religious elements, who aspired to

intensify "religious coercion," and at believers in the "Greater Land of Israel," who wanted to "rule over another nation." Extreme elements on the right and within the *haredi* world could not have agreed more, striking back with the very same argument. Moderates on both right and left began to accept the premise and, though trying to navigate between the extremes, they were increasingly pulled toward the poles and did not discuss the matter in depth. What brought about the discovery of this apparently not previously discerned truth? There is no doubt that the exacerbation of the debate between the "religious" and "secular" segments of the population on "religious coercion," on the one hand, and the "Greater Land of Israel" and "the occupation," on the other, had a marked influence on the definition of the problem. It is also undeniable that the continued occupation of Judea, Samaria and Gaza cast a shadow over Israeli democracy. To a certain degree, it justified the concern that "ruling over another nation" would have implications for the quality of democracy in Israel.

However, the "smoke of battle" blinded people to two interesting facts. First, Israel actually became more liberal in its policies after the Six-Day War, in terms of both its policy toward its Arab citizens and the functioning of its internal political system – the relations between parties, the functioning of the media, the protection of civil rights and, especially, the relationship between the government and the opposition. In other words, the democratic process was in fact strengthened, not weakened.

Second, during the progressive liberalization of the ruling process, a significant ideological change took place in the way the secular elites on the left understood the concept of democracy. As an alternative to religion, till then presented as the exclusive factor shaping Jewish identity, they wished to offer an alternative world-view, a way of life that could shape the identity of secular Jews. Against the background of the intensifying political debate, democracy seemed to be the best alternative. It was extolled not just as a type of regime and an infrastructure of values for relations between people, but as a comprehensive world-view that would shape the personal and collective identity most appropriate, in their view, for Israeli society.

This shift produced the view that there is an irreconcilable contradiction between Israel's Jewish identity and its democratic identity. And it was this change that focused the debate on the need to determine which of these identities should take precedence. This is quite understandable from the perspective of the secular left. If democracy is perceived as a form of secular identity, a possible alternative to Judaism, then there must be a contradiction between the two, especially if they are both to be implemented in one state. The polarized view is also understandable, to a certain degree, from the perspective of religious Zionists and extreme secular nationalists – both groups which also tend to contrast one identity with the other and to give unequivocal preference to one over the other. What is less comprehensible, however, is the acceptance of the premise by moderates on the left and right. After all, for these moderates (on both sides), Judaism and democracy complement each other. But the fact is that the leadership of the political center also fell into this ideological trap. The leadership of that part of the political spectrum did not even realize that the concept of democracy had taken on a meaning substantially different from its meaning in the Declaration of Independence, and that the new meaning created a contradiction not just between democracy and a "Jewish state," but between democracy and any modern "nation-state."

Let us review the facts. The democratic model envisaged by the people who drafted the Declaration of Independence was the national-parliamentary model that developed in Western Europe, particularly in England. Along with the national-parliamentary approach, Israeli democracy adopted from the outset the social-democratic approach of a "welfare state" – this principle guided the policies of the Labor party. The basic assumption was that "the nation," as a collective entity, in the full cultural-historical sense of the term, was the "master" in its country (for those who may have forgotten, "democracy" means "government by the *demos* – the people"), and that society, as a solidaristic set of relations anchored in the commitment of mutual responsibility, must be the focus of the regime's political activity.

In contrast, "democracy" as referred to today is based on a

neo-liberal version of the American model: The "master" is the citizen – each individual citizen, i.e., a composite of all citizens as individuals. We are not concerned, then, with a collective historical entity in the form of a people, but rather with a civil society that is unified – legally, administratively and functionally – by the state institutions. It is only this combination that justifies the use of the term "nation," and the "national will" that is determined through elections is only a weighted combination of the wills of all of the country's individuals which, and only which, the state must represent and serve.

Needless to say, the switch from democracy in the first sense to democracy in the second sense represents a drastic revolution on all planes of activity – personal-moral, social, legal and political. But those who debate the matter in public take the change for granted, as if it were self-evident or as if it were not a change at all, as if they were still talking about the same "democracy" referred to in the Declaration of Independence. Israelis for whom democracy is a comprehensive world-view believe that there is just one true form of democracy. For them democracy is a single unchanging "platonic idea," whose definition is not in dispute in any way. One must either accept their perception of democracy, or be forever damned as an evil person, a racist, a chauvinist or a heretic.

The disregard of history entails the disregard of other important information. One argument that is raised in public debate as if it were a proven scientific finding is that the State of Israel does not have a "democratic tradition," imprinted in a constitutional and institutional structure, in a social ethos and in a style of political behavior and public way of life. This lacuna is usually attributed to the fact that most of Israel's Jewish citizens originated in nondemocratic countries. They had no one to learn from; they could not shape a democratic way of life for themselves, as in, say, America. It is further argued that for this reason Israeli democracy is still shallow or primarily technical, in the sense of rule by the majority. It is not adequately based, so it is claimed, on personal values and ways of life. Moreover, as a result of this lack Israeli society is fraught with many

anti-democratic pressures, which represent a real danger to the stability of the regime.

What are the "facts" on which these arguments are based? At best, they are founded on public-opinion polls, which examine political attitudes in relation to well-defined issues, and on direct comparison between the accepted style in relations between political parties and institutions in the United States and the manners of the middle class in the U.S., on the one hand, and the political style and accepted lifestyle in Israeli society, on the other. Now, what this means is that the political style and social ethos that have developed in Israel are completely different from those that evolved in the United States. But does it mean that the Israeli style is lacking in relation to democratic values? A closer look at Jewish tradition, Zionist tradition and Israeli tradition, in their full historical contexts, reveals a markedly different picture.

First, as long as there were traditional Jewish communities in the Diaspora (including the countries of Eastern Europe, Africa and Asia), and as long as there were modern national and international Jewish asssociations and organizations, there were democratic Jewish traditions, based on Halakhah and the law, whatever the regimes in the countries of the Diaspora. Of course, they were traditions with a special character, both because of the nature of religious law and culture, and because of the circumstances of the Diaspora. However, the traditional communities were most certainly democratic; they drew the values of human dignity and freedom, solidarity and mutual responsibility, from religious sources.

Second, it is indeed true that most of the immigrants who came to Israel, whether for Zionist motives or in order to escape oppression and poverty, came from nondemocratic countries, most of which were ruled by tyrants. Very few came from the democratic countries – for obvious reasons: Jews in democratic countries led relatively comfortable lives, while Jews in nondemocratic countries faced real and direct threats both to their identity and to their physical existence. But those Jews who fled from oppressive regimes wanted a free way of life in a free country. They were looking not only for their own country or for a country that would admit them, but also – and

primarily – a democratic country that would allow them to maintain and freely express their identity.

This, then, was the political, social and cultural rationale of Zionism. It was conceived and born in democracy. In this context, we should mention, first of all, the fact that the modern democratic regimes in Europe emerged on the foundations of national movements that strove for national independence for their nation in their land. Democracy was the radical conclusion from the institutionalization and legitimization of the secular national idea: The nation must be independent, because the People is the regime's true source of legitimacy. The nation was perceived, then, as a cultural-historic entity with a national will, determined through elections in which parties competed. However, we must be precise here. The assumption was that the decision of the majority in a representative process (and not through direct democracy) determines the collective national will. In other words, the nation is a historical entity, responsible not only for individuals in the present, but also for a chain of cultural identity anchored in the past and aspiring to a historical future.

Zionism arose in the wake of the national movements that came to democracy by this route. It took shape as an organized movement according to their format. Its purpose was to demand and attain for the Jews, as a nation, the same democratic national right – to be its own master in its own land, like all the other nations of Europe – and it indeed demanded this in the name of democracy. In this context, it is worth noting that not only Herzl but also the religious *Hibbat Zion* movement based itself on these ideas. It, too, aspired to establish, even in the Diaspora, a national parliamentarism that would represent the political expectations of the Jewish nation among the nations. Furthermore, while most of the national movements in Europe established states by rebelling against the previous regimes and engaging in military struggle (thus of necessity injecting a non-democratic dimension into the process of establishing their national state), emerging Zionism could only organize itself as a civilian and not a military system; in particular, it was a voluntary system. The unification and representation of the nation, the recruitment of human and financial resources, the conduct of international policy and

negotiations, settlement in the Land of Israel and the establishment there of an economic, social and cultural infrastructure – all of these could be realized only through free choice, whether through volunteerism or for remuneration; in other words, only through national or social-national democracy. The same is true of the struggle that gradually developed with Arab nationalism. For defense purposes, a military force was required; but under the mandatory protection of a democratic country, most of the political, demographic, settlement and economic struggle was possible only with democratic tools.

The change in this regard came later, with the establishment of the state; but by the time a frontal military contest was required, the democratic infrastructure of the Yishuv had already been sufficiently established, and the armed forces did not become a body that shaped the regime. It remained a defensive force, structurally subordinate to a democratic civilian leadership.

To this we must add the simple fact that, for practical reasons and reasons of principle, only democratic countries tended consistently to support the Zionist movement, permitting the movement's goals to be realized and the State of Israel to be established. Clearly, Zionism itself was obligated thereby. Only as a democratic movement did it have a chance of winning its friends' and patrons' support. The historical truth is, then, that Jewish democracy emerged simultaneously with Herzl's founding of the Zionist Organization, as a direct realization of liberal national parliamentarism, even before the nation had its own state. The process of Zionist achievement in the Land of Israel maintained this framework, as did party and settlement sub-frameworks of social-democratic nationalism.

What follows from this historical description is, then, that the State of Israel was democratic not just out of choice but also out of necessity and out of substance. Its infrastructure was that of a well-formed political tradition, deriving both from Jewish sources and from West-European models. The masses of Jews who immigrated to Israel were seeking not just a homeland but also their national, social, political and cultural freedom. Despite the difficulties of settlement and the political and military struggle, and despite the

difficulties of absorbing such large numbers of immigrants, which created pressures on Israeli democracy and constrained it in certain respects, it withstood these pressures, continually striving for more complete implementation, although it did have to develop special solutions appropriate for its purpose and for the conditions under which it had to operate.

An in-depth examination of the question of the stability of democracy in the State of Israel reveals that it is stronger than many believe. Despite frequent warnings from politicians on the left, Israel can be counted among the countries whose democratic regime is extremely stable. There are no threats to Israeli democracy from within Jewish society or its political parties; nor is there such a threat from government institutions or the military establishment.

This is especially conspicuous when one considers the army – usually the most readily available alternative force to seize power in countries with shaky democratic regimes. The Israel Defense Forces took shape as a people's army, unequivocally subordinate from the start to the civilian government and to the law. The fact that soldiers are enlisted and officers trained from all sectors of the public rules out the possibility that a military leader, or group of officers, might lead all or part of the armed forces against the civilian government. But this is also true for any other group. There is no body in Israel that is interested in posing an alternative to the democratic regime. Even parties that do not consider democracy a supreme value would not give it up in practice, under any circumstances.

This conclusion does not reflect an idealization of the situation, nor does it disregard the anti-democratic views held by right-wing religious circles and extreme secular nationalists, or by extreme leftist circles. Such pressures exist in every democratic regime, and some stem from the regime itself. Democratic regimes are constantly restraining, regulating and balancing; the stability of the regime is a function of the structure that creates a situation in which even persons who profess anti-democratic views prefer the democratic "rules of the game" and act accordingly. This is true of the United States as well. In this context, for persons with short memories, one might recall the McCarthy period as an example of anti-democratic pres-

sures coming from within the government itself; at the other extreme one has the tensions that have turned contemporary American society into a violent society in which there is a real and direct threat to the individual's freedom, his property and even life.

Thus, despite the existence of undemocratic organizations in the State of Israel, and despite the inclination of Israeli governments toward centralization and the application of undemocratic pressures, democracy in Israel is no less stable than in any other democratic country in Europe or America.

Like every democratic regime, Israeli democracy has encountered dilemmas, some of which stem from its historical background, others, from the implementation of national democracy in a multi-national state that came into being in the midst of a war of survival with an opposing national movement. From a historical perspective, it is also worth emphasizing the following fact: Israel did not create the types of dilemma produced by its clash with Arab nationalism, or by the presence of a large Arab national minority within the State of Israel. There is not one democratic country in the world that has not experienced a similar national dispute, whether in its earliest, formative stage or in the course of its later development. And not one of these countries has been able to overcome this challenge by completely eliminating the tension between the majority, for whom the country is named, and the minority within its borders. Neither did Israel create the dilemma of the status of religion in the state. There is not one democratic country in which this dilemma has not developed; nor has any country succeeded in completely eliminating it.

The United States, for example, which goes to great lengths to maintain a clear separation between religion and state – perhaps because it defined itself from the start as the state of all of its individual citizens – has basically failed to eliminate both dilemmas. They emerge against its will: from the national perspective, in violent ethnic tensions between the white majority and the large "colored" minorities, particularly the blacks; from the religious perspective, in incessant pressures from the Christian churches – Protestant and Catholic – which wield real influence in American society, to intervene

in social processes, particularly in the area of education. Indeed, despite its declared secularity, the United States is still the country of the white Anglo-Saxon Protestant majority that founded it. The real problem stems from the fact that this majority is becoming increasingly smaller and is on the verge of becoming a minority, without a consensus capable of establishing social and national solidarity to replace it.

Totalitarian regimes tend to solve such dilemmas by oppression. The difference between such regimes and democracies is that the latter recognize the necessity and legitimacy of different national identities and different value-group identifications, and even seek ways to permit them full expression.

Indeed, democracy is a regime that does not try to eliminate such dilemmas but, rather, tries to accommodate them. This is accomplished by adopting compromises based on unifying material and cultural interests of sufficient historical depth; by agreeing upon values, principles and rules of dialogue based on understanding; and by making efforts to define the legitimate demands of the majority and the minorities and to seek mutual constraints that appear just to both majority and minorities.

The search for such just compromises raises a question of principle: Is justice an equation of simple equality? Is it possible to find a universal common denominator, encompassing all of the different individuals, beyond their conflicting collective identities, on the basis of which contrasts can be "neutralized" or "removed" from the social-public and political plane? And can this be done in a manner that creates constitutional, political and social equality between all individuals and groups, whether the majority or a minority?

It is around this question, or questions, that the current debate in Israel concerning the argument that there is a contradiction between Israel as a Jewish state and Israel as a democratic state revolves. Beyond grappling with dilemmas of majority-minority relations between Jews and Arabs and between secular and religious Jews, the main conflict is between two aspirations. On the one hand, one has the national democracy, whose goal is a justice which takes into account the various collective identities and their right to social-public

and political expression, but does not waive the right to sovereignty of the majority, which established the state for its life, liberty and identity. On the other, one has the individualistic democracy, which aspires to establish on the basis of itself alone, a comprehensive social-public and political way of life that will neutralize disputes and completely eliminate them from the public and political arena.

Thus, as opposed to the ideal of the State of Israel as a Jewish state, which at the same time respects the human rights of its Arab citizens and is even willing to agree to a compromise that would give the Palestinians national expression in their own separate political framework, an even farther-reaching aspiration is now being raised: The rights of the individual, and only those rights, will be considered the supreme values that will determine the country's constitution and law, the structure of its institutions and their modes of functioning, its policy and its morality. The values of the nation and the values of religion will have to be subordinate to the values of individual rights. Religious and nationalistic Jews, whose religiosity or nationalism shapes their identities, will have to forego the expression of their collective identity in their state; they will have to settle for whatever expression is made possible by the exercise of individual rights in private. Those who see a contradiction between a "Jewish state" and a "democratic state" are basically arguing that the demand for social-public and political expression to be given to certain collective human values, which are perceived as being above and beyond the values of individual liberty, is necessarily in conflict with democracy.

Let us examine this argument in greater depth. Does every dispute between different collective identities in the same state create a dilemma, not just between rival groups trying to exercise their democratic rights, but also between these collective identities and the democratic social-political order itself?

A categorization that does not intentionally blur the differences between the various dilemmas with which a regime must cope on the basis of its values, refutes this argument completely. In fact, the argument itself contains a substantial contradiction of the principles of democracy and its original purpose: the giving of free and full

expression to the social-cultural identity of various groups and individuals, not just as individuals but as the members of nations, the possessors of cultures and the believers of religions.

There are three types of dilemma that a democratic regime may encounter in dealing with collective identities within its social-political frameworks:

Dilemmas stemming from disputes between groups, movements and parties that support the regime and its principles, values and constitution, and groups, movements and parties whose interests conflict with the regime and its principles and values, and which attempt to take power and introduce a different regime.

Dilemmas stemming from disputes between two groups, or two nations, that support the regime and its principles and values, but compete with each other for superior status and full expression of their identity in the same state.

Dilemmas stemming from disputes between groups that support the regime and its principles and values, but which have supreme values that they consider above and beyond the values of democracy, and for whom these values determine their overall world-view and the way of life that they wish to lead in the same country.

As far as disputes of the first type are concerned, there can be no compromise. No regime can tolerate groups that aspire to undermine its foundations. A democratic state must protect its constitution; it cannot possibly tolerate opposition that directly undermines it. At the same time, it must be careful not to damage the foundations of its regime by suppressing opposing views by tyrannical means. The war against individuals or circles opposed to democracy must also be waged in accordance with the rules and laws of democracy.

The other two types of dispute, however, are fundamentally different. Surely a democratic regime means more than the use of a mechanism of elections and majority rule? Surely it must protect the basic rights of minorities from arbitrary practices on the part of the majority, and the rights of individuals from arbitrary usage on the part of the public? Neither is there any doubt that protection of the rights of minorities and individuals is based on moral values, on a constitution and on legal norms that have supremacy in the areas in

which they apply, i.e., methods of dialogue and the coexistence of individuals, groups, nations and even countries. However, supremacy in regard to the regulation of interpersonal and intergroup relations is not absolute supremacy in regard to the totality of the processes of personal, social and political life. It is not such supremacy that invests people's lives with meaning, or that shapes lifestyles that express such meaning. On the contrary. From the standpoint of religious people or people possessing cultural-national (e.g., humanist) or social-collective (e.g., socialist) world-views – and these constitute the overwhelming majority in every human society – democratic values derive their authority and validity from a higher absolute plane, whether it be religion, humanistic national culture or the collective experience that aspires to partnership, mutual responsibility and justice. Thus, by placing religious values, national values or social values above and beyond the values of democracy in its narrow sense, and by demanding the right to shape one's lifestyle according to religious, national-humanistic, or social criteria on a social-public and political level as well, one is not coming into conflict with democracy. Rather, one is giving legitimate expression to the desire to live a full life within democracy. The dilemmas thus created are dilemmas *of* democracy, not dilemmas that undermine democracy. It is precisely these dilemmas that make up the democratic process, in fact defining its roles and purposes.

The solutions that the State of Israel has attempted to find since its establishment as a Jewish-democratic state have been based on this understanding of the relationship between democracy and the identities of the different groups that established it or were included in it. The state's commitment to Jewish religion and tradition was founded on the assumption that the "master" was the Jewish nation, and that the state was established in order to serve the life interest of that nation. It was Jewish religion and tradition that shaped the cultural-historical identity of the Jewish nation through the generations. Considerations of national unity and continuity of the nation's historical identity dictated that Jewish religion and tradition receive institutionalized expression in the state, even though its regime was secular. Despite the fact that most of the country's citizens are not

religious (although most are traditional and nationalist according to various perceptions), the legal infrastructures for family and community life were defined on the basis of *Halakhah*, religious law. These norms of identity were not established by a religious regime but by a secular, nationalist regime which wanted them to be representative of the nation; hence the regime required most of the country's citizens to limit their freedom as individuals, for the sake of their national identity as individuals, members of the Jewish public in its state.

The assumption that the nation is sovereign, that the state was established in order to permit the Jewish nation sovereignty in its own land like every other free nation, also provided the basis for the exclusivity of Jewish nationalism in the State of Israel. Members of national and religious minorities enjoy democracy at the level of individual rights, including the right to cultural and religious freedom and the right to maintain their separate national identities in autonomous frameworks in such areas as education and way of life. However, just as Jews do not enjoy overall political expression of their collective identity in Diaspora countries, so it was assumed that the minorities would not receive political-national expression at the expense of the Jewish nation's sovereignty in its state. Democratic justice was upheld in that the collective identity of the minorities was fully expressed in several Arab-national states, particularly in "Jordan," where Palestinians make up the majority of the population. Furthermore, given Israel's agreement in principle to the Partition Plan, and against the background of the present-day realization of that plan in the establishment of an independent Palestinian entity, the exclusivity granted in the State of Israel to the Jewish nation, which established it and for whose national future it is essential, would seem to be in full accord with democratic justice.

What is the view from the standpoint of the believers in democracy as a mere tool for establishing the sovereignty of the citizens as individuals, a tool that is supposed to shape the social-public and political way of life on the sole basis of the norms of individual rights? This belief involves two far-reaching assumptions. First, it denies or

completely disregards the fact that identification with a national or cultural-historical group, or with a society that has cooperative social values, or with a specific religion, is essential to people's identity and to the meaning and completeness of their lives, no less – perhaps even more – than the individual rights that protect individuality itself. Most people are willing, of their own volition, to limit their individual rights out of recognition of an internal duty, or in order to realize supreme meaningful values. The second assumption here is that the individual's happiness – in the sense of "successful" realization of abilities, acquisition of property and the use of that property for private purposes, and social and economic status – is a universal common denominator for all individuals as individuals; hence it is necessarily a supreme social value, subordinating all other values and commitments, and all forms of group solidarity – religious, social, ethnic, national, community or family.

This is indeed the "pragmatic" world-view, the neo-liberal view, underlying the perception of democracy as a regime of the country's citizens as individuals. In such a regime, the "individual's happiness," in its narrowest (selfish) sense, is the supreme value. It is this value that determines all of the constitutional, legal and institutional orders, as well as interpersonal morality, displacing even familial, communal and national obligations. Clearly, then, according to this approach, religious, national and family values must be subordinate and their applicability restricted. They have no binding validity, only the validity of a "suggestion" or good advice, since no duty stands above the primary "right" of the individual except for those duties that stem from the need to ensure such rights for everyone. These duties entail avoiding damage to others, but none of them require positive action on the part of any individual. No doubt, if all individuals agreed wholeheartedly with this scale of values, all disputes rooted in group, religious, national and ethnic affiliations would magically disappear. Society would consist exclusively of individuals competing with one another under conditions of "fair competition," on the basis of "equality of opportunity" and respect for the "individual rights" of others. Surely, there can be no more complete and harmonious democracy than this, if we disregard for a moment class

differences defined in terms of property and differences of ability, temperament, etc., between individuals who are entitled to happiness. Of course, we must also disregard the interpersonal, interclass, interreligious and interethnic struggles that competitive morality amplifies, without balancing them with imposed duties of mutual responsibility, without cultivating the value and feeling of solidarity.

As against this perspective, however, several reservations come to mind. First, perhaps, despite most people's natural selfish tendency to see happiness as individuals as their primary goal, their being and existence as human beings are nevertheless anchored in their beliefs, culture and sense of belonging to a family, community and nation, and in their internal and external ability to maintain a way of life that expresses meaning, commitment and responsibility to an authority beyond their individuality. Alternatively, perhaps the perception of the individual as an individual, taking precedence over the public in which he was born and educated, is a fiction created by selfishness, incapable of constituting an exclusive guide to happiness. Again, it might not be possible to eliminate collective entities such as nations, societies and religions, or to have them settle for partial institutionalization, functioning solely on the basis of individual rights and the individuals' spontaneous choices. Last, perhaps most individuals, despite their natural selfishness, feel that they will never achieve happiness and self-realization as human beings if, besides exercising their rights, they cannot also realize affiliations of belonging and duty that shape man as having been created in "the image of God." Given these reservations, does the sovereignty of the individual, the equality of rights that protects the selfish happiness of the strong, still appear to be a perfect democracy?

We are thus faced with an ironic paradox: The perception of democracy that denies the legitimacy of the social-public and political functioning of collective entities based on binding affiliation; that denies the idea that the nation is sovereign and not the aggregate of the individuals that make up the nation; that sees the sovereignty of the individual as a value shaping public and political ways of life – this extreme liberal approach entails a kind of tyranny, forcing individuals – religious and secular, Jew and Arab – to forego, in the name

of their "equality," "happiness" and "liberty" as individuals, the full expression of their spiritual identity and the full realization of values which are for them not prerogatives but duties.

The constitutional perception of the state as representing the interests and rights of its citizens as individuals took shape in the United States. A careful look at national and social reality in the contemporary United States, against the background of its history as a state created by individual immigrants from innumerable countries, nations and religions in search of happiness, raises certain doubts as to whether it has succeeded in consistently realizing its principles. Furthermore, to the degree that it has indeed implemented its principles, has it, by doing so, successfully guaranteed the liberty, rights and dignity of most of its citizens, in terms of their success in realizing the rights promised by the constitution *vis-à-vis* the institutions of the regime? As already pointed out, despite what is stated in its constitution, the United States is still the country of its white Anglo-Saxon majority, and despite the consistent separation of Religion and State, it is still a Protestant country. Accordingly, rifts have indeed been created within the U.S., and to the degree that it has successfully implemented the principle of the supremacy of individual rights in order to mend these rifts, questions concerning the identity of the Unites States as a nation have engendered increasing attention and perplexity.

The questions center, first and foremost, on the source of the feeling of national solidarity without which no regime, especially a democratic one, can function. The most extreme expressions of these doubts are the real results of that selfish, competitive morality which is perceived as a supreme value. Lacking infrastructures of binding morality, mutual responsibility and solidarity, one cannot, apparently, control competition between individuals and contain it within the boundaries of "fairness," even within the boundaries of the law. Competition has long since breached those boundaries. It appears in a variety of guises: the violent war between the police and organized and unorganized crime; the struggle between a respectable class society and the "underworld"; and, in particular, the struggle between

individuals who have successfully realized their rights and those who have failed in competition – the homeless, the impoverished, those lacking the protection of family or community (both of which are in advanced stages of degeneration). From the point of view of society, these people are superfluous, since they are not protected by any social solidarity that might take precedence over competition for individual happiness.

In a state with such a history, established for such a reason, consistent application of the liberal-democratic approach of the "sovereignty-of-the-citizens-as-individuals" type would amount to tyranny based on slogans of freedom. If such an approach is enforced through a constitution and policy, not only will it fail to solve the national and religious disputes in the state – it will aggravate them considerably. Its citizens' infrastructure of solidarity will fracture, irreparable rifts will be created, its society will crumble and its culture will degenerate. Why would its citizens want to "find their happiness" as individuals in this specific country? Why would they even be interested in its continued existence?

To summarize, Israel will be neither a democracy nor a state if it is not simultaneously both democratic and Jewish.

It is questionable, then, whether individualistic democracy fulfills expectations, even in a rich immigrant country such as the United States. How much more so in Israel, which was created by the immigration of members of a single nation – the Jews. The State of Israel was established for the needs of the nation that founded it. The nation still needs the state in order to continue existing as a nation and to maintain its special cultural-historical identity. If it gives up its country, it will break down into fragmented and alienated groups. Israel was founded by a nation unified throughout history by its unique monotheistic religious tradition and culture, which did not organize itself as a church but as a halakhic way of life that applies to the entire nation. Furthermore, Israel is also inhabited by the members of another nation, whose members belong to several religions: Muslims, Christians and Druze. The other nation, which constitutes a large minority, also identifies itself as a complex collective entity,

not as a simple combination of "individuals." It is not satisfied, therefore, with "individual rights," but demands for its individual members expression of a collective entity.

THE VALUES OF A JEWISH AND DEMOCRATIC STATE

*Asher Maoz**

The beginning of 1992 marked a constitutional revolution in the Israeli legal system. Almost four and a half decades after being commissioned to enact a constitution for the State of Israel, the Knesset passed the two first chapters of Israel's Bill of Rights. These were Basic Law: Freedom of Occupation[1] and Basic Law: Human Dignity and Freedom.[2] Both Basic Laws include "purpose" clauses which provide:

> The purpose of this Basic Law is to protect human dignity and freedom [or: freedom of occupation], in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic State.

This rather vague provision aroused much controversy in the legal as well as the political communities. Opinions expressed ranged from the statement that a Jewish State could be anything but democratic[3]

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I wish to extend my gratitude to the Memorial Foundation for Jewish Culture for its support of this research.

1 *Sefer haHukkim* (*Principal Legislation*, Hebrew) (No. 5752), 114. This Basic Law was replaced in [1994] *Sefer haHukkim* (No. 5754), 90.

2 *Sefer haHukkim* (No. 5752), 150.

3 See A. Levontin, "'Jewish and Democratic' – Personal Reflections," 19 *Tel Aviv Univ. L. Rev.* (1995) 521, 542 (Hebrew). Cf. Jakobovits, below, text at notes 24-25.

to the declaration that a Jewish State could be nothing but democratic.[4] Like the rabbi in the famous Jewish tale, it is submitted that both statements are correct. The question is: what does one mean by the phrase "a Jewish State"?

Those who regard the Jewish State as nondemocratic have in mind a Halakhic state based on the laws of the Torah. Such a state cannot be democratic. In a Jewish religious state there is no room for tolerance toward a secular way of life. Moreover, in a democratic state sovereignty is entrusted to the people; in a Halakhic state the only sovereign is God Almighty. The basic norm in such a state is that the commandments of the Lord must be obeyed.

Those who regard the Jewish state as democratic have in mind a democratic state which derives its values from Jewish teachings. As such, the Jewish State presents no contradiction to democracy. Indeed, Western notions of human rights and democratic values have derived much of their substance from the Bible, as well as from classical Judaic sources.

Thus, William Lecky wrote in a famous work:[5]

> It is a historical fact that in the large majority of cases, the Protestant advocates of civil rights took most of their principles from the Old Testament, whereas the advocates of oppression took most of their principles from the New Testament.

The American Bill of Rights is based to a large extent on the constitutions of the colonies, which themselves drew extensively from the Old Testament.[6] The Puritan settlers of the first colonies – in Plymouth and Massachusetts Bay – chose the ancient laws of the Hebrews as their governing legal system. An American jurist colorfully described Jewish Law as sailing to America "aboard the Mayflower and

[4] See Cr. A. 2145/95, *State of Israel v. Guetta,* 46 (5) *PD* 704, 716 *per* Elon D.P.; *Cf.* Gordis, below, text at notes 21-22 and Goldenson, below, text at note 23.

[5] W. E. H. Lecky, *History of the Rise and Influence of the Spirit of Rationalism in Europe* (rev. ed., New York, 1871), II, 168.

[6] On Puritan constitutionalism as "a fertile seed-bed out of which American constitutionalism grew," see J. Witte, "How to Govern a City On a Hill: The Early Puritan Contribution to American Constitutionalism," 39 *Emory L. J.* (1990) 41, 62.

the Alberta" and striking "deep roots in rocky New England."[7] A writer of that period decisively averred that "the people of Massachusetts adopted the laws of Moses."[8] It has moreover been stated that "[t]he legacy of Hebrew laws, by the Massachusetts Puritans, was to remain part of the American heritage."[9] A contemporary American jurist states:

> The fundamentals of man – as they are stated in the Bill of Rights or in the Universal Declaration of Human Rights – find their roots in the narratives and prophets of the Hebrew Scriptures and the teachings they have generated over the centuries.[10]

Another American jurist went so far as to state that "The Hebrew Bible [serves] as the primary source of American civilization."[11] Mr. Justice Brandeis was no less ecstatic, for he stated that "twentieth century ideals of America had been the age-old ideas of the Jew."[12]

Professor Suzanne Stone is critical of the heavy reliance on Jewish law in American legal thinking. She writes:

> ... the Jewish legal tradition has come to represent in this scholarship precisely the model of law that many contemporary American theorists propose for American legal society.[13]

References to biblical law, as well as to classical Jewish sources, may be found extensively in American judicial decisions.[14] Just one example: in his famous opinion in the *Miranda* case,[15] Chief Justice

7 B. J. Meislin, *Jewish Law in American Tribunals* IX (New York, 1976).
8 H. St. G. Tucker, *Commentaries on the Laws of Virginia* (Winchester, 1831) 1, 6-7.
9 Meislin, *op. cit.* (above, n. 7), 28.
10 M. R. Konvitz, *Judaism and Human Rights* (New York, 1972), 17.
11 J. S. Auerbach, *Rabbis and Lawyers: The Journey From Torah to the Constitution* (Bloomington IN, 1990), xvii.
12 A. Gal, *Brandeis of Boston* (Cambridge MA, 1980), 126.
13 S. L. Stone, "In pursuit of the counter-text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory," 106 *Harv. L. Rev.* (1993) 813, 819.
14 For a comprehensive survey on the reliance on Jewish law in American judicial decisions, see D. A. Ashburn, "Appealing to a Higher Authority? Jewish Law in American Judicial Opinions," 71 *Univ. of Detroit Mercy L. Rev.* (1994) 295.
15 *Miranda v. Arizona,* 384 *U.S.* (1966) 436.

Earl Warren relies expressly on Jewish Law, as stated by Maimonides, in establishing the rule against self-incrimination.[16]

The reliance on biblical and other Judaic sources is not unique to the Americans. René Cassin, asked about the source from which he derived the principles of the Universal Declaration of Human Rights, is said to have answered that he had just rephrased the Ten Commandments.[17]

It may seem strange that Jewish law, being a religious legal system, would incorporate democratic values and principles of human rights. Such values and principles seem to be in direct contradiction with a religious normative system, in which the task of the individual is to serve God.[18] Yet, as Abba Hillel Silver wrote:

> Judaism was essentially a democratic faith, a people's religion. The covenant was made with "all the men of Israel, from the hewer of your wood to the drawer of your water" (Deuteronomy 29:11). The Torah was given to all and in sight of all (Exodus 19). The entire people was summoned to become a "kingdom of priests and a holy nation" (Exodus 19:6)... On the verse: "You stand this day all of you before the Lord your God, your heads, your tribes, your elders, and your officers, all the men of Israel" (Deuteronomy 29:10), a midrash expounds: God says: "Even though I have appointed over you Heads and judges, elders and officers, you are all equal in my sight." This is the meaning of "all the men of Israel" – all are alike (Midrash Tanhuma, on the verse).[19]

In his essay "The Biblical Basis of Democracy,"[20] Rabbi Robert Gordis remarked that "the main current of Biblical thought and Jew-

[16] Chief Justice Warren quotes from N. Lamm, "The Fifth Amendment and Its Equivalent in Halacha," 3 *Judaism* (1950) 53, and expressly relies on Maimonides' *Mishneh Torah, Book of the Judges, Laws of the Sanhedrin*, ch. 18, par. 6 (iii *Yale Judaica Series*), 52-53.

[17] See A. Rubinstein, *Constitutional Law of the State of Israel* (5th ed., Jerusalem, 1996), 907.

[18] See Y. Leibowitz, *Judaism, Human Values and the Jewish State* (Cambridge MA, 1992), 14.

[19] A. H. Silver, *Where Judaism Differed* (New York, 1956), 275-276.

[20] 4 (4) *Conservative Judaism* (1948) 1 ff.

ish tradition is fundamentally democratic... [and] has helped to mould the democratic ideals of western civilization."[21] Noting that the word "democracy" is of Greek origin and was unknown in ancient Hebrew, he went on to state, that "Greek had the word for it, but the Hebrews had the substance."[22]

A similar view had been expressed a decade earlier by Rabbi Samuel Goldenson:

> When we examine the central ideas of the nature of man and society as conceived in Judaism, we discover that democracy is not only congenial to the Jewish mind but is necessarily implied in its ethical thinking and spiritual beliefs. Though the concept is not found in the terminology of the writings of Israel, the sentiment for it is unmistakable.[23]

These statements seem far-reaching. Obviously, ancient Judaism did not coincide with modern notions of democracy. Rabbi Immanuel Jakobovits wrote that "[o]f all great ideals making up whatever is best known in 'Western Civilization,' it is only democracy which does not derive its entire inspiration from the creation of the Hebraic genius and heritage."[24] And he went so far as to state that "contemporary notion of democracy [is] an idea which is largely foreign to Jewish teachings."[25]

Yet, it was the old ideals of Judaism that could be accommodated in democracy, for as noted by Jakobovits, "[s]ocial justice, human equality and freedom, the education of the masses," which underlie democratic values, "first found expression in the literature and history of Israel."[26] In Gordis's words, "[w]hat the Judeo-Christian tradition was able to do was to mould the ideals of men, so that when the objective political and social conditions made political democracy possible, men were able to accommodate it to their world-view,

[21] *Ibid.*, 2.
[22] *Loc. cit.*
[23] S.H. Goldenson, "The Democratic Implications of Jewish Moral and Spiritual Thinking," 49 *Central Conference of American Rabbis* (1939) 331, 335.
[24] I. Jakobovits, *Journal of a Rabbi* (London, 1967), 105-106.
[25] *Ibid.*, 106.
[26] *Loc. cit.*

which had grown up almost unconsciously in the centuries."[27] In a more confined way, it would be correct to state that "there is [a] democratic element in the Jewish conception of government" and that "Judaism... through its... return to the political and constitutional arena of world affairs, can make its most significant contribution to modern thought and the solution of present-day world problems."[28]

The democratic nature of Judaism may be demonstrated by the fact that in the Jewish religion there is no room for a pope. Each and every individual is directly commanded by God and is personally responsible to Him; there is no mediator between them. Significantly, the Sages tell us that it is incumbent upon the individual to choose his rabbi ("*aseh lekha rav*"[29]), rather than for a rabbi to be imposed on him. Even the institute of the Chief Rabbinate, accepted by Jews today, does not have its origin in Jewish religion. Rather, it was created in the Diaspora in order to represent the Jewish community before the gentile authorities. Nine of the greatest rabbis cannot form a *minyan*, the quorum needed for congregational prayer, while ten illiterate men, even sinners (*avaryanim*) will suffice.[30]

In a notable work of 1927, George Foot Moore wrote:

> Judaism ... made religion in every sphere a personal relation between the individual man and God, and in bringing this to clear consciousness and drawing its consequences lies its most significant advance beyond the older religion of Israel.[31]

It would be impossible to summarize democratic elements in Judaism in a nutshell. I would like to touch, however, on a few examples.

The rule of law and equality before the law is of universal application in Judaism. We are told in the Babylonian Talmud of Alexander Yannai, one of the most powerful kings, who was summoned to

[27] Gordis, *op. cit.* (above, note 20), 4.

[28] Jakobovits, *op. cit.* (above, note 24), 106.

[29] *M. Avot* 1:6.

[30] See D. Hoffmann, *Melammed Leho'il*, *Orah Hayyim*, nos. 29, 28-29 (1925-26); Cf. A. Guttmann, "Participation of the Common People in Pharisaic and Rabbinic Legislative Processes," 1 *Jewish Law Association Studies* (1985) 41, 51.

[31] *Judaism in the First Centuries of the Christian Era: The Age of the Tannaim*, I (Cambridge MA, 1927), 121.

court in a tort case of vicarious liability for the actions of his slaves. The king rejected the summons and, when he finally appeared in court, insisted on remaining seated during the trial. The president of the court, R. Simeon Ben Shatah, reprimanded the king and said:

> Stand up on thy feet, King Yannai, and let the witnesses testify against thee; yet it is not before us that thou wilt stand, but before Him who spoke and the world came into being, as it is written [in the *Torah*], "Then both the men between whom the controversy is, shall stand before the Lord" (*Deut.* 19:17).[32]

Thereupon, the Talmud tells us, the King rose to his feet.

God Himself is subject to the rule of law. The Jerusalem Talmud states:

> It is universal custom that when an earthly king issues a decree, at his will he observes it himself, and at his will only others are bound to observe it. But it is otherwise with the Holy One Blessed Be He, for He is Himself the first to observe all his decrees. This is deduced from the text "And ye shall observe that which I observe... I the Lord" (*Lev.* 22:9). That is to say, I, the Lord am the first to observe the commandments of the Torah.[33]

A colorful demonstration of the idea of the Torah's supremacy over its giver is to be found in the Babylonian Talmud. The Talmud tells us of a halakhic dispute that arose among the Tannaim (sages who lived in the first two centuries CE), where all the sages had disagreed with R. Eliezer, who tried, nevertheless, to convince his colleagues that justice lay with him:

> On that day Rabbi Eliezer brought forward every imaginable argument, but they [the sages] did not accept them. Said he to them: "If the *Halacha* [Law] agrees with me, let this carobtree prove it!" Thereupon the carobtree was torn a hundred cubits out of its place – others affirm, four hundred cubits. "No proof can be brought from a carobtree," they retorted. Again he said to

[32] *BT Sanh.* 19b.
[33] *JT R.H.*, chap. 1, 57a.

> them: "If the *Halacha* agrees with me, let the stream of water prove it!" Whereupon the stream of water flowed backwards. "No proof can be brought from a stream of water," they rejoined. Again he urged: "If the *Halacha* agrees with me, let the walls of the schoolhouse prove it," whereupon the walls began to lean. But Rabbi Joshua rebuked them, saying: "When scholars are engaged in a *Halachic* dispute, what have ye to interfere?" Hence they did not fall, in honour of Rabbi Joshua, nor did they resume the upright, in honour of Rabbi Eliezer; and they are still standing thus inclined. Again said he to them: "If the *Halacha* agrees with me, let it be proven from heaven!" Whereupon a Heavenly Voice cried out, "Why do ye dispute with Rabbi Eliezer, seeing that in all matters the *Halacha* agrees with him!" But Rabbi Joshua arose and exclaimed, "It is not in heaven" (*Deut.* 30:12). What did he mean by this? - Said Rabbi Jeremiah: The *Torah* had already been given at Mount Sinai; we pay no attention to a Heavenly Voice, because Thou hast long since written in the Law at Mount Sinai, "After the majority must one incline" (*Ex.* 23:2).[34]

There is an addendum to this legend:

> Rabbi Nathan met Elijah [the prophet] and asked him: "What did the Holy One, Blessed Be He, do in that hour?" – "He laughed [with joy]," he replied. saying: "My sons have defeated Me, My sons have defeated Me!"[35]

Commenting on these two Talmudic passages, the late Justice Moshe Silberg of the Supreme Court of Israel wrote:

> Here we find the Rule of Law in the absolute sense of the term: The law ruling the lawgiver; the inclusion of the legislator himself within the framework of legal and decisional relationships created by the laws given by him. He observes "the precepts of the Law," submits to the authority of the law, and furthermore submits to the authentic interpretation given by the

[34] *BT B.M.* 59b.
[35] *Ibid.*

> interpreters, i.e., submits himself to the jurisdiction of an authoritative body, the majority, authorized by him to determine in case of doubt, which for him is of course no doubt at all. If the law is "After the majority must one follow," then this rule is to be applied even when the lawgiver himself is an interested party,[36]

and Justice Silberg summarizes:

> The idea is too great to be grasped by our ordinary mind, but one conclusion certainly rises from it: that the jurisdiction of Jewish law is not confined within the boundaries of relations between man and man. Matters concerning the relationship between man and God... are caught by the net of legal relations as well.[37]

Silberg was not unique in viewing the relations between God and the Jewish people in legal terms. In his work *Leviathan*,[38] Hobbes rejected the Christian notion of "the Kingdome of God" as "Eternal Felicity, after this life, in the Highest Heaven." Instead, Hobbes searched "for the Monarchy, that is to say, the Sovereign Power of God over any Subjects acquired by their own consent, which is the proper significance of Kingdome." This he found in the Bible, as "a Kingdome properly so named, constituted by the Votes of the People of Israel... wherein they chose God for their King by Covenant made with him."[39] Hobbes concluded:

> It is manifest... that by the Kingdome of God, is properly meant a Commonwealth, instituted (by the consent of those which were to be subject thereto) for their Civil Government, and the regulating of their behaviour, not only towards God their King, but also towards one another in point of justice, and towards

[36] M. Silberg, "Law and Morals in Jewish Jurisprudence," 75 *Harv. L. Rev.* (1961) 306, 310-311. See, however, I. Englard, "Majority Decision vs. Individual Truth: The Interpretation of the 'Oven of Achnai' Aggadah," 15/1-2 *Tradition* (1975) 137.

[37] *Loc. cit.*

[38] Thomas Hobbes of Malmesbury, *Leviathan or The Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civil* (1651).

[39] *Ibid.*, 216.

> other Nations both in peace and warre which properly was a Kingdome, wherein God was King....[40]

The idea of a covenant, whereby the Jewish people chose Jehovah to be their God, no less than the Jewish people were chosen by God to be His people, is a basic principle of Jewish philosophy.[41] It is therefore of paramount significance that this central event in the creation of the Jewish community is described in terms acceptable to democratic theories. Nachmanides, one of the classical commentators on the Bible, wrote: "[God] said to [the People of Israel]: 'I hereby put My words in front of you, choose if you wish to live according to them'."[42] Only after the Jewish people had accepted the Torah were they regarded as bound by its commandments.[43] Rabbinic teaching emphasized the covenant concept as "a manifestation of reciprocity... the reciprocity of the relationship between ruler and ruled."[44]

Referring to the covenant theory, Jose Faur wrote:

> The effect of this conception of religion is the establishment of a bilateral pact, a *berit,* between God and man where both parties freely agree to maintain a relationship between themselves. Thus conceived, religion for Judaism is a

[40] *Ibid.*, 218.

[41] See, *inter alia*, M. P. Golding, "Community, Covenant and Reason: A Study in Jewish Legal Philosophy," Ph.D. Thesis, Columbia University, 1959; D. J. Elazar, "Covenant as the basis of the Jewish Political Tradition," in D. J. Elazar, ed., *Kinship and Consent* (Ramat-Gan, 1981), 21; A. J. Wolf, ed., *Rediscovering Judaism* (Chicago, 1965).

[42] Commentary to *Exodus* 19:7. Another source suggests that God offered the Torah to each and every nation and only after they all rejected it did He offer it to the Children of Israel; *Pesikta Rabbati, Aseret haDibberot* 21:99a-b.

[43] See R. Hezekiah b. Manoah (*Hizzekuni*), commentary to *Exodus* 24:7-8. The Babylonian Talmud tells us that God imposed the Torah upon the Israelites at Mount Sinai. Therefore, this source goes on to say, if God summons the Jews to a court of law for breaching its commandments they would be justified in their argumentation, as no undertaking made under duress is enforceable. However, at a later stage the Jews ratified their acceptance of the Torah out of free choice, and for that reason they are indeed bound by the Torah; *BT Shab.* 88a, commenting on *Exodus* 19:17 and on the words from *Esther* 9:27.

[44] G. Freeman, "The Rabbinic Understanding of Covenant as a Political Idea," in *Kinship and Consent* (above, n. 41).

> relationship between God and man, the sole ground of which is the free and mutual election of God and man.[45]

Another writer described the covenant between God and Israel "in every way comparable to Rousseau's *contrat social.*"[46]

The covenant theory, notably in its social contract manifestation, suffers from ample flaws. In essence they result from the fact, rooted in Jewish theology, that "God is the ultimate source of authority,"[47] and that "God's existence and indeed his legitimate power over man must certainly precede the covenant in Jewish thought."[48] Nevertheless, it is of significance that the covenant model "clearly expresses the *relationship* between God and the Jewish people on which Jewish law is built."[49] It is of importance that this relationship is based on human freedom,[50] and imposes mutual rights and duties on God and man.[51]

[45] J. Faur, "Understanding the Covenant," 9/4 *Tradition* (Spring, 1968) 41, 42.

[46] H. Silving, "The Jurisprudence of the Old Testament," 28 *N.Y.U. L. Rev.* (1953) 1129, 1130.

[47] E. Rachman, "Secular Jurisprudence and Halakhah," 6 *The Jewish Law Annual* (1987) 45.

[48] B. S. Jackson, "Secular Jurisprudence and the Philosophy of Jewish Law: A Commentary on Some Recent Literature," *ibid.*, 9. It has therefore been suggested that the Biblical covenant, rather than a contract between subjects, was a pact between subjects and the sovereign; Jackson, *op. cit.*, 8-9. Cf. D. Novak, "Natural Law, Halakha and the Covenant," 7 *The Jewish Law Annual* (1988) 43, 59; E. N. Dorff, "The Covenant: The Transcendent Thrust in Jewish Law," *ibid.*, 68, 83-84.

[49] Dorff, *op. cit.*, 95. The Bible, moreover, records a covenant between God and all living beings, following the flood: *Genesis* 9:8-17.

[50] While accepting that "the authority of the conventional requirements is the will of God," Novak stresses that man was given the freedom of choice, that is the freedom to accept or reject the covenant; Dorff, *op. cit.* (above, note 48), 59.

[51] While Novak categorically argues that God seems to have bound Himself to [the covenant] for ever" (*op. cit.* [above, note 48], 51), Dorff considers it as a covenant with an absolute monarch: "There can be no suits against him to force him to carry out his responsibilities, but he is generally trusted to do so, at least as long as his reign lasts"; *op. cit.* (above, note 48), 89. Covenant theory played a negligible role in early Christianity, but it became a cornerstone of sixteenth- and seventeenth-century Puritan theology, which has been said to have influenced several philosophers and served as "a prototype of the social constructualism of Locke, Spinoza and Kant"; J. Witte Jr., "Blest Be the Ties That Bind: Covenant and Community in Puritan Thought," 36 *Emory L.J.* (1987) 579, 600.

The covenant concept underlines the relations not merely between man and God but also between man and man. The covenant that God concluded with the Children of Israel at Mount Sinai is twofold: "a covenant of God with a group of individuals and that of a group covenanting amongst themselves."[52] As such, the covenant provides the basis for the organization and functioning of the Jewish community.

The concept of communal life is emphasized in Judaism. Suffice it to mention the religious duty of pilgrimage to the Temple in Jerusalem to celebrate the Jewish festivals amongst all Israelites, and the present-day religious duty to participate in communal prayers. Other religious precepts, too, demand participation in communal life. The Jews were always characterized by their intensive communal life.

After stating that "Judaism... made religion in every sphere a personal relation between the individual man and God," Moore adds:

> It was, however, a relation of the individual to God, not in isolation, but in the fellowship of the religious community and, ideally, of the whole Jewish people, the *Knesset Israel*. Not alone the synagogue but the entire communal life – even what we should call the secular life – knit together by its peculiar beliefs, laws, and observances was the expression and the bond of this fellowship.[53]

Moore points out that "[o]f all the religions which at the beginning of the Christian era flourished in the Roman and Parthian empires, Judaism alone has survived," and then adds:

> ... and it did survive because it succeeded in achieving a unity of belief and observance among Jews in all their wide dispersion then and since... The ground of this remarkable unity is to be found not so much in a general agreement in fundamental ideas as in community observance throughout the Jewish world.[54]

Of special interest is the phenomenon of the organized Jewish com-

[52] Golding, *op. cit.* (above, note 41), 58.
[53] See above, text at note 31.
[54] Moore, *op. cit.* (above, note 31), 110.

munities in the Diaspora, when Jews were deprived of political independence and scattered all over the globe. This did not put an end to Jewish communal creation but rather strengthened it. Some of the greatest Jewish creations were made in the Diaspora. After the exile from Eretz Israel and the decline of the Babylonian center, the Jews organized themselves into autonomous local communities (*kehillot*). We come across the Jewish community as "a unit of self-government with fully developed institutions, with firmly rooted customs, and with an established method of co-operation with neighbouring communities" as early as the tenth century,[55] preceding the communal organization of the European town commune by several generations.[56] It is from that era that we have a responsum by Rabbenu Gershom Me'or haGolah, one of the greatest Jewish authorities in the Middle Ages, according to which "the community is a legal entity having the judicial and legislative authority of the Sanhedrin [the High Court of Jerusalem]."[57]

The organization of the communities in the Middle Ages marked a basic transformation in Jewish civil leadership. From one-man government in the era of political independence in Eretz Israel, through Babylonian hegemony, we come to popular rule. The civil leadership of the kings, patriarchs (*nesi'im*) and exilarchs (*rashei golah*) was replaced by the rule of the members of the community. One historian of Jewish communities during the Middle Ages describes their political organization as follows:

> We encounter... a government democratic in form, based on ideals of justice, freedom and equity. The principle that "the majority rules" is generally accepted in the matter of election of

[55] See I. A. Agus, "Democracy in the Communities of the Early Middle Ages," 43 *Jewish Quarterly Review* (1952-53) 153, 155-56. See, generally, L. Finkelstein, *Jewish Self-Government in the Middle Ages* (New York, 1964); M. Elon, "Power and Authority: Halachic Stance of the Traditional Community and its Contemporary Implications," in *Kinship and Consent* (above, n. 41), 183.

[56] See Y. Baer, "The Beginning and the Foundations of the Organization of the Jewish Communities in the Middle Ages" (Hebrew), 15 *Zion* (1950-1951) 32-36. Baer traces the foundations of the *kehillah* to the first generations of the Second Temple period.

[57] Agus, *op. cit.* (above, note 55), 156.

> officers and in legislation designed for the public welfare and for strengthening the religious observance, while unanimous agreement is required for the introduction of arbitrary new practices.[58]

Dating the establishment of the majority rule to the turn of the tenth century, he concludes that

> the democratic system of government in the communities was an outgrowth of Jewish law in its constant adjustment to the problems of life... [showing] the sensitivity of the community government to the interest of each individual member.[59]

Another authority, however, dates this rule to a later period, following the revival of the study of Roman law in Europe. He attributes the adoption of the majority rule to the influence of Christian jurists and canonists rather than to talmudic tradition.[60]

The legislative measures most characteristic of the Jewish community in the Middle Ages are *takkanot haKahal* – legislation enacted by the community. Though such legislation has its roots in the legislation of the townspeople (*benei ha'ir*) in the Tannaitic and Talmudic periods,[61] there was a basic difference between the two sources. While in the earlier periods such legislation required unanimous approval of the members of the community, *takkanot haKahal* were enacted by a majority of the members of the community. This was a result of a basic transformation in the legal concept of the community. While during the Talmudic era the townspeople were regarded as "an aggregate of the individuals who comprise its membership," the community became legally independent. Thus, "the community was converted from a juridical partnership to a corporate body with numerous features characteristic of a legal person."[62] This was the

[58] *Ibid.*, 157.

[59] *Ibid.*, 158. Cf. M. Elon, "The Basic Laws: Their Enactment, Interpretation and Expectations" (Hebrew), 12 *Mehkerei Mishpat* (1995) 253, 263-264.

[60] Baer, *op. cit.* (above, note 56), 38.

[61] See *T. B.M.* 11:23; *BT B.B.* 8b.

[62] A. Kirschenbaum, "Legal Person," in M. Elon, ed., *The Principles of Jewish Law* (Jerusalem, 1974), 160, 161. See also A. Namdar, "The Rule of the Majority and the Rights of the Minority in the Balkan Jewish Communities in

reason that decisions of the majority could not be vetoed by the minority.

A source of controversy in those days was whether equal weight should be given to all votes. R. Elijah Mizrahi was called upon to rule whether it would be permissible to give preferential weight to the votes of the wealthy and learned, the argument being that most decisions related to the spending of communal taxes. Mizrahi ruled that, even though all the wealthy and learned members might oppose a decision, it was the majority that should prevail.[63] This egalitarian approach, however, was exceptional. Other authorities favored the learned and the wealthy, at least, in some contexts.[64]

The power of enacting *takkanot* was limited by the demand that they be just and equitable. Thus, the majority could not prejudice the rights of the minority. Likewise, *takkanot* had to apply equally to all members of the community. There was also a rule against retroactive enactments, especially in the area of taxation.[65] Regardless of the practice of the non-Jewish environment, taxes within the communities were imposed on a progressive basis.[66]

The leadership of the community was elected by popular vote, the weight of which varied according to different approaches, as demonstrated above.[67] R. Solomon b. Adret (*Rashba*) described these lay leaders as

> ... persons chosen not on account of wisdom, wealth or honor, but simply... persons sent by the public to be in charge of public matters.[68]

the 16th Century," 10 *Israel Yearbook on Human Rights* (1980) 299.

63 *Resp.* R. Eliyahu Mizrahi, sec. 53, pp. 145-146.

64 See, e.g., *Resp. Maharashdam, Orah Hayyim*, 37, ruling that the majority rule applies "only when the parties are equal." R. Isaac Adarbi, on the other hand, ruled that decisions in fiscal matters should follow the economic majority, while all other matters should be decided by a "simple" majority; R. Isaac Adarbi, *Resp. Divrei Rivot* 68; 224. See, in general, Elon, *op. cit.* (above, note 55) 196-199.

65 M. Elon, "Takkanot Ha-Kahal," in idem, ed., *Principles* (above, note 62), 654, 660-661; idem, *op. cit.* (above, note 55), 194-196.

66 M. Elon, "Taxation," in idem, ed., *Principles* (above, note 62), 662, 671 ff.

67 See above, notes 61-62.

68 *Resp. Rashba*, I, 617.

Indeed, the Jewish community in Lisbon rebelled against the seven wealthy leaders of the community and replaced them with other leaders, "some wealthy, some of the middle class and some poor." R. Isaac Adarbi ruled that the act, backed by a majority of the community, was binding.[69]

The preceding brief selection of Jewish sources reveals democratic elements in Jewish philosophy and practice. Our main concern, however, is with the status of human rights in Judaism, for it is in this area that Jewish thinking has influenced Western civilization most, and this is the area referred to by the new Basic Laws. It may, therefore, be surprising to find that the very term "human rights" is unknown in classical Jewish texts,[70] as is the term "rights" in general, for "Jewish law... postulates a system of duties rather than a system of rights."[71] Yet, the protection of these rights might be even more effective under such a system.[72]

Consider, for instance, the right to life. This is no doubt the paramount right in Western democracies. But as an American court stated a century ago, a person watching a two-year old baby on a railroad track and not trying to rescue it from an approaching train would be breaking no law. "[H]e may be styled a ruthless savage and a moral monster," the learned judge tells us, "but he is not liable in damages for the child's injury, or indictable under the statute for his death."[73] No "right to life" exists in Jewish law. Nevertheless, the Torah commands us: "Do not stand upon the blood of your fellow" (*Lev.* 19:16). This duty takes precedence over almost all other commandments. Maimonides summarized this rule as follows:

> If a person is able to save another and does not save him, he violates the ... injunction, "Do not stand upon the blood of your fellow."[74]

[69] *Divrei Rivot.*, sec. 224, p. 115a.
[70] See Konvitz, *op. cit.* (above, note 10), 13.
[71] H. H. Cohn, *Human Rights in Jewish Law* (New York, 1984) 18.
[72] Cf. R. M. Cover, "Obligations: A Jewish Jurisprudence of the Social Order," 5 *J. L. & Religion* (1987) 65.
[73] *Buch v. Amory Mfg. Co.* 44 *A* (1898) at 809, 810.
[74] *MT Hil. Rotzeah uShemirat Nefesh* 1:14.

Put differently: failing to save a human life is deemed tantamount to actively shedding blood.[75]

A major encounter of democracy with Judaism occurs in the area of human dignity. Human dignity is central in several international instruments, including the 1945 Charter of the United Nations, the 1948 Universal Declaration of Human Rights and the 1966 Human Rights Covenants. These documents regard human rights as deriving from the "inherent dignity" of the human being.[76]

Several State constitutions, mainly recent ones, such as the German *Grundgesetz*, explicitly recognize human dignity. But even constitutions that do not specifically mention human dignity do not disregard it. An American writer has even stated: "The basic value in the United States Constitution, broadly conceived, has become a concern for human dignity."[77] Another writer notes:

> Understood abstractly enough, the right to human dignity would gain unanimous adherence in the United States and in many if not all other contemporary societies.[78]

As is the case with human rights, the term "dignity" does not appear in Jewish writings. Indeed, no parallel term exists in Hebrew; the term used is *kavod*, literally meaning "honor." However, the value of *kevod haberiyot* ("the honor of the creatures"), which Justice Cohn correctly translates as human dignity,[79] informs all the teachings of Judaism. It is a supreme value, superseding under certain circumstances even the commandments of God Himself.[80]

Human dignity stems from creation itself. We are told in the book of Genesis (1:26-27) that man was created in the very image of God. Thomas Paine regarded this Biblical source as proof "that the equal-

[75] *M. Sanh.* 4:5. See in general A. Kirschenbaum, "The 'Good Samaritan' and Jewish Law," 7 *Dinei Israel* (1976) 7.

[76] See in general H. H. Cohn, "On the Meaning of Human Dignity," 13 *Israel Yearbook on Human Rights* (1983) 226.

[77] W. F. Murphy, "An Ordering of Constitutional Values," 53 *South. Cal. L. Rev.* (1980) 703, 745.

[78] P. Brest, "Accommodation of the Majoritarianism and Rights of Human Dignity," 53 *South. Cal. L. Rev.* (1980) 761, 762.

[79] Cohn, *op. cit.* (above, note 76) 226, 247.

[80] *BT Ber.* 19b.

ity of man, so far from being a modern doctrine, is the oldest upon record" and relied on it to support the dogma of the American Declaration of Independence that all men were created equal.[81]

Indeed, this short, yet meaningful, biblical statement might be regarded as the basis of human rights in Judaism. So many interpretations have been ascribed to this verse as to cover most aspects of human dignity and freedom. The full verse reads as follows:

> And God said: 'Let us make man in our image, after our likeness'...And God created man in His own image, in the image of God created He him; male and female He created them.

The poet of Psalms described man as not worthy to be noticed by God, yet he went on to say: "...You have made him little less than divine,[82] and adorned him with glory and majesty" (*Ps.* 8:6-7). Ben Azzai, an early Jewish scholar, inferred from this verse that all descendants of Adam – regardless of religion, race or color – bear the imprint of divine creation and divine likeness, and must be treated accordingly.[83]

It is appropriate to mention a traditional commentary as to why God created Adam alone: "Therefore each one ought to say: 'It is for me alone that the world was created'." The practical application of this idea may be traced in the warning administered by the Jewish Religious Courts to witnesses in criminal cases. The Court must warn the witnesses not to give hearsay or speculative evidence:

> Man was created single, to teach you that whoever destroys one human life, Scripture imputes to him as though he had destroyed the whole universe and if a man saves the life of a single soul, Scripture imputes it to him as though he had saved the life of the whole world.[84]

Another interesting reason given as to why man was created single is "that no one may be heard to say to another: 'My father was

[81] T. Paine, *The Rights of Man* (London, 1915), 43.

[82] Interestingly, the King James translation could not accept the idea that man is just a little lower than God, and replaced God with "the angels."

[83] *Sifra, Kedoshim* 4:12.

[84] *M. Sanh.* 4:5. Cf. Maimonides' version in *MT Hil. Sanh.* 12:3.

greater than yours.'"[85] This may remind us of another statement of the Bible: "Have we not all one father? Hath not one God created us?" (*Mal.* 2:10). This is not a mere philosophical point, as God commanded the Children of Israel: "One law and one rule shall apply to you and to the stranger who resides among you."[86]

No doubt, Jewish law has proven a promising source of human rights. One could go on describing this source endlessly. Indeed, dozens of books and hundreds of articles have been written to describe this facet of Judaism.

Jewish law has also left its imprint on the status of human rights in Israeli law. Suffice it to mention just two cases, one from the period preceding the enactment of the Basic Law: Human Dignity and Freedom, another following its enactment.

In 1979, criminal proceedings were instituted against a Jewish husband who had forced himself upon his wife.[87] In his defense against the accusation of rape, the husband submitted the well established common law rule, that, by the marriage contract, the wife was under duty to cohabit, an essential part of which was to consent to sexual relations. A husband could not, therefore, be convicted of raping his wife, as this offense is committed only if one has sexual intercourse with a woman without her consent.[88] The court rejected the common law defense – based on ecclesiastical law – as inapplicable to Jews in Israel, and the decision was upheld on appeal.[89] The court based its decision on Jewish family law, which applies to Jewish couples under Israeli law.[90] Under this law, although a wife is under marital obligation to have intercourse with her husband, the common law

[85] *M. loc. cit.*

[86] *Num.* 15:16; see also *Ex.* 12:49.

[87] Cr. C. 163/79, *State of Israel v. Cohen,* 5740(1) *P.M.* 245.

[88] See M. Hale, *The History of the Pleas of the Crown,* I (1773), 629.

[89] Cr. A. 91/80, *Cohen v. State of Israel,* 35(3) *P.D.* 281.

[90] See Rabbinical Law Jurisdiction (Marriage and Divorce) Law, 1953, *Laws of the State of Israel* (*L.S.I.*) 7:139; A. Maoz, "Enforcement of Religious Courts' Judgments Under Israeli Law," *Journal of Church & State* 33 (1991) 473, 473-475; idem, "Religious Human Rights in the State of Israel," in J.D. van der Vyver & J. Witte, Jr., *Religious Human Rights in Global Perspective – Legal Perspectives* (Boston, 1996) 349, 354-357. The Cohen precedent has been applied in all cases of rape within marriage, overlooking the fact that its *ratio* relates to Jewish couples only.

doctrine of the husband's "domain" over his wife and of the wife's "submission" to him is totally unacceptable, and the husband is prohibited from forcing himself upon her. To use Maimonides' words: "The wife is not a captive taken by sword to please her master's desires."[91] One of the justices of the Supreme Court summarized the decision as follows:

> The conclusion... is consistent with the fundamental principles of protecting a woman as a free person, not as a slave subject to the whims of her husband on such a sensitive matter principles which, unfortunately, have not been embodied in the legislation or judicial opinions of some of the most enlightened and progressive nations... The Jewish people should be proud of the progressive and liberal approach of its traditions and Halakhah to the subject according to Jewish law throughout the ages.[92]

But why quote an Israeli magistrate? Here is what the editor of the *Australian Law Journal* had to say about the novel Israeli decision:

> It is supremely ironical that the newly contemplated States legislation... merely echoes after thousands of years the age-old doctrine of rabbinical law that aggressive sexual assaults by a husband on his wife are prohibited.[93]

Over a decade later the House of Lords handed down a decision in line with that of the Israeli court.[94] When rendering the court's decision, their Lordships were aware of the Israeli decision, as it had been reported by an English Law Commission shortly before the House of Lords' decision.[95] It is thus most likely that Maimonides has influenced the legal approach to rape within marriage both di-

[91] *MT Hil. Ishut* 14:9. See also N. Rakover, "Coercion of Conjugal Relations," *Jewish Law and Current Legal Problems,* 137 (N. Rakover ed., 1984).
[92] *Op. cit.* (above, note 89), 291, per J. Bechor.
[93] "A Wife's Right to Say 'No'," 55 *Aus. L.J.* (1981) 59, 60.
[94] *R. v. R.,* [1991] 1 *All E.R.* 747.
[95] See *Law Commission Working Papers* No. 116: *Rape Within Marriage* (1990), 126.

rectly, in Australian and in English law,[96] and indirectly, in other legal systems.[97]

The other case involved the question of whether the severity of an offense is in itself sufficient cause to arrest a suspect or an accused, where release would not jeopardize the legal proceedings or present a serious threat to the public. The majority in the Supreme Court, led by Justices Bach and Barak, answered this query in the affirmative.[98] After the enactment of the new Basic Law, most judges changed their mind and ruled against such imprisonment. They emphasized the protection of human dignity and freedom as calling for such a shift.[99] It is of interest that Justice Elon did not need the provisions of the new Basic Law to come to the same conclusion, for he had ruled accordingly even before,[100] relying on the attitude of Jewish law.

Finally, it is worth mentioning the judgment of a Military Court in the West Bank.[101] The Court was asked to impose capital punishment on a terrorist, a punishment it was authorized to impose under prevailing Jordanian law. The Court declined to do so and stated as follows:

> The Military Court is one of the judicial arms of the State of Israel. Therefore, although it has the authority to impose capital punishment, the moral concepts of the Jewish heritage of the State must serve us as a guideline. In our heritage a Sanhedrin [the ancient Supreme Court] that had imposed capital punishment was termed "a murderous court."[102]

[96] Since the publication in the *Australian Law Journal* all of the Australian States have done away with the common law defense.

[97] Note the language of the House of Lords which resembles so much that of Maimonides: "[M]arriage is... no longer one in which the wife must be the subservient chattel of the husband."

[98] See Cr. A. 3717/91, *State of Israel v. Goldin,* 45(4) *P.D.* 807; Cr. A. 3717/91, *State of Israel v. Shem-Tov,* 45(3) *P.D.* 645.

[99] See Cr. F.H. 2316/95, *State of Israel v. Ganimat,* 49(4) *P.D.* 589 .

[100] See Cr. A. 5700/91, *Avidan v. State of Israel,* 46(1) *P.D.* 677.

[101] Ramallah 3009/89, *The Military Prosecutor v. Takruro,* abridged in 25 *HaLishkah* (1995) 33 (Hebrew).

[102] For an analysis of the approach of Judaism to capital punishment see D. De-Sola, "Capital Punishment Among the Jews," in *Jewish Eugenics and Other Essays*

Of special interest is the role of justice in Judaism. Moore concludes:

> In no sphere is the influence of the highest conceptions of Judaism more manifestly determinative than in that to which we give the general name of justice, including under it, *first*, fair dealing between man and man, the distributive justice which gives to each his due; *second*, public justice, the function of the community in defining and enforcing the duties and rights of individuals and classes; and, *third*, rectitude, or integrity of personal character. In all parts of the Bible, justice in the broad sense is the fundamental virtue on which human society is based. It is not less fundamental in the idea of God, and in the definition of what God requires of man.[103]

The potential interplay of Judaism and democracy is obscured by the misappreciation of both components. In the article cited above,[104] Professor Levontin asserts that "Israelites have no escape from slavery,"[105] as the Torah commands: "For it is to Me that the Israelites are servants" (*Lev.* 25:55). Yet, based on this verse, our sages concluded that the children of Israel cannot become "servants of servants."[106] Moreover, this passage did not serve the purpose of eliminating the institution of Jewish slavery, which had ceased to exist since the revelation on Mount Sinai.[107] From this passage the Sages inferred, rather, that no vestiges of servitude are permitted; there-

(New York, 1916), 51.

[103] *Op. cit.* (above, note 31), vol. II, 180.

[104] Above, note 3.

[105] *Op. cit.*, 532.

[106] *BT Kid.* 22b.

[107] See I. Mendelson, *Slavery in the Ancient Near East* (New York, 1949), 123. The status of the non-Jewish slave was by far better not only in comparison with slaves in the ancient world, but even compared with recent developments. Thus, the Bible orders that a fugitive slave may not be returned to his master. Rather "He shall live with you in any place he may choose among the settlements in your midst, wherever he pleases" (*Deut.* 23:16-17). Compare this commandment with the situation in the United States of America during the nineteenth century, when the Supreme Court ruled that it was unconstitutional to assist a runaway slave; *Prigg v. Pennsylvania,* 42 *U.S.* (1842) 539, *Jones v. van Zandt,* 46 *U.S.* (1847) 215. The constitutional basis for such rulings still exists — in art. iv section 2[3] of the Constitution of the United States of America. See L. Sheleff, *The Rule of Law and the Nature of Politics* (Tel Aviv, 1996; Hebrew), 273-276.

fore, a hired servant may choose to interrupt his labor in the middle of his work and nevertheless be entitled to the appropriate proportion of his salary.[108]

Rabbi I. Jakobovits, on the other hand, regards democracy as "the result of superior numbers," which "give the majority the prerogative for having its views and decisions turned into law and imposed by force upon the minority."[109] Hence the democratic order presents "a certain challenge to fundamental moral principles" which are basic to Judaism.[110] I would suggest that Jakobovits represents a technical concept of democracy. In its truest analysis – to use Jakobovits' phrase – democracy, as accepted in the western world today, includes moral concepts, which in many aspects are not far from Jewish morals.[111] Moreover, the majority rule represents a basic value in itself – the concept of equality and the fair distribution of the power to influence society.[112]

A substantial challenge is raised by Yeshayahu Leibowitz. In his view,

> no social, political or economic program could be derived from Judaism. Judaism does not engage in social or in human problems as such. This is so because man is meaningless... there is no intrinsic value in man himself but only in his position before God. Judaism is not humanism... The social constitution

[108] *BT B.M.* 77a. See S. Warhaftig, "Labor Law," in Elon, ed., *Principles* (above, note 62).

[109] *Op. cit.* (above, note 24), 107.

[110] *Loc. cit.*

[111] What we have in mind is liberal democracy. Analytically, it may be necessary to distinguish between democracy and liberalism, as the former is a form of government while the latter is a political theory; see J. Raz, "Liberalism, Skepticism and Democracy," 74 *Iowa L. Rev.* (1989) 761. Jakobovits raises an interesting dilemma embodied in democracy: "If the masses, who are to be raised ever higher towards the ideal level of the moral law, are themselves the ultimate masters and creators of that law, its administration and enforcement, how can any moral advance of the human society be achieved?"; *op. cit.* (above, note 24) 107.

[112] Moreover, Judaism itself accepts majority rule, though it may lead to wrong decisions, as evidenced by the dispute between Rabbi Eliezer and the Sages; see above, note 33.

> of the Torah is neither social nor philanthropic: it does not stem from the concept of human rights but rather from man's duty.[113]

In Leibowitz' opinion,

> [t]he attempt to fuse morality and religion is not a happy one... Judaism did not produce an ethical theory of its own, was never embodied in a moral system, and made no pretense of representing a specific moral point of view.[114]

Leibowitz' approach is that of the believer. Even among religious Jews his philosophy is unique.[115] Yet, even if sound from a religious point of view, his position is irrelevant to the thesis advocated in this paper. In Leibowitz' opinion, "the religious end is the ultimate end"; it "is desecrated when it is made to serve as a means to some other end."[116] In his view, "a person acting as a moral agent cannot be acting as a religious agent." This is so since "human actions... can only be identified in terms of the agent's intention." Therefore, "a religious action cannot be simultaneously a moral action."[117] Leibowitz stresses the idea that "[t]he Bible does not recognize the good and the right as such, only 'the good and the right in the eyes of God'."[118] Yet the question is whether that which is good and right in the eyes of God is also good and right in the eyes of Western democracy. I have tried to show in this paper that to a large extent this is so.

Speaking of "the character of God," Moore writes: "God's justice is first of all man's assurance that God will not use His almighty power over His creatures without regard to right."[119] It is, moreover,

[113] Y. Leibowitz, *Judaism, Jewish People and the State of Israel* (Jerusalem, 1975; Hebrew), 310.

[114] Leibowitz, *op. cit.* (above, note 18), 6-7.

[115] For criticism of Leibowitz see Ch. Ben-Yerucham & Ch. E. Kolitz, eds., *Negation for Negation's Sake: Versus Yeshayahu Leibowitz – Essays and Comments* (Jerusalem, 1983; Hebrew); M. Granot, *A Singular Faith* (Tel Aviv, 1993); M. Gilboa, *Y. Leibowitz: Ideas and Contradiction* (Sedeh Boker, 1994; Hebrew).

[116] E. Goldman in his introduction to Leibowitz' book, above, note 18, xvi.

[117] *Loc. cit.*

[118] *Ibid.*, 7, quoting from *Deut.* 12:28.

[119] *Op. cit.* (above, note 31), I, 387-388.

disputable whether what is "good and right in the eyes of God" is the ultimate good even in the eyes of the Bible. The Bible records many episodes where actions of God are challenged from a moral point of view. Thus, when God informs Abraham of His decision to destroy Sodom and Gomorrah as an act of retaliation for their inhabitants' sins, Abraham reprimands "the Judge of all the earth" for failing to do justice (*Gen.* 18:25).

An illuminating demonstration of the relationship between what is good and right in the eyes of God and human behavior may be found in the Talmudic interpretation of the Biblical verse "You shall walk after the Lord your God" (*Deut.* 13:4):

> What means the text?... Is it then possible for a human being to walk after the *Shechinah* [the Divine Presence]; for has it not been said "For the Lord thy God is a consuming fire" [*Deut.* 4:24]? But [the meaning is] to walk after the attributes of the Holy One, blessed be He. As He clothed the naked..., so do thou also clothe the naked. The Holy One, blessed be He, visited the sick..., so do thou also visit the sick. The Holy One, blessed be He, comforted mourners..., so do thou also comfort mourners. The Holy One, blessed be He, buried the dead..., so do thou also bury the dead.[120]

We have dealt so far with religious Jewish sources. Yet, when referring to Jewish values, we are not referring to the Jewish religion as such. Judaism is a culture and a way of life. Jewish religion constitutes a major part of this culture, but it is the heritage of Judaism as a whole to which we are referring.

Judaism is a product of thousands of years, of several generations. Its messages are not uniform. Yet, at the end of our brief tour of Judaic values, it is my submission that, by and large, they are compatible with democratic notions. To use Gordis' metaphor, "Judaism is a mighty river with many currents and eddies," yet I believe that its mainstream complies with the values of a democratic state. That

[120] *BT Sot.* 14a.

is why "Jewish and Democratic" represents no contradiction but rather completeness and harmony.[121]

This is not merely an academic argumentation. Democracy is fragile even in the modern era and often comes under fire. Democratic values cannot exist in the abstract divested of social concepts. Religion plays a major role in society. Jewish ideals and values infused into western culture directly and through Christianity enriched its humanistic and liberal thinking. It is capable of enriching it yet more.

The contribution of Jewish values to Israeli democracy is of special interest. The establishment of a democratic state in this part of the world was not obvious: Israel is located in a region with almost no history of democracy; its founders and most of its citizens immigrated from non-democratic countries; finally, Israel was born in war and continues to strive for its very existence.[122] The fact that, against all odds, the State of Israel has maintained its democratic character proves that democratic values are deeply rooted in Jewish heritage, for as Bialik, the great Hebrew poet, said: "there can be no more heaven above our heads than we have ground beneath our feet."[123]

[121] Justice Elon speaks of a synthesis to be achieved between Jewish and democratic values; see C.A. 506/88, *Shefer v. State of Israel,* 48(1) *P.D.* 87, 167-68. See *also* Elon, *op. cit.* (above, note 59), 258 ff. See in general A. Maoz, "The Values of a Jewish and Democratic State" (Hebrew), 19 *Tel Aviv Univ. L. Rev.* (1955) 547.

[122] See A. Maoz, "Constitutional Law," in I. Zamir & S. Colombo, eds., *The Law of Israel: General Surveys* (Haifa, 1995) 5, 49; idem, "The System of Government in Israel," 8 *Tel Aviv Univ. Studies in L.* (1988) 9, 57.

[123] Quoted by Gordis, *op. cit.* (above, note 20), 11.

ISRAELI LAW IN THE VIEW OF *HALAKHAH*

*Jacob Bazak**

What is the attitude of *Halakhah* to the laws of the Knesset? Does *Halakhah* regard these laws as illegitimate because they were not enacted by Orthodox rabbis, or even by Orthodox laymen, or because of the fact that in many cases these new enactments do not resemble Talmudic laws? Or, conversely, does *Halakhah* recognize the legitimacy of the laws of the Knesset and even indicate that they should be obeyed?

This question will be dealt with here via two different approaches. The first is analytical-theoretical, the other, empirical-sociological. In the context of the first approach, the question will be dealt with by a study of rabbinical literature, past and present. Special attention will be given to those rabbinical authorities who are considered binding by *Halakhah*-abiding Jewish communities. For the problem is not a mere academic one, i.e., what conclusion can one reach through a thorough, objective study of Talmudic sources. The real question concerns the conclusions that can be drawn from those sources *as interpreted by rabbinical authorities recognized as such by the majority of the Halakhah-abiding community.*

Proceeding then to the empirical-sociological approach, we shall examine how in practice the various religious groups, *haredi* and National Religious, relate to the laws of the Knesset and the decisions

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of the judiciary. Naturally, after almost fifty years of existence of the State of Israel, we can already examine the facts in the field and see what the approach of these groups to the laws of the Knesset is in practice. Do they regard these laws as alien and illegitimate, or do they accept these laws as halakhically binding and even respect them?

Dina deMalkhuta Dina

Before beginning to examine the attitude of *Halakhah* to the laws of the State of Israel, we must first examine, as a preliminary, the attitude of *Halakhah* to the laws of the various gentile countries in which the Jewish people have lived for the past 2000 years as minority groups. For, as we shall immediately see, halakhic discussions of our problem are based mainly on Rabbinic rulings regarding the attitude of *Halakhah* towards the laws of these gentile countries.

The attitude of *Halakhah* to the laws of gentile countries in which the Jews lived as minority groups was dictated by practical considerations which in fact left no other alternative but to respect these laws. The ruling of *Halakhah* on this problem can be summarized in the famous short dictum of Samuel, one of the greatest Talmudic authorities, who lived in Babylonia in the 3rd century: *Dina deMalkhuta Dina,* "The law of the (gentile) kingdom is a law," i.e., it is binding from the standpoint of *Halakhah.* About 300 years earlier, R. Haninah Segan Hakohanim, who lived at the end of the period of the Second Temple, said (*Abot* 3:2): "You should pray for the welfare of the government, because were it not for the fear it inspires, every person would swallow the other alive."

These and other, similar dicta reflect a sincere recognition of the importance of government and legal order in any society, for without it "one person would swallow the other alive" – the very existence of human society depends upon it.

Like many other short dicta, Samuel's dictum, too, needs some clarification and reservations. The first reservation is that it does not apply when the law in question is not general and equal but a discriminatory one. Maimonides states the law on this point, based on the discussion in *BT Baba Kama* 113a, as follows:

> In sum: any enactment that the king enacts as a general law, not a law or an act that applies merely to a specific individual, is not considered robbery. However, whenever he (the king) takes away from one individual only, not under a general rule, that is mere robbery.[1]

A similar reservation is expressed by R. Menachem Hameiri of Spain (13th century). He stipulates that Samuel's principle applies to public law, not to private law:

> All we have said regarding the enactments of the king, i.e., that by us (i.e., by Jewish Law) they are considered fully legitimate, relates to enactments that he has enacted for his own benefit or for the benefit of his property... Even when these enactments are contrary to our laws, they are binding, and it is forbidden to transgress them. For, being a king, he is entitled to do so, in the same way as it is said in the Talmud regarding Jewish kings: "Whatever is stated in the Biblical passage (*I Sam.* 8:5) regarding the king – a king is entitled to do."... However, whatever he takes away by force, or any laws that the nations adhere to because these laws are included in their (ancient) books, these are excluded from the general principle, for otherwise that would be the end of all Jewish laws![2]

Another reservation, which is quite obvious, is that the principle does not apply when the law concerned orders the cancellation of a religious precept (Maimonides, *MT Melakhim* 3:9).

The above passage from Hameiri refers to an important halakhic source for governmental powers – the so-called "law of the king" (*Mishpat haMelekh*). In the Bible (*I Sam.* chap. 8) we read how the people asked the Prophet Samuel to appoint a King for them, "to govern us like all other nations." In response, Samuel warned the people of the "law of the king" (i.e., the conduct of the king who would govern them). Samuel enumerates the king's powers: to levy taxes, to expropriate property and to mobilize an army. In the Talmud, the two Amoraim Rav and Samuel differ: Samuel says: "All

[1] *MT Gezelah vaAvedah* 5:14.
[2] *Bet haBehirah* to *B. K.* 113a, ed. K. Schlesinger (Jerusalem, 1963), 331-332.

that is said in the Biblical passage regarding the king, a king is *entitled* to do." According to Rav, however, that passage was meant just to warn the people how the king *might* behave, not to state that the king is *entitled* to behave in that way. Samuel's opinion was accepted as binding and, accordingly, it was held by rabbinical authorities throughout the ages that the Jewish community must obey the law of the land, even when the law in question is contrary to Jewish law. But the two above-mentioned conditions must hold: first, that the law is equal and not discriminatory; and, second, that the law does not violate a religious precept.

For many centuries, Jews lived as minority groups in states which, openly and officially, discriminated against them. Surely, *Halakhah* did not and could not approve of such discriminatory laws, for such laws were considered robbery (*gazlanuta*), not law (*dina*). True, in many cases the Jewish minority had no other alternative but to comply even with such discriminatory laws, but *de facto* compliance does not mean *de jure* recognition or legitimization on the part of *Halakhah*.

This long and persistent discrimination against Jews by gentile governments created, as a reaction, an attitude of non-recognition of the legitimacy of the gentile government and its discriminatory laws. This attitude, in turn, extended, as a natural result, not only to the discriminatory laws of the gentile government but to gentile laws in general, i.e., even to laws which were not necessarily discriminatory. Moreover, it became a habit which persisted even when, with changing times, discriminatory treatment of Jews was discontinued. The effects of this historical habit – a tendency to disrespect laws in general – may still be traced in the present-day State of Israel. This point must be taken into consideration later, when we discuss the attitude of the *haredi* groups in Israel to the laws of the state.

The halakhic rationale for the maxim Dina deMalkhuta Dina

What is the halakhic-legal ground for the rule *Dina deMalkhuta Dina*? The Talmudic commentator R. Samuel b. Meir suggests that the legal ground is an implied contract between the king, on the one hand, and the people who reside in his kingdom, on the other:

> For all of them agreed to obey the laws of the king; therefore whatever (property) the king (takes away from his citizens) is perfectly legitimate. Consequently, a person who, under the authority of the king, takes away the property of another person, in accordance with the laws of the king, cannot be considered a robber.[3]

In the opinion of R. Nissim, however,[4] the legal basis for the rule lies in the fact that all the lands of the country belong to the king; hence, the king is entitled to stipulate that a person who does not obey his laws should be expelled from the country. R. Nissim goes on to say that it follows from that reasoning that the maxim *Dina deMalkhuta Dina* does not apply to the Holy Land. Indeed, Eretz Israel is not considered the property of any king: God gave the land to each individual of the Tribes of Israel. In Eretz Israel, therefore, the king is not entitled to say: "if you do not obey my laws, you will be expelled." Later on, however, we shall see that, according to the majority of rabbinical authorities, the maxim is applicable in Eretz Israel as well.

Public law and private law

Rabbi Solomon b. Adret (*Rashba*), one of the leading rabbinical authorities, who lived in Spain in the 13th century, vehemently protested the attempt to use the maxim of *Dina deMalkhuta* to give halakhic validity not just to public law, i.e., laws governing the relations between the state (or the Jewish community) and the individual, but also to private law, i.e., laws governing relations between private individuals. "For if we accept this attitude," he writes, "you have canceled the (Jewish) inheritance law of the firstborn son..., indeed, you are uprooting the whole law of Torah." And the Rashba concludes, in a sarcastic vein:

> If so, what is our need for all the holy books that were written for us by R. Judah the Prince [= the Mishnah] and after him by Ravina and Rav Ashi [= the Babylonian Talmud]? Let them

[3] Commentary to *BT B.B.* 54b, s.v. *VehaAmar Shemuel dina demalkhuta dina.*
[4] Commentary to *BT Ned.* 28a, in the name of the Tosafists.

> teach their children the laws of the gentiles and let them build altars in the schools of the gentiles! Heaven forfend, nothing like that will happen among the Jewish people![5]

Similarly, R. Joseph Colon (*Maharik*; Italy, 15th century) expressly states (though not in the same legal terms) that the maxim applies to public law, not to private law, saying, "but very clearly (the maxim) does not apply regarding relations between private individuals, for otherwise you cancel the whole Torah laws!"[6]

The Place of Jewish Law in the Modern State of Israel

The special status of law in Jewish tradition

Before going on to reconsider the scope of the maxim *Dina deMalkhuta Dina* in the modern State of Israel, we should refer to another relevant topic, namely, the special status of law in the history of Jewish cultural life. Since the earliest days of our existence as a nation, law has been our most important and prestigious cultural asset. As we read in *Deut.* 4:5-8:

> See, I have imparted to you laws and rules, as the Lord my God has commanded me, for you to abide by in the land that you are about to enter and occupy. Observe them carefully, for that will be proof of your wisdom and discernment to other peoples, who on hearing of all these laws will say: "Surely, that great nation is a wise and discerning people."... [For] what great nation has laws and rules as perfect as all this Teaching that I set before you this day?

The Oral Law, comprising the Mishnah (finalized by R. Judah the Prince in the Land of Israel in the 3rd century CE) and the Babylonian Talmud (edited by Ravina and Rav Ashi in Babylonia in the 5th century CE) are huge codes of law, religious law as well as civil law. The sages of the Mishnah and the Talmud were brilliant scholars, who devoted all their time and intellectual energy to the thorough study and constant teaching of Torah in its broadest sense. Since their times to the present day, intensive study of the Talmud has never

[5] *Responsa,* vol. 6, no. 254, cited in *Bet Yosef, Hoshen Mishpat,* para. 26 (end).
[6] *Responsa,* no. 188.

ceased amongst the Jewish people. From generation to generation the best intellectual minds have been devoted to the study of the Talmud, the writing of commentaries and the analysis of legal concepts and theories. But it was not only great minds and intellects that devoted themselves to the study of the Talmud; old people and young studied it day and night, thus achieving a wide and comprehensive knowledge of the Talmud.

Attitudes of religious groups in Israel

Given the above observations, it is not surprising that, when the State of Israel was established after two thousand years of Exile, many expected that the great legal opus of the Jewish people would find a fitting and prestigious role in the new-born state. However, as we all know, that has not been the case. In fact, in view of present-day historical and sociological circumstances, on the one hand, and the nature of Talmudic literature, on the other, there was little real chance that it would happen. In recent times, the great majority of people lack the basic Talmudic knowledge which is a prerequisite for understanding the vast body of Talmudic literature, including rabbinical responsa, much of which uses Aramaic terminology and is written in "Rashi script," and is therefore unintelligible to most of the public. It was therefore unrealistic to hope that the people in general would be able and willing to introduce Talmudic Law as part of the legal system of the State of Israel.

The result is that legislative and judicial activity in Israel is almost completely detached from the great legal heritage of the Jewish people. On this ground one can understand the ambivalent attitude of the various groups of religious Jewry toward Israel's legal system. All these different religious groups share a deep disappointment and great sorrow regarding this situation – the failure of the great treasures of Jewish legal creation to find their rightful place in the new-born state, even though, as just stated, this was unavoidable for objective reasons.

As regards the conclusions to be drawn from this situation, however, there are large differences between the groups. On the one side of the spectrum stand the so-called "ultra-orthodox" groups, i.e., *Naturei Karta*, the Satmar Hasidim and similar groups, who deny the

legitimacy of the State of Israel and its legal system. They do not participate in elections to the Knesset and refer to the Israeli government as "the heretical government," bringing their disputes to adjudication in the rabbinical courts of their own communities.

At the other side of the spectrum are the religious Zionists. The attitude of the National Religious group, which originates in the Mizrachi movement, established at the beginning of the century by Rabbi Jacob Reines, has always been that of cooperation with the Zionist movement and, later on, with the State of Israel, regardless of its secular nature. The underlying assumption is that we are one people, have one fate and must lay emphasis on what is common to all of us. National Religious circles hold a similar view regarding western culture, science and general studies. Though they, too, hold that the study of Torah and religious observance are of primary importance; they at the same time acknowledge the importance of general studies, science and western culture. As a result, the National Religious educational system aims, first and foremost, to teach and educate its pupils to love the Torah, fear God and fulfill the religious commandments; but at the same time it also endeavors to teach its pupils as much general knowledge as possible, including science, technology and general literature. Indeed, today graduates of the State Religious Educational System hold prominent positions in all fields of higher education, in institutes of science and technology, medicine, engineering and law, as well as in yeshivot and rabbinical positions.

The National Religious group has adopted a similar attitude toward participation and activity in the State of Israel and in its governmental bodies. Their recognition of the State of Israel is not merely *de facto* but also *de jure*. They see in the establishment of the state a realization of God's prophecy to redeem the People of Israel from the yoke of the gentiles and to gather together all the remnants of the dispersed Jewish people in the Land of Israel. Moreover, as correctly pointed out after the end of the Second World War by the late Chief Rabbi Herzog, in view of the growing trend of assimilation and mixed marriages in major Jewish centers throughout the world, the existence of the State of Israel has become a vital necessity, not just

to save Jews from persecution and discrimination, but also – and even more so – to save Judaism from disappearance.

The authority of every Jewish community to enact regulations

When it was felt that the dream of a Jewish State was indeed about to be realized, the highest rabbinical authorities, especially those of Zionist orientation, started to discuss the problem of the place of Jewish Law in the forthcoming modern State of Israel. The fact that most of the law at that time, under the British Mandate, was English Law and Ottoman Law, only heightened the sensitivity of the problem. Why not use the original laws of the Jewish people in the forthcoming Jewish State, rather than foreign systems, like English and Turkish Law?[7]

The National-Religious oriented rabbinical school found a halakhic basis for the legitimacy of the laws of the Knesset and of the governing bodies of the state, in the powers given under *Halakhah* to any Jewish community to enact regulations enabling it to conduct its life according to the changing needs of time and place. Such regulations may be enacted from time to time by representatives of the community, elected by a majority vote. These powers pertain to both civil and criminal matters.[8] Thus, for example, the great halakhic authority R. Asher b. Jehiel (*Rosh*; Germany and Spain, 13th-14th centuries), wrote:

> In civil disputes, the *Bet Din* [= Religious Court] is entitled to make regulations according to the needs of the time and of the place, even when such regulations are contrary to Torah laws, and to take from one individual and to give to another.[9]

The same holds true regarding criminal law. *Halakhah* empowers any Jewish community to enact new prohibitions and to impose various punishments according to the needs of the time, even when they

[7] This situation has changed completely since then, for by now almost all laws from the time of the British Mandate, including Ottoman Law, have been replaced by original legislation of the Knesset and the linkage with English Law has been explicitly abolished.

[8] See *Sh. Ar., Hoshen Mishpat,* para. 2.

[9] *Responsa* 55:10.

are contrary to Torah law. An instance of this situation is the statement of R. Isaac b. Sheshet:

> For the *Bet Din* is entitled to inflict punishments according to the needs of the time, even contrary to Torah Law, and even when the evidence presented is not enough under strict Torah law.[10]

Accordingly it is stated in the *Shulhan Arukh, Hoshen Mishpat* para. 2:

> Any *Bet Din,* even though not ordained in the Land of Israel, is entitled, when convinced that the crime rate is high and that the time requires it, to impose capital as well as all kinds of punishment and to convict even when the evidence presented is not enough under Torah law.

The same holds true not only regarding the law but also regarding the composition of the court. Thus, we read in *Hoshen Mishpat* para. 8:1: "Similarly, every community is entitled to agree to the jurisdiction of a court which is composed of judges who are not competent under Torah Law."

Another halakhic source for the legislative functions of the Knesset is the aforementioned *Mishpat haMelekh.* The powers of the king are assigned to the governing body of any Jewish community properly constituted under law. Such is the conclusion of R. Abraham Isaac Hakohen Kook:

> It seems that when there is no king... and a leader for the nation is appointed in a proper political way, with the consent of the people and of the *Bet Din*, this leader then fills the place of the king as far as the powers invested in him for the management of the State are concerned.[11]

A third halakhic source for the legislative authority of the Knesset is the previously discussed dictum of Samuel – that the law of the governing authority is binding. Most rabbinical authorities hold that this

[10] *Responsa,* no. 234.
[11] *Mishpat Kohen,* 144:14.

dictum also applies to Jewish kings in the Land of Israel. Thus, for instance, R. Ben-Zion Meir Hai Ouziel (Sephardi Chief Rabbi of the State of Israel at its inception), in an article written on this subject, presents the following logical argument:

> But if you say that the maxim "the law of the kingdom is law" does not apply in the State of Israel, how then will the state be able to exist if each citizen is not obliged to obey criminal law and the laws of taxation? It is unthinkable that in the State of Israel obedience to the law should be a matter of discretion and not obligatory![12]

The halakhic majority opinion on this point has been aptly summarized by R. Obadiah Hedayah as follows:

a. The dictum *Dina deMalkhuta Dina* applies to both Jewish and gentile kings.
b. It also applies when the governor is not a king but a governor or a legislative body.
c. Even according to those who hold that the governing body does not have the authority of a king but merely that of "the best men of the community," the governing body (i.e., the Knesset) is entitled to legislate at its discretion for the benefit of the State, because it was elected by the people for that purpose – that the people will obey whatever the legislative body decides.
d. Whether the Knesset's authority derives from the concept of "king" or from the concept of "the best men of the community," it is not entitled to enact any legislation contrary to Torah law.[13]

A similar opinion has been expressed by R. Obadiah Joseph:

> ...This maxim also applies to the State of Israel, where some members of the Knesset are not observant and some of them even hate the Jewish religion. Therefore the law is that, as far as tax law is concerned, one must respect the laws of the State.[14]

[12] 5-6 *HaTorah vehaMedinah* (1953-1954) 16.
[13] 9-10 *HaTorah vehaMedinah* (1958-1959) 36-44.
[14] *Responsa Yehavveh Da'at,* vol. 5, no. 63.

No wonder, then, that in judgments handed down by Israel rabbinical courts we find from time to time that specific laws of the Knesset are upheld under the principle of *Dina deMalkhuta Dina*. Such, for instance, was the case regarding the law that requires registration of a land transaction in order to give it legal effect. According to the decision of the Rabbinical Court, this law does not contradict *Halakhah*. It was enacted for the benefit of the public and therefore has halakhic effect under the maxim *Dina deMalkhuta Dina*.[15]

Halakhah may also render Knesset laws legitimate under the validity that Jewish Law grants custom. Under Jewish Law, customs that have been accepted by the public as binding have the force of law. Accordingly, the Supreme Rabbinic Court of Appeals declared that, as the Knesset Law of Condominiums is generally accepted by the public in Israel, it is halakhically binding, being a "custom" generally accepted by the public.[16]

Public law

Apparently, no rabbinical authority denies the halakhic right of the Knesset to legislate on matters of "public law," i.e., constitutional law, criminal law, traffic laws, economy, public health, licenses, planning and building, etc. The halakhic rationale for this is found in the maxim *Dina deMalkhuta Dina*. No serious rabbi would claim that, halakhically speaking, one is not obliged to obey Israeli traffic laws or the laws of planning and building, etc. It is generally accepted that such laws are binding under the aforementioned maxim. As has already been pointed out, there are actually some extreme religious groups, like Naturei Karta and Satmar Hassidim, who oppose the legitimacy of the Knesset, because of the fact that the great majority of its members are not observant. For that reason, these extremists do not participate in the elections to the Knesset and will not even accept National Insurance allowances, but this is not the attitude of the great majority of the *haredi* groups, at least, not in practice. The majority of these groups take part in the elections to the Knesset,

[15] 6 P.D.R. 382.
[16] 14 P.D.R. 171.

both actively – as voters, and passively – as candidates seeking election.

Private law

We may conclude, therefore, that the great majority of religious Jewry recognizes the Halakhic authority of the Knesset to legislate in matters of public law. The real problem lies in the area of private law. Despite the fact that, as pointed out above, from a halakhic-technical point of view, any Jewish community is free to legislate on criminal as well as on civil matters, according to the changing needs of the time, and although there is no dispute that such legislative activity is badly needed in order to deal with modern problems, which were not known in the time of the Talmud, the National Religious school insists that there can and should be much wider use of Jewish Law in Israeli legislation and adjudication. Yet, proponents of that school must admit that under the present circumstances, Jewish Law being a sealed book for the great majority of the Israeli secular public, it is very difficult to achieve much more than has already been achieved up till now.

The attitude of the haredi school

The other main Jewish religious stream in the State of Israel is that of the *haredim*, represented mainly by Agudat Israel, founded by R. Jacob Rosenheim in Kattowitz in 1912. The attitude of the *haredim* since the very beginnings of the Zionist Movement was one of isolation and estrangement *vis-à-vis* secular Jewish groups. Accordingly, the *haredi* movement refused to participate in the Zionist movement, and also in the Jewish Agency and Knesset Israel (the organized Jewish body at the time of the British Mandate).

The *haredi* movement experienced a severe ideological crisis upon the establishment of the State of Israel. On the one hand, it was impractical for them to ignore the Knesset, the government and the judiciary as if these institutions did not exist. On the other, cooperation with these institutions was in complete contradiction to everything the *haredim* had previously preached and practiced since the beginning of the century. At first, it seemed as if Agudat Israel had indeed taken a revolutionary step, as the party participated in the elections

for the First Knesset and was also represented in the government by a minister, R. Isaac Meir Levin. Later on, however, on the instructions of *Moezet Gedolei haTorah*, the Agudah refrained from official participation in Israeli governments and was represented at most by deputy ministers. Nevertheless, it did not abstain from participation in the elections and in Knesset activities. It follows, therefore, that the Agudah and its spiritual guides (*Moezet Gedolei haTorah*) accept the competence of the Knesset, halakhically speaking, to legislate on public as well private matters, and hold that the public must obey these laws – subject to one condition only, namely, that the law in question does not require an individual to act contrary to *Halakhah*.

At the same time, however, the *haredi* community compare the judiciary of Israel – at least, when dealing with matters of private law – to a "gentile court," therefore holding that litigants should bring their cases, whenever possible, to a Rabbinical Court rather than to the official judiciary system of the state. In fact, National Religious rabbis also hold that religious Jews should bring their legal disputes, whenever possible, to the Rabbinical Courts. At least one such authority (R. Jacob Ariel) considers the judiciary in Israel a "gentile court."[17]

In practice, however, the majority of National Religious people do not refrain from bringing their legal disputes to the ordinary state courts and do not consider them to be "gentile courts." Judges whose personal convictions place them in the National Religious camp serve in these courts at all levels, without giving up the hope, albeit apparently unrealistic at present, that Jewish Law will at some time in the future assume its proper and prestigious place in the State of Israel.

[17] J. Ariel, "Law in the State of Israel and the Prohibition of Gentile Courts" (Heb.), 1 *Tehumin* (1980) 319-328.

Human Rights and the Individual

THE PROTECTION OF HUMAN DIGNITY

*Nahum Rakover**

Introduction

The rule of human dignity – the rule that the individual deserves respect and honor – is wide-ranging and many-faceted. It may be considered from various aspects – philosophical, moral, sociological and legal. Our concern here is with the legal aspect alone.

Human dignity has in recent times found a place among values worthy of protection by law, constitutional and international. Article 12 of the Universal Declaration of Human Rights (1948) enjoins that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation." Similar protection is accorded under article 17 of the Convention on Civil and Political Rights (1966).

In Israel, the universal right to human dignity has entered the legislation as the "Basic Law: Human Dignity and Liberty," passed by the Knesset in 1992. The purpose of the law was specified in para. 1A as follows:

> 1A. The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.

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The value of human dignity is also mentioned in paras. 2 and 4 of the law:

2. There shall be no violation of the life, body or dignity of any person as such.
4. All persons are entitled to protection of their life, body and dignity.

In addition, according to para. 8:

8. There shall be no violation of rights under this Basic Law except by a Law befitting the values of the State of Israel, enacted for a proper purpose, and to any extent no greater than is required....

What, however, does this protection imply, what are the substance and scope of the right protected? Is the rule of a positive nature or does it merely preclude invasion? Does it grant a person any right relative to other individuals, or only a right relative to the authorities, who are supposed to extend him protection? What is the "dignity" that is to be protected and when is it deemed to have been infringed? Does the protection extend to "honorable" or "respected" persons only, or is everyone so entitled?

These are only some of the questions that present themselves in any discussion of the subject. What we are seeking here is to examine the basis and substance of the protection of human dignity in the Jewish sources, with an eye to laying its conceptual foundations and outlining means for its consolidation and realization.[1]

The social system is an amalgam of all kinds of relationships that involve the dignity, respect and honor of others. One can speak of the dignity of women,[2] respect for one's parents, for persons in pub-

1 Such issues as defamation and abuse will not be considered here.

2 Meaning woman in general, not necessarily one's wife. The proof text, "All glorious is the King's daughter within" (*Ps.* 14:14) – that the Jewish woman is modest and virtuous and as far as possible does not appear in public – is taken to indicate that she is exempt from many commandments out of respect for her person; see *BT Shevu.* 30a; *Shittah Mekubbetzet* to *B.M.* 7a, citing Rosh; *Resp. Peri Yitzhak* I, 52; M. M. Kasher, *Resp. Divrei Menahem*, 28,3. Cf. *BT B.M.* 59a.

lic office and for learned men.[3] Basic to all these, however, is undoubtedly the dignity of man as such.

Perhaps the most incisive expression of human dignity as such may be found in the explanation given by R. Johanan b. Zakkai (first century CE) for the different penalties imposed for the theft of an ox and of a sheep. R. Johanan b. Zakkai rules as follows: "The Holy One blessed be He is mindful of the dignity of mankind. For [stealing] an ox, which walks on its [own] feet, the payment is fivefold; for [stealing] a sheep, which has to be carried on one's shoulders, the payment is fourfold."[4] As Rashi *ad loc.* explains, the penalty is less in the case of a stolen sheep because the thief usually carries it away on his shoulders, thereby demeaning himself.

The mention of human dignity in connection with criminal offenders may perhaps be surprising, but it indicates the supreme importance of the concept. When one accords honor to a person who is entitled to it by reason of merit, that person's singular qualities are being honored. But when one honors a person who has no such qualities, that person's character as a human being is being respected. Moreover, while the dignity of an ordinary, i.e., average, person is unlikely to be impaired, the criminal has violated his own dignity, debasing himself in the eyes of others. Despite this, he is not excluded from the scope of the law; on the contrary, R. Johanan b. Zakkai is at pains to restore his dignity.

R. Johanan b. Zakkai's ruling also embraces the very origin of the concept of human dignity, since the Hebrew phrase he uses is not *kevod ha'adam*, "dignity of man," but *kevod haberiyot*, "dignity of creatures." This alludes to the Creator of the Universe; "creatures" in this context includes all of humankind. Nor should it be forgotten that God created man in His own image, and honoring the Divine image of every human being is one of the most difficult challenges confronting us in our conduct toward ourselves and toward others.

It is worth noting that the Jewish concepts of *kevod haberiyot* and the Divine image of humankind were adopted in a law recently en-

[3] *Peri Yitzhak*, *loc. cit.*, points out that the discussion of the question of a learned man giving evidence, in *BT Shevu.* 30b, is not based on respect for the Torah but on human dignity in general.

[4] *Mekhilta deR. Yishma'el*, *Mishpatim* 13; *T. B.K.* 7:3; *BT B.K.* 79b.

acted (1998) by the Knesset, prescribing equal rights for persons with disabilities.

Preservation of the Divine image in people, even in criminals, is already mentioned in the Bible:

> If a man is guilty of a capital offense and is put to death, and you impale him on a stake, you must not let his corpse remain on the stake overnight, but must bury him the same day. For an impaled body is an affront to God; you shall not defile the land that the Lord your God is giving you to possess (*Deut.* 21:22-23).

Explaining the words "an impaled body is an affront to God," R. Meir cites a parable of identical twins, one of whom became king, while the other took to highway robbery. After a while, the latter was caught and crucified, and passersby seeing the body thought that the king had been crucified.[5] The Italian biblical commentator R. Obadiah Sforno (c. 1470–c. 1550), commenting on the same verse, observes that

> Every essence distinct from matter is called Divine, and this applies to the essence of the intellectual soul in man, which is called the image of God... Now, since the dishonor done to a dead person after death is a dishonor of the intellectual soul, which is the distinct essence that remains after bodily death, [the Torah] said that it is an affront to God, for keeping the body impaled overnight without burial is a dishonor to that same eternal essence, which is called Divine.

The same idea is formulated by Ben Azzai, relying on a different verse ("This is the record of Adam's line"; *Gen.* 5:1):

> "Love your fellow as yourself" (*Lev.* 19:18). R. Akiva says: This is a foremost principle of the Torah. Ben Azzai says: "This is the record of Adam's line" is a greater principle. You should not say: Because I have been dishonored, let my fellow man be dishonored along with me.... R. Tanhuma explained: If you do

[5] *T. Sanh.* 9:7; *BT Sanh.* 46b.

> so, know whom you are dishonoring – "He made him in the likeness of God" (*Gen. ibid.*).[6]

Since the very source of human dignity is that human beings were created by God, the principle applies to all God's creatures, not the Jews alone, but all humanity. As Maimonides enjoined: "Do not belittle human dignity, for it overrules a negative commandment enacted by the rabbis..."[7]

The Basic Talmudic Source

R. Johanan b. Zakkai, as cited above, intended to explain a legal question – the difference between the penalty imposed for the theft of a sheep and that imposed for the theft of an ox – not to introduce new legislation. As we progress in time, from early (Tannaitic) to late (Amoraic) Rabbinic literature, we find the Talmud treating the question of human dignity as a major issue of *Halakhah* (Jewish Law), a basic legal principle that both confers rights and imposes restrictions.

The primary Talmudic source dealing with the subject is to be found in *BT Berakhot* 19b-20a. Here two opposing principles come into conflict, and as a result the scope and force of each of them receives clarification.

The argument commences with a ruling reported by Rav Judah in the name of Rav, that a person who finds mixed species (Heb. *kil'ayim*; e.g., linen and wool, which it is forbidden to wear together) in a garment must take it off at once, even in public. The proof text is: "No wisdom, no prudence, and no counsel can prevail against the Lord" (*Prov.* 21:30).[8] The Talmud goes on to state that "whenever *hillul haShem* (desecration of the Divine Name) is involved, no respect is paid to a teacher."[9] The point of this example

6 *Bereshit Rabbah* 24 (end). So also *Sifra, Kedoshim* 4; *JT Ned.* 9:4 (41c).

7 *MT Hil. Sanhedrin* 24:10.

8 See R. Meir Melammed, *Mishpat Tzedek,* 76, who asks why a proof text is needed – on what basis might the wearing of the garment be permitted?

9 What is the relevance of desecration of God's name and the respect due to a teacher? According to Maimonides (*MT Hil. Kil'ayim* 10:29), the text is stating that even if the mixed species were found in one's teacher's garment it would be permissible to tear it off; this explains the Talmud's reference to a teacher. Even

is that to walk undressed in public is, in the view of the Sages, conduct of a most shameful kind: "there is nothing more objectionable and abominable to the Omnipresent than the man who goes naked in the street."[10]

Thus it would appear from the rule relating to "mixed species" that when dishonor of a person's dignity clashes with an act that entails *hillul haShem*, the latter, i.e., Divine honor, takes precedence. This principle is, however, limited in a number of ways, since the Talmudic argument that follows cites five other sources which seem to indicate that preference should rather be given to human dignity when it conflicts with observance of a religious precept (*mitzvah*). Let us consider these sources in turn.

(a) The first source in conflict with the postulate that "no counsel can prevail against the Lord" considers a case in which the participants in a funeral, escorting the mourner(s) on the way back from the cemetery, find two paths available, one "pure" and one "impure" (and therefore forbidden for a person of priestly descent). The source rules that if the mourner should take the "impure" path, his companions are obliged to follow suit, out of respect for him,[11] even those

if the text is referring to one's own garment, one must remove it, even if one is a scholar; *Tummim*, *Hoshen Misphat*, 28,12.
As to desecration of God's name, see *Resp. Noda biYhudah, Mahadura Kama, Orah Hayyim* 35, who on the basis of *hillul haShem* thinks to distinguish between violations committed in public and those which are not (implying, *inter alia*, that there is no obligation to inform a man that his wife has committed adultery); but he is finally compelled by the conclusion of the Talmud to reject any such distinction, the mere fact of violation constituting desecration. One may nevertheless suggest that the original ruling regarding mixed species applied to cases in which public desecration would occur, and was then extended to the commission of any prohibited act, wherever it took place.

[10] *BT Yev.* 63b. From the wording of haMeiri and *Sefer haNer ad loc.*, the text might be understood as referring to a person of some standing, for whom even taking off an outer garment would be humiliating.

[11] Another version reverses the roles: "If they go by the impure path, he goes by the impure path," that is, the mourner himself, even if he is a priest, must avoid disrespect to the public and not inconvenience them. HaMeiri *ad loc.* prefers this version, rejecting the alternative version on the grounds that public respect does not yield to the respect due to individuals, even mourners. According to *Peri Yitzhak* 54, respect is due to the mourner alone because of his state of mind at the time of the burial, this respect being one aspect of human dignity.

of them who are priests.[12] The conflict is resolved by confining this ruling to a path of a special category, called *bet haperas* (a field which once contained a grave that has been plowed up and the bones scattered), which is considered impure only on Rabbinic authority; in such a case, the Sages themselves waive the respect due to their rulings.

(b) The second contradiction arises from a report by R. Eleazar b. Zadok (second half of the first century CE), who was a priest:

> "We used," (he said,) "to leap over coffins containing corpses so as to see the Israelite kings and not only them but also gentile kings so that if a person were worthy (to live at the time of the Messiah when royalty will be restored to Israel), he might be able to distinguish between the kings of Israel and the kings of the gentiles."[13]

In other words, it was permitted even for priests to risk impurity in order to pay their respects to "kings." Although the text indeed specifies "kings," the *rishonim* (early Halakhic authorities) seem to imply that the Talmud did not mean to differentiate between respect for kings and respect for people in general. Thus Rashi *ad loc.* observes that the Biblical commandment that no priest may defile himself for the dead (*Lev.* 21:1) is disregarded where human dignity is involved. R. Menahem haMeiri *ad loc.*, similarly, explains the reference to "kings" as an illustration: "He is permitted to leap over these coffins for the sake of human dignity, for example, to pay respect to kings and the like, and he is not required to take a roundabout way."[14] Here

[12] See Melammed, *op. cit.* (note 8 above) 76, who asks why the Talmud does not explain the source as referring to ordinary Jews who are not enjoined to avoid defilement but would have to cleanse themselves when defiled. This would dispose of the inconsistency in the sources.

[13] According to some scholars, the "kings of Israel" referred to here were Agrippa I and Herod II, who died some twenty years before the destruction of the Temple.

[14] *Peri Yitzhak* 54 asks how the case of the honor due to royalty can serve the argument, since that is a positive commandment that should set aside the negative commandment of not defiling oneself. The explanation given is that to honor royalty is a positive commandment of a special category, and the king himself may under certain circumstances forgo the honor due to him.

as well, the fact that the "impurity" is of Rabbinic origin is decisive – where respect to kings was involved, the rabbis waived their authority.

(c) Following upon the above, the Talmud cites, not a specific Halakhic ruling, but a general principle, not known to the earlier Rabbinic Sages but cited by those of the Talmud: "Great is human dignity,[15] which overrides a negative precept of the Torah," which would seem inconsistent with the principle that "no counsel can prevail against the Lord." To reconcile the contradiction, the Talmud quotes Rav bar Shaba, who interprets the principle as referring specifically to precepts of Rabbinic (not Biblical) force, which are binding by virtue of the commandment "You must not deviate from the verdict that they announce to you either to the right or to the left" (*Deut.* 17:11).[16] This explanation was greeted in the Academy by laughter, since that negative commandment is also Biblical and the inconsistency remains. At this R. Kahana said "A great man has made a statement; you should not laugh at him. All the ordinances of the Rabbis were based by them on the prohibition of 'You must not deviate,' but where [a person's] dignity is concerned the rabbis permitted [such deviation]."[17]

(d) While the contradictions offered by the previous three sources are resolved by explaining that they refer to Rabbinic prohibitions, which may be overridden in face of the requirement of human dignity, the two sources that follow involve Biblical prohibitions, so that a different explanation must be found.

The first involves the laws governing lost property. Normally, any person happening upon lost property is required by *Halakhah* to pick it up and seek the owner. However, an elderly person, for whom such action may entail a loss of dignity, is exempt from doing so:

[15] Heb. *kevod haberiyot*, lit.: the dignity of [God's] creatures or creations.

[16] See R. Eliezer Mintz, *Sha'arei Hokhmah – Shev Shema'ateta*, XI,17, who counts this as one of the passages in the Talmud in which an issue is referred to as "Torah" but explained as of Rabbinic authority.

[17] See Rashi *ad loc.*, who goes on to illustrate the situation by reference to the permissibility of carrying stones into a privy on the Sabbath to cleanse oneself (*BT Shab.* 81b; see below, at note 46), or of continuing to wear a garment in public on the Sabbath when the *tzitziyot* (the fringes attached to a four-cornered garment as required by Jewish Law) have been torn off (*BT Men.* 38a).

> Come and hear. "...and hide yourself from them" (*Deut.* 22:1). There are times when you may hide yourself from them and times when you may not. How is that? If [the finder] is a priest and (the object found) is in a graveyard, or if he is an elderly person and it is not in accordance with his dignity, or if his own work is more valuable than that of his fellow – in such a case it is said "...and [you shall] hide yourself."[18]

In reply to the question why the principle that "no counsel can prevail against the Lord" should not apply, the Talmud answers that here the situation is different because it is expressly provided, "...and you shall hide yourself." The Talmud then asks whether this reasoning could not be extended to other cases. The answer is that we do not derive a ritual prohibition from a law relating to property, and here the ruling relates to the return of lost property.

Another point considered here is the nature of the "elderly person" – Heb. *zaken* – mentioned in the text. Some authorities take the term to mean a learned man, which might mean that the ruling is referring to respect for the dignity of the Torah.[19] However, the wording of Maimonides' ruling in *Mishneh Torah* seems to imply otherwise:

> If he found a sack or a chest, if he was a learned man or a *respected elderly person*, not accustomed to carrying such things, he is not obliged to trouble himself with them; rather, he should consider whether, if the object were his own, he would bring it back himself, and if so he must return another person's property. But if he would stand on his dignity even with regard to his own property, just so he is not obliged to return another person's property."[20]

[18] The reasoning here is based on the Hebrew wording of the verse, which may be translated literally as follows: "You shall not see your fellow's ox or sheep gone astray *and hide yourself from them...*" It is the positive sense of the last phrase (where the text might have been, "...do not hide yourself...," i.e., do not ignore them) that prompts the conclusion, "There are times when you may hide yourself from them and times when you may not."

[19] Ritba, in *Shittah Mekubbetzet* to *B.M.* 30a. See also Ritba to *Shevu.* 30b; *Nimukei Yosef* to *B.M.* 32 (17b in Vilna ed.) in the name of Nahmanides. *Peri Yitzhak* I,52 takes the view that this is also the opinion of Rosh to *B.M.* 30.

[20] *Hil. Gezelah vaAvedah* 11:13. Similarly: *Shulhan Arukh, Hoshen Mishpat* 263;

Be that as it may, the whole tenor of the argument in the Talmud, which discusses the matter of the "elderly person" in the context of human dignity in general, is more consonant with the view that the ruling should not be limited to a sage.[21]

(e) The fifth apparently inconsistent case concerns a person, on the way to slaughter his paschal lamb or to circumcise his son, who learns that a close relative has died. By busying himself with the burial, he will be prevented from carrying out the precept of circumcision at its proper time or from slaughtering the paschal lamb because of impurity. The Talmud rules that a person in such circumstances should not normally put aside the religious duty with which he is occupied. There is one exception, however, and that is the case of a *met mitzvah* (a corpse found unattended), where the obligation to bury the dead overrides, *inter alia*, the obligation to circumcise one's son or to slaughter the paschal lamb. According to Rashi *ad loc.*, the obligation to bury a *met mitzvah* stems from the principle of human dignity, which is once again found to override certain religious duties – which cannot in these cases be interpreted as of Rabbinic authority. The Talmud resolves the difficulty by pointing out that the obligation may in fact be derived hermeneutically from the Biblical text. To the question as to whether the principle might not be inferred from here to apply in general, the answer given is that in the cases of the paschal lamb and circumcision, the person concerned is not required to

Bayit Hadash, Tur Hoshen Mishpat 272,8. According to *Peri Yitzhak* I,53, Maimonides is also referring to a scholar, so that there is no disagreement between Maimonides and Rosh.

21 See *Peri Yitzhak* I,52, who insists that, even on the understanding that a scholar is involved, it is not the honor due to the Torah that displaces the commandment of returning lost property but the principle of human dignity, since whatever affects a person's personal dignity – albeit because that person is a Torah scholar – is a matter of human dignity. An ordinary person of standing is, however, obliged to restore lost property, since by performing a *mitzvah* that person's dignity will not suffer. It is otherwise with a Torah scholar, for whom it is humiliating to carry certain things. (One might suggest that if the scholar were known to be engaged in restoring lost property no disrespect might arise; see *Peri Yitzhak, ibid.*, who explains that Maimonides holds that any person, not necessarily learned, is exempt from the commandment if to carry it out will detract from his dignity as not everyone will know that he is so engaged.)

violate the precepts by a positive act but merely by abstention from action (*shev ve'al ta'aseh* = "sit back and do nothing").

Having presented the Talmudic text basic to our subject, we now go on to discuss several points raised by that text.

Respect for gentile kings

According to the Talmud as quoted above, one is permitted to render oneself impure to greet even a non-Jewish king, because this might enable the person concerned "to distinguish between the kings of Israel and the kings of the gentiles." What has this got to do with indignity? Should a commandment indeed be overruled to enable one to make this distinction?[22] Perhaps the respect due to a monarch does not affect him only, but also benefits the person showing respect, whose very understanding of the nature of respect is a part of that respect. It is also possible that the question of human dignity is not involved at all but whether "counsel can prevail against the Lord," that is, whether there are matters and values which may override a religious commandment, and in that context the respect due to royalty – including the ability to distinguish between Israelite and gentile kings – is but one instance? The fact is that the association with the subject of human dignity is cited by Rashi; it is not necessarily implied by the wording of the Talmud.

According to the Munich manuscript of the Babylonian Talmud, however, the picture is quite different. After citing R. Eleazar b. Zadok as in our text, that a person may render himself impure out of respect for kings, the following passage appears: "For R. Johanan said: a person should always endeavor to go and welcome royalty, and not only the Israelite kings but also the gentile kings, so that if a person were worthy..." According to this version, the whole question of respect for gentile kings was brought up by R. Johanan, who

[22] See *Resp. Ketav Sofer, Orah Hayyim* 37, in the name of his father *Hatam Sofer*, that the "privilege" of being able to distinguish non-Jewish royalty will surely override a Rabbinic decree, since such an ability involves Divine honor, while in the case of Jewish royalty only human dignity is involved. He then explains that the ability to make such a distinction will serve the person well should he be privileged to greet the Messianic king and distinguish him from gentile royalty.

is similarly cited elsewhere in the Talmud.[23] There is, however, no explicit permission to render oneself impure in this situation.[24]

While the meaning of the passage in the Babylonian Talmud depends, perhaps, on the specific text adopted, the Jerusalem Talmud states unequivocally that permission to defile oneself applies to both Jewish and non-Jewish kings:

> R. Yannai said: A priest may render himself impure in order to see a king. Thus, when the emperor Diocletian came here, I saw R. Hiyya b. Abba stepping over graves in Tyre to see him. R. Hezekiah and R. Jeremiah reported in the name of R. Johanan that it is a religious duty to see great kings, so that when the Kingdom of David is restored one should know how to distinguish between [Jewish and gentile] royalty.[25]

This text is in perfect agreement with the Munich reading of the Babylonian Talmud. And Maimonides sums up the law as follows:

> A priest is permitted to defile himself in a *bet haperas* or by going abroad, for the purpose of fulfilling a religious duty.... Similarly he may defile himself with things considered impure on Rabbinic authority for the sake of human dignity... So also he may leap over coffins to welcome kings of Israel, and even gentile kings, so as to be able to distinguish between them when the glory of the kings of Israel is restored....[26]

The *Shulhan Arukh* does not cite the ruling with regard to impurity, merely stating that "it is a religious duty to endeavor to see kings."[27] *Magen Abraham* comments that the conclusion in the Talmud – that where respect to kings was involved, the rabbis waived their authority – applies only to Jewish kings; he explains the statement "not only [Israelite kings] but also gentile kings" as meaning that it is a

[23] Cf. *BT Ber.* 9b and 58a.

[24] Some earlier authorities delete any reference to gentile kings in the text; see, e.g., *Tosafot* of R. Judah Sir Leon of Paris (N. Zaksh ed.), p. 231. Of course, if one accepts the reading of the Munich Ms. there is no need for such an emendation.

[25] *JT Ber. 3:1* (23a in Vilna ed.); cf. *Tosafot* of Judah Sir Leon, *loc. cit.*

[26] *MT Hil. Avel* 3:14. For the meaning of *bet haperas* see above, text after n. 12.

[27] *Orah Hayyim* 224,9.

religious duty to hurry to do so, but not that a priest is permitted to defile himself for that purpose.[28] It would thus appear that *Magen Abraham* is consistent with the Munich text of the Talmud. At the end of his remarks, however, he cites Maimonides and notes that the latter's summary coincides with the conclusions of the Tosafot,[29] Nahmanides in his Critical Annotations[30] and the Jerusalem Talmud.[31]

As to more recent practice, R. Abraham Samuel Benjamin Sofer (1815-1871; oldest son of the *Hatam Sofer*), was asked by his brother R. Simeon Sofer[32] whether it was permitted to parade with a Torah scroll in the street on a Day of Atonement that happened to fall on the Sabbath, in order to greet a gentile king. R. Simeon thought that it was permitted. In his responsum, R. Abraham, after considering the law as set out in Maimonides and the observations of *Magen Abraham,* summed up his view as follows:

> It seems to me that, as Maimonides explicitly wrote in the Laws of Mourning that one may leap over coffins even for [the respect of] gentile kings, and this seems to be the plain meaning of the statement of R. Eleazar b. Zadok..., there is no reason to give the statement of R. Eleazar b. Zadok any meaning other than its plain one, and whoever wishes to do so must bring proof. Moreover, none of the other *rishonim* and Halakhic authorities has explicitly opposed Maimonides. Indeed, *Magen Abraham* ruled against Maimonides because the *Shulhan Arukh* refrained from citing this ruling in *Yoreh De'ah*, and this silence certainly

[28] *Ad loc.*, (7).

[29] To *Ber.* 28a.

[30] To Maimonides, *Sefer haMitzvot, Shoresh* 1.

[31] See also Tosafot to *Shab.* 152b; *Haggahot Hatam Sofer* to *Shulhan Arukh, Orah Hayyim* 224,9 who is of the view that for the earlier authorities it was clear that no distinction was to be made between Jewish and non-Jewish royalty; see also *Resp. Ketav Sofer, Orah Hayyim* 37. On the view of *Magen Abraham*, that there is no obligation to show respect to gentile royalty, see *Mekhilta* 98a; *Mahatzit haShekel* to *Magen Abraham, ad loc.; Resp. Ketav Sofer, Orah Hayyim* 37. R. Abraham Ashkenazi, *Darash Abraham*, 108b, infers from *BT R.H.* 11a that a Biblical prohibition may be set aside out of respect for royalty; this view is criticized by R. Judah Benveniste, *Tivasha Yehudah* 108b-109a.

[32] *Resp. Ketav Sofer, Orah Hayyim* 37.

> requires consideration... Nevertheless, as a Rabbinic ruling is involved, we should not abandon an explicit ruling of Maimonides and the plain meaning of R. Eleazar b. Zadok's words merely because [R. Joseph Caro] is silent on the matter; the reason for [that silence] is unknown and the law should thus be interpreted leniently.

That conclusion was valid with regard to a violation that has a direct bearing on the welcoming of gentile kings, for the reason given in the Talmud – so as to learn to distinguish them from Jewish kings. Carrying on the Sabbath, however, had nothing to do with going out to welcome a gentile king for that reason; hence there was, it seemed, no justification to permit such action. Nevertheless, R. Abraham concluded, since it had long been customary to welcome monarchs by parading before them with Torah scrolls, failure to do so, albeit on the Sabbath, might be misconstrued as *lèse majesté*; as an emergency measure, therefore, permission should be granted.[33]

Avoiding humiliation and showing respect

Another matter that requires attention is the question, whether the requirement of human dignity is to be met only in a negative sense, by avoiding humiliation of one's fellow (analogous to Hillel's dictum, "what is hateful to you, do not do to your neighbor" [*BT Shab.* 31a]), or whether it calls for some positive act of respect that will override a commandment. This question is obviously connected with our previous discussion. If the respect due to royalty is a question of human dignity, as explained by the *rishonim*, the answer must be in the affirmative.[34] It should, however, be remembered that in this

[33] Whether a scroll of the Torah may be carried on the Sabbath in honor of royalty is discussed further in *Bet Lehem Yehudah* to *Shulhan Arukh, Yoreh De'ah* 282,7 (annotation in the name of Radbaz) and *Pithei Teshuvah*, *ibid.*, in the name of R. Shabbetai Katz and in *Resp. Maharsham* III,198.

[34] The same could possibly be demonstrated in the case of a mourner (*Resp. Sha'agat Aryeh* 58) – see text to note 12 above – but the demonstration is more pertinent in the case of royalty. See, however, R. Naphtali Amsterdam, cited in *Peri Yitzhak* 53, to the effect that human dignity is involved only in those cases where the dignity of people generally, whatever their status, is concerned, as with a *met mitzvah* or public nakedness, but not as regards loss of dignity that relates only to an individual person because of his specific character – there

case, one is commanded to pay respect to royalty,[35] so that even passive disrespect would be an offense. Hence we cannot conclude from the example of royalty that in the general case, where one is not required actively to pay respect, such passivity would violate the requirement of human dignity. (For the same reason, we cannot infer from the honor due to royalty as to the converse, i.e., that respect for human dignity is not a general, uniform norm but a relative requirement. Such an argument would single out the particular respect due *inherently* to royalty, in contrast to other "respected" persons, whom we are not commanded to respect but normally do so because of their wealth, intellect or other qualities.)

The distinction between refraining from respect and active humiliation is not easily drawn, just as the definition of respect is not an easy task. What is the criterion? Is it Halakhic, or is it perhaps a question of social convention, of how such matters are normally viewed?

R. Ja'ir Hayyim Bacharach (1638-1702) was once asked whether a learned man, who was an amateur musician, might play at a wedding without shaming himself in view of the respect owed to his learning. On the one hand, there is a well-known principle that a sage may forgo his dignity, as when people do not rise in his presence; on the other, perhaps this principle does not apply to actively causing disrespect? In reply, Bacharach first considered the question of whether playing before a bride and bridegroom involved active humiliation or just loss of dignity. After discussing the Mishnaic adage "Who is honorable? He that honors other people" (*Avot* 4:1), he goes on to point out:

human dignity surely does not override a *mitzvah*. However, R. Isaac Blaser (*ibid.* 54) rejects this view, insisting that loss of dignity *per se* infringes the requirement of human dignity. See further *Or Same'ah* to *MT Hil. Yom Tov* 6:14, who shows that a *mitzvah* may be overridden not only to avoid contemptuous conduct but also where positive action must be taken to do honor (although he tries to argue that where contemptuous conduct is not involved but merely the honoring of royalty, a matter that does not apply equally to all persons, the effect is not to displace a Biblical precept.)

35 In the case of mourners there are also special considerations of respect; see note 11 above.

> At any rate,... one cannot deny that [such action] involves some humiliation from the standpoint of public opinion and behavior, for such persons are indeed known generally as *letzanim* [= jesters, buffoons].[36]

On this view, public opinion, or social convention, should be considered a criterion of human dignity. As dignity is associated with social behavior, with the delicate texture of interpersonal relationships, it seems clear that generally accepted conventions, variable as they are, are of major significance.

How religious observance may be overridden

As regards the manner in which a Rabbinic decree does not apply when in conflict with human dignity, three possibilities suggest themselves: (1) The decree was not intended to apply at all to the case at hand; (2) the Rabbis set their decree aside in that particular case; (3) they permitted their decree to be ignored without actually setting it aside. (Importance may attach to the choice of possible explanations: If a decree does not apply in a particular instance, there is no need to waive one's dignity in that case; but if the decree is merely set aside but is generally effective, one might consider waiving one's dignity a worthwhile, meritorious measure.)

In the case of becoming impure in order to receive royalty, the Talmud suggests as a first alternative[37] that in those circumstances the relevant Rabbinical decree is not effective, whereas their second alternative – "Great is human dignity, which overrides etc." – implies that the decree remains effective but is set aside in that particular case. As the Talmud puts it: "where (human) dignity is concerned the rabbis allowed the act." According to Rashi, *ad loc.*, however, the rabbis in this case waived their own dignity in permitting an act contrary to their decree, thus giving a third alternative. Rashi indeed took the same approach in his explanation of the case of the two paths open to a mourner, as above. The inference is that,

[36] *Resp. Havvot Ya'ir* 205.

[37] See Melammed, *Mishpat Tzedek,* 76, who points out that the verb "override" is out of place in that case, just as Rashi (to *Ber.* 20a) observes that, since the laws of impurity do not apply in the case of a *met mitzvah,* one should not speak of human dignity "overriding" them.

according to Rashi, the decree was not abrogated, but permission was given to overlook it in the given instance without, however, affecting the "impurity" of the person concerned.[38]

Respect due to the individual and to the public

The Hebrew term for "human dignity," *kevod haberiyot*, i.e., dignity of "creatures" or "creations," in the plural, might lead one to suggest that only the dignity of the public need be upheld, not that of the individual.[39] Moreover, the Jerusalem Talmud[40] specifically uses the term *kevod harabbim*, "dignity of the many." The Babylonian Talmud, however, explicitly interprets the rule as applying equally to the dignity of the individual. For when the question is asked, why human dignity is taken into account contrary to the injunction "No wisdom... can prevail etc.," the Talmud answers, "where [a person's] dignity (Heb. *kevodo*) is concerned the rabbis permitted [such deviation]" – unequivocally using the singular.

Perhaps the statement of the principle in the plural form is intended to emphasize that human dignity is a matter of public concern. On this basis, it is not pointless to ask whether an individual may forgo the respect owed to him or allow himself to be treated with

[38] Cf. *BT Betz.* 32b and Rashi *ad loc.* R. Ahai, in *She'iltot* 103, questions the statement in *Pes.* 92a, that in the case of *bet haperas* (see above, text after n. 12), the Sages waived observance of their enactments if that might entail *karet* (i.e., a punishment of premature death by Divine decree), pointing out that in any case one may go into *bet haperas* in order to perform any religious precept. He answers that a distinction is made between crossing *bet haperas* to perform some religious duty, in which case one becomes unclean, and doing so to slaughter one's paschal lamb, in which case the Sages waive their decree entirely and consider the person clean. In this connection cf. also R. Judah Sir Leon to *Ber.* (Zaksh ed.), p. 225; *Resp.* R. Isaiah di Trani 44,3, to the effect that not all Rabbinic decrees are considered to have the same force. According to R. David Pardo, *Mikhtam LeDavid, Yoreh De'ah* 51 (also cited in *Mar'eh Adam* 20,9), the requirement of human dignity will have overriding effect in occasional instances, but will not permanently annul a Rabbinic decree.

[39] The expression *kevod hatzibbur*, "public dignity," may also be found in the Talmud; see Ch. Y. Kasovsky, *Thesaurus Talmudis*, s.v. And see, e.g., *BT M.K.* 21b: *kevod harabbim.*

[40] See text at notes 54 and 55 below.

disrespect, or whether the public has a right to prevent this from happening.[41]

This question should not be confused with that of whether a man learned in the Torah may waive the respect due to him. In the latter case the honor of the Torah is at stake. Although the Talmud indeed permits a scholar to forgo the honor due to him, there is – once again – a difference between lack of respect and active humiliation.[42]

The *rishonim* touch on this question in connection with the exemption of scholars from the obligation to return lost property to its owner when such action is beneath their dignity. Considering whether a scholar so exempted may nevertheless refrain from standing on his dignity, Maimonides writes:

> He who follows the right and proper path and acts beyond the strict letter of the law will in any event return the lost goods despite its being beneath his dignity.[43]

R. Asher, on the other hand, states that

> since the Torah exempted the elderly person [= scholar] from this obligation, he may not derogate from his honor. For him, this constitutes violation of a prohibition, as it would be showing disrespect toward the Torah when he is under no obligation.[44]

[41] R. Naphtali Amsterdam, cited above, n. 34, after explaining that the principle applies to acts affecting the dignity of all people, whatever their status, goes on to say that where human dignity overrides a rule of law through refraining from the performance of an act, it is to protect people from general shame. In such a case, one could hardly say that one should waive one's honor and allow oneself meekly to be shamed. At this level, Divine honor is also affected, as deduced above (text at notes 5, 6) in the case of the corpse of an impaled criminal.
In *BT Sanh.* 46b the question is asked, whether burial in general is intended to prevent disrespect or is a means of atonement. The practical difference, the Talmud observes, is that where a person expresses a wish not to be buried, that direction will be ignored if the intention of burial is to avoid disgrace. This would seem to indicate that a person cannot waive an act which entails his own disgrace. Rashi *ad loc.*, however, explains that the disgrace referred to is that of the deceased's surviving family; the Tosafot concur, ruling that a dead person is not affected by disgrace.

[42] See R. Isaac b. Sheshet (Ribash), *Resp.* 220, who rules that a Torah scholar may not demean himself; and see *Peri Yitzhak* 52.

[43] *MT Hil. Gezelah vaAvedah* 11:17.

[44] *Piskei haRosh* to *B.M.* II,21; so also *Tur Hoshen Mishpat* 263 and 272. We have

R. Joseph Caro understands Maimonides to be saying that rather than the Torah being shown disrespect, its honor is in fact enhanced when a scholar acts – in a matter of interpersonal relations – beyond the strict letter of the law.[45] This discussion raises the possibility that perhaps human dignity should yield to the more sublime concept of Divine dignity.

Human dignity manifested in private

Is the principle of human dignity operative in private and not just in public?

The Talmud permits carrying something into a privy on the Sabbath (a desecration of the Sabbath, as such installations were at that time outside homes) in order to cleanse oneself (or otherwise violating the sanctity of the Sabbath to that end) because "Great is human dignity, which overrides a negative precept of the Torah."[46] If this refers to a situation in which no other people are present, it might be construed as proof that the consideration of human dignity is also applicable to a person who is alone.[47]

Respect for the dead

Another aspect of human dignity may be learned from the Talmudic discussion of the *met mitzvah*, referred to above. As we have noted, one possible interpretation of the text (specifically, Rashi's understanding) is that care for a *met mitzvah* is a matter of respect for the dead and, in that sense, a question of human dignity. However, this

already mentioned the question in *Resp. Havvot Ya'ir* 205, as to whether a learned man may play music at a wedding, thus showing disrespect for his learning: see text at note 36 above. He seeks to make the answer dependent on the disagreement between Maimonides and Rosh, which he reconciles by distinguishing between "disrespect" shown when engaged in the performance of a religious duty or otherwise. See also J. Eybeschuetz, *Urim veTummim* 28,12.

45 Bet Yosef to *Tur Hoshen Mishpat* 263; cf. *Urim veTummim* 28,12.

46 *BT Shab.* 81a-b. See also Rashi to *Ber.* 19b and *Suk.* 36b; *Shulhan Arukh, Orah Hayyim* 312,1.

47 R. Saul Berlin, *Besamim Rosh*, 280, in *Kasa deHarsena*, infers that if so, a violation of the Torah would also be permitted in order to prevent pain and distress to oneself. However, his reasoning is strongly attacked by *Or Same'ah* to *MT Hil. Sanh.* 15:1.

is not generally agreed. R. Meshullam b. Moses of Béziers (fourteenth century) wrote in his father's name in *Sefer haHashlamah*:

> [Care for a *met mitzvah*] is permitted out of respect for the living, not out of respect for the dead. Namely, in the case [mentioned in the Talmud, *BT Shab.* 94b] of the corpse in Drukeret, the neighbors were unable to endure the odor [and therefore R. Nahman permitted its removal from the house]; hence it is respect for the living, which is a matter of human dignity, that overrides a negative precept of the Torah... But respect for the dead is not a question of human dignity.[48]

R. Menahem haMeiri disagreed with this approach, however, asserting on the basis of various Talmudic passages that "human dignity is not confined to respect for the living only, as has been suggested by some commentators, but also concerns respect for the dead..."[49]

It must be observed that this difference of opinion centers on the question of whether the principle that human dignity overrides other commandments is also applicable when the dignity at stake is that of a deceased person. There is no dispute as regards the honor due to the dead as such, as the Talmud unequivocally enjoins that "a cemetery may not be treated disrespectfully... out of respect for the dead."[50] Moreover, the Talmud prescribes that

> if a man gave instructions that upon his death he should not be buried at the expense of his estate, he is not to be obeyed. It is not within his power to enrich his sons and throw himself upon the public.[51]

R. Meir of Rothenburg commented on this basis that the rabbis were concerned with the respect due to a dead person, even if he himself was not so concerned.[52]

[48] Cited from Ms. by the editor in *Bet haBehirah* (Lange ed.) to *Shab.* 43b.
[49] *Bet haBehirah* to *Ber.* 20a; *Shab.* 43a, 94b.
[50] *BT Meg.* 29b; see *Shulhan Arukh, Yoreh De'ah* 368.
[51] *BT Ket.* 48a; see *Shulhan Arukh, Yoreh De'ah* 348,2; and see above, n. 41.
[52] R. Meir b. Baruch, *Resp.* (Prague ed.) 926. The case concerned a mother who had provided money as a loan for the burial of her son; however, the widow subsequently refused to repay the money but wished to retain all his estate against the payment due under her *ketubbah*.

Biblical and Rabbinic precepts

It emerges from the Talmudic discussion that the rule "Great is human dignity, which overrules a negative precept of the Torah" was understood as applying to those precepts that derive from Rabbinic decree. As haMeiri puts it, "Although human dignity is most desirable, the respect due to the Torah does not yield to it and a negative Biblical commandment will not be set aside by any requirement to take positive action in order to show respect for humans."[53] Yet there are commandments in the Torah that yield to human dignity. The Talmud itself states that the commandment to return lost property is overridden, because it is "a question of civil law" [Heb.: *davar shebe-mamon*, lit.: a matter of money] (from which the general rule follows that a Biblical commandment in the area of civil law will be displaced by the requirements of human dignity). Then the Talmud explains that the ruling according to which a person may defile himself by dealing with the burial of a *met mitzvah*, thus becoming unfit to slaughter the paschal lamb, is explicable by the fact that it involves not positive action but abstention from action (*shev ve'al ta'aseh*) (from which follows the general rule that a Biblical precept will give way to the rule of human dignity where all that is involved is such abstinence).

Each of these elements has received careful consideration. How is a Rabbinical precept to be defined, and how a Biblical precept? What constitutes "a question of civil law," why should it give way to human dignity, and to what cases is this ruling applicable? Under what definition of "abstention from action" is the violation of a Biblical commandment permitted when human dignity is involved? These questions merit some discussion, but first some reference should be made to the approach taken by the Jerusalem Talmud.

The discussion in the Jerusalem Talmud, in contrast to the Babylonian, seems to imply that human dignity does indeed override even Biblical negative precepts. Thus, in connection with the question, already referred to above, of "mixed species" in clothing, we read in Tractate *Kil'ayim*:

[53] *Bet haBehirah* to *Ber.* 20a.

> If a person was walking in the street and found that he was wearing a garment of "mixed species," two Amoraim (take different views). One says that it is forbidden (to continue wearing the garment), the other – that it is permitted. He who holds that it is forbidden [does so] because a Biblical precept [Heb.: *devar Torah*] is involved. He who holds that it is permitted agrees with the view of R. Zeira: Great is the dignity of the public [Heb. *kevod harabbim*, lit.: "dignity of the many"], which overrides a negative precept of the Torah temporarily [Heb. *sha'ah ahat*, lit. "for one hour"].[54]

Elsewhere, R. Zeira's dictum is cited in relation to the case of a priest attending a funeral:

> What is the law as regards a priest becoming impure because of the dignity of the public? It was taught: If there were two roads etc... Now [this is the case] with regard to impurity due to a Rabbinical decree, and also impurity derived from the Torah, because of what R. Zeira has said....[55]

Clearly, then, it is the view of the Jerusalem Talmud that considerations of human dignity are paramount even in conflict with a Biblical commandment. However, two reservations are in order here. First, the text in the Jerusalem Talmud expressly restricts the ruling to cases in which the commandment is set aside temporarily, and not as a permanent arrangement: "which overrides a negative precept of the Torah temporarily." Second, while the Babylonian Talmud in these contexts is clearly speaking of human dignity (*kevod haberiyot* = respect for people), the term used in the Jerusalem Talmud is, as we have noted, "respect for the many" or, more idiomatically, "dignity of the public."[56]

[54] *JT Kil.* 9:1. But cf. *Or Zarua, Hil. Kil'ayim* 299, where the expression *devar torah* is interpreted in such a way as to reconcile the two Talmuds, explaining it as referring to the commandment "You must not deviate..," hence ultimately to a Rabbinic decree. See also R. Elijah of London, *Pesakim,* Order *Zera'im* (Sacks ed.), p.2.

[55] *JT Ber.* 3:1; *Naz.* 7:1; cited in *Piskei haRosh* to *Niddah,* IX, *Hilkhot Kil'ei Begadim* 6.

[56] R. Ezekiel Landau, *Resp. Noda biYhudah* (*Mahadura Kama*), *Orah Hayyim* 35,

The fact is that even the restricted interpretation of the rule, to the effect that only Rabbinical precepts are set aside when in conflict with human dignity, was not universally applied by the early Halakhic authorities. Their reservations were generally based on other passages in the Babylonian Talmud.[57]

Ritual as against civil law

We have already cited the reason given in the Talmud that general conclusions may not be drawn from the fact that, under certain conditions, an "elderly person" is exempted from the obligation to restore lost property to its owner: "We do not derive a ritual prohibition from a ruling relating to property."[58] This is explained by Rashi, *ad loc.* as follows: "Matters of property are of less import than those involving ritual." In what sense is this intended? The question has been pondered at length by various authorities.

Another version of the text of *Ber.* 19b, however, adds: "We do not derive a ritual prohibition from a ruling relating to property, for

expresses the view that the Jerusalem Talmud agrees with the Babylonian, that the principle is effective only with regard to abstention from action. See also *Penei Yehoshua* to *Ber.* 19a. Landau, relying on the words *sha'ah ahat* (= "temporarily"), argues that, even according to the view of the Rosh that a person is not obliged to inform another that he or she is violating a precept (see note 73 below), there is an obligation to inform a husband of his wife's adultery (see note 88 below), since adultery is not temporary in effect. See, however, R. Solomon Kluger, *Sefer haHayyim* to *Shulhan Arukh, Orah Hayyim* 13,11, who suggests a different interpretation of the Jerusalem Talmud. Another distinction (between major and minor humiliation) is suggested by R. Moses Zeev Cohen, *Tif'eret Moshe* 58. In regard to the seemingly different terminology of the Babylonian Talmud ("human dignity") and the Jerusalem Talmud ("dignity of many"), see L. Ginzberg, *Perushim Hadashim baYerushalmi*, p. 103, for a different view. See text at note 40 above.

[57] Nahmanides, *Torat haAdam* (Chavel ed.), p. 78, limits the possibility of overriding Rabbinic decrees to those that have no warrant in Biblical sources. Cf. R. Solomon b. Adret, *Novellae* to *Shab.* 94b; R. Nissim to Alfasi, *Shab.* 35b; *Bet Yosef* to *Tur, Orah Hayyim* 311. *Resp. Havvot Ya'ir* 95 goes even further, limiting the principle to matters expressly mentioned in the Talmud. See also *Yad Mal'akhi* 122; *Mikneh Abraham* 3, 79; *Taharat haMayim* 3; *Sede Hemed* 3,22-23; *Pe'at haSadeh* 3,15. A new distinction is made in *Resp. Bet Shelomoh, Orah Hayyim* 111, between a situation where there is an immediate danger that a Biblical prohibition may be violated – in which case human dignity will not be the overriding consideration – and one where there is no such danger.

[58] *BT Ber.* 19b

property is different in that it may be remitted." This, then, might be the sense in which civil matters are of less import and therefore may be overridden by considerations of human dignity.[59]

The question is, however, whether the ultimate conclusion of the Talmud in the passage under consideration is indeed that a negative precept attaching to matters of property may be overridden. According to Rashi it seems that such is not the case because, he explains, the ruling in the instance of lost property (and the paschal lamb) is justified by the fact that no positive action is required:

> But [the precepts of] returning lost property and the paschal lamb were addressed to all of Israel, and the fact that they may be set aside because of human dignity is only because these [particular precepts] are not set aside actively (lit.: with one's hands) but by inaction.

HaMeiri takes the same view. Discussing the same problem, he writes:

> There are some matters regarding which the Torah provided us with a general principle to set aside precepts written in the Torah because of human dignity, such as their nullification by abstention from action. Thus, in the case of the return of lost property... as where the property was an ass and the [finder] was an elderly man who would have to lead the ass – in such and similar cases we set aside the absolute negative precept expressed in the words "Do not hide yourself from them," and permit him to hide himself, for the Torah did not say that one should respect others by demeaning oneself.[60]

He goes on to say that, although the Talmud indeed invoked the rule that ritual matters may not be derived from civil ones, it could just

[59] See *Dikdukei Soferim* to *Ber.* 19b; Tosafot to *Shev.* 30b. R. Abraham Sofer, *Resp. Ketav Sofer, Orah Hayyim* 37, suggests that civil matters are not really of less import; however, the very fact that property rights may be remitted enables the Torah to require the owner of lost property to forgo such rights in face of the respect due to the elderly. Cf. Nahmanides to *B.M.* 30a; *Penei Yehoshua* to *Ber.* 19b; D. Reiss, *Shoshanim leDavid* I, 5.

[60] *Bet haBehirah* to *Ber.* 19a; and cf. *Resp. Havvot Ya'ir* 205.

as well have based its explanation on the fact that in this case the negative precept is not overridden by positive action. It preferred, however, to teach us that, while the Torah was cognizant of human dignity in connection with other people's property, such consideration could not be inferred in connection with ritual matters.

In any event, it seems clear that, according to the final conclusion of the Talmud as explained by Rashi, the main reason that no inference may be drawn from the case of lost property is not the distinction between ritual and civil law, but the fact that refraining from the restoration of lost property constitutes abstention from action, nullifying the negative precept in question by inaction. There are no grounds, therefore, to permit setting aside a negative precept relating to property or other civil matters, in the case that positive action is required to do so.

Maimonides, however, does not invoke the concept of "abstention from action," explaining rather that the exemption in the case of lost property derives from its civil nature.[61] If so, would every negative precept concerning matters of property be overridden by the requirements of human dignity? For example, would theft be permitted for that purpose? The case of lost property indicates that while it is permitted to look aside and leave the property where it is, one is surely not entitled to appropriate another's property in the interests of human dignity.[62]

Abstention versus positive action

When the question is asked in the Talmud, why it cannot be inferred from the case of a *met mitzvah* that human dignity will always override a negative Biblical commandment, the answer is that in that case it is only necessary to abstain from action ("sit back and do nothing"). Why the rule does not apply equally to cases in which positive action is called for is explained by Rashi, *ad loc.*, on the grounds

[61] See text at note 66 below.

[62] A similar distinction is suggested by R. Joseph Engel, *Gilyonei haShas* to *B.M.* 113b, discussing a responsum of R. Meir of Rothenburg regarding the repayment of a debt; he points out that no analogy should be drawn from the fact that there are situations in which lost property need not be returned.

that the Sages possessed the authority to set aside certain precepts, provided only abstention from action was involved:

> They permitted many things to be uprooted, even if contrary to the Torah, as a preventive measure or in the interests of human dignity, provided that no positive action is involved but only abstention from action, so that the commandment, [even] a Biblical one, is uprooted of itself, for example, [when one refrains from] blowing the *shofar* [= ram's horn, on the New Year] or taking the *lulav* [= palm branch, on Sukkot] when the festivals in question fall on the Sabbath... and the like... However, to do so by positive action [lit.: with one's hands] is not permitted.[63]

While Rashi lays emphasis upon the manner in which the commandment is nullified – abstention as against positive action – Rav Hai Gaon stresses the nature of the commandment being set aside. With reference to fact that the obligation to deal with the burial of a *met mitzvah* overrides a positive precept, such as slaughtering the paschal lamb, he is quoted as follows:

> ... [Slaughtering] the paschal lamb is a positive precept, and in the context of a *met mitzvah* we instruct him: Sit back and do not [slaughter] the paschal lamb. And since this is a positive precept, which is of less import, we set it aside because of human dignity. The matter of mixed species, however, is a negative precept, and we do not set it aside because of human dignity....[64]

Importance attaches to this difference of approach where a negative commandment is not transgressed by performance of an act but by abstention. A negative commandment is not always infringed by pos-

[63] Cf. *Sefer heArukh* s.v. *Shev* (b), citing R. Hananel. Although the passage quoted gives examples of Biblical commandments being set aside by the Sages on the basis of inaction, R. Hananel does not assert that the overriding power of human dignity is of Rabbinic origin.

[64] *Sefer heArukh*, *loc. cit.* For a discussion of the relative import of positive vs. negative commandments, see R. Solomon Kluger, *Shenot Hayyim* 244 and 370; D. Reiss, *Shoshanim leDavid* I, 5.

itive action. For example, the commandment to set up a parapet on one's roof is also formulated as a negative precept: "Do not bring bloodguilt on your house" (*Deut.* 22:8). Again, the commandment not to defer burial of a dead person has its source in the verse "You must not let his corpse remain on the stake overnight" (*ibid.* 21:23). Both these commandments, then, may also be categorized as negative.[65] What is the decisive element – the category into which a commandment falls in terms of the Torah (positive or negative), or the manner in which it is infringed?

As to the nullification of a Biblical prohibition by abstention from action, this would seem, on the basis of Maimonides' ruling, to be impossible:

> A person who notices someone wearing mixed species prohibited by the Torah, even if he is walking in public, must disrobe him immediately, even if he is his teacher... since human dignity does not override a negative commandment explicitly formulated in the Torah. And why is the commandment not to refrain from returning lost property set aside? – because that is a negative commandment involving property.

The case of a *met mitzvah* is also different, writes Maimonides, because the obligation to deal with its burial is hermeneutically derived from the Biblical text and therefore has the status of a Biblical commandment proper. However,

> ...a Rabbinic prohibition is always and everywhere superseded for the sake of human dignity. And even though we are explicitly enjoined in the Torah not to depart from the Sages' teachings, either to the right or to the left, this negative precept itself is set aside in the interests of human dignity.[66]

Thus, in neither of the two cases he cites does Maimonides invoke the principle that a commandment may be set aside by abstention from action, although that is the ground mentioned in the Talmud.[67]

[65] *Resp. Sha'agat Aryeh* 58.
[66] *MT Hil. Kil'ayim* 10:29.
[67] While Maimonides states that a negative commandment is not set aside because of human dignity, he does not say that the same applies to positive

It is, however, possible that his version of the Talmudic text did not specify that reason.[68] In any event, later authorities do invoke the concept of abstention from action in order to override even Biblical commandments.[69]

Prohibition involving a voidable vow and a prohibition not generally applicable

A further extension of the possibility of a Biblical precept yielding to human dignity emerges from a reading of the Talmudic text which, though not in the standard version, may be found in some old versions.[70]

The Tosafot to our Talmud (*ad Ber.* 20a) do not rely on the text but suggest the very same extension on their own initiative. The question is asked, why a nazirite and a High Priest may defile themselves in the case of a *met mitzvah*, although this involves positive action. After rejecting Rashi's explanation, they state that no inference may be drawn from the case of a nazirite because his vow is voidable in certain circumstances; nor is any inference to be drawn from the case of the High Priest because the prohibition relating to him is not universally applicable.

According to this argument, the rulings permitting a priest to become impure in the cases of "two paths" and "leaping over coffins" to greet royalty need not be restricted to Rabbinic impurity alone.[71] One could conclude that human dignity will override even Biblical prohibitions, permitting even positive action to that end, when the

commandments, i.e., where one can invoke the consideration of "sit back and do nothing."

68 See *Or Same'ah* to *MT Hil. Kil'ayim* 10:29; R. Saul Hayyim haLevi, *Kelilat Sha'ul* 61a.

69 *Magen Abraham* to *Orah Hayyim* 13(8) and 444(11) (end).

70 Cf. Nahmanides, *Torat haAdam, Sha'ar haKohanim* (Chavel ed.), p. 137; *Sefer haMa'or* to *Ber.* Ch. 3; *Bet haBehirah* to *Ber.* 20a; cf. *She'iltot deRav Ahai* 34.

71 The same conclusion is drawn by Nahmanides *loc. cit.* on the basis of the variant version but he expresses reservation: "It would now follow on the basis of these versions that any negative precept in the laws of impurity would be set aside because of human dignity, for they are all precepts not universally applicable to all... [This would apply also to] impurity of Biblical origin; but this is a lenient measure that is very hard to accept." See also R. Naphtali Z. Berlin (Netziv), *Meromei Sadeh* to *Ber.* 19b.

prohibition is based upon a voidable vow or a prohibition not generally applicable.[72]

Different measures of humiliation

Above, in connection with the case of a person wearing mixed species in public, it was mentioned that the Sages considered nothing more abhorrent than a person going around undressed in public. The question arises whether, in those instances where human dignity displaces other commandments, one differentiates between the measure of humiliation or disrespect involved.

According to one view expressed in the Tosafot (to *BT Shev.* 30b), such a differentiation is indeed to be made: One may set aside another commandment by abstention from action if the loss of dignity entailed is considerable, as in the case of public nudity or care for a *met mitzvah.* However, where the loss of dignity is slight, e.g., when a distinguished person is required to testify before a court of lesser authority, there is no such dispensation, even when only abstention from action is involved.[73]

[72] *Resp. Havvot Ya'ir* 95 points out the difficulty that the view of the Tosafot creates in respect to the ruling cited by Rema in *Shulhan Arukh, Yoreh De'ah* 372, that if a priest not fully clothed is informed that a dead person is lying in the house, he must immediately leave, even in his undressed state, since no Biblical commandment yields to the requirement of human dignity. This seems inconsistent with the view of the Tosafot that, since priestly impurity is not the same for all, it may be set aside where human dignity is involved. The answer given is that the author of the ruling in question did not accept the view of the Tosafot but followed Rashi. This solution in turn raises another difficulty: even if the priest remains where he is, this is not an active infringement of the laws of impurity. See also R. Solomon Kluger, *Resp. Tuv Ta'am vaDa'at (Mahadura 3)*, II, 211, dealing with a similar problem involving public respect. The question was whether a priest leading prayers on the Day of Atonement should be informed of the discovery of a dead person in a room adjacent to the place of prayer. The answer was that, if no person could be found immediately to replace him, the priest should continue, even if aware of the presence of the dead person: whether the impurity is Rabbinic or Biblical, the relevant prohibition gives way to respect for the public, for to leave them without a leader would be disgraceful.

[73] Cf. Tosafot to *B.M.* 30b; *Magen Abraham* to *Shulhan Arukh, Orah Hayyim* 13,8; *Tummim* 28,12. R. Naphtali Amsterdam, in his previously cited responsum (*Peri Yitzhak* 53), challenges the usual interpretation of the Tosafot, questioning whether one can differentiate between greater or lesser contempt. He suggests the meaning that, where the disrespect is general, it is considered to be of a

Another view in the same passage of the Tosafot, however, holds that even abstention from action is not considered halakhically as "sit back and do nothing" if the outcome is infringement of some prohibition. This approach takes no account, clearly, of the degree of humiliation involved.[74]

Nevertheless, even if this last view is adopted, not every affront to human dignity has the power to override another precept. In a case that came before R. Isaac b. Sheshet (Ribash), the problem was whether it was permissible to sew garments during the intermediate days of a festival for the circumcision of a child born on the first or second day of the Festival, so that the father's dignity should not be injured by his child having to wear borrowed or old clothes for the occasion. Ribash rules that, for a variety of reasons, the sewing of new clothes was impermissible; but then he adds;

> We should not compare the dignity of different kinds of persons. The permission to defile oneself on account of a *met mitzvah* or out of respect for a mourner or in honor of royalty, the permission given to a scholar to ignore the command to restore lost property, the prohibition of removing a garment which contains mixed species according to Rabbinic decree – these cases are not to be compared with the dignity of a parent regarding the dress of his infant child.[75]

On the other hand, R. Ja'ir Bacharach (*Havvot Ya'ir*) was once asked whether a priest standing in the yard of his house at the height of a severe winter, upon hearing suddenly that somebody had died in the

greater measure than when it affects an individual.

74 But cf. *Piskei haRosh* to *Niddah* Ch. IX, *Hil. Kil'ei Begadim* 6 (end); *Shulhan Arukh, Yoreh De'ah* 303,1 and Rema's comments *ad loc.* And see *Resp. Sha'agat Aryeh* 58: "Rashi, Maimonides, Nahmanides and the Tosafot all had the same intention, namely, that if failure to act may cause another person actively to violate a prohibition, human dignity will not prevail." Cf. *Ha'amek She'elah* to *She'iltot* 127,17; *Resp. Noda biYhudah, Mahadura Kama, Orah Hayyim* 35; *Peri Yitzhak* 52.

75 *Resp. Ribash* 226. Cf. *Or Same'ah* to *MT Hil. Yom Tov* 6:14, who suggests that human dignity will only set aside a prohibition that will avoid disgrace at that moment (as in the case of a *met mitzvah,* in contrast to the child to be circumcised, where there is a time gap between the time the garment is to be made and the disgrace that might occur).

house, might run to a neighbor's home, even though he would have to pass through the house made unclean by the presence of the deceased, lest he suffer excessively from the cold. The answer given was that although it was well established that no personal inconvenience or shame might override Rabbinic decree, in the given circumstances the priest's suffering and chagrin warranted permitting him to risk defiling himself.[76]

Human Dignity as a Value and its Implications

In the course of examining the Talmudic discussion in *Berakhot* 19a-b, we have defined the limits within which a commandment will be overridden in deference to human dignity. Put differently: we have been concerned with what one might call in modern terms the constitutional status of the principle of human dignity – the degree to which it has the power to prevail over any other legal ruling that contradicts it.

This exceptional status of the principle of human dignity has been given expression by many scholars. HaMeiri, in his introduction to the Talmudic discussion which we have been discussing, writes:

> Human dignity is very highly prized. There is no principle that is more prized. The rabbis laid down a cardinal rule: "Great is human dignity, which overrides any negative prescript of Rabbinic standing, permitting its violation even by an active measure... There are [moreover] some matters regarding which the Torah provided us with a general principle to set aside precepts written in the Torah because of human dignity, such as their nullification by abstention from action.[77]

In the field of penal law Maimonides, after describing the wide punitive powers vested in the court, regarding both fines and physical punishment, affirms:

> All these matters depend on what the judge deems necessary

[76] *Resp. Havvot Ya'ir* 191; cf. *Resp. Sha'ar Efrayim* 93.

[77] *Bet haBehirah* to *Ber.* 19b; and cf. especially *Sha'agat Aryeh* 58, who holds the principle of human dignity to be "greater than all the commandments in the Torah," by virtue of its power to override even negative commandments.

> under the circumstances. In any event, whatever he does should be for the sake of Heaven, and moreover he should not treat the honor of humans lightly, since it overrides a Rabbinic prohibition. All the more so is this valid for the honor of the children of Abraham, Isaac and Jacob, who adhere to the true Torah – he should be careful not to injure their dignity, save only when that is necessary for the honor of the Almighty.[78]

Maimonides presumably considered his admonition especially apt in relation to penal law, as measures taken in that context are particularly liable to impair human dignity unless judiciously chosen.

The principle of human dignity as an overriding consideration takes effect in different areas of *Halakhah*, and the topics deliberated in that connection in the course of legal history present a wide variety. The Talmud itself touches upon various implications and rulings of relevance. The Jerusalem Talmud, for example, permits a person who has begun to trim his beard to continue doing so even after hearing that a close relative has died.[79]

At a later stage in the history of *Halakhah*, we find R. Moses Isserles (Rema) invoking the principle. Thus, he ruled that a priest lying undressed in the vicinity of a dead person but unaware of the impurity is not to be told until he has dressed himself.[80] On another occasion, he permitted the marriage of a poor orphan girl to proceed after the advent of the Sabbath (which is Rabbinically prohibited), out of consideration for the shame the girl might suffer if the marriage was put off.[81]

Another case in point concerns a ruling of R. Israel Isserlein that the son of an apostate is called to the reading of the Torah not by his father's but by his grandfather's name.[82] R. Meir Katzenellenbogen (Maharam of Padua), referring to this ruling, limited it to situations

[78] *MT Hil. Sanh.* 24:9. R. S. Kluger, *Sefer haHayyim* to *Shulhan Arukh, Orah Hayyim* 13,11, stresses that the principle of human dignity will surely not apply when its infringement is essential to eradicate crime.

[79] *JT Shab.* Ch. 1; *Shulhan Arukh, Yoreh De'ah* 390,2; and cf. *Torah liShmah* 510.

[80] Rema to *Shulhan Arukh, Yoreh De'ah* 372,1.

[81] *Resp. Rema* (Ziv ed.) 128.

[82] *Resp. Terumat haDeshen* 21, also citing *Sefer Hasidim* (Wistinetzki-Freimann ed., no. 1572; Margaliot ed., no. 791).

where to do so would not shame the son, e.g., when the congregation does not know the father's name:

> For have not our Sages said...: It is better for a person to throw himself into a fiery furnace rather than to shame his fellow in public?!.... Have they not said: Great is human dignity, which overrides a negative precept of the Torah?! How much more so such a matter, which has no basis either in the Torah or in the Prophets![83]

This opinion, in turn, provided the basis for a similar ruling of R. Moses Sofer (*Hatam Sofer*). According to *Halakhah*, one may not mourn a person who has committed suicide.[84] Sofer nevertheless followed Maharam of Padua in permitting the family to mourn if failure to do so would bring lasting disgrace on the family, despite the fact that people would thereby be led to think that the deceased had not done away with himself.[85]

R. Ezekiel Landau dealt with the dilemma facing a person who knows that the wife of a member of a well-known and respected family has committed adultery: should he disclose the fact to the husband so that the latter might desist thereafter from a prohibited relationship?[86]

R. Meir Simhah of Dvinsk, in his commentary on Maimonides, confirmed the ruling of a certain rabbi that musical instruments could be played in honor of royalty on the second day of a Festival in the Diaspora (where that day is normally observed with the same sanctity as the first day).[87]

A number of scholars have dealt along the same lines with abortion in cases where conception occurred under adulterous circumstances and failure to abort might create a situation of considerable disgrace.[88]

[83] *Resp. MaHaRam* of Padua 87. Rema rules similarly in his gloss to *Shulhan Arukh, Orah Hayyim* 139,3. Cf. *Be'urei haGra ad loc.*, note 7.

[84] *MT Hil. Avel* 1:11 and *Shulhan Arukh, Yoreh De'ah* 345,1. See also *Resp. Eitan Aryeh* 114.

[85] *Resp. Hatam Sofer, Yoreh De'ah* 327,2.

[86] *Resp. Noda biYhudah, Mahadura Kama, Orah Hayyim* 35.

[87] *Or Same'ah* to *MT Hil. Yom Tov* 6:14.

[88] *Resp. Tzitz Eliezer* pt. 9, no. 51 (3,12). Saul Berlin, *Besamim Rosh* 375,

Importance attaches to the principle of human dignity in the field of property law as well. R. Meir of Rothenburg, discussing the collection of a verbally contracted debt, cites the view of the Babylonian Talmud[89] that collection may be effected even by removing the clothes from the debtor's back. However, he explains, this may be done only provided the debtor has two sets of clothing, one fine and one less so; in that case, the finer may be taken and the other left to the debtor. In any other event the debtor may not be left without clothing, for considerations of human dignity.[90]

This would seem to imply that the various provisions according to which a debtor must be allowed to retain enough for his essential requirements derive from two sources: (1) the law of the valuations of dedications made to the Temple, where the rule of "according to the sufficiency of his means" prevails; (2) the principle of human dignity, which requires the debtor to be left with sufficient clothing so that he is not put to shame.[91] R. Joseph Engel explains the view of R. Meir of Rothenburg as follows:

> Just as human dignity will override a Biblical commandment through abstention from a positive act..., so also will it override the precept that a debtor must repay his debt, in the sense that he is under no obligation to give his clothing to the creditor and be left naked. Since he is not commanded to go to such lengths, neither may the court, by the same token, collect the debt from him [under such circumstances], because the entire purpose of the court is to compel the debtor to fulfill his obligation to repay his debt..., and that does not apply here, where he himself is not so obliged.[92]

Engel then goes on to reason that reliance on the laws of valuations is necessary only in relation to things that the debtor needs, but

permitted traveling in a wagon on the Sabbath or walking beyond the Sabbath limits in order to avoid taking charity – on the grounds of human dignity.

89 *B.K.* 11b, *B.B.* 157a.

90 R. Meir b. Baruch, *Resp.* (Prague ed.) 400.

91 *Ibid.*, 926.

92 *Gilyonei haShas* to *B.M.* 113b.

whose confiscation would not occasion any loss of dignity on his part.

Prevention of shame to the poor

Concern with human dignity may also be manifested in refraining from acts that might shame another person, not only directly, but also indirectly, by doing something that another person may be unable to match. As haMeiri puts it: "A person should always take care that the poor or other people should not be shamed by his actions. Thus, the rich should behave like the poor, so as not to shame someone who has nothing."[93] For example, the Mishnah (*Ta'an.* 4:8) states:

> R. Simeon b. Gamliel said: There were no better days for Israel than the fifteenth of Av and the Day of Atonement, when the daughters of Jerusalem would walk out in borrowed white dresses, so as not to shame anyone who had none....

And the Talmud (*Ta'an.* 31a) expands:

> Our Rabbis taught: The daughter of the king borrows from the daughter of the High Priest, the daughter of the High Priest from the daughter of the deputy [High Priest], the daughter of the deputy from the daughter of the [priest] anointed for battle, the daughter of the [priest] anointed for battle from the daughter of an ordinary priest; and all Israel borrow from one another, so as not to shame a person who has none.

Although this account deals with a custom that had developed independently, the principle it embodies was applied in other directions by legislation. Thus, the Talmud (*M.K.* 27b-28a) cites a *barayta* listing several enactments (*takkanot*) relating to mourning which had the same purpose:

> Formerly people were wont to bring food to a house of mourning, the rich in silver and gold baskets and the poor in osier baskets of peeled willow twigs, and the poor felt

[93] *Bet haBehirah* to *M.K.* 27a.

> humiliated. It was decreed that all should bring food in osier baskets of peeled willow twigs... out of deference to the poor... Formerly people were wont to serve drinks in a house of mourning, the rich in white glass and the poor in colored glass, and the poor felt humiliated. It was decreed that all should serve drinks in colored glass out of deference to the poor.[94]
>
> Formerly people were wont to uncover the faces of rich (deceased persons) and to cover the faces of the poor because their faces turned dark in times of drought, and the poor felt humiliated. It was decreed that the faces of all should be covered.

The *barayta* lists a few more such enactments, concluding with a practice that was not specially enacted but arose out of custom:

> Formerly burial of the dead was a heavier burden for his relatives than his death (because of the high cost of the shrouds), so much so that they would abandon him and go off; until R. Gamliel came and, in disregard of his own dignity, was buried in (cheap) flaxen vestments, and thereafter people followed (his example).[95]

The Talmud adds here: "Nowadays everyone (is buried) in cheap shrouds worth a mere *zuz*." The importance of the reform initiated by R. Gamliel is attested by the following regulation: "The Sages decreed that ten cups [of wine] should be drunk in a house of mourning. Later four were added: one... and one in honor of R. Gamliel" – because of his enactment regarding shrouds.[96]

Since, however, the reason for these practices was to avoid shaming the poor, they were subject to changing social conditions. Thus

[94] See *MT Hil. Avel* 13:7. Colored glass concealed the color of the wine and hence also its quality.

[95] *BT M.K.* 27b; *Bet haBehirah ad loc.* And cf. *Resp. Maharil Diskin, Kuntres Aharon*, 34, in regard to plowing and sowing in a Sabbatical year to enable people to pay their taxes and avoid imprisonment: "Permission to do so extends even to the rich, lest the poor be shamed, and this is the case even according to the view that observance of the Sabbatical year in our time is required by Biblical law."

[96] *BT Ket.* 8b.

the custom developed for the community to cover the expenses of burial out of public funds (as is done today in Israel). Maimonides, relying upon the Talmud cited above, writes that shrouds are sewn with white flax threads so that they should not be costly; scholars were usually dressed with a head cloth worth only one *zuz,* to avoid shaming those who possessed none.[97] Radbaz (16th century Cairo) notes, *ad loc.*,

> Today we use shrouds worth a *maneh* [= 100 *zuz*] or more... and we do not take the enactment regarding the poor into consideration; for since everyone is buried in white [shrouds], people do not notice whether they are of fine or coarse cloth and the poor do not leave their dead and go off, since the burial of those who cannot afford it falls upon the community and they are buried in accordance with their dignity."

And he goes on to explain that conduct in this respect depends upon custom.

The principle of avoiding shame to the indigent was eventually one of the motives for much of the sumptuary legislation adopted in Jewish communities, which included regulations directed against throwing extravagant feasts or wearing ostentatious clothing and jewelry. Of course, such legislation had other motives too, such as the need to avoid economic impoverishment, which could affect communal revenue by rendering people unable to pay their taxes and making them a burden on the community; another reason was the desire to avoid provoking gentile hostility.

A number of illustrative examples will now be presented of enactments aimed expressly at preventing situations in which the economically disadvantaged might be forced to compete with the wealthy, or might be shamed by various practices beyond their means.

A regulation was enacted by the community of Castilian refugees in Fez in 1698, limiting the amount of dowry given to a daughter on marriage. The background is explained in the introductory text of the regulation: It had become customary to fix large sums of money as dowries, together with various luxury items such as expensive jew-

[97] *MT Hil. Avel* 4:1.

elry and the like. The social pressure generated by such practices frequently led to the utter impoverishment of the bride's family, who felt obliged to incur heavy debts which burdened them for long periods; many families, lacking the means, were in fact unable to find suitable matches for their daughters. Accordingly, the community resolved as follows:

> We therefore have seen fit to ordain and decree on all who henceforth make arrangements for a daughter's marriage that neither the prospective bride nor her family stipulate any addition whatsoever to the dowry... beyond that customary in the past.... Any person who deliberately offends against any detail of the foregoing is to be banned and separated from the Congregation of Israel; and in addition he must pay a fine to the community, as deemed fit by the court and the communal officers in office that month.[98]

A regulation adopted in Halberstadt in 1776, placing restrictions on the festive meals that accompanied circumcisions, explicitly mentions that it was instituted in order to avoid shaming those who could not afford the outlay.[99]

The same reason is cited in a regulation enacted in Yemen in 1828, under the influence of an emissary from Tiberias, R. Joseph Hakohen Ashkenazi. The introductory text explains the deleterious consequences of sumptuous wedding feasts, among them:

> ...that because of the prohibitive expense the poor are shamed, for they are unable to afford such things, and postpone their marriages and [the women] remain unmarried until after the age of 20... [Therefore,] if the groom wishes to entertain guests

[98] *Kerem Hamar* II, 139. Cf. Jacob Moses Toledano, *Ner haMa'arav*, p. 124. For further examples of sumptuary laws, see *Kerem Hamar* II, 48, 81, 92, 94, 154, 160. See D. Fraenkel, 1 *Alim* (1934) 110, for a similar regulation from Constantinople, passed in 1726; however, Fraenkel's assertion that the motive was to avoid impoverishment of the poor is his own conjecture, not supported by the text of the *takkanah*.

[99] The *takkanah*, in Yiddish, was published by Yom Tov Levinski in 1 *Reshumot* (1946) 142. In this case the words "so as not to embarrass..." appear explicitly in the text.

> during the seven days of festivity (after the wedding), he shall not be prevented from doing so if he is a person of means, provided he does not throw large feasts, entertaining no more than ten people each day, no more, even if he is rich and able to afford [such luxury], so as not to embarrass those who cannot afford it.[100]

Conclusion

The value of "human dignity" has been recognized as deriving from the honor due to the Creator. To shame a person is regarded as marking gross disrespect of the Divine image in man. Hence any affront to the dignity of an individual immediately affects the public interest. And since the concern here is with human beings as created by God, all people are included, irrespective of religion and race. Even the criminal is not excluded from the human family and is protected from degradation.

Human dignity is considered a supreme value not only in point of morality. It has received recognition as a legal norm that can override other conflicting legal provisions. The tension between these two poles is well illustrated in the discussion of the Talmudic text that has provided the basis for this study. On the one hand, one has the rule derived from the book of Proverbs, "No wisdom, no prudence, and no counsel can prevail against the Lord," that human values must defer to Divine commandments. On the other hand, one has the dictum, "Great is human dignity, which overrides a negative precept of the Torah." Neither of these rules, which are by way of being "constitutional" norms, is invalidated by the other. Rather, each is interpreted subject to certain constraints, taking the other into consideration. The Divine commandments, the *mitzvot*, having their source in the Torah, are in principle treated as possessing a preferred status, as a supreme norm, in face of the principle of human dignity. In practice, however, commandments involving matters of property have been excluded, as also have commandments whose infringement does not entail the performance of a positive act (and perhaps also

[100] Y. Ratzahbi, "Emissaries and Yemenite Customs" (Hebrew), 3 *Yeda Am* (1945-46) 34.

commandments that involve voidable vows or are not universally applicable).

Moreover, commandments that do not derive from the Torah but from Rabbinic decree yield to human dignity even when their violation entails positive action. Indeed, despite the fact that such decrees derive their force from the Biblical prohibition: "You must not deviate from the verdict that they announce to you either to the right or to the left," this particular negative precept is set aside: man-made law, even that made by Divine dispensation, is superseded by the principle of human dignity.[101]

It is noteworthy that the exemption granted the elderly (or the learned) from the obligation to return lost property is not based on an explicit Biblical text but derived from the injunction "And you shall hide yourself." This is construed to mean that at times one may indeed "hide oneself," i.e., ignore a lost article; this dispensation, in turn, is then interpreted as applying specifically to a person for whom picking up the article (or caring for it) would be considered undignified. It follows, therefore, that there is a basic principle which, under certain circumstances, recognizes the priority of human dignity. Once this has been allowed in regard to a specific precept – in this instance the return of lost property – the principle may be extended to other commandments, such as the paschal lamb, circumcision of a son and *met mitzvah*. In other words, the law is interpreted according to a system of underlying guiding values, one of which is human dignity. (One might compare this to another principle governing the interpretation of the Torah: "Her ways are pleasant ways" [*Prov.* 3:17].)[102]

The overriding force of human dignity finds expression in a variety of different areas of *Halakhah*. Thus, we have seen it to be effective not only in respect of laws regulating man's relations with God, but also in relation to social intercourse. Hence the restrictions in such areas as the collection of debts and penal law. The principle goes even farther, inspiring legislation aimed not merely at prevent-

[101] See, as a parallel, section 8 of the Basic Law: Human Dignity and Liberty, mentioned above.

[102] *BT Suk.* 32a.

ing direct humiliation but also at avoiding humiliation due to economic inequalities and the bitter feelings these engender.

Many details of our topic are still undecided and require further study. Indeed, the quest for a definition of human dignity is perhaps endless.

R. Eleazar HaKappar said, "Envy, lust and [the desire for] honor take a man from the world."[103] Some seek honor and never achieve it; as the popular saying has it, "every person who runs after honor, honor flees from him," or "from him who seeks greatness, greatness flees, but he who flees from greatness, greatness follows."[104] Sometimes, however, the failure to give honor to a person – even though he or she might not seek it – may "take him or her from the world," that is, alienate that person from the environment and cause untold distress. If we desire a quality of life that offers joy in this world, we must nurture and promote human dignity as basic to civilization, a social value whose legal aspect, as we have tried to describe it here, is simply the legal expression of an inherent human value.

Concern for such values will create not only proper self-regard but empathy with the nation, with the entire human family and all living beings. This sentiment was beautifully expressed by Rabbi Kook in a quatrain appearing in his *Orot haKodesh*:

There is he who sings **the song of his soul**, and in his soul finds everything, the full satisfaction of the spirit.

And there is he who sings **the song of his nation**, he escapes from the bounds of his private soul... and communes in exquisite love with the entire body of Knesset Israel, joining it in song....

And there is he whose soul further unfolds so that he goes beyond the confines of his nation, to sing **the song of man**; his spirit exalts in the glory of humanity and the splendor of his image....

And there is also he who ascends to still greater heights, to commune in harmony with **the entire universe**, with all creatures, with all the worlds, and with them bursts out in song...[105]

[103] *M. Avot* 4:21.

[104] Or, similarly: "He who courts respect, respect evades him. He who avoids respect, respect courts him" (*BT Er.* 13b).

[105] *Orot haKodesh*, II, p. 444.

HATE SPEECH, EQUALITY AND THE LIMITS ON FREEDOM OF EXPRESSION:

THE CANADIAN EXPERIENCE AS A CASE-STUDY

*Irwin Cotler**

May I preface my remarks with a personal statement, or perhaps I should say, that my paper should be understood against the backdrop of my own *sensibility* on the issue – but which sensibility is not unrelated to the juridical subject matter of the paper. In a word, speaking on a Holocaust-related topic is something I do sparingly, and with difficulty. For the subject matter evokes for me a sense of awe and reverence – indeed, humility – and I address it with a certain degree of hesitation, and not without a certain measure of pain. For I am reminded of what my parents taught me while still a young boy – a *formation* that informs my scholarship and advocacy to this day – that there are things in Jewish history that are too terrible to be *believed*, but not too terrible to have *happened*; that Oswiencim, Majdanek, Dachau... these are beyond vocabulary. For the Holocaust, as Professor Yehuda Bauer has stated, is "uniquely unique" – a war against the Jews in which, as Elie Wiesel has put it, "not all victims were Jews, but all Jews were victims."

But if the Holocaust is uniquely unique – if it is beyond vocabulary – it is, arguably – and here sensibility merges with substance – beyond law; but if it is beyond the law, it may also escape the law, so

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that the very profundity of the horror – be it the Holocaust or its denial – becomes the basis for its immunity from law. Conversely, if law is to address it, it must somehow normalize the evil; yet the very "normalization" – while legally exigent – is somehow existentially unreal. And so the paradox: the very enormity – indeed transcendental – character of the evil may defy legal remedy; while the very use of legal remedy – the "banalization" of evil – is the banality also of the law. An evil, then, that is "uniquely unique" requires the imaginative use of law and legal remedy that is unique, if not uniquely unique.

This invites yet another paradox or dilemma: how is one to be imaginative in speaking of freedom of speech – or freedom of speech in relation to hate propaganda – the hate propaganda of the Holocaust denier – when one is reminded of the words of John Stuart Mill, who in an apology at the beginning of his famous essay titled *On Liberty* said:

> Those to whom nothing which I am about to say will be new, may therefore, I hope, excuse me, if on a subject which for now three centuries has been so often discussed, I venture on one discussion more.[1]

Speaking 140 years after John Stuart Mill uttered his apology, I too must beg your indulgence for beginning still another discussion on the issue of freedom of speech. As I stated above, the very subject matter of this paper – Holocaust denial hate propaganda – appears as much to defy comprehension as freedom of expression itself is burdened with the banality of hundreds of years of discussion.

Yet, there are some compelling considerations today that invite "one discussion more" – and distinguish the discussion from that of John Stuart Mill. First, there is the very existential character of the discussion. In other words, we are not simply discussing the abstractions of freedom of speech, or speech *in abstracto*, or freedom of expression as a matter of legal or political theory alone; rather, we

[1] John Stuart Mill, *On Liberty. Representative Government. The Subjection of Women* (London, 1969), 21.

are discussing the balancing – or even the confrontation – of two core values:

- the principle of freedom of speech, on the one hand,

and

- the right of minorities to protection against group-vilifying speech, on the other.

The philosophic and normative inquiry here, I submit, while owing much to Mill, emerges as more profound – and more compelling – than that addressed by Mill.

Second, there are important legal – indeed, constitutional – considerations which did not even arise for Mill, or which arose in the framework of political theory – but which today have not only a national but international juridical resonance, and are anchored in the dynamics of constitutional theory. More particularly, is anti-hate legislation – the panoply of civil and criminal remedies developed to combat hate propaganda – constitutional? How does one address – let alone determine – its constitutionality? Is such anti-hate legislation – necessarily over-broad and all-encompassing, given the enormity but ephemeral character of the evil it seeks to combat – to be rendered void because of this very over-breadth or vagueness? Or, conversely, if it is narrowly tailored so as to meet a constitutional challenge, can it be effective in combating the evil? Can constitutional theory and practice coexist? Is there a dissonance between validity and efficiency? And what principles – and precedents – exist to guide us in our deliberations?

Third, there are important sociological considerations which Mill did not face, or could not even imagine. In a word, there is a veritable explosion today of racist hate speech – a global web of hate – not only of a kind and character that Mill could not envisage, but conveyed by a technology of cyberhate that even post-modernists did not foresee.

Fourth, there is a particular socio-legal dynamic that did not, and again could not, obtain in Mill's time, or any time, until the recent past. I am referring to the explosion of Holocaust denial – perhaps the most obscene form of hate propaganda – and the little known, but not insignificant fact, that Canada has emerged as one of the

world centers for hate propaganda litigation in general, and Holocaust denial litigation in particular. This is not, one must hastily add, because Canada is an international center for Holocaust deniers, or a center for the international dissemination of hate propaganda; rather, it is because Canada – while certainly not without its hate propagandists – has developed one of the most comprehensive legal regimes to combat hate propaganda of any jurisdiction – or jurisprudence – anywhere.

Indeed, it is the dialectical – or what I would call dynamic – encounter in Canada between the rise in hate speech, on the one hand, and the existence of a comprehensive legal scheme to combat it, on the other, which has produced this Holocaust denial hate propaganda litigation. It is an encounter and litigation that would have been alien to Mill; but it is an encounter and experience – culturally and legally – that has international significance, and which makes the Canadian experience a constitutional model for the validity and efficacy of legal remedy – for trying to determine the boundaries of liberty and tolerance.

There is a fifth consideration – a psychological one – that underpinned Mill's analysis from the perspective of political theory, but again was unknown to Mill, and is only now becoming known to us. I am referring to the serious individual and societal harm resulting from this scurrilous speech, harm that is only now being appreciated as a veritable "assault" on our psyches with "catastrophic" effects for our polity – and harm which, if it were known to Mill, would make the hate speech issue, even for this classical liberal theorist, a hard case.

Sixth, there are considerations of an international juridical character that were neither existing, nor even foreseeable, in Mill's time. In a word, there exists an international legal regime, anchored in international treaty law, which not only prohibits racist hate speech – and excludes it from the ambit of protected speech – but obliges State Parties to these treaties, like Canada, to enact measures to combat such scurrilous speech. If countries like Canada had not enacted such measures, they would now be obliged to do so; having enacted them, they cannot lightly be set aside.

Seventh, there is a jurisprudential movement beyond the liberal legal theory and perspectives on free speech as reflected in Mill and Rawls, and which find expression in critical race theory, feminist legal theory, and international legal theory.

Finally, and of particular interest to this audience, there is a Jewish jurisprudence on speech, anchored in a configurative analysis of rights and duties, and organized around the principles of the inherent dignity of the human being, the equal dignity of all human beings and the dangers of assaultive speech, as expressed in the dictum that "life and death are in the tongue."

One can see, therefore, that there are a variety of considerations of an existential, philosophical, legal, sociological, psychological and international character that simply were not part of Mill's analysis some 140 years ago; indeed, these considerations alone warrant "one discussion more," and must necessarily be factored into any discussion of free speech and hate propaganda today.

Moreover, this "one discussion more" may also be said to be warranted by its taking place today against the backdrop of the most celebrated hate speech litigation in the history of Canadian jurisprudence – and one that embraces all the above considerations. It includes, most notably,

- the historic trilogy of the *Keegstra,*[2] *Andrews*[3] and *Taylor*[4] cases, decided together by the Supreme Court of Canada in 1990, for which *Keegstra* has become both metaphor and message, and including the ultimate disposition of the *Keegstra* case (*Keegstra*, No. 2) in 1996;
- the *Zundel cause célèbre,*[5] involving one of the world's foremost Holocaust deniers;
- still another *cause célèbre,* involving a complaint lodged under the Province of New Brunswick's *Human Rights Act* against the New Brunswick school teacher and hate propagandist Malcolm Ross, constituting the most recent "hate speech" judgment by

2 *R. v. Keegstra,* [1990] 3 S.C.R., 697.
3 *R. v. Andrews and Smith,* [1990] 3 S.C.R., 870.
4 *Canada (Human Rights Commission) v. Taylor,* [1990] 3 S.C.R., 892.
5 *Zundel v. R.,* [1992] 2 S.C.R., 731.

the Supreme Court in 1996[6] and organized around the principle of Holocaust denier hate propaganda as assaultive of equality, if not of the underlying liberal rationale for free speech itself;

numerous lower court decisions under the federal and provincial human rights codes involving hate propaganda, notably the *Heritage Front* case in Ontario,[7] the *Harcus* case in Manitoba,[8] the *Bell* case in Saskatchewan,[9] the *Aryan Nations* case in Alberta,[10] and the *Liberty Net* cases in British Columbia,[11] which again are organized around the notion of hate propaganda as a discriminatory practice.

In each of the major hate speech cases decided under the *Canadian Charter of Rights and Freedoms* and human rights legislation thus far there have been two central issues before the courts, issues that are likely to be the central concerns of any court in a democratic society called upon to decide a racial incitement case. The first issue is whether incitement to racial and religious hatred is *prima facie* "protected speech" under the Charter's section 2(b) guarantee of freedom of expression. The second issue, even assuming that racial incitement is *prima facie* protected speech, is whether, and indeed not just whether but how and to what extent, hate propaganda can nonetheless be subject, in the words of the balancing principle stated in section 1 of the Charter, to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[12]

6 *Ross v. New Brunswick School District #15* [1996] 1 S.C.R., 825.

7 *Canada (Human Rights Commission) v. Heritage Front,* [1994] 1 F.C. 203 (T.D.); *Canada (Human Rights Commission) v. Heritage Front* (1994), 78 F.T.R. 241 (Fed. T.D.).

8 *League for Human Rights B'nai B'rith Can. (Midwest Region) v. Man. Knights of the Ku Klux Klan* (1993), 18 C.H.R.R. D/406 (Can. Human Rights Trib.).

9 *Saskatchewan (Human Rights Commission) v. Bell* (1994), 114 D.L.R. (4th) 370 (Sask. C.A.).

10 *Kane v. Church of Jesus Christ Christian-Aryan Nations (No. 3)* (1992), 18 C.H.R.R. D/268 (Alta. Bd. of Inq.).

11 *Khaki v. Canadian Liberty Net* (1993), 22 C.H.R.R. D/347 (Can. Human Rights Trib.); *Canada (Human Rights Commission) v. Canadian Liberty Net,* [1992] 3 F.C. 155 (T.D.); *Canada (Human Rights Commission) v. Canadian Liberty Net,* [1992] 3 F.C. 504.

12 Section 1 of the Charter states: "1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such

But what makes this Canadian jurisprudential experience particularly significant for us – and for those seeking to construct a comprehensive legal theory for democracies generally – is that it has generated one of the more instructive and compelling sets of legal precedents and principles respecting this genre of hate speech litigation – and a set of precedents and principles of particular value to Israel – for a variety of reasons. First, the dynamic and dialectical encounter between the rise of racist hate speech in Canada – and the existence in Canada of a comprehensive legal regime to combat it – not only mirrors this phenomenon in other democratic societies like Israel, but is a case study of the validity and efficacy of legal remedy for any free and democratic society. Second, this encounter between freedom of expression and freedom from expression (e.g., hate speech) emerges not just as a legal one but as a profoundly philosophical or existential one. For what is at stake is not only the validity and efficacy of legal remedies, but the balancing of two fundamental normative principles that have found expression in Israeli free speech jurisprudence: on the one hand, freedom of expression as the lifeblood of democracy, of the autonomy of the individual; and, on the other, the right of vulnerable minorities to protection against group-vilifying speech and its related humiliation, degradation, and injury.

Third, the Canadian Charter of Rights emerges as a double-edged sword – invoked by both hate-monger and victim alike. Hate-mongers shield themselves behind the principle of freedom of expression; victims shield themselves behind the right to protection against group-vilifying speech. Each principle seeks to "trump" the other on normative grounds, and each anchors itself in a set of compelling principles and perspectives. Finally, and of particular relevance to this paper, the Supreme Court of Canada has itself articulated a series of principles and perspectives that may help to pour content into what American First Amendment scholar Fred Schauer has called the "multiple tests, rules, and principles" reflecting "the

reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[extraordinary] diversity of communication experiences,"[13] a matter of particular importance as the rise in racist hate propaganda is now an international and not just domestic phenomenon, and one of growing concern to both Canada and Israel.

What follows, therefore, is a distillation of some of these interpretive principles and perspectives which should be useful to advocates, activists, judges and scholars from, *inter alia*, both Canada and Israel, in appreciating the considerations that ought to be factored into any analysis of hate speech, freedom of expression and nondiscrimination and, correspondingly, into any attempt to "balance" competing normative principles.

Principle 1. "Chartering" Rights: The Constitutionalization of Freedom of Expression – The "Lifeblood of Democracy"

The adoption by Canada of a Canadian Charter of Rights and Freedoms in 1982 was regarded by the then Minister of Justice, Mark MacGuigan, now a judge of the Federal Court of Canada, as the "most significant legal development in Canada in the second half of the 20th century." The present Chief Justice of the Supreme Court of Canada, the Right Honourable Antonio Lamer, characterized the enactment of the Charter as a "revolutionary" act, parallel to the discoveries of Pasteur in science. Indeed, the Charter has transformed the ethos of the free speech debate in Canada from a "power" process, or "jurisdictional" one, to a "rights" process or normative one. In pre-Charter law, the question was which jurisdiction, federal or provincial, has the power to legislate respecting free speech and its limits, particularly as regarding hate speech; in post-Charter law the question is whether the legislative exercise of power – whether federal or provincial – is in conformity with the Charter of Rights.

Section 1 sets forth the fundamental premise for balancing competing rights and normative principles as follows: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Section 2(b) constitutionalizes freedom of expression and guarantees

[13] F. Schauer, Book Review, 56 *Univ. Chicago L. Rev.* (1989) 397, 410.

"everyone... freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

In the words of the Supreme Court of Canada – and invoked as a general interpretive principle – the rights and freedoms guaranteed by the Charter, such as freedom of expression, are to be given "a generous and liberal interpretation" as befits constitutionally entrenched rights. The Constitution, said the Court, in its paraphrase of Paul Freund, "should not be read like a last will and testament, lest it become one."[14]

This by no means suggests that the Canadian experience is irrelevant to societies like Israel that do not as yet have an entrenched Charter of Rights. As stated by the Supreme Court, "[The notion] that freedom to express oneself openly and fully is of crucial importance in a free and democratic society was recognized by Canadian Courts prior to the enactment of the Charter;... [f]reedom of expression was seen as an essential value of Canadian Parliamentary democracy."[15] In other words, freedom of expression was regarded as a core right even before the advent of the Charter, a perspective that ought to be instructive for societies without a constitutionally entrenched Bill of Rights.

What the Canadian experience demonstrates is that a constitutionally entrenched Charter of Rights invites "a more careful and generous study of the values informing the freedom,"[16] and therefore commends itself to those concerned with a more enhanced promotion and protection of human rights generally. Even in the absence of a Charter, however, freedom of expression may well be treated as if it were a constitutionally protected freedom.

But while Canadian constitutionalism regards freedom of expression as "the lifeblood of democracy," it acknowledges that it may be subject to reasonable and demonstrably justified limits; and, as will be seen below, this balancing act involves existential as well as legal questions – rights in collision as well as rights in the balance. On the one hand, there is the "fundamental" right of free speech, a core

[14] *Hunter v. Southam* [1984] 2 S.C.R., 145, 155.
[15] *Keegstra, supra,* n. 2, at 726.
[16] *Ibid.*

principle; on the other hand, there is the right to protection against group-vilifying speech – also a core principle. What is at stake, as we have seen, is the litigation of the values of a nation.

Accordingly, one cannot say that those who challenge anti-hate legislation are the only civil libertarians, or the only ones promotive of free speech; or that those who support anti-hate legislation are not really civil libertarians, or are against free speech; rather, there are good civil libertarians and good free-speech people on both sides of the issue. In a word, one can adhere to the notion of free speech as the lifeblood of democracy and still support anti-hate legislation.

Principle 2: Freedom of Expression – Fundamental – but Not an Absolute Right

Freedom of expression, then, as Professor Abraham Goldstein has put it, "is not absolute, however much so many persist in talking as if it is."[17] Indeed, in every free and democratic society certain forms and categories of expression are clearly regarded as being outside the ambit of protected speech. Even in the United States, certain categories of speech – obscenity, personal libel and "fighting words" – are not protected by the First Amendment; such utterances, said the U.S. Supreme Court in *Chaplinsky*, "are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit... is clearly outweighed by the social interest in order and morality";[18] while some American scholars argue that *Beauharnais v. Illinois,*[19] which upheld the constitutionality of a group libel ordinance, is still good law.

In summary, all free and democratic societies have recognized certain limitations on freedom of expression in the interest of national security, such as prohibitions against treasonable speech; or limitations in the interest of public order and good morals, such as prohibitions against obscenity, pornography or disturbing the public peace; or limitations in the interest of privacy and reputation, such

[17] Abraham Goldstein, "Group Libel and Criminal Law: Walking on the Slippery Slope," Paper presented at the *International Legal Colloquium on Racial and Religious Hatred and Group Libel,* Tel Aviv University, 1991, 3.

[18] *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-572 (1942).

[19] *Beauharnais v. Illinois* 343 U.S. 250 (1952).

as prohibitions respecting libel and defamation; or limitations in the interest of consumer protection, such as prohibitions respecting misleading advertising; and the like.

Principle 3: The Scope of Freedom of Expression and the "Purposive" Theory of Interpretation

In the view of the Canadian Supreme Court, the proper approach to determining the ambit or scope of freedom of expression and the "pressing and substantial concerns" that may authorize its limitation is a *purposive* one. This principle of interpretation was set forth by Chief Justice Dickson (as he then was) in the *Big M. Drug Mart Ltd.* case as follows: "The meaning of a right or a freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect."[20]

In the *Keegstra* case, the Court reiterated the three-pronged purposive rationale for freedom of expression that it had earlier articulated in the *Irwin Toy* case as follows:

> (1) seeking and attaining truth is an inherently good activity;
> (2) participation in social and political decision-making is to be fostered and encouraged; and
> (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment, for the sake of both those who convey a meaning and those to whom a meaning is conveyed.[21]

Hate-mongering, however, according to the Court, constitutes an assault on these very values and interests sought to be protected by freedom of expression, as follows: first, hate-mongering – and particularly Holocaust denial hate propaganda – is not only incompatible with a "competitive marketplace of ideas which will enhance the search for truth," but it represents the very *antithesis* of the search for truth in a marketplace of ideas.[22] Second, it is antithetical to par-

[20] *R. v. Big M. Drug Mart Ltd.* [1985] 1 S.C.R., 295.
[21] *Keegstra, supra* n. 2, at 728.
[22] *R. v. Zundel* (1987), 580 R (2d) 129 at 155-156, quoted with approval on this point in *R. v. Andrews and Smith* (1988) 28 O.A.C. 161, to the effect that "the

ticipation in democratic self-government and constitutes a "destructive assault" on that very government.[23] Third, it is utterly incompatible with a claim to "personal growth and self-realization"; rather, it is analogous to the claim that one is "fulfilled" by expressing oneself "violently."[24] Citing studies showing that victims of group vilification may suffer loss of self-esteem and experience self-abasement,[25] the Court found that incitement to racial hatred constitutes an assault on the potential for "self-realization" of the target group and its members. It is not surprising, then, that the Court anchored its reasons for judgment in the "catastrophic effects of racism."[26]

Principle 4: Freedom of Expression and the "Contextual" Principle

A fourth principle of interpretation – or "building block,"[27] as Supreme Court Justice Bertha Wilson (as she then was) characterized it – is the "contextual" principle. Again, the contextual principle, as with the purposive principle, is relevant both in the interpretation of the ambit of a right, and the assessment of the validity of legislation to limit it reminds us of the constraints of trans-cultural appellation.

As the Supreme Court put it in *Keegstra*, "it is important not to lose sight of factual circumstances in undertaking an analysis of freedom of expression and hate propaganda for these shape a court's view of both the right or freedom at stake and the limit proposed by the state; neither can be surveyed in the abstract."[28] As Wilson J. (as

wilful promotion of hatred is *entirely antithetical* to our very system of freedom" (emphasis added).

23 *R. v. Andrews and Smith, Ibid.*, per Grange J.A. at 181-184.

24 See *Irwin Toy Ltd. v. A.-G. of Quebec* [1989] 1 S.C.R., 927, 970.

25 See empirical data respecting the harm to target groups as summarized in *Report of Special Committee on Hate Propaganda in Canada* [otherwise known as the Cohen Committee] (1966), 211-215; findings of the Ontario Court of Appeal in *R. v. Andrews and Smith, supra,* n. 3, per Cory, J., 171; and empirical data cited in M. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," 87 *Michigan Law Review* (1989) 2320.

26 *Keegstra,* 725.

27 See Justice B. Wilson, "Building the Charter Edifice: The First Ten Years," conference paper, Tenth Anniversary of the Charter (Ottawa, April 1992), 6.

28 *Keegstra,* 737.

she then was) said in *Edmonton Journal*, referring to what she termed the "contextual approach" to Charter interpretation:

> A particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute.[29]

In a recent retrospective on the case, Justice Wilson commented that "there was, for example, no point in assessing the value of freedom of speech for balancing purposes in the context of our political institutions if it had come before the court in the context of advertising aimed at children."[30]

One might equally argue – as will be seen through the prism of the principles below – that it makes all the difference in the world if the freedom of expression principle at issue comes before the court in the context of political speech, or in the context of hate speech aimed at historically disadvantaged minorities and against the backdrop of "the chilling facts of history." As Justice Wilson concluded on this point, "a contextual as well as purposive interpretation of the right was required for purposes of Section 1 balancing."[31] In the matter of hate-mongering, then, whether the principle of interpretation adopted is the purposive or the contextual one, both interpretations converge in favor of the right of disadvantaged minorities to be protected against group vilification, while maintaining an "expansive" and "liberal" view of freedom of expression itself as a core right.

Principle 5: Freedom of Expression in a Free and Democratic Society

According to Supreme Court doctrine, the interpretation of freedom of expression must involve not only recourse to the purposive character of freedom of expression (section 2(b)), but "to the values and principles of a free and democratic society." This phrase, as the court put it, "requires more than an incantation... [but] requires

[29] *Edmonton Journal v. Alta.* (AG), [1989] 2 S.C.R., 1326 at 1355-1356.
[30] *Supra,* n. 25.
[31] *Ibid.*

some definition... an elucidation as to the values and principles that [the phrase] invokes."[32]

Moreover, such principles, said the court, are not only the genesis of rights and freedoms under the Charter generally – or democratic societies – but also underlie freedom of expression (Section 2b) in particular. These values and principles include "respect for the inherent dignity of the human person... [and] respect for cultural and group identity";[33] accordingly, anti-hate legislation should be seen not as infringing upon free speech but as promoting and protecting the values and principles of a free and democratic society.

Principle 6: Freedom of Expression in Comparative Perspective

In determining whether incitement to racial hatred is a protected form of expression, the Supreme Court reasoned that resort may be had not only to the values and principles of a free and democratic society such as Canada, but to the legislative experience of other free and democratic societies; and it concluded that an examination of the legislative experience of other free and democratic societies clearly and consistently supports the position that such racist hate speech is not entitled to constitutional protection.[34]

Indeed, by 1966, the Special Committee on Hate Propaganda (hereinafter: the Cohen Committee) had already recorded the existence of legislation in a number of countries which sought to proscribe incitement to group hatred. The countries concerned were demonstrably "free and democratic."

Indeed, an analysis of the legislative experience of other free and democratic societies supports the view, as the Court put it, that not only is such legislation representative of free and democratic societies, but its very purpose is to ensure that such societies remain free and democratic. Indeed, free and democratic societies in every region of the world have now enacted similar legislation, including coun-

[32] *Keegstra,* 736.

[33] *R. v. Oakes* (1986) 24 C.C.C. (3d) 321 (S.C.C.) 346.

[34] See, for example, the *Study on the Implementation of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination* (a report on the United Nations Committee on the Elimination of Racial Discrimination, submitted in May 1983) A/CONF, 119/10, 18 May 1983.

tries in Asia, the Middle East, and Latin America, as well as the countries of Scandinavia and Western and Eastern Europe. Such legislation can also be found in the countries of the former Soviet Union.

Principle 7: Freedom of Expression in the Light of "Other Rights and Freedoms"

The Supreme Court has also determined that the principle of freedom of expression must be interpreted in the light of other rights and freedoms sought to be protected by a democracy like Canada. In the words of the court: "The purpose of the right or freedom in question [freedom of expression] is to be sought by reference to ... the meaning and purpose of the other specific rights and freedoms with which it is associated."[35]

It should be noted that the purpose, if not also the effect, of hate speech is to diminish, if not deny, other rights and freedoms, or the rights and freedoms of others; indeed, such hate-mongering is the very antithesis of the values and principles underlying these rights and freedoms. Accordingly, any reading of freedoms of expression in the light of other rights and freedoms admits of no other interpretation than that such hate speech is outside the ambit of protected expression.

Principle 8: Freedom of Expression and the Principle of Equality: Hate Propaganda as a Discriminatory Practice

If freedom of expression is to be interpreted in the light of other rights and freedoms, a core – and underlying – associated right is that of equality. The denial of other rights and freedoms – or the rights and freedoms of "the other" – makes freedom of expression, or group defamation, not just a speech issue, but an equality issue. In the words of Professor Kathleen Mahoney:

> In this trilogy of cases, the majority of the Supreme Court of Canada articulated perspectives on freedom of expression that are more inclusive than exclusive, more communitarian than

[35] *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R., 573, per McIntyre, J., 583.

> individualistic, and more aware of the actual impacts of speech on the disadvantaged members of society than has ever before been articulated in a freedom of expression case. The Court advanced an equality approach using a harm-based rationale to support the regulation of hate propaganda as a principle of inequality.[36]

Principle 9: Freedom of Expression, Group Libel and the "Harms-Based" Rationale

According to the Supreme Court in *Keegstra*, the concern resulting from racist hate-mongering is not, "simply the product of its offensiveness, but stems from the very real harm which it causes."[37] This judicial finding of the "very real harm" from hate-mongering is not only one of the most recent findings on record by a high court, but may be considered a relevant and persuasive authority for other democratic societies like Israel. The following excerpt from the *Keegstra* case, anchored in the analysis and findings of the Cohen Committee, is particularly instructive in this regard:

> Essentially, there are two sorts of injury caused by hate propaganda. First, there is harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence... A second harmful effect of hate propaganda which is of pressing and substantial concern, is its influence upon society at large. The Cohen Committee noted that individuals can be persuaded to believe "almost anything" (p. 30) if information or ideas are communicated using the right technique and in the proper circumstances (at p. 8).[38]

The Supreme Court's conclusion on this point – relying as it does on the conclusions of the Cohen Committee itself – is particularly relevant today. In the words of the Court:

[36] K. Mahoney, "*R. v. Keegstra:* A Rationale for Regulating Pornography?" 37/1 *McGill Law Journal* (April 1992) 242.
[37] *Keegstra,* 746.
[38] *Ibid.*

> The threat to self-dignity of target group members is thus matched by the possibility that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society. With these dangers in mind, the Cohen Committee made clear in its conclusions that the presence of hate propaganda existed as a baleful and pernicious element, and hence a serious problem, in Canada.[39]

Again, in the words of the Cohen Committee as quoted by the Supreme Court of Canada:

> The amount of hate propaganda presently being disseminated [is] probably not sufficient to justify a description of the problem as one of crisis or near crisis proportion. Nevertheless the problem is a serious one. We believe that, given a certain set of socio-economic circumstances, such as a deepening of the emotional tensions or the setting in of a severe business recession, public susceptibility might well increase significantly. Moreover, the potential psychological and social damage of hate propaganda, both to a desensitized majority and to sensitive minority target groups, is incalculable... As Mr. Justice Jackson of the United States Supreme Court wrote in *Beauharnais v. Illinois,* such "sinister abuses of our freedom of expression... can tear apart a society, brutalize its dominant elements, and persecute even to extermination, its minorities."[40]

Principle 10: Freedom of Expression, Hate Propaganda and International Law

In the words of the Supreme Court, international law may be regarded as "a relevant and persuasive source"[41] for the interpretation of rights and freedoms under the Charter. Moreover, as Chief Justice Dickson (as he then was) wrote in *Keegstra*, "no aspect of interna-

[39] *Ibid.*, 748.
[40] *Ibid.*
[41] *Reference re Public Service Employees Act* (Alta) (Dickson C.J.C. dissenting, but not on this point) (1987) 1 S.C.R., 313, per Dickson, C.J. at 349. See also *R. v. Videoflicks* (1984) 14 DLR (4th) 10 (Ont. CA) 35-36.

tional human rights has been given attention greater than that focused upon discrimination... this high concern regarding discrimination has led to the presence in two international human rights documents of articles forbidding the dissemination of hate propaganda."[42]

Accordingly, reading the freedom of expression principle in light of international human rights law generally, and under these two international human rights treaties in particular,[43] requires that such racial incitement be excluded from the protective ambit of freedom of expression. Any legislative remedy prohibiting the promotion of hatred or contempt against identifiable groups on grounds of their race, religion, color or ethnic origin would be in compliance with Canada's international obligations, and indeed have the effect of implementing these international obligations.

Accordingly, reasoned the Supreme Court in *Keegstra*, after a review of international human rights law and jurisprudence, "it appears that the protection provided freedom of expression by CERD and ICCPR does not extend to cover communications advocating racial or religious hatred."[44] Of crucial importance was the conclusion of the Court that, in assessing the interpretive importance of international human rights law, the "CERD and ICCPR demonstrate that prohibition of hate-promoting expression is considered to be not only compatible with a signatory nation's guarantee of human rights, but is as well an obligatory aspect of this guarantee."[45]

Principle 11: Freedom of Expression and the Multicultural Principle

The increasing multicultural features of the liberal democracies – or multicultural democracies like Canada and Israel – invite consideration or interpretation of hate speech in light of the multicultural principle. Indeed, Section 27 of the Charter mandates that the rights guaranteed therein, including freedom of expression, be interpreted

[42] *Keegstra,* 752.

[43] *International Convention on the Elimination of All Forms of Racial Discrimination.* See especially Article 4 (a) of the convention; and *International Covenant on Civil and Political Rights.* See especially Article 20(2) of the convention.

[44] *Keegstra,* 752.

[45] *Ibid.,* 753.

"in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

In a word, this interpretive principle admits of no other reading than that such hate-mongering is not only an assault on the members of the target group singled out on grounds of their identifiable race or religion, but it is destructive of a multicultural society as a whole; as such, it falls outside the protection of freedom of speech. Conversely, and again to paraphrase Mr. Justice Cory in *Smith and Andrews,* anti-hate legislation is designed not only "to protect identifiable groups in a multicultural society from publicly made statements which willfully promote hatred against them," as Justice Cory observed, but are designed to "prevent the destruction of our multicultural society."[46]

Principle 12: Freedom of Expression and the Principle of "Abhorrent Speech"

It is important that one distinguish between political speech – where the government, its institutions, and public officials are the target of offensive speech – and abhorrent, racist speech, intended to promote hatred and contempt of vulnerable and targeted minorities. The hate-mongering at issue in *Keegstra* – and in analogous cases – is not the libel of public officials as in the *Sullivan* case;[47] or directed against "the world at large" as in the *Cohen* case;[48] but it is hate-mongering willfully promoted against disadvantaged minorities with intent to degrade, diminish, vilify. In a word, this is not a case of a government legislating in its own self-interest regarding its political agenda, but an affirmative responsibility of governments to protect the inherent human dignity – and equal standing – of all its citizens.

Principle 13: Freedom of Expression and the "Slippery Slope"

Those who reject anti-hate legislation on the grounds that such group libel legislation leads us inevitably down the "slippery slope" to censorship, ignore a different "slippery slope" – "a swift slide into a

[46] *R. v. Andrews and Smith* (1988) 43 C.C.C. (3d) 193 (Ont. C.A.O. 211).
[47] *New York Times v. Sullivan,* 376 U.S. 254 (1964).
[48] *Cohen v. California,* 403 U.S. 15 (1971).

marketplace of ideas in which bad ideas flourish and good ones die."[49] In a word, it is submitted that the more that hateful speech is tolerated, the more likely it is to occur. As Karl Popper put it, the "paradox of tolerance" is that it breeds more intolerance – so that the tolerance of hateful speech results in more, not less, hate speech, in more, not less, harm, and in more, not less hateful actions. For tolerance of hate speech risks legitimizing such speech on the grounds that "it can't be all bad if it is not being prohibited." The slippery slope is there – but it may lead not in the direction of more censorship – which the Canadian experience does not demonstrate – but in the direction of more hate – which it does.

Conclusion

These, then, constitute the principles respecting freedom of expression, hate speech and non-discrimination as articulated by the Supreme Court of Canada in the recent historic trilogy of cases symbolized by *Keegstra*. But an appreciation, or invocation, of these principles or factors need not be limited to the Canadian jurisdiction only. Rather, just as Canadian courts, and counsel appearing before them, have drawn upon principles grounded in comparative and international perspectives to help strike a balance, so too may courts and counsel of other free and democratic societies like Israel – and those aspiring to become ones – draw upon the Canadian experience.

[49] This principle and perspective find expression in A. Goldstein, *supra,* n. 17.

RELIGIOUS TOLERANCE AND DIVERSITY IN JUDAISM

*Moshe Ish-Horowicz**

Jerusalem, City of Peace and Righteousness

Mankind's ideal of and longing for universal peace are ingrained in the very name Jerusalem, the "City of Peace and Righteousness," as described in *Psalms* 48 and 122. These chapters extol Jerusalem's beauty, fame and importance. They also call on her people to "Pray for the peace of Jerusalem," the "city of the Lord of hosts, the city of our God – may God preserve it forever." "Pray for the well-being of Jerusalem," the Capital of Israel past and present, the seat of the House of David and the courts of justice. "May there be well-being within your ramparts, peace in your citadels, for the sake of my kin and friends," for the sake of those who love her and live in her and "for the sake of the house of the Lord our God." "For God – He is our God forever; He will lead us evermore."

This beautiful city, "joy of all the earth" became a religious and spiritual center of the world's monotheistic religions. In particular, Israel, her faith, ethics, law, history, sufferings, hope and aspirations are bound up with the past grandeur and subsequent destruction of this city. Now again "The Torah shall come forth from Zion, the

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word of the Lord from Jerusalem" (*Isa.* 2:3) – 3000 years after King David captured Zion and established her as his capital.

The current celebrations of Jerusalem's return to her former glory and beauty remind us of prophecies about the messianic era of righteousness: "In those days Judah (Israel) shall be delivered and Jerusalem shall dwell secure. And this is what she shall be called: 'The Lord is our righteousness'" (*Jer.* 33:16). The prophet Isaiah, too, predicted that "Zion shall be saved in the judgment; her repentant ones (or: those who dwell in her, depending on the root and meaning of the Hebrew *shaveha*), by righteousness" (*Isa.* 1:27). *Psalms* 119:172 explains: "For all your commandments (*mitzvot*) are righteousness"; this is the core of Judaism, embracing all ethical and theistic duties, virtues and values of justice and mercy.

Righteousness is both the ideal and the way to holiness. A person's and a people's conduct is evaluated by righteousness. It is also the criterion for reward or punishment in this world and in the world to come. In addition, disputes and controversies, social, religious and otherwise, can and should be peacefully resolved through righteousness and tradition. Even the ways and acts of God may be criticized for the sake of His righteousness. The principles of ethical and theistic righteousness also provide the stimulus and criterion for the constant examination of various laws and practices, to determine whether they should be changed or annulled and to guide as to how they should be changed or new ones established. As foretold in *Malachi* 3:20, ultimately, for those who revere God, "a sun of righteousness shall arise with healing in its wings" – healing all ills, including intolerance, fanaticism and animosity.

Controversies of Hillel and Shammai

The controversies between the Schools of Hillel and Shammai provide the most convincing and authoritative examples of religious tolerance and diversity. These schools, who were also known as "fathers of the world," practised love, peace and tolerance, all of them facets of righteousness, despite their disagreements, in keeping with the commandment, "Love truth and peace!" (*Zech.* 8:19). They lived in friendship, intermarried and borrowed each other's utensils, in spite of their differences on permitted marriages and on *kashrut*. For

as we read in *Prov.* 21:2: "All the ways of a man seem right to him, but the Lord probes the mind." In fact, diversity was established by Heaven, when a heavenly voice announced: "The utterances of both (schools) are words of the living God" (*BT Erub.* 13b). Their opinions were only different facets of truth, and their discords will endure because they were well-meaning "controversies for the sake of God," not for personal or sectarian gain. Followers of the School of Shammai were permitted, therefore, to act according to their own rulings, although at the same time the heavenly voice continued: "But the Law is in accordance with the rulings of the School of Hillel." The rulings of the School of Hillel prevailed "because they were affable and humble, they studied their own rulings and those of the School of Shammai and were so modest and tolerant that they mentioned the words of the School of Shammai before their own" (*ibid*). All these passages affirm diversity.

The two Schools also set a precedent and established the tradition that in all subsequent controversies between schools of Tannaim or Amoraim, the rulings of each of the disagreeing parties were considered to be words of the living God (*Erub.* 6b-7a). Rabbi Judah points out that a differing opinion, even of a single sage, is recorded in the Talmud along with the prevailing, majority ruling, "so that if times (and circumstances) necessitate it, they may rely upon" the minority opinion. Hence diversity, referred to by others also as many-sidedness, multi-facetedness or pluralism, is not only tolerated but also proper, useful and desirable.

Denial of Monopoly on God

The above quotation from the book of *Proverbs* (21:2) and the heavenly declaration, "Both (conflicting opinions) are words of the living God" deny that any orientation or trend possesses a monopoly on Judaism. As we read in *Eliahu Rabba* 15 (14), quoting *Joel* 2:12: "There are many windows and openings by which to turn to the Omnipresent." Every trend and every individual should turn to the "All Merciful" through one of these windows or openings in the House of Judaism. This *midrash* is probably also the source of Martin Buber's rejection of monopoly for any religion on earth; all faiths should be tolerated, except when acting unrighteously.

Ignorance, Intolerance and Animosity

We read in the Babylonian Talmud, *Sanh.* 88b, that "when the numbers of the disciples (of the Schools) of Shammai and Hillel, who had insufficiently studied, increased, disputes multiplied in Israel and the Torah became as two *Torot*." The resulting extremism led the School of Shammai to perpetrate a massacre of disciples of the rival school, "on a day (considered) as grievous to Israel as the day on which the Golden Calf was made."

According to *BT Yoma* 9b, such "groundless hatred" brought about the destruction of the Second Temple even though the generations "were occupying themselves with the Torah, *mitzvot* and deeds of love and kindness...." Thus "groundless hatred is also of even gravity with the three cardinal sins of idolatry, sexual immorality and bloodshed put together."

This is a dire warning that sectarian diversity must be tolerated. As posited by the prophet, "walk modestly with **your** God" (*Mic.* 6:8), literally meaning: do not force your fundamentalist or other perception of God and Judaism on others – especially not by abuse or violence. Such imposition implies arrogance and borders on *hillul HaShem*, blasphemy. How can any trend dare to claim that it alone knows the whole truth – God's prerogative? This claim is contrary to *Prov.* 21:2 and the teachings of the great Schools of Hillel and Shammai, while diversity characterizes and enriches almost every value and concept in Judaism. For example, the Baal Shem Tov derives from the phrase "God of Abraham, God of Isaac and God of Jacob" in the opening blessing of the *Amidah* prayer that each of the Patriarchs had his own different perception of God. Otherwise a better wording would be "God of Abraham, Isaac and Jacob," implying the same perception of the one God. Fundamentalists' intolerance, i.e., failure to recognize every person's equal right to his or her own opinion, betrays not only ignorance, as derived above from *Sanh.* 88b, but also narrow-mindedness and fanaticism. Such persons disregard their own human limitation and fallibility in "this world of falsity."

Dr. Jonathan Sacks, Chief Rabbi of the United Kingdom, warns against "two dangerous tendencies... in Judaism. One ... secularism

... the other, fundamentalism which sees tradition as monolithic" and not "as living entities with all the internal variety which it implies. My own understanding of Judaism is a constant battle against fundamentalism..."[1]

Definition and Causes of Religious Diversity

Religious tolerance and diversity accept and often welcome differences of interpretation and opinion about almost all religious tenets, laws and observances. Many-sidedness does not necessarily imply inconsistency or contradictions; most issues and concepts can be viewed from different standpoints. The oneness of the Torah does not imply unanimity or uniformity, neither does it exclude diversity. Various rabbinical opinions need neither be accepted by all, nor at all times, and diverse views of both the majority and the minority of rabbis are "words of the living God" – providing they do not transgress the ethical and theistic principles of righteousness and tradition. In each generation, new situations and conditions of life, new ways of thinking and perception, affect the human personality, especially in light of the enormous development of knowledge, technology and science. According to the Modern Orthodox Rabbi R. P. Bulka, "for the many who wanted to embrace the new culture with its freedom and infinite opportunities, [right-wing] Orthodoxy was too hard a pill to swallow."[2]

The social and political orders and cultures of the Jews' countries of residence have also invariably influenced rabbinical opinion on old and new observances and laws. Accordingly, religious diversity in the form of many-sidedness is impossible without tolerance, flexibility and mutability. This is manifested, for example, even in the abolition of biblical laws such as levirate marriage, flogging, polygamy, etc. According to the Babylonian Talmud (*Men.* 29b), when Moses was transposed in place and time to Rabbi Akiva's Academy, the changes that had occurred during the 1,350 intervening years were such that Moses could not understand Rabbi Akiva's discourse.

1 J. Sacks, Interview, 4 *Cambridge Alumni Magazine* (Autumn 1991) 47-48.
2 In J. Sacks, ed., *Orthodoxy Confronts Modernity* (Hoboken NJ and London, 1991), 34.

He was nevertheless appeased when he heard that Rabbi Akiva was adhering to the spirit of his (Moses') teachings.

Changes in knowledge, outlook and perception had led to flexibility and mutability of observances and concepts. They have also caused diversity in the meaning and significance of such observances and concepts. Suffering, for example, need not necessarily be a punishment: "There is death without sin and suffering without iniquity." Abbaye's illness was the result of poverty and hunger, not of wrongdoing.[3] "Whom the Lord loves, He rebukes" (*Prov.* 3:12). God loves the poor but lets us care for them, so that we should merit being saved from *Gehinnom.*

In the creation story, the phrase "very good" refers to suffering. Thus, *Gehinnom* is also "very good," for its fire refines sinners, rendering them worthy of being transferred to Paradise. God tests a person by suffering (Abraham, Job). Suffering serves education, or constitutes a warning; it also purifies. "The suffering of love" culminated in R. Akiva's martyrdom and in the prophet Isaiah's concept of the "Suffering Servant of the Lord."

To cite another example of changing meanings: the Passover festival originally commemorated only the salvation from Egyptian slavery. It now celebrates redemption "in every generation," including future redemption in the messianic era.

Even the changeability of *Halakhah* is acknowledged in the saying *hilkheta kevatra'ei*, that is, the Law follows the ruling of the latest authority (cf. *Erub.* 53a), and in such sayings as "Matters not revealed to Moses were revealed to Akiva." Scripture provides the principles and a number of laws and examples. For all other contingencies, the Torah has granted man the permission and duty to legislate. This was initially the privilege of the priests and the judges, then of the prophets and finally of the rabbis. According to the Jerusalem Talmud, *Sanh.* 4:2, as interpreted by the commentator *Penei Moshe,* the world could not exist if each law were "cut," i.e., permanently fixed, without being subject to an opinion and without the ability to move "one way or another." Laws must be flexible and mutable, subject to interpretation and commentary. They have to be

[3] *BT Shab.* 33a.

debated and subsequently submitted to a vote, in which the majority decides. Both opinions may then be "words of the living God."

The Talmud tolerates diversity in the implementation of Jewish law in different localities, saying: "There is no dispute; each master rules in accordance with the custom of his region."[4] For example, in Galilee it was permitted to eat milk together with the flesh of a fowl, since the latter is born of an egg, so that the prohibition "You shall not boil a kid in its mother's milk" does not apply.

Polyvalency of words and phrases increases diversity of interpretation. This is further augmented by use of the very lax thirty-two hermeneutic rules of R. Eliezer b. Jose HaGelili – mainly in the *Aggadah*. The thirteen rules of R. Ishmael are pseudo-logical or logical, as are the seven rules of Hillel. The thirty-two rules allow great diversity in the field of eschatology, of which Scripture tells us almost nothing, except in the vague verse *Daniel* 12:2. Nothing can be verified about the hereafter, as recognized by R. Hiyya b. Abba: "As for the world to come, 'No eye has seen, O God, but You'" (*BT Ber.* 34b).

According to *JT Hag.* 1:9, possible errors in transmission, particularly of oral traditions, may also lead to diversity.

Manifestations of Religious Diversity

Diversity is a characteristic of Judaism, manifested and acknowledged in almost every concept, rule and topic. Diversity only offers an alternative, while a changed rule is a replacement.

The diversity of perceptions of the One and Unique God is infinite. The Sages also called him "The Righteous of the Universe" (*Zaddik Olamim, Zaddiko shel Olam*), the Omnipotent (*Kol Yakhol*), the Omnipresent (*HaMakom*), the Dispenser of Justice (*Ba'al HaGemul*), the Merciful (*Rahmana*). God is a model of tolerance, waiting for sinners to repent, when He will pardon all their past transgressions. In the book of Jonah, God changes his decision and reprieves the penitent city of Nineveh. Never again will the Lord destroy all life on earth for the sins of man, nor will He bring a universal flood. He has other punishments in store. They are unpredictable – different

[4] *BT B.M.* 40a; *Yoma* 55a; see also *Ber.* 45a and *Pes.* 54a; and cf. *Hul.* 116a.

for the same transgressions or the same for different transgressions. The diversity in recompense also depends upon the extent to which the Attribute of Mercy mitigates the Attribute of Justice.

In the Talmud and even more in the aggadic midrashim, versatile opinions and interpretations of verses or phrases are frequently exchanged with ease and tolerance, as in a game, not necessarily for a debate or for deciding which are the correct ones. For example, *Pesikta Rabbati* 3:2 renders *Eccl.* 12:11 as: "The words of the wise are like *kaddur banot* (a girls' ball, instead of *ka-darvonot*, like goads)... given by one Shepherd" – by God through Moses. In this metaphor the sages, playfully and tolerantly, interject to and fro their diverse comments and views emanating from the Torah, just as girls toss their ball to and fro playfully and in friendship.

Such light-hearted aggadic interpretations are acknowledged by R. Hanina b. Pappa, who distinguishes four facets of the revelation on Mount Sinai: "earnest" for Scripture, "equanimous" for the Mishnah, "friendly" for the Talmud and "joyous" at the revelation of Aggadah (*Tanhuma, Yitro*).

The remaining phrase of the verse *Eccl.* 12:11, "Firmly planted are the words of the masters of assemblies, they are given from one Shepherd," is expounded in *BT Hag.* 3b: "As a plant grows and increases so do the words of the Torah grow and increase." In other words, beginning with the Five Books of Moses, the Torah first grew to include all of Scripture; it then expanded to include the Oral Law and subsequently absorbed the accumulated rabbinical writings of all generations. Through this expansion, God's will can be applied to prevailing conditions in the spirit of righteousness and tradition. Such growth and dynamism also entail flexibility and mutability. The Midrash continues to expound:

> "The masters of assemblies" – these are the disciples of the wise, who occupy themselves with the Torah, some declaring a thing [or person] unclean and other declaring it clean, some prohibiting and others permitting, some disqualifying and others declaring fit... Get yourself a perceptive heart to understand...

– and to accept even conflicting pronouncements and opinions as true.

Tolerance and diversity are also expressed in various dicta:

a) "The Torah has seventy facets" or "there are seventy modes of expounding the Torah."
b) The Torah can be expounded so as to show, for every rule, forty-eight or forty-nine reasons to declare a thing (or person) ritually unclean and the same number of reasons to declare it clean.

And, of course, we have already referred to the heavenly declaration that the conflicting opinions of the Schools of Hillel and of Shammai "are words of the living God."

The Mishnah, the basis of the Oral Law, presents one of the most radically variegated pictures in the evolution of our religion. It contains very few quotations from Scripture and shows diversity and tolerance in many respects. For example, each head of an Academy had his own version of the Mishnah. In *BT B.B.* 154b, for example, there is a reference to the "Mishnah of Bar Kappara." Moreover, the Mishnah, edited in a unified version by R. Judah the Prince, nevertheless quotes differing opinions of R. Akiva, R. Meir and heads of various other schools. And even now, we use three different versions of the unified Mishnah: the version published on its own, that in the Babylonian Talmud and that in the Talmud of the Land of Israel (or Jerusalem Talmud).

Both Talmuds show immense diversity and tolerance. There are frequent controversies between such "pairs" as Rav and Samuel, Abbaye and Rava, as well as between individuals and the majority on every possible issue, concept and value. Each issue lends itself to diverse solutions and answers. For example, Rashi, in his commentary on *Lev.* 19:26, points out that the Babylonian Talmud in *Sanhedrin* 63a expounds "many facets" of the prohibition on eating blood. And Rashi's grandson Samuel b. Meir (Rashbam), commenting on *Gen.* 37:2, quotes his grandfather as having expressed the desire to modify his commentary "and include other 'innovative' interpretations which were appearing every day."

The various Codes of Practice by R. Isaac Alfasi, R. Asher b.

Yehiel, Maimonides and Joseph Caro signify diversity. Especially Caro's *Shulhan Arukh*, and R. Moses Isserles' glosses adapting it for the Ashkenazi community, demonstrate the different influences of Muslim and Christian regimes.

Finally, history provides us with copious evidence of sectarian diversities and diversions. For example:

i) The two kingdoms of Judah and Israel differed in ritual worship, the former worshiping in the Temple of Jerusalem and the latter practising a ritual akin to idolatry.
ii) The Jews of the Land of Israel in Second Temple times were divided (at least) into Pharisees, Sadducees and Essenes. Fanaticism and "groundless hatred" within the community led to the destruction of the Second Temple.
iii) In the 18th century East-European Jewry was split by the controversy between Hasidim and *Mitnagdim*, who used all the weapons at their disposal, including even excommunication. Nowadays, all the Hasidic dynasties are an integral part of Orthodoxy, along with fundamentalists, graduates of *Yeshivot* and others.
iv) Sephardi and Ashkenazi denominations coexist and often cooperate in religious matters, in a clear show of mutual tolerance.
v) Such tolerance was once maintained between the Orthodox and Progressive movements as well, outside the State of Israel. In the early 1970s, unfortunately, this situation ended, when intolerance and extremism became a world-wide phenomenon. Nevertheless, some cooperation seems to have been resumed in certain countries.

Faults and Merits of Diversity

The following faults are inherent in, or may arise from, religious diversity:

a) Differences of opinion may harm interrelationships and lead to arguments, in total disregard of the tolerant character of pluralism.
b) Excessive diversity and freedom of interpretation may imply

conclusions contrary to the spirit of Judaism. The appropriate rabbinical authorities must possess the means to safeguard the fundamental principles of the Jewish religion, including ethics, ritual, purity and holiness. Sometimes it may become difficult to establish definite borderlines within which diversity in Judaism is acceptable; but the widest feasible latitude should be allowed, in order to encompass the largest numbers of Jews.

c) Excessive diversity is also likely to complicate issues and cause confusion, even frustration. Occasionally it may prevent the establishment of consistent theories and doctrines, as well as of unambiguous valid definition. Such sayings as that quoted above – "The Torah can be expounded so as to show... forty-eight... reasons to declare a thing ritually unclean and the same number of reasons to declare it clean" – may arouse ambiguities and contradictions.

d) Tolerance may be abused by flimsy, pseudological interpretations, as exemplified by descriptions of *Gehinnom*, Paradise and the World to Come.

On the other hand, the following merits of diversity can be enumerated:

a) Diversity enriches, deepens, and broadens the variety of concepts, doctrines and ideas. It gives them new dimensions and increases their significance.

b) Diversity, by its many-sidedness, increases the variety of religious experience and practice. It therefore provides greater opportunities for religious fulfilment and spiritual satisfaction to a much broader spectrum of the community. Different sections, and a wider range of people, are likely to be attracted to greater diversification, as they will be able to select services, ideas and concepts to suit their perception, outlook and individuality.

c) Recognition of diversity and tolerance entails intersectarian cooperation in all matters of common concern and interest, in the spirit of the Scriptural verses quoted above regarding the Schools of Hillel and Shammai. It also contributes to the unity

of the people of Israel and its strength, eliminating the evils of groundless hatred, excommunication and delegitimation.

d) Diversity does not indicate confusion or irresolution. Rather, it displays the versatility, flexibility and many-sidedness of the all-embracing righteous Torah. As Ben Bag-Bag says in *Avot* 5:22, "Turn it this way, turn it that way, for everything is in it."

e) Full appreciation of diversity should augment understanding, tolerance, friendship and cooperation between all segments and trends of Judaism. It is in the spirit of the Torah to do "what is right and good in the sight of the Lord" (*Deut.* 6:18).

f) Rejection of diversity, in spite of its prevalence, recognition and manifestations, is bound to foment argumentation, hatred without cause and intersectarian strife among the ignorant and the fanatics. In contrast, the scholars of the Schools of Hillel and Shammai exercised tolerance, lived in "love and friendship" and practised love of "truth and peace" despite their differences.

g) Rejection of diversity might grant one of the trends of Judaism a monopoly on God and Torah, to the detriment of the other sections of the nation and the unity of the Jewish people. A monolithic perception of Judaism would impoverish Judaism – reduce its depth and narrow its expression. Numerically, it would even further estrange the vast majority of our people. It turns a blind eye to the reality that only 6.8% of affiliated Jews in the United States belong to Orthodoxy, in any of its varieties, compared with 81.8% affiliated with the Conservative and Reform movements. It was on these grounds, according to Rabbi Bulka, that Modern Orthodoxy in the United States objected to the passing of a law in Israel basing the definition of a Jew exclusively on *Halakhah*: it might jeopardize the "unity of Israel."[5] After all, it is halakhically forbidden to promulgate a rule by which the majority of society refuses to abide.

h) The eternal principles of *tzedek*, righteousness, and tradition

[5] *Orthodoxy Confronts Modernity*, 39-41.

> have kept the Torah meaningful and relevant throughout the ages, by allowing diversity to meet the "needs of the time" in every generation, everywhere. As Eliezer Berkovits has written, "God forbid that there should be anything in the application of the Torah to actual life situations that is contrary to the principles of ethics."[6]

Truth... Is Built of Diverse Sides

Under the above heading, Rabbi Kook[7] discusses R. Eleazar's commentary on *Isaiah* 54:13 in *BT Berakhot* 64a, showing himself to be an outstanding exponent of diversity or many-sidedness. The Talmud states, "R. Eleazar said in the name of R. Hanina: 'The disciples of the Sages increase peace in the world.'..." Rabbi Kook opens, "There are mistaken persons who think that universal peace will be established only by one single variety of opinions and qualities." They fear that if the Torah is found to embrace a variety of aspects and ideas, this will cause controversy and the opposite of peace. On the contrary, argues Rabbi Kook. He points out that R. Eleazar's proof-text, "...and **great** is the peace of your children" (*Isa.* 54:13), uses the adjective "great" (Heb. *rav*), literally meaning "multiple" or "many," rather than "great" (*gadol*), so that the peace envisaged is not monolithic but many-sided. Accordingly, scholars should study, search and reconcile all the manifold facets of peace, even if some appear to be irrelevant or contradictory. This multiplicity will bring out "the light of truth and righteousness, knowledge of the Lord, revering and loving Him and the light of the true Torah." Such scholars will enrich and deepen understanding and bring much peace to the world.

This universal peace will be brought about not by *banayikh,* "your children," but by *bonayikh,* "your builders," i.e., your scholars. For, in Rabbi Kook's words,

> A building is built of different parts, and the truth of the world light will be built of different aspects and different opinions, for all [conflicting opinions] are the words of the living God,

6 E. Berkovits, *Not in Heaven* (New York, 1983), 19.
7 *Olat Ra'ayah* (Jerusalem, 1978), 330 f.

> stemming from different methods of worship, of guidance and of education, each of which occupies its proper place and value.

Rabbi Kook then goes on to expound the remaining verses quoted by Rabbi Hanina: "May there be well-being within your ramparts, peace in your citadels. For the sake of my kin and friends, I pray for your well-being; for the sake of the house of the Lord our God, I seek your good" (*Ps.* 122:7-9). These verses, construed as referring to world peace, are sung by the psalmist about the peace of Jerusalem, that same peace prayed for, sung and quoted at the opening of this conference at the residence of the President of the State of Israel, Mr. Ezer Weizman. The peace of Jerusalem epitomizes world peace as R. Hanina ends, "May the Lord grant strength to His people; may the Lord bless His people – all His people – with peace" (*Ps.* 29:11).

RELIGIOUS FREEDOM AND THE JEWS IN EARLY AMERICAN HISTORY

*Herbert Druks**

A barometer of a society or civilization is the freedom of thought, freedom of speech and above all freedom of religion that its people enjoy. By these standards, America has done rather well. That issue has often been interwoven with a variety of other issues, including the relationship between the Federal Government and the states. The question of religious freedom was and still is one of the most sensitive issues in the American experience.

The First Federal Congress passed Ten Amendments to the Constitution. The very First Amendment dealt with the issue of religious freedom: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof... ." The issues involving religion and religious freedom were central to the concerns that Americans had from the very start of the American experience, and the members of the Republic reflected that heritage.

The purpose of this article is to examine freedom of religion and the role of Jewish heritage and Jewish people in the days of the early American Republic.

Hebrew Foundations of American Civilization

One of the pillars of American society – colonial, revolutionary and

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Federal Republic – was the Hebrew Bible. Whether we examine the colonies, life and times of the people of Massachusetts Bay, New Amsterdam, Virginia, Maryland or South Carolina, we find repeated references to biblical tradition and law.

The Puritans regarded themselves as the Israelites who had reached the Promised Land. They accepted the sanctity of the Hebrew Bible. John Winthrop and William Bradford were their Moses and Joshua, and they lived by the Mosaic code. But while they respected and felt connected to Jewish heritage, they sought to convert the Jews – any Jews they could find. For example, the Reverend Ezra Stiles, a good friend of the Jews of Newport, Rhode Island, President of Yale and student of Hebrew, wanted to see the Jews accept Jesus as the Messiah.

Philip Freneau, poet of the Revolutionary and Federal periods, often referred to biblical themes and figures, in such poems as the *History of the Prophet Jonah* and *The Deserted Farmhouse*:

> So sits in tears on Palestina's shore
> The Hebrew town, of splendor once divine –
> Her kings, her lords, her triumphs, are no more;
> Slain are her priests, and ruin'd every shrine.[1]

When we turn the pages of the writings of such American defenders of freedom of conscience as James Madison, we find him alluding to such biblical texts as the Proverbs of Solomon:

> Lying Lips are an abomination to the Lord: but they that deal truly are his delight. (*Prov.* 12:22)
> A Soft Answer Turneth away wrath: but grievous words stir up anger. (*ibid.* 15:1)
> A fool despiseth his Father's Instruction. (*ibid.* 15:5)
> He that Answereth a Matter before he heareth it, it is folly and shame unto him. (*ibid.* 18:13)
> Death and Life are in the Power of the Tongue and they that love it, shall eat the fruit thereof. (*ibid.* 18:21)

[1] Harry H. Clark, *Poems of Freneau* (New York, 1968), 126.

Those were some of Solomon's Proverbs that Madison used in the course of his writings and speeches.

Jerusalem in America

In principle and practice, Jews enjoyed an unprecedented measure of freedom in the United States, and it is no wonder that American Jews found the U.S. to be their Second Jerusalem. As Moses Myer of Charleston put it in 1806, America was a "blessed country." He was "proud of being a sojourner in this promised land.... Who is there that has glided thro' this calm and pleasant current of Liberty, that would ever wish to sail through the boisterous sea of Despotism and Slavery."[2]

George Washington, President of the Federal Republic, was committed to the principle of Religious Freedom. To the Touro congregation of Newport, Rhode Island, he wrote "the government of the United States... gives to bigotry no sanction, to persecution no assistance."[3]

But it was not Paradise, nor was it Jerusalem. In 1784, Philadelphia's Congregation *Mikve Israel* protested against the requirement in the state's constitution that legislative representatives take an oath affirming that the New Testament was divinely inspired. As they saw it, "the conduct and behavior of the Jews in this and the neighboring states, has tallied with the great design of the revolution; that the Jews of Charleston, New York, Newport and other posts, occupied by the British troops," distinguished themselves in the service of the revolution. Moreover, the Jews of Pennsylvania, in proportion to their numbers, distinguished themselves in the field of battle for the Revolution; and yet they did not enjoy equality with their Christian neighbors.[4]

The new state Constitutions of New Hampshire, Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina,

[2] Moses Myer, "An Oration, Delivered before the Hebrew Orphan Society," on October 15, 1806 (Charleston, 1807), 6-7,15, 18; see Eli Faber, *A Time for Planting – The First Migration, 1654-1820* (Baltimore, 1992), 127.

[3] *Ibid.*; Stanley Feldstein, *The Land that I Show You: Three Centuries of Jewish Life in America* (New York, 1978), 26.

[4] Faber, *A Time for Planting,* 102-106.

North Carolina and Georgia, adopted during the revolution, still restricted public office to Protestants or to Christians in general; while some, like Pennsylvania's, required an oath of belief in Christian principles. Thus, when the Revolution was over in 1783, American Jews did not enjoy the full privilege of citizenship in the states where they lived.

Anti-Semitism in the Federal Republic

But the Jews were still outsiders and Christians still wanted to see the Jews converted to Christianity. Physician Dr. Benjamin Rush of Philadelphia wanted to see the Jews "unite with Christians with one heart and one voice in celebrating the praise of a common and universal Savior."[5] Among the organizations established to convert the Jews during this Federal period were *The Female Society of Boston and Vicinity for Promoting Christianity among the Jews, The American Society for Evangelizing the Jews* and *The American Society for Meliorating the Condition of the Jews,* the last of which was founded by a German convert from Judaism.

There was some anti-Semitism, although not as much as in Europe. Here are a few examples.

A synagogue in Charleston, South Carolina, was broken into about the time of Rosh Hashanah; a silver ritual spice box was stolen, and the scrolls of the law "were wantonly thrown about the floor."[6]

The prohibition in the Constitution of a religious test for holding office prompted one anti-Federalist to declare it to be "an invitation for Jews and pagans of every kind to come against us."[7]

When the charter for a new bank came up to the Pennsylvania legislature in 1784, Miles Fisher, a Quaker lawyer, spoke against the so-called "Jewish Brokers," who were the "the authors of high and unusual interest." In response, Chayim Salomon declared "I am a Jew; it is my own nation and profession. I also subscribe myself a Broker... . I exult and glory in reflecting that we have the honor to reside in a free country where, as a people, we have met with the most generous countenance and protection." Furthermore, American

[5] *Ibid.*, 132.
[6] *Ibid.*, 134.
[7] *Ibid.*

Jews supported the American cause during the conflict with the British, whereas Miles Fisher had been exiled from Pennsylvania for supporting the British.[8]

Benjamin Nones of Philadelphia, after being accused of being a Jew, a Republican and poor, replied "I am a Jew. I glory in belonging to that persuasion... whose patient followers have endured for ages the pious cruelties of pagans, and of Christians." As far as poverty was concerned – well, even impoverished Jews could be honest. Yes, he was a Republican, since Jews could be nothing else. For in "republics we have rights," while "in monarchies we live but to experience wrongs." Monarchy continued to exist in England, a country supported by the Federalist party.[9]

Moses Sheftall was not admitted to a Savannah, Georgia, social organization because he was a Jew. In 1809, when the North Carolina legislature deprived Jacob Henry of his seat in that parliament, he charged that his faith did not make him any less a citizen. Commodore Uriah P. Levy, the man who tried to eliminate corporal punishment in the U.S. Navy, found anti-Semitism within the ranks of fellow officers.[10]

While such individuals as Adams, Jefferson, Madison and Franklin favored equality for all, including the Jews – John Adams, for example, considered the Hebrews as having "done more to civilize man than any other nation"[11] – there were others, like Thomas Paine, Deist and anti-religionist, who despised their heritage. Paine did not consider the Bible to be the "word from God," insisting that it was an immense fraud. Moses, as far as Mr. Paine was concerned, was "a drastically overrated figure." But he too would not deny Jews the right to equality, which he believed all mankind deserved.[12]

All through his political and writing career M.M. Noah remained a Jewish person, proud of his identity. During the consecration of

[8] *Ibid.*, 135; Edwin Wolf and Maxwell Whiteman, *The History of the Jews of Philadelphia from Colonial Times to the Age of Jackson* (Philadelphia, 1957), 12.

[9] Faber, *A Time for Planting,* 136.

[10] *Ibid.*, 134; Feldstein, *The Land that I Show You,* 73-74.

[11] *Ibid.*, 26.

[12] Norman Cousins, *In God We Trust* (New York, 1958), 405, 411, 434, 441.

Shearith Israel's new synagogue building, on April 17, 1818, he instructed his fellow Jews as to their history and rights and concluded that "Our Country is the bright example of universal tolerance, of liberality, true religion and good faith." America was the Jewish people's "chosen country." But he believed that the ultimate destiny of the Jews was their restoration to "their ancient rights and dominion." He advised the Jews and all others to find useful manual labor and learn how to be farmers, but always to adhere to their religion.

Noah sent copies of his address to Jefferson and Madison. They replied with liberal statements about Jewish rights. With regard to establishing a Jewish Homeland in the Land of Israel, President John Adams wrote M. Noah: "I really wish the Jews again in Judea an independent nation." Thomas Jefferson wrote Noah on May 28, 1818, "Our laws... protecting our religions, as they do our civil rights, by putting all on equal footing. But more remains to be done, for although we are free by law, we are not so in practice; public opinion erects itself into an Inquisition, and exercises its offices with as much fanaticism as fans the flames of an Auto-da-Fe."[13]

The training place for this Zionist adventure was to be Grand Island on the Niagara River, near Buffalo. Noah called it Ararat. There were some 17,000 acres that could be used to train Jews in farming and industry and Hebrew. But the Jews did not respond to his call.

From 1819 to 1826 Noah campaigned for the abrogation of the regulations that kept Jews from holding public office in Maryland. He also campaigned to make Thanksgiving a day for all, not just those of the Christian faith.

The Continental Congress

The minutes and papers of the Continental Congress are filled with references to religion and some members of that revolutionary body openly reflected their belief in Protestantism. They did not hesitate to legislate on prayer, public worship, chaplains and Thanksgiving. Congress adjourned on the Sabbath, as it did on Good Friday.

When it assembled, it called for prayers at the opening of each

[13] Mordechai M. Noah, *Discourse on the Restoration of the Jews. Delivered at the Tabernacle, October 28 and December 2, 1844* (New York, 1845), V-VII.

daily session and designated an Episcopal clergyman to act as chaplain of the Congress. The person whom they selected would eventually side with the British, after serving the Members of Congress for two years. In June 1775, the Congress adopted a resolution setting aside July 20, 1775, as a day of national "humiliation, fasting and prayer." Chaplains were provided for the army, with pay equivalent to that of captains. In 1776 Congress directed the employment of ministers to instruct the Indians in the principles of Christianity. It even endorsed an American edition of the Bible.

In 1783, the Continental Congress proclaimed the peace treaty with England "in the name of the Most Holy and Undivided Trinity." Some in Congress even proposed that the western lands be divided into townships, and that the 16th section be set aside for the use of public schools and another section for the support of the ministry. Thanks to such members of Congress as James Madison, the latter proposition was defeated. While the Northwest Ordinance of 1785, authored by Thomas Jefferson, provided for freedom of religion, Congress did grant tracts of land for the support of religion as well as for the support of schools. Once the First Amendment was adopted, there was to be no more allocation of public lands for the purpose of supporting religion.

The Continental Congress relied heavily upon religious authority and sought to promote religion as a means of establishing a well-ordered government and society. The inclination of the members of that Congress was towards Protestant Christianity.

Thomas Jefferson and Freedom of Religion

Jefferson had grown up in Virginia as a member of the established Anglican Church, but he developed his own religious ideas. He became a Unitarian/Deist. He witnessed the Anglican Church enjoy official state support. All citizens of the colony paid taxes for the support of the Anglican Church. Preachers of non-established churches received penalties, even prison terms, for preaching without a license granted by the government.

While serving in the Continental Congress, he continued to be greatly concerned with the issue of freedom of religion. When Jefferson resumed his place in the House of Delegates in September

1776, he was appointed to the Committee on Religion. As far as he was concerned "...Every argument for civil liberty gains additional strength when applied to liberty in the concerns of religion... ."[14]

As Jefferson saw it:

> Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint;... . *That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical;* that even the forcing him to support this or that teacher of his own religious persuasion is depriving him of the comfortable liberty of giving his contributions of money to the particular pastor whose morals he would make his pattern...; our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion is depriving him injuriously of those privileges and advantages to which... he has a natural right... .[15]

Jefferson's Virginia Bill for Religious Freedom stated, *inter alia*:

> Sect. II. WE the General Assembly of Virginia do enact that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain their opinions in matters of religion and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[16]

Five years elapsed between the passage of Thomas Jefferson's *Vir-*

[14] Elwyn A. Smith, *Religious Liberty in the United States: The Development of Church-State Thought Since the Revolutionary Era* (Philadephia, 1972), 41.
[15] Cousins, *In God We Trust,* 125-126.
[16] Leo Pfeffer, *Church, State and Freedom* (Boston, 1967), 114.

ginia Statute of Religious Liberty and the ratification of the First Amendment to the Constitution.

The Constitution, as adopted, made no reference to God or the Creator. But Article VI, paragraph 3, provided that "No religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." The First Amendment later added: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Those two clauses established the basis of religious liberty in the United States of America. The first forbade union of Church and State and the second guaranteed freedom of conscience. No American – believer or non-believer – was to have special standing or preference in political affairs, nor could any American exert special influence in determining the spiritual values of society. Each was to enjoy equality. The 14th Amendment of 1868 was to protect this Freedom of Religion from infringement by the individual states.

In one of his books, *Notes on Virginia,* Jefferson wrote:

> Is uniformity attainable? Millions of innocent men, women and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch towards uniformity. What has been the effect of coercion? To make one half the world fools, and other half hypocrite. To support roguery and error all over this earth.[17]

President Jefferson wrote to his Attorney General, Levi Lincoln:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.[18]

[17] Thomas Jefferson, *Notes on the State of Virginia* (Chapel Hill, NC, 1955), 160.
[18] *Writings of Thomas Jefferson* (Monticello Edition), vol. 16, 281-282.

This concept of a "wall" reflected Thomas Jefferson's view that religion was strictly a private and personal matter. Religion was a matter between man and his God. The Bill of Rights, as it had been approved and ratified, indicated to Jefferson that the American people agreed with his view that there had to be a separation between Church and State. He felt that government was totally incompetent in the matters of faith, and that religions should be supported voluntarily. Government attempts to organize and regulate support for religion involved a seizure of power, a violation of soul liberty and should be avoided in the United States.

In a July 8, 1820, letter to Joseph Marx, a Jew who lived in Richmond, Virginia, Jefferson expressed his regrets at seeing "a sect, the parent and basis of those of Christendom, singled out by all of them for a persecution and oppression which prove they have profited nothing from the benevolent doctrines of him whom they profess to make the a model of their principles and practice."[19] And in another letter, written to Dr. De La Motta on September 1, 1820, Jefferson wrote of how he was "gratified that America was the first to prove to the world two truths, the most salutary to human society, that man can govern himself, and that religious freedom is the most effectual anodyne against religious dissension...." He was happy that "in the restoration of the Jews, particularly, to their social rights, and hopes they will be seen taking their seats on the benches of science as preparatory to their doing the same at the board of government."[20]

On matters of separation between State and Religion President Jefferson broke with his predecessors, George Washington and J. Adams. He refused to proclaim days of Prayer and Thanksgiving. He believed that the president did not have the constitutional authority to lead the people in acts of religious worship. As the author of Virginia's *Statute on Religious Freedom* and one who had fought for freedom of religion in the First Amendment, Jefferson felt strongly that Church and State had to be separate.

[19] From *Thomas Jefferson Papers*. Series 2, vol. 62, 45.
[20] *Ibid., Jefferson Correspondence,* Volume 6, p. 119.

Madison and Religious Freedom

Madison was one of America's staunchest defenders of freedom of conscience. Even as a student in college Madison had composed his notion regarding separation of Church and State:

> A person has a sacred right to relate to his creator as he choose, without interference by the government.
> Government had a responsibility to protect the religious freedom of its citizens but must not interfere with what a person believes.
> No one denomination or religious community could be allowed to dominate the others.[21]

Madison was one of the foremost fighters for religious freedom in America. As far as Madison was concerned, freedom of religion was central to all other freedoms to be enjoyed by mankind.

In Virginia he had fought to amend the article in the *Virginia Declaration of Rights* in June 1776, to assert the equal right of every person to the free exercise of religious conscience; for Jefferson's *Statute for Religious Freedom* and he helped defeat a measure that would have provided a tax to support teachers of religion in Virginia.

George Mason, a liberal Episcopalian, suggested changes to the Virginia Constitution. As amended by James Madison it was called the 16th Article of the *Virginia Declaration of Rights*. Madison suggested that there should be a formal abandonment of the notion of toleration because the phrase "toleration" conceded to some sort of religious establishment. Mason's draft provided that: "as religion... can be governed only by reason and conviction, not by force or violence... therefore all men should enjoy... the fullest toleration... according to the dictates of consciences."[22]

For Madison this was not the true ground of religious liberty. The issue was not how to govern matters of religious opinion, but how to exclude religion from governmental jurisdiction. Madison argued that "religion... being under the direction of reason and conviction only, not of violence and compulsion, all men are equally entitled to the full and free exercise of it according to the dictates of con-

[21] Ralph Ketcham, *James Madison. A Biography* (New York, 1971), 55-61.
[22] Smith, *Religious Liberty,* 36-37.

science... ." Madison withheld conscience from the realm of public action. He even hesitated to support a federal bill of rights, lest conscience be submitted to public definition and limitation.[23]

Madison worked for total disestablishment: "...no man or class of men ought, on account of religion to be invested with peculiar emoluments or privileges... ."[24]

The text adopted retained Madison's amendment: "That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards the other."[25]

While the Virginia legislation considered Virginia's laws regarding the support of church establishment, nothing was said about the Virginia statute of 1705 which called for the punishment of atheism, antitrinitarianism, polytheism, denial of the Christian religion or the authority of the Scriptures. This caused Jefferson, Madison, Mason and others a great deal of anxiety.[26] While the bill of 1776 discontinued financial support to any religion by declaring that "all dissenters of whatever denomination from the said church shall from and after the passage of the Act be totally free and exempt from all Levies, Taxes and impositions whatever toward the supporting and maintaining the said Church...," marriages were still celebrated by the Episcopal clergy alone and the distribution of monies to the poor was still handled by the Episcopal clergy alone – a situation that denied equality and hindered religious freedom.[27]

In the Spring of 1784, the Virginia legislature indicated that it might favor some kind of religious establishment. In the fall of 1784, the legislature seemed to favor Patrick Henry's call for the re-establishment of state-supported religion. The measure was to require all persons "to pay a moderate tax or contribution annually for

[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*, 38.
[26] Jefferson, *Notes on the State of Virginia,* 158.
[27] Smith, *Religious Liberty,* 36-47.

the support of the Christian religion, or of some Christian church, denomination or communion of Christians, or for some form of Christian worship." Patrick Henry insisted that Virginia had entered a period of "moral decay" since the disestablishment. Even though the bill for a religious tax to support teachers of religion did not require citizens to support religions in which they did not believe, and was otherwise tolerant and permissive, Madison thought it to be "obnoxious on account of its dishonorable principle and dangerous tendency." There was to be no tax aid to religion simply because the legislature had no authority or jurisdiction to enact such a bill.[28]

In November 1784, Madison presented his views against the bill. It would neither make religion more vital nor cure the alleged "moral decay" in Virginia. It would, in effect, violate the natural right to liberty of conscience and involve the state in questions of heresy and orthodoxy entirely outside its jurisdiction.[29]

The Baptists in Virginia were most vocal in their opposition to Henry's bill and they reiterated their stance that "religion was a thing apart from the concerns of the state" and that "no human laws ought to be established for this purpose, but that every person ought to be left entirely free in respect to matters of religion," The Presbyterians of Virginia likewise expressed their opposition to such legislation. As they put it, "Religion is altogether personal, and the right of exercising it unalienable; and it is not, cannot and ought not to be resigned to the will of the society at large; and much less to the Legislature which derives its authority wholly from the consent of the People; and is limited by the Original intention of Civil Associations; (and) we never resigned to the control of Government our rights of determining for ourselves in this important article...."[30] Madison led in the opposition and was able to win a postponement of the bill from December 1784 to November 1785. In the meantime Patrick Henry was elevated to the position of Governor of Virginia, a development that deprived the assessment bill of its ablest legislative leader.

In June of 1785, Madison brought together his views on religious

[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*; Jefferson, *Notes on the State of Virginia,* 158.

liberty and complete separation between church and state, in an essay entitled "Memorial and Remonstrance Against Religious Assessments":

1. Religious freedom was "in its nature an unalienable right ... because the opinion of men, depending only upon the evidence contemplated by their own minds, cannot follow the dictates of other men... Religion is wholly exempt from the cognizance (of Civil Society)."
2. Since civil society had no right to interfere with religion, the legislature, one of its creations, had no such right.
3. "It is proper to take alarm at the first experiment on our liberties. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?"
4. The free exercise of religion implies the right to believe in no religion at all, so even the most permissive tax to support religion might violate some consciences.
5. Civil magistrates can properly neither judge religious truth nor subordinate religion to public purposes.
7. "Ecclesiastical establishment," far from promoting religious purity and efficacy, had nearly always corrupted and stultified it.
8. Instead of promoting order and freedom in civil society, religious establishments were oppressive.
9. Religious taxes and assessments initialed a first step towards bigotry, differing from "the Inquisition... only in degree." This would put an end to Virginia as an asylum for the persecuted.
10. Such religious taxes would repel good and useful citizens from choosing Virginia.
11. Such laws would promote religious strife and violence.
12. "The policy of the bill is adverse to the diffusion of the light of Christianity...."[31]

Various Christian sects were suspicious and fearful of one another. So much so that they fought against the enactment of any legislation

[31] Ketcham, *James Madison,* 163-164.

that would have placed any one group in charge or in any way made it superior to the other. When Madison took his seat in the Virginia Assembly, he gathered a good deal of support against legislation "in matters of Religion." He obtained a great number of signatures appended to his *Memorial*, including "a considerable portion of the old hierarchy." A Presbyterian convention had called for a law establishing religious freedom; Baptists and Methodists had likewise proclaimed their opposition to a religious tax. Petitions were received from forty-eight counties in opposition to assessment; only seven counties favored it. The assessment bill died, and Madison proposed the adoption of Jefferson's *Bill for Establishing Religious Freedom,* which had first been introduced in 1779 and finally obtained its passage in January 1786. Jefferson was in Paris as America's emissary to France. Once it was adopted, Madison wrote to Jefferson: "I flatter myself [we] have in this country extinguished forever the ambitious hope of making laws for the human mind." Madison had steered Jefferson's document through the Assembly and into Virginia law in 1785-1786, and he took the greatest pleasure and pride in this legislative victory.[32]

Jefferson noted in his autobiography that there had been an attempt to amend the preamble "by inserting the words 'Jesus Christ'," so that it should read, "a departure from the plan of Jesus Christ, the holy author of our religion"; the insertion was rejected by a great majority, in proof that they meant to comprehend within the mantle of its protection "the Jew and the Gentile, the Christian and the Mahometan, the Hindoo, the infidel of every denomination."[33] The passage of Jefferson's bill represented the culmination of Virginia's struggle to achieve full religious freedom and separation of church and state.

The 1802 Virginia law provided that if any church lands should become vacant because of the death or removal of the Episcopal minister, they should be sold by the overseer of the poor for the support of the poor, or for any other nonreligious purpose which a majority of the voters might decide. Virginia's struggle and achievement of

[32] *Ibid.*, 165.
[33] Thomas Jefferson, *Autobiography* (New York, 1959), 58-59.

freedom and separation helped influence many of the other states and the Federal Republic to accept the principle of freedom and separation.

Madison was a stalwart defender of Religious Freedom throughout his career. His proposal for the First Amendment, which read "the full and equal rights of conscience [shall not] be in any manner, or on any pretext, infringed," and "no State shall violate the equal rights of conscience," was less equivocal than the wording eventually adopted.[34] He was the prime mover in the congressional politics that produced the First Amendment.

As Justice Robert Jackson would put it some 150 years later: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[35]

Madison was concerned with the preservation of freedom of conscience, whether for those who embraced a religious faith or for those who were unbelievers, atheists or the like. He noted that coercive religious establishments contradicted the Christian religion itself, for every page of it disavowed a dependence on the powers of this world. Madison, like Roger Williams before him and Thomas Jefferson in his lifetime, insisted that state religions had never worked and could never work; that "torrents of blood" had been spilled in the past on behalf of established religions.[36]

On December 15, 1791, Virginia ratified the Bill of Rights and thus became the 11th state to ratify – eleven were necessary to make up the required two thirds, since Vermont had been added to the original thirteen states. Thus on December 15, 1791, the Bill of Rights became the law of the land.

Madison fought against a census that would question a man's pro-

[34] William Lee Miller, *The First Liberty* (New York, 1986), 102-103, 125.
[35] *Ibid.*, 67-68, 102-103.
[36] Smith, *Religious Liberty,* 37; Cousins, *In God We Trust,* 312.

fession. He felt that if clergymen were asked to respond to such questions it might impair their right to freedom of religious opinions. He opposed the establishment of national banks because it might set a precedent for the establishment of religious corporations. His cooperation with Jefferson in opposition to the Sedition Act in 1789, 1799 and 1800 was based in part upon his claim to the preservation of religious liberty. He likewise opposed the appointment of chaplains for Congress or the armed forces because he felt that was an infringement of separation of Church and State; in addition, he opposed the proclamation of religious holidays, such as Thanksgiving Day.

During the debates of the First Federal Congress Madison supported the right of individuals not to serve in the armed forces if such service ran counter to their religious scruples. He proposed that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person." He likewise supported the Quakers in their refusal to pay a fee in place of their military service. He envisioned the need to protect the individual in the states of the Union against any violation of their rights. "No state shall violate the rights of conscience, or the freedom of the press, or the trial by jury in criminal cases... ." As President, he vetoed a Congressional land grant to a Baptist church in Mississippi, because it comprised "a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies."[37]

Madison's defense of religious liberty did not reflect any hostility to religion or to its social impact. He seems to have believed that attitudes and habits nourished by the churches could and did help improve republican government. But he also believed that complete separation of Church and State saved religions from the inevitable corrupting influence of civil authority. Throughout his long public career he received support from Jews, Catholics, Protestants, Quakers and others, who admired his forthright stand on religious liberty. He respected the constructive contributions made by the multiplicity of religions to the well-being of society. Religious freedom, internal

[37] Helen E. Veit *et al.*, eds., *Debates in the House of Representatives,* Volume 14 of *Documentary History of the First Federal Congress, 1789-1791* (Baltimore, 1994), 148-149, 162.

improvements and interstate cooperation were matters of prime importance to Madison.

In sum, George Mason, Thomas Jefferson and James Madison helped provide the philosophical basis for religious freedom in Colonial America and the Federal Republic. Their ideas and philosophy helped lay the foundation for religious freedom as it appeared in the Constitution and its Bill of Rights. The outlook of European rulers and societies, who could not imagine a state without an official religion, was unacceptable to the multi-ethnic and varied American society. These men established the foundations of a free and open society, thus inaugurating the path for complete freedom of conscience and freedom of religion.

The Constitutional Convention of 1787

While the Continental Congress had instituted daily prayers when it first met, the Constitutional Convention met for some four months without any public recitation of prayers. When Benjamin Franklin proposed that prayers be instituted, asking for Heaven's assistance every morning before proceeding, and that "one or more Clergy of this City be requested to officiate in that service,"[38] his proposal was politely and silently put to rest.

John Adams, in the first days of the Continental Congress, had expressed the hope that Congress would "never meddle with religion further than to say their own prayers, and to fast and to give thanks once a year";[39] nevertheless, the documents issued by the Continental Congress often included references to God. The Constitution made no such reference. Apparently, the years from 1774 to 1787 proved to the delegates of the Constitutional Convention the dire necessity of separating State from Religion.

During the debates at the Constitutional Convention, Charles Pinckney of South Carolina introduced a resolution to separate Church and State. He proposed that "...the Legislature of the United States shall pass no law on the subject of religion; nor touching or abridging the liberty of the press; nor shall the privilege of the *writ*

[38] Pfeffer, *Church and State,* 122.
[39] *Ibid.*

of Habeas Corpus ever be suspended, except in the case of rebellion or invasion."[40] While these concepts were not adopted by the Convention, they would be adopted by Congress and incorporated into the Bill of Rights.

The members of the Convention were concerned that, since the government would have the power to establish qualifications for Federal office, it might impose a religious test for such offices. In order to forestall such an eventuality, the Convention adopted Charles Pinckney's resolution, which was to become Article VI of the Constitution: "... no religious test shall ever be required as a qualification to any office or public trust under the United States."

Some delegates, like those from Massachusetts, feared, as Madison observed, "that the constitution by prohibiting religious tests, opened a door for Jews, Turks and infidels." Delegate Isaac Backus observed that both reason and the Holy Scriptures subscribed that "religion was ever a matter between God and individuals."

The ratifying conventions of almost every state expressed some objection to the absence of restrictions on the Federal government with respect to legislation regarding religion. Six of the states that ratified proposed amendments to guarantee religious liberty. North Carolina and Rhode Island would not ratify until a bill of rights with a specific provision for freedom of religion and disestablishment of religion had been included. From his post in Paris, Jefferson wrote Madison that, while he agreed that there was a need for a more perfect union, there were certain things that he did not like:

> First, the omission of a bill of rights, providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the *habeas corpus* laws, and trials by juries... [A] bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse or rest on inference.[41]

[40] *Ibid.*, 123, 162.
[41] *Ibid.*, 125.

Madison observed that the "public clamor" for a bill of rights was so pervasive that he could persuade the states to ratify only after he had promised to work for the addition of a bill of rights. He became convinced that it was necessary to have amendments that would provide for "all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trial by jury, security against general warrants, etc."[42] As a member of the House of Representatives in 1789, Madison introduced his proposals for amendments to the Constitution for a bill of rights. As he explained, many Americans "respectable for their talents and respectable for the jealousy which they have for their liberty" were dissatisfied with the Constitution as it stood, because it "did not contain those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power."[43]

The Bill of Rights, approved by the states in 1791, began with a guarantee of Freedom of Religion:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

The last words of the Constitution – except for the formal article that specified when the Constitution would become effective – prohibited any religious test "as a qualification to any office or public trust under the U.S.," and the first words of the Bill of Rights prohibited "any law respecting an establishment of religion." The Founding Fathers openly stipulated that there would be a separation between State and Religion.

George Washington

Washington believed that God, the Author of the Universe, had control over the affairs of men and nations. He did not waver on the importance of religious liberty. As far as he was concerned, religion

[42] *Ibid.*, 126.
[43] *Ibid.*

and morality were essential to the well-being of the country. While he felt that religious instruction was the responsibility of the clergy, government should become only minimally involved in the promotion of religion. To a Baltimore congregation he wrote: "We have abundant reason to rejoice that in this Land the light of truth and reason has triumphed over the power of bigotry and superstition, and that every person may here worship God according to the dictates of his own heart."[44]

We have already referred briefly to Washington's letter to the Touro Congregation of Newport, Rhode Island, in which he wrote: "For happily the government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support."[45]

John Adams

John Adams championed "liberty of conscience." In 1782 he wrote: "...I am an enemy of every appearance of restraint in a matter so delicate and sacred as the liberty of conscience."[46] And three years later he observed: "I am happy to find myself perfectly agreed with you, that we should begin by setting conscience free. When all men of all religions consistent with morals and property, shall enjoy equal liberty... and when government shall be considered as having in it nothing more mysterious or divine than other arts or sciences, we may expect that improvements will be made in the human character and the state of society."[47]

Benjamin Franklin

Franklin observed: "When a religion is good, I conceive it will support itself; and when it does not support itself, and God does not take care to support it so that its professors are obliged to call for help of the civil power, 'tis a sign, I apprehend, of its being a bad one."[48]

[44] Cousins, *In God We Trust,* 49.
[45] Faber, *A Time for Planting,* 129.
[46] *Ibid.*, 94.
[47] *Ibid.*, 47.
[48] Anson P. Stokes, *Church and State in the United States* (New York, 1950), vol.

The States during the Federal Period and the First Amendment

The First Amendment did not restrict the states in the matter of legislation regarding religious practices. Only "Congress shall make no law." James Madison felt that the Bill of Rights should require the states as well as the Federal government to steer clear of matters of religion. His proposition provided that "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." Thomas Tucker of South Carolina argued against Madison's suggestion: "It will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do, and that is thought by many to be too much."[49]

Madison's phrase was amended to read: "The equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any State." It was passed by the House, but not by the Senate. Only the First Amendment mentions Congress; the others do not.

By the time the Bill of Rights was adopted in 1791, all the states had guaranteed religious liberty, but in some states there remained a few vestiges of intolerance against Catholics and Jews. But even in those states such statutory restrictions were dead letters for many years before they were formally repealed. North Carolina repealed its restrictions for public office against those who "deny the being of God or the truth of the Christian religion" in 1868; but by 1808 a Jewish person had been elected to the legislature and he was not prevented from occupying his seat. Only Massachusetts, Connecticut, New Hampshire and Maryland retained some form of establishment in their basic laws by 1791, but taxpayers could choose the religious denomination that was to receive their taxes. Massachusetts was the last of the states to give up its establishment – in 1833. All the states that were admitted into the Union after the Constitution was adopted entered with freedom of religion, and they were devoid of any church establishment.

1, 298.

[49] Anson P. Stokes and Leo Pfeffer, *Church and State in the United States* (New York, 1964), 96.

These were the beginnings of freedom of conscience, but only the beginning. One could see limitations of one sort or another in the newly established states.

Conclusions

America was a refuge for humanity from the 1600s until the mid 1920s. It was a golden land of opportunity and freedom. It was a land that provided humankind with the opportunity for life, liberty and the pursuit of happiness. This was particularly so after the American Revolution.

The American Revolution marked a watershed in the development of freedom in America and throughout the world. Seldom, if ever, had Jews – or, for that matter, any religious group – achieved the Freedom they enjoyed in America. This was due to the determination of such men as James Madison, Thomas Jefferson, George Washington, George Mason and Benjamin Franklin. By the time the Federal Republic was established in 1789, American Jews enjoyed equality not only through the Federal laws, but they began to enjoy those rights and privileges in most of the individual states. Certainly by the 1820s, most, if not all, religious restrictions in the various states would be lifted and all Americans would be able to pursue their religious convictions freely and without any state limitations. The American experience was and remains unique in its enlightened approach to freedom of religion. But it was, at times, a hard won contest.

PERSON AND PROPERTY IN JEWISH LEGAL THOUGHT

*Alan J. Yuter**

Prof. Moshe Greenberg has argued that there is a fundamental distinction between person and property in ancient Hebrew thought.[1] For the ancient Mesopotamian,[2] the ultimate source of law resided in the wills of the gods Marduk and Shamash. Humankind was created to serve them. But the ancient Near Eastern (ANE) kings admitted *en passant* that the great laws were the work of their hands, given their concern that the laws not be effaced and that the credit of monarchical authorship not be denied to them. Greenberg also contends that, in Israelite thought, God is the author of the law, and crimes against humans are offenses against God, who is a very interested party in interpersonal human relationships. Consequently, while

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1 Moshe Greenberg, "Some Postulates of Biblical Criminal Law," *Yehezkel Kaufmann Jubilee Volume* (Jerusalem, 1960), 5-28, reprinted in Aaron M. Schreiber, ed., *Jewish Law and Decision Making: A Study Through Time* (Philadelphia, 1979). Citations are taken from the Schreiber text. This insight has informed Greenberg's theological applications in Moshe Greenberg, "You are Called Man" (Hebrew) in *Al haMiqra ve'al haYahadut* (Tel Aviv, 1984), 55-67, and "Mankind, Israel and the Nations in the Hebraic Heritage," in *Studies in the Bible and Jewish Thought* (Philadelphia, 1995), 369-393.

2 Greenberg, "Postulates," 145, and Robert F. Harper, *The Code of Hammurabi* (Chicago and London, 1904), 101 (hereafter: *CH*).

adultery may be forgiven in pagan ANE cultures,[3] it could not be forgiven in ancient Israel, because God remains an offended party.[4]

The acceptance of ransom (*kofer*) on behalf of a murderer[5] is explicitly precluded by Biblical law. Only in the case in which a wanton ox kills a human is ransom accepted.[6] When Scripture legislates that the human court may not punish a child for the sins of the father, or the father for sins of the children,[7] it rules, argues Greenberg, against the compensation principle of the ANE laws and the implicit values encoded therein. He insightfully notes that the Koran also accepts both retaliation and compensation for the death of the human being,[8] indicating a common cultural value order that Islam inherited from and shares with its ancient Near Eastern forbears.

In contradistinction, Hebrew law requires the death of the cow who kills a human being[9] because the offense is ultimately a sacrilege against God. While in ANE codes, there are offenses against property which are capital offenses,[10] there is no such extant legislation in Israelite culture. In his thoughtful critique of Prof. Greenberg, Bernard S. Jackson argues that the search for underlying principles is a bit speculative.[11] Nevertheless, outside of Israelite culture, the restoration of disorder is the apparent function of the law.

Since the execution of the offending culprit may diminish the demographic power of the community, the offending culprit may be

3 Greenberg, "Postulates," 146. See n. 30 below.

4 *Lev.* 1:10, *Deut.* 22:22-23 do not provide for the husband's forgiving his wife's infidelity.

5 *Num.* 35:31.

6 *Deut.* 21:21-32.

7 *Deut.* 24:16.

8 Koran 2:178.

9 *Ex.* 21:28.

10 Greenberg, "Postulates," 147 and nn. 15, 16 and 177, below.

11 Bernard S. Jackson, "Reflections on Biblical Criminal Law," in *Essays in Jewish and Comparative Legal History* (Leiden, 1975), 25-63, cited in Schreiber, 154. Jackson shows that the Eshnunna Code and the Hittite laws did not impose death for torts. We would contend that the world views exhibited by the legal formulations, whether or not the codes in which they were recorded were intended as juridical guides, nevertheless reflect the world view of their authors. See Greenberg's response in "More Reflections on Biblical Criminal Law," in Sara Japhet (ed.), *Studies in Bible 1986* (*Scripta Hierosolymitana* 31) (Jerusalem, 1986), 1-17.

spared because of his material utility to society. However, in Hebrew law, "Whoever sheds the blood of man, by man shall his blood be shed."[12] While some serious offenses against property are indeed punished by death in *CH*,[13] in Jewish law the offending culprit may be killed only if s/he presents an immediate criminal danger to the life of another person when in the act of assaulting property.[14] From the above we conclude that, in the canonical writings of ancient Israel, person and property represent two legal categories that were neither confused nor collapsed. This insight permeates Israelite thought, as evidenced by the three significant Biblical episodes to be explicated below.

A brief survey of *CH* will demonstrate that, at least for Hammurapi and his world, (1) life and property were extensions of the same reality, and (2) one's worth as a person was defined by one's place in a hierarchical social order: If man [of standing] stole the property of the gods or the Temple, that man is to be killed. And the man [of standing] who received the stolen goods from his hand [that man] shall be killed.[15] While on the basis of this statute alone, it might be argued that the death penalty is appropriate because the property stolen is sacred, the next paragraph illustrates that person and property are part of the same value continuum:

> If a man [of standing] had bought or had taken a deposit of silver, gold, a male slave, a female slave, an ox, a sheep, or ass or anything for the hand of a son of a man [of standing] or the slave of a man [of standing], that man [of standing who had received the deposit] is a thief [who] is to be killed.[16]

The conceptual statute which expresses this cultural value is best expressed in the following statute, the Akkadian of which is presented to illustrate the unambiguous conceptual frame of the discussion: *summa awilum ḫubtam iḫubutma, awilum šu iddak*. If a man [of

[12] *Gen.* 9:6.
[13] For example, *CH* 22.
[14] *Ex.* 22:1-3.
[15] *CH* 6.
[16] *CH* 7.

standing] stole a stolen object and is apprehended, that man [of standing] is to be killed.[17]

As noted by Greenberg, above,[18] according to the Babylonian laws, an offense against man can be forgiven by man: If a married woman is apprehended lying with a different male, they shall tie them and throw them into the water. If her husband [of the unfaithful spouse] wants her to live, then the king will let his slave live.[19] If one were to cause the loss of an eye or a bone of a man of standing, one pays with the loss of one's own eye or bone.[20] If however the loss is incurred by a lower-class person, then financial compensation is sufficient.[21]

In the case of an assault on the fetus of a man of standing's daughter: If a man strikes the daughter of a man [of standing] and makes her lose that which is in her [the fetus] he shall weigh out [in payment] 10 sheqels of silver.[22] Should the daughter die, the daughter of the offending culprit rather than the culprit himself is put to death.[23]

In the instance of a house collapsing due to shoddy workmanship, if the house owner should die, the builder will be put to death.[24] However, if the owner's son dies, the builder's son is subject to the death penalty.[25] Similarly, in the instance of the death of the house owner's slave, a slave of the builder must be put to death.[26] Any loss of property must be subject to parallel compensation.[27] Stealing people is punished by death because it is a serious assault upon property.[28] The conceptual basis for this principle is expressed in the following statute:

17 *CH* 22.
18 See nn. 3 and 8 above, and 30, below.
19 *CH* 129.
20 *CH* 196-197. See also *Ex.* 21:24.
21 *CH* 291.
22 *CH* 209.
23 *CH* 210. See n. 12 above for the Israelite alternative value statement.
24 *CH* 229.
25 *CH* 230.
26 *CH* 231.
27 *CH* 232.
28 *CH* 14-16, 19,33. In Israel, the theft of a person is an assault upon the integrity of the person stolen and, like sexual offenses, is punishable by death.

> If a man [of standing] steals an ox, or a sheep or a donkey or a wooden boat, [and] if the theft was taken from the god [= the Temple] or the State, restitution of thirty-fold will be given; if the theft's victim was a man [without standing, a commoner], compensation is ten-fold. If the thief does not have [in his possession] to give [the compensation required by law] he is to be killed.[29]

For the world of *CH*, greater monetary value is placed upon the individual with a higher station in life. Offenses can, in principle, be forgiven, because they are all ultimately reducible to financial compensation. Should an individual be unable to compensate, in which case his compensatory obligation is greater than his financial/moral worth, his very right to life is forfeit.[30] As will be demonstrated below, when dealing with internal Israelite and Jewish cases, the Israelite distinction between person and property is maintained. When, on the other hand, Israelite/Jewish values interact with the larger world, the *ius gentium* which regards people and property as moral extensions, is applied.

[29] *CH* 8.

[30] Similarly, the Hittite Code, *ANET* 17 and 18, rules that payment, albeit in different amounts, is required for the destruction of the fetus of either a free woman or a slave woman. Citing Marcus Jastrow, "An Assyrian Law Code," 41 *Journal of the American Oriental Society* (1921) 47, R. Samuel Belkin concedes that the Assyrian Code is the only ancient Near Eastern code which treats the fetus as a person. See his *Philo and the Oral Law* (Cambridge, 1940), 132 n. 125. Although Ancient Near Eastern codes have no normative significance, they clarify and, in our context, corroborate, the philological meaning of the halakhic statute, so that the encoded norm might be explicated. See also Bernard S. Jackson, *Essays in Jewish and Comparative Legal History* (Leiden, 1975). Middle Assyrian law requires compensation, but not punishment, for the loss of the fetal life with a life, not necessarily his own. The death of the culprit is appropriate only if the mother had died. See G.R. Driver and J. Miles, *The Assyrian Laws* (Oxford, 1935), 110-113, cited in Stanley Isser, "Two Traditions: The Law of Exodus 21:22-23 Revisited," 52 *Catholic Biblical Quarterly* (1990) 31-32. Isser correctly calls attention to the shared legal legacy, albeit with regional peculiarities, of the ancient Semitic world. The unique elements of the Hebraic code are best explicated in the context of these second millennium codes.

The Case of the Pharaoh of the Exodus

In the Exodus narrative, Pharaoh is confronted with a population, Israel, which he takes to be a "fifth column." He views Israel as a subject population, not of Egyptian stock, in his address "to his people" (= *ammo*) that "the Israelite people are much too numerous for us" (*Ex.* 1:8). Pharaoh then directs the midwives (*Ex.* 1:16) and his compliant masses (*Ex.* 1:22) to kill the Israelite males.

In his commission introducing himself to Pharaoh on behalf of God, Moses is told to announce, with exactitude: "Thus says the Lord, My son, My first-born, is Israel" (*Ex.* 4:22).[31] Having been verbally released by Pharaoh, God proceeds to press His claim regarding His people. And because Pharaoh refuses to acknowledge this claim after nine plagues, God announces that "every first-born in the land of Egypt shall die, from the first-born of Pharaoh who sits on his throne to the first-born of the slave girl who is behind the millstones; and all the first-born of the cattle" (*Ex.* 11:5). It must be noted that (1) Pharaoh is excluded from the threat of death and (2) Pharaoh's son, his population, and his beasts are all viewed as mere Pharaonic property. Pharaoh is thus threatened because God asserts that Israel belongs to God and not to Pharaoh.

Not only does Pharaoh survive the first-born plague, in which God kills "all the first-born in the land of Egypt, from the first-born of Pharaoh who sat on the throne to the first-born of the captive who was in the dungeon, and all the first-born of the cattle" (*Ex.* 14:29); but after the Song of the Sea it is reported that Pharaoh's horses, men

[31] The word *koh*, "thus," means "verbatim," or "exactly as follows." The JPS rendering "Israel is my first-born son" misses the literary crescendo created by the triadic structure of the passage. The LXX's penchant for literalism is reflected in its rendering "the son, first offspring of mine, is Israel." Similarly, *koh* is used to introduce the priestly blessing of *Num.* 6:22-27 which is also a triad. Significantly, the Oral Law takes this *koh* or "thus" with great seriousness and reverence, for Onqelos does not translate the blessing, which may *only* be rendered "thus," in Hebrew. Similarly, *BT Sotah* 38a understands the norm identically to Onqelos, for this passage may not be translated into another language. The Peshitta, however, is not limited by Jewish oral tradition scruples and so does render the Hebrew passage into Syriac.

and chariots were cast into the sea, but not Pharaoh himself (*Ex.* 15:19-30).[32]

Scripture refers to Egypt not as the house of "bondage," or slavery, but the house of slaves (*Ex.* 20:2).[33] All Egypt is the property of Pharaoh. Since Pharaoh made an assault upon Israel, which, possessing the quality of personhood, is sacred to God as God's property,[34] God assaults Pharaoh's property because Pharaoh assaulted Israel, the property of God. An assault upon God's property, his "first-born," is compensated by the death of any and all of the first-born property of Egypt. Unlike the Israelite notion outlined above, that only the offending culprit is to suffer the consequences of his or her own actions, God assaults Pharaoh according to the Israelite understanding of the *ius gentium*, the general law of nations accepted in Antiquity.[35]

The Solomonic Judgment of the Two Prostitutes

A first reading of the narrative of King Solomon's judgment of the two prostitutes (*I Kgs.* 3:16-26) has to date baffled both classical

[32] According to Rashi to *Ex.* 12:29, Pharaoh was the only firstborn who was spared. This reading, while clearly not explicit in the text, sharpens the question further. If a death taboo was declared upon all of the first-born of Egypt, why would the most culpable of Egyptians, the Pharaoh, be spared? Nahmanides contends that only the maternal first-born were struck, for only in that way would the miracle be manifest.

[33] The concept of Egypt being the "house of bondage" is based on Targum Onqelos, which renders *bet avadim,* house of slaves, as *bet avduta,* house of bondage. This is also the Peshitta version. The LXX however, reads *douleias*, meaning "slaves."

[34] See *Jer.* 2:3.

[35] David allowed the Gibeonites to execute seven of Saul's children (*I Sam.* 21:1-9). M. Greenberg argues that "a national oath made in the name of God has been violated by a king.... The injured party, the Gibeonites, demand life for life and expressly refuse to hear of compromise" (Greenberg, "Postulates," 149). Since the Gibeonites were not Israelites, even if they were vassals of Israel, national honor required that the pagan practice common to international law be honored, in which case vicarious punishment is made. See Maimonides, *MT Nizqei Mamon* 8:5, who observes that when dealing with non-Israelites, the laws by which they hold themselves accountable are the laws by which they are to be judged.

Jewish commentaries[36] and modern critical commentaries.[37] Literary analysis provides the code whereby the conceptual frame of these ancient texts may be parsed. According to Meir Sternberg, the mere assignation of Biblical materials to Ancient Near Eastern parallels is insufficient to arrive at a full understanding of those materials.[38] Nevertheless, a literary approach to parsing these materials, like any set of materials, is not mere intellectual fantasy. It is not the deductive imposition of a theory upon a text, but an inductive demonstration, based on the weighted information available, of the text's literary logic.[39]

[36] Per Rashi to *I Kgs.* 3:27, Solomon decided the case on the basis of an oracle, a *bat qol.* But this view not only has no basis in the narrative; but the fact that Solomon resorted to a ruse, to threaten to divide and destroy the child, indicates that Solomon was acting on his own initiative. For R. David Qimhi to *I Kgs.* 3:23 and Abravanel, Introduction to *I Kgs*, 3, the Solomonic ruse provides precedent that witnesses must be examined and tested regarding the veracity of their testimony. For Gersonides to *I Kgs.* 3:15, the Solomonic ruse served to discover which of the prostitutes felt motherly passion for the offspring. I must thank my colleague, Dr. Stanley Boylan, Dean of Faculties of Touro College, who graciously called my attention to the Midrash *Yalqut Shimoni* to our chapter, para. 175, which reports that the Tana R. Judah b. Ilai would have been forceful in restraint to King Solomon's apparent breach of judicial procedure. The methodological error of those who are content merely to show that Biblical materials are similar to other Ancient Near Eastern writings confuses similarity with congruency. Similarities of culture provide the grid which highlights the significance of the truly meaningful points of disjuncture.

[37] For Robert R. Wilson, *Kings* is but an instance of the Deuteronomist's religious polemic in general, and Solomonic judgment must be understood as a folktale which justifies the "wisdom" that was Solomon's; "Introduction to Kings," in *The Harper Collins Study Bible* (New York, 1987), 511. This reading does not take into account the fact that the prophetic narrator is displeased with Solomon's behavior in the second half of his career. P. Kyle McCarter, a very accomplished Semitist, claims to see in this narrative an Israelite instance of a larger wisdom narrative motif; "Kings I," in James Luther Mays, ed., *Harper's Bible Commentary* (San Francisco, 1988), 309. This approach assigns theoretical categories to the text at hand, but does not examine its actual message.

[38] Meir Sternberg, *The Poetics of Biblical Narrative: Ideological Literature and the Drama of Reading* (Bloomington IN, 1987), 186-187. That *Kings* is constructed in a structured, literary fashion is demonstrated by George Savran, "1 and 2 Kings," in Robert Alter and Frank Kermode, eds., *The Literary Legacy of the Bible* (Cambridge MA, 1987), 147-148.

[39] While Sternberg, *ibid.*, believes that the prostitutes intruded upon Solomon as a court of first and last jurisdiction, a reading warranted by the narrative flow,

According to the Biblical narrative, two prostitutes give birth to children, but one mother inadvertently smothers her offspring in her sleep, and thereupon seizes the surviving child from her roommate and "professional colleague." The two roommates present their case before the King of Israel who, like the litigants, also has a history. The Israelite king, if he is to retain legitimacy, is a king under the law in practice as well as in theory. The Israelites agree to obey Joshua only if God is with him as God was with Moses (*Josh.* 1:16-17).

Solomon's father, David, charges his son that he must be a constitutional monarch: "...be strong and show yourself a man. Guard the guarded portion of the Lord your God, walking in His ways and guarding His legislated statutes, commands, judgments and testimonies as written in the oracle of Moses, in order that you may succeed in all that you undertake and wherever you turn" (*I Kgs.* 2:2b-3). Because Solomon loves God, i.e., is faithful and obedient to Him, as witness his resolve to function as a constitutional monarch (love of God, if sincere, must be manifest by concern for God's image, one's human fellow), God appears to him in a dream and promises Solomon the wise heart (3:9) that the young king believes that he lacks. Upon waking from this dream, Solomon (a) stands before the ark of God's covenant, the footstool of God's palpable presence, (b) responds by sacrificing burnt-offerings to attract God's actual attention, then offers *shelamim* as a goodwill gesture,[40] and (c) proceeds to make a party for his staff (3:15).

A close reading of the subsequent narrative will demonstrate that

Herbert Chanan Brichto assumes, without textual warrant, there must have been an appeal process before these litigants could appear before the king. See Brichto's reading in *Toward a Grammar of Biblical Poetics* (New York and Oxford, 1992), 48-55. Brichto is taken by the words *az tavona*, usually construed to be an imperfect or prefix tense formation, even though the narrative is referring to a perfect, or completed action, situation. In point of fact, this very usage is an instance of the preterite or punctive tense. See John Huehnergard, *An Introduction to Old Babylonian Akkadian* (Cambridge MA, 1987), 15. Yehuda Keel, *Kings (I)* (Jerusalem, 1989) 81 (in Hebrew), tries to coordinate the literary Biblical data, which he takes to be historical, into a literary and historical frame.

[40] Following Baruch A. Levine, *In the Presence of the Lord* (Leiden, 1974), 22-27.

the narrator is presenting information in an order that preserves the ultimate intent of the narration. "Later two women who were prostitutes came to the king and stood *before him*" (3:16) – the Israelite King, like the Israelite God, addresses all people face to face,[41] horizontally, even though these women were prostitutes, single mothers without any male resident in the house. Even the lowest of society has a conventional claim to justice. The claim of the first mother is filled with information regarding not only the facts of the case, but also the attitudes of the litigant to the information being presented:

> The first (Hebrew *ha-ahat* = the one) woman said, "Please, sir, I and this woman reside in the same house, and I gave birth with her in the house. Three days after my delivery, she had also given birth (we are together, there is no stranger with us in the house, two are we in the house). And the son of this woman died at night, because she had lain upon him [causing suffocation]. And she got up at night and took my son from my armpit [embrace] while your subject was sleeping and she laid him in her bosom, and she had laid her dead son in my bosom. And I rose in the morning to suckle my son, and here he was dead. And I looked upon him in the morning [light] and here he was not the son to whom I had given birth" (3:16-21).

This passionate, motherly soliloquy is long on emotional claims, but short on empirical facts. The woman who was formerly noted as "this" (*zot*) now becomes the "other" woman,[42] who deems it sufficient merely to deny her adversary's factual claim: "No! your son is the dead one and my son the live one."

[41] While *lpn* in Ugaritic corresponds to the Hebrew *lpny*, the Biblical Hebrew idiom possesses a literary ideological quality, i.e., that the surface, horizontal face represents the arena of ultimate Divine concern.

[42] This idiom is also used in reference to Jepthath's mother, who also happens to be a prostitute. See *Jud.* 11:2.

	Statement	**[A] Other mother**	**[B] True Mother**
I	*I Kgs.* 3:22: **The two women's claims:**	The other woman said "No, rather, my son is the living one and your son the dead one,"	and this one said, "No, rather, your son is the dead one and my son the living one."
II	v. 23: **The king's summary:**	And the king said, "This one says, 'this is my living son and your son is the dead one,'	and this one said, 'No, rather, your son is the dead one and my son the living one.'" **[Note chiasm!]**
III	vv. 24-25: The king said [not to the mothers but to his staff]: [a] "Bring me a sword," and they brought a sword before the king. [b] And the king said: "Cut the living child in two, [c] and give half to one and half to one" **[note the internal triad – the climax of the pericope]**.		

[Note chiastic reversal in the denouement]

		[B′] True mother	**[A′] Other mother**
II′		v. 26a: The mother of the live child said to the king — for her motherly instincts prevailed upon her — "Please, master, give her the living child, but do not put him to death,"	v. 26b: and this one said, "Neither I nor you shall have him, cut him [*gezoru*]."
I′	**The king's resolution:** [a] Give her [the true mother] the living child, [b] do not kill him [i.e., the living child]; [c] **she is his mother** [note triadic climax to the pericope!].		

The Solomonic suggestion to divide the living baby in half is not fully explicable on the basis of the narrative alone. There is, however, another source whose content and context parallel this narrative, namely, the mishnaic passage in *B.M.* 1:1:

> (a) Two are holding [claiming possession of] a garment
> (b) This one says, "I found it," and this one says, "I found it"
> (c) This one says, "It belongs entirely to me," and this one says, "It belongs entirely to me"
> (d) This one swears that he does not have claim to less than half, and this one swears that he does not have claim to less than half,
> (e) And they shall divide [it] [*yahaloqu*].

The parallels between the Mishnah and the scriptural passage are both thematic and linguistic.[43] Thematically, both deal with two litigants who claim possession rights over an object, and each passage has five distinct parts. Linguistically, the syntax of alternative claims, the cadenced use of the demonstrative pronoun, and the pausal forms for verbs meaning to divide, *yahaloqu / gezoru*, indicate that the concept of property disputes was couched in an oral tradition that was structured and cadenced, from Biblical antiquity until the Judaism of the rabbis.

In light of the Mishnah just cited, the Biblical passage before us is given to deconstruction. Prostitutes are women on the margin of society, who earn their livelihood by selling themselves to men as objects of male pleasure. When faced with the blessing and challenge of a living male child, to whom they had just given birth, the two

[43] It is possible, albeit not necessary, to read the Mishnah like the Scriptural parallel:
a. Two are holding [in claim of possession] a garment. (A)
b. This one says, "I found it," and this one says, "I found it." (B)
c. This one says, "it belongs entirely to me," and this one (C) says, "it belongs entirely to me."
d. This one swears that he does not have claim to less (B') than half, and this one swears that he does not have claim to less than half,
e. and they shall divide [it]. (A')
To this reading, when the impasse between the litigants appears to defy resolution, the legally possible and plausible means of conflict resolution is applied in B', which leads to the conclusion of A' – in fact the resolution of the conundrum posed by A.

prostitutes are put to the test by Solomon. Realizing that there was no objective way of measuring the arguments of the women on the basis of the reported facts of the case, Solomon tricked the unsuspecting women to respond not as objects, following their professional habit, but as subjects, or living, feeling, responsible mothers who, by nature as well as nurture, ought to be bonding with the fruit of their wombs.

The syntax of the argument, both in Scripture and in the Mishnah, deals with property considerations. The "other" woman regarded the surviving baby as a male to be possessed, and was willing to have it cut in half, no differently than the person who swears to possessing a portion of no less than half in the disputed garment. The true mother deals with the fruit of her womb not as an object, but as a subject, a person. The "other" woman, however, by continuing to think, feel and emote like a prostitute, has not grasped Solomon's signal, and has violated her own personhood with her inability to view another human being, her roommate's child, as something other than an object to be possessed, by whatever means.[44]

The Fetus as Property in Canonical Jewish Literature

The current abortion debate is emotionally and morally charged.[45]

[44] My teacher and mentor, Prof. Baruch A. Levine, has called my attention to the incident of Mephiboshet, of Saul's line, and Ziba, the steward, and their competing claims to the monarchical *ahuzzah*, which was David's to [re]assign; he ultimately decides to parcel the estate between two competing claims. See his "Farewell to the Ancient Near East: Evaluating Biblical References to Ownership of Land in Comparative Perspective," in *Privatization in the Ancient Near East and Classical World*, ed. Michael Hudson and Baruch A. Levine (Cambridge MA, 1996), 230-232, and Z. Ben Barak, "The Confiscation of Land in Israel and the Ancient Near East" (Hebrew), 5-6 *Shenaton – An Annual for Biblical and Ancient Near Eastern Studies* (Jerusalem, 1978-1979), 101-117, and "Meribaal and the System of Land Grants in Ancient Israel," 62 *Biblica* (1981) 73-91.

[45] Aharon Lichtenstein, "Abortion: a Halakhic Perspective," 25 *Tradition* (Summer 1991); David Novak, *Law and Theology in Judaism* (New York, 1974), 114-124; and David Bleich, "Abortion in Halakhic Literature," in *Contemporary Halachic Problems* (New York, 1977). Bleich argues that "the pertinent halakhic discussions are permeated with a spirit of humility reflecting an attitude of awe and reverence before the profound mystery of existence and a deeply rooted reluctance to condone interference with the sanctity of individual human life"

The moral underpinnings of Jewish law are encoded in the Bible and Talmud, which, when parsed philologically, yield findings similar to those recorded above regarding the legal relationship of person and property:

> When [two] men fight and [inadvertently] strike a pregnant woman and [as a consequence of the blow] the fetuses abort, but there is no calamity [i.e., the woman does not die], [the offending culprit] must assuredly be punished as will be mandated [literally, cast upon him] by the woman's husband in court (*Ex.* 21:22-23).

The penalty for the destruction of the fetus, which is not a whole person, is a fine both in Scripture and in Hammurapi's code.[46] Were the Biblical offense against the fetus to be construed in any way as an assault against a person, the offending culprit would have been consigned to a city of refuge (*Ex.* 21:12-13) rather than fined.

A close reading of the Rabbinic materials demonstrates that the canonical Jewish literature of the Sages yields an understanding of the fetal status identical to that found in *CH*. The more popularly cited source has been misread, possibly for polemical purposes:

> [In the case of] a woman in hard labor [the court mandates] the cutting of the [unborn] birth and removing it [from the womb] limb by limb because her [= the mother's] life takes precedence over its life (*BT Sanh.* 72a.)

Literally understood, this norm mandates the aborting of the fetus to save the mother's life. No statement is made in this passage regarding discretionary abortions. The *Gemara* first suggests that this case

(*Ibid.*, 325). But all serious discussion must be undertaken with humility, and halakhic discourse does not entertain mysteries (see *Deut.* 29:28). The sanctity of "individual human life" must be determined by hard evidence, and not by thinking which is softened by conclusions that one wishes *a priori* to find in the evidence.

[46] *CH* 210. The Hittite Code, *ANET*, 17 and 18, which is also a second millennium document, regards compensation as the proper recourse in the case of aborted fetuses. The Assyrian Code is unique in its punishing the offense against a fetus as a capital delict. See Jastrow, "An Assyrian Law Code" (*supra*, n. 30), 47, and Belkin, *Philo* (supra, n. 30) 132 n. 125.

is akin to that of a bystander who is required to slay a pursuer on the basis of presumptive intent, but then rejects this argument with the idiom "*min hashamayim karadfei lah,*" she is being pursued from heaven, i.e., by Nature and/or Providence.

Maimonides' reading of this passage is exquisitely precise: "The Sages ruled that in the case of a pregnant woman having difficulty in childbirth one is permitted to dismember the fetus in her womb, whether by potion or by hand, for it is like a pursuer [chasing] her to kill her."[47] Maimonides is not challenging the Talmud's rejection of the argument from pursuit;[48] he does not claim that the fetus *is* a pursuer, only that the fetus is like or similar to a pursuer. Of all the decisors, Maimonides is the last authority to deviate from his *textus receptus* of the Talmud.[49] If the fetus is indeed endangering the mother's life, the law would mandate fetal destruction.

The implication, popular among many contemporary Orthodox thinkers, is that the *Gemara*, by its silence, is implicitly forbidding all other abortions.[50] It will be shown, however, that this reading is both philologically unjustified and exegetically questionable.[51] Legislated Rabbinic norms are explicit; implicit meanings must be defended on the basis not of remonstration but of demonstration.

The rendering of the Talmudic text that all abortions which are performed other than to protect the life of the mother must be regarded as ideological because it is based on the argument from si-

47 *MT Hil. Rotzeah uShmirat haNefesh* 1:9.

48 See David M. Feldman, *Marital Relations, Birth Control, and Abortion in Jewish Law* (New York, 1974), 277.

49 A rejected opinion may be recorded in order to preclude its being considered to be normative. See Dov Zlotnick, *The Iron Pillar: Mishnah, Redaction, Form and Intent* (Jerusalem, 1988) 191-193.

50 "It may readily be inferred from this statement [which requires fetal destruction in the instance of danger to the mother] that the destruction of the fetus is prohibited in situations not involving a threat to the life of the pregnant mother" (Bleich, 327).

51 Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (Berkeley, Los Angeles and London, 1978), 101, understands "imputation [to be]... just as much or just as little an illusion or ideology as causality, which – to use Hume's or Kant's words – is only a habit or category of thinking." Kelsenian legal ideology is the "nonobjective presentation of the subject influenced by subjective value judgments" (*Ibid.*, 105).

lence. In point of fact, Talmudic law is not silent with regard to fetal status in cases when the mother's life is not in danger: R. Judah said in the name of Samuel: "The woman who is led to execution is [first] beaten at the place of her pregnancy (i.e., the womb) in order that the fetus die first and she (i.e., the woman about to be executed) should not come to disgrace (*nivvul*)" (*M. Arakh.* 1:4). The *Gemara* asks why the woman's disgrace is given such consideration at the expense of the father's property rights to the fetus, *mamona deba'al hu*. Hence, the fetus only enjoys the status of property and the court possesses the legal right to confiscate property.[52]

Philologically understood, the two Rabbinic citations complement each other. The passage in *BT Sanh.* 72a deals with an instance of mandatory abortion, because a living person has rights, but a potential person is only viewed as property and does not receive legal protection. The passage in *Arakhin* also indicates that the court considers the shame of a condemned person to be sufficient justification to destroy the property/fruit of her womb, indicating that shame provides sufficient warrant to permit an abortion, which is taken to be the destruction of property.[53]

In the subsequent halakhic tradition, the status of the fetus was subject to definitional development. One Tosafist tradition claims that "even though we may violate the Sabbath to save a fetus, it is permissible to kill the fetus,"[54] but another Tosafist tradition argues that it is forbidden to kill the fetus[55] on the grounds that a non-Isra-

[52] *BT Ar.* 7a. For a recent rabbinic authority who actually applies this philological reading in his decision, see R. Ben-Zion Hai Uzziel, *Pisqei Uzziel: BiSh'elot haZeman* (Jerusalem, 1977), 268-279.

[53] See also *Pisqei Uzziel* (*supra*), no. 52, pp. 275-279, who considers parental shame sufficient warrant to destroy a fetus.

[54] *Tosafot* to *BT Nid.* 44b. The fact that legal authorization is given to violate the Sabbath in order to save a fetus does not necessarily mean that it is forbidden to destroy the fetus, because the two rulings may reflect independent acts of Rabbinic legislation. This point is conceded by the otherwise restrictive I. Jakobovits, who admits "that none of these regulations [i.e., that some women may or must use tampons for birth control]... necessarily prove that the foetus enjoys human viability"; see Immanuel Jakobovits, *Jewish Medical Ethics: A Comparative and Historical Study of the Jewish Religious Attitude to Medicine and its Practice* (New York, 1959), 183.

[55] *BT Sanh.* 59b.

elite should not be held to a more rigorous standard than an Israelite. This view assumes that the seven Noachide rules which oblige all humankind represent a less rigorous dispensation than the six hundred and thirteen commandments of the Sinaitic dispensation to Israel, and that strictness *per se* is an index of religious excellence and authenticity.

Now, according to the Rabbinic understanding of Scripture, a Noachide is executed for the committal of feticide on the basis of the Scripture, "Whoever sheds the blood of man, by man shall his blood be shed" (*Gen.* 9:6 and *BT Sanh.* 7a). And two leading natural law Jewish theologians, Rabbis David Novak[56] and Aharon Lichtenstein,[57] apply the argument of *BT Hullin* 33a, "can there be any act which is permitted to a Jew which is prohibited to a Noachide?" in their restrictive approaches to this issue.

However, unless explicitly stated in the Talmudic statute, the derivation of a positive law from a rhetorical question is spurious. Second, the Talmudic report in *BT Sanh.* 59a constitutes *setam* or anonymous *Gemara* which, while part of the historical Jewish memory, is not necessarily as authentic or authoritative as earlier, named, explicit reports. Third, there are in fact situations in which a Noachide is treated more harshly than an Israelite:

> A Noachide is executed on the decision of one judge, without warning, by the testimony of a man, but not a woman, and even a relative; in the name of Rabbi Ishmael it was said, even for the destruction of fetuses (*af 'al ha'ovarin*[58]) (*BT Sanh.* 57a).

In the case of kosher slaughter and the eating of a limb from an unexpired animal,[59] the *Halakhah* does treat the Noachide more rigorously. The unchallenged legal principle that one does not derive legal facts from generalizations, *ein lemeidim min hakelalot* (*BT Erub.* 27a), would cancel the assumption of the restrictive Tosafist tradition even if there were no Talmudic arguments to the contrary.

[56] Novak (*supra*, n. 45), 117.
[57] Lichtenstein (*supra*, n. 45), 4.
[58] *Ubbarim* is the popular but philologically incorrect form.
[59] See *Deut.* 12:23 and *BT Hul.* 102b for the law that applies to an Israelite, and *Gen.* 9:4 and *BT Sanh.* 59a for the law that applies to a Noachide.

Now, the Rabbinic understanding of the Noachide dispensation imposes the death penalty upon a Noachide for an assault upon property, while an Israelite would not be so punished (*BT Sanh.* 57a).[60] So a Noachide who destroyed a fetus would be subject to the death penalty, as would be the case with any assault upon property. Significantly, the Israelite treatment of the Noachides preserves the oral tradition memory which we have noted in the Pharaonic narratives and in *CH*, that for the Noachide, or non-Israelite, there is no moral distinction between person and property. Consequently, the halakhic treatment of the Noachide echoes the Ancient Near Eastern non-Israelite understanding according to which person and property are part of the same value continuum.

No group within contemporary Jewish life addresses the canonical past philologically. In Liberal Judaism it is assumed "that abortion is permitted," for the question, as put, postulates that abortion is sanctioned.[61] Most Orthodox[62] authorities regard abortion to be an offense similar but not identical to murder. For Rabbi Prof. David Bleich, a Jew is governed by such reverence for life lest he tamper unmindfully with the greatest of all divine gifts, the bestowal of which is the prerogative of God alone.[63] What Bleich does not demonstrate is the actual status of fetal life, for he leaves the reader with a moralistic statement to which he himself imputes legal value. Similarly, Rabbi I. Jakobovits permits an abortion only in order to save the life of the mother.[64]

Now, Jakobovits correctly traces the notion that the abortion of a

[60] See Maimonides, *MT Hil. Melakhim* 9:9.

[61] Question of A. Klausner to the Reform Responsa Committee, in Walter Jacob, *Contemporary Reform Responsa* (New York, 1987), 23. But for Eugene B. Borowitz, Liberal Judaism's leading theologian, "suggestions of Reform Jewish practice... are resources, not law. They did not presume to tell Reform Jews what they must do" (*Liberal Judaism* [New York, 1984], 335). For Jacob, Jewish usages are customary "and do not represent a divine enactment" (*American Reform Responsa: Jewish Questions: Rabbinic Answers* [New York, 1983], 9).

[62] Notable exceptions are Maharit, I 97, 99; *Mishpetei Uzziel* III 23; *Seridei Esh* III 128.

[63] Bleich (*supra*, n. 45), 370.

[64] I. Jakobovits, "Jewish Views on Abortion," in David T. Smith, ed., *Abortion and the Law* (Cleveland, 1967).

formed fetus is murder to Philo.[65] But this notion originates in Plato's *Phaedo*, not in Semitic writings. Victor Aptowitzer has shown that Philo represents a Greek tradition while Josephus, who contends that fetal death is punished by a fine,[66] represents the Palestinian tradition. As a Platonist, Philo associated fetal assumption of human form with the moment of ensoulment, when the mind or idea of being human enters the body and invests it with its humanity.[67] The reverence for fetal life expressed by these Orthodox thinkers is grounded in sources outside of the Jewish canonical tradition, as Platonic personhood is not Biblical personhood.

Like Lichtenstein, who claims that "aborting an existing fetus is unequivocally prohibited" and "disturbing from a moral point of view,"[68] Novak[69] also argues that a liberal view of abortion is immoral. He presumes, following the restrictive Tosafist view, that Noachide morality would not be more rigorous than the Sinaitic dispensation. But as we have shown, Jewish law regarding Jews is of a

[65] *De Specialibus Legibus* II 19, cited in Jakobovits, "Jewish Views," 179. The doctrine of Soul, or *psyche*, is actually Platonic, and not Semitic!

[66] Josephus, *Antiquities* VI, ii, 24. For a somewhat different view, see *Contra Apion* II:24, and discussion in Jakobovits, *Jewish Medical Ethics* (*supra*, n. 54), 180. Now, Jakobovits concedes that his position, like that of R. Yair Bacharach, *Responsa Havvot Yair*, 31, who prohibits the aborting of an illegitimate fetus on moral grounds, is based on policy. Were R. Bacharach not to have ruled restrictively, the way would have been opened "to immorality and debauchery" (*ibid.*, 180).

[67] Victor Aptowitzer, "Observations on the Criminal Law of the Jews," 15 *Jewish Quarterly Review* (1924-25) 77.

[68] Aharon Lichtenstein, "Abortion" (*supra*, n. 45), 3, and see his explanation for the difference between the secular humanist and what he takes to be the halakhic position, *ibid.*, 11-12. Lichtenstein dismisses the possibility that the imputed sin of fetal destruction is only Rabbinic, for he contends that it must be a Biblical offense. See also Aharon Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of Halakha," in Martin P. Golding, ed., *Jewish Law and Legal Theory* (New York, 1993), 155-181. An authority no less than Nahmanides (R. Moses b. Nahman) claims that the Biblical mandate "you shall be holy" (*Lev.* 19:2) prohibits one from being *naval bireshut haTorah*, i.e., a scoundrel who is nevertheless behaving within the parameters of halakhic statute.

[69] Novak (*supra*, n. 45), 117. Novak cites with approval the restrictive ruling of R. Yair Bacharach, referred to above (n. 66). In point of fact, Bacharach's restrictive ruling is grounded in social policy, his motive being that Gentiles should not view Jews as morally undisciplined.

different genre than Jewish law regarding Noachides. Furthermore, the assumption that Jewish law is necessarily more rigorous than other legal orders is an ideological assumption, because it defines Jewish law on the basis of extrasystemic, non-Jewish considerations. Maimonides rejects the "sage" who considers a confession that Muhammad is an "agent (*rasul*) of Allah" to be idolatry, because a Christian would rather die than make such a statement, and a Jew ought not to be more lenient than a non-Jew, with the sarcastic retort "Is there no Torah in Israel?!"[70] by which Jewish normative value is to be defined and applied.

Many contemporary Orthodox halakhists are so committed to the sanctity of personhood that they extend the category of personhood to fetal life, which, according to the canonical halakhic sources, is only accorded the status of property, as argued above. Novak's moralistic rejection of a lenient approach to abortion is grounded in a natural law theological ethic, which informs his reading of the legal sources.[71] Lichtenstein's opposition to abortion is also grounded in a theological intuition, given his doctrine that there may indeed be a normative ethic independent of Jewish law.[72]

[70] *Iggeret ha-Shemad* (Jerusalem, 1987), 33.

[71] See his *The Theology of Nahmanides Systematically Presented* (Atlanta GA, 1992), 3, where he demonstrates that for Nahmanides, one may be a scoundrel while obeying the Torah. See Nahmanides to *Lev.* 19:2 and *Deut.* 6:18, where religious intuition is invested with the power to approximate Divine intention outside of, but not contradictory to, normative statute.

[72] See his "Does Jewish Tradition..." (*supra*, n. 68), 155-57. For a critique of this view, see Jose Faur, *In the Shadow of History* (Albany NY, 1991), 12. In point of fact, every legal order has its implied value system or ethic. That God's moral will could be intuited from nature has little precedent in Talmudic law. In spite of the range of commentaries on the subject, Lichtenstein contends that "aborting an existing fetus is unequivocally prohibited" ("Abortion" [*supra*, n. 45], 3). The view that there is no explicit restriction on abortion must be rejected, argues Lichtenstein, "not only because it is disturbing from a moral point of view, but because it *seems* to contradict an explicit halakhah [*BT Sanh.* 57b and Maimonides, *MT Hil. Melakhim* 9:4]" (my emphasis). Lichtenstein concedes that there is a moral component regarding this issue, and he assumes that his reading of *BT Sanh.* 57b is necessary and sufficient to define the status of the legal fetus. He proceeds to outline possible prohibitions which, to his mind, apply in restricting abortions: "Though a Jew who kills a fetus is not punished by the judicial system as a murderer, he has nevertheless violated the prohibition of murder. It is like a case of one who has killed a *treifa* (an individual with a fatal

Rabbi Isser Yehudah Unterman contends that "it appears obvious from the point of *sevara* [legal conjecture] that it is Biblically forbidden to kill it [= the fetus]."[73] Legal conjecture and Biblical statute are, for Jewish law, very different sources of law. Rabbi Moshe Feinstein forcefully dismisses the lenient opinions regarding abortion,[74] ultimately on the grounds that the consequences of these positions are immoral and on the assumption that they must be grounded on a faulty and inauthentic textual tradition.[75] Now, R. Feinstein does not demonstrate why these sources are faulty, only affirming his intuition that abortion is sinful, and that he takes the pains to say so because of the license of the age.[76]

wound or defect); he is not liable for capital punishment though he has violated the prohibition of murder" (*ibid.*, 4). This argument is circular, because Lichtenstein merely assumes his conclusion in his definition. He then suggests that abortion is "ancillary to homicide (*senif retzihah*)" and that abortion would render the coital act that led to gestation to be a retroactive wasting of seed. A major methodological problem with the analytic Brisker "Torah" is its invention of artificial categories which disfigure the halakhic statute. Talmudic law does not recognize the category of *senif retzihah*, and the mere articulation of a concept does not invest that with legal force. And if the coital act that led to the gestation of the fetus about to be aborted was undertaken in a licit fashion, it was not *le-vatalah*, an act of wasteful and therefore sinful ejaculation. When Lichtenstein claims that the commandment of saving a life implies that one is commanded to preserve the fetus, he assumes, without warrant, that the fetus is a person who must, under all conditions, be saved. If this were indeed the case, the condemned woman's shame would not be warrant for an abortion. Conjectured concepts that conflict with a philological reading of the statute must be dismissed. See n. 73 below.

73 *Be-Din piquah nefesh shel ovar* (Regarding the Law of Saving the Life of a Fetus), *No'am* VI, 52, and the summary of Bleich (*supra*, n. 45), 338-339.

74 R. Moshe Feinstein, "*Be-Din Harigat Ovar*," in *R. Yehezkel Abramsky Memorial Volume* (Jerusalem, 1978), and *Iggerot Moshe, Hoshen Mishpat* II, no. 69.

75 I.e., the lenient Tosafist opinion in *BT Nid.* 44a (*Iggerot Moshe, ibid.*, p. 295). See however, R. Moshe Hirschler, who argues that the two Tosafist traditions are not necessarily contradictory, "*Bedin ovarim ee havei bi-chlal nefesh*" (Does the Fetus Indeed have the Legal Status of a Person), in *Abramsky Memorial Vol.*, 338. Even Jakobovits, who opposes all but therapeutic abortions, like Feinstein, concedes that the dispensation to destroy a fetus does not necessarily contradict the dispensation which permits the violation of the Sabbath to save a fetus (*Jewish Medical Ethics,* 183).

76 *Ibid.*, 300. See, however R. Eliezer Waldenberg, *Tzitz Eliezer* 14:100, and Daniel Sinclair, "Law and Morality in Halakhic Bioethics" in Bernard S. Jackson, ed., *Jewish Law Association Studies* (Atlanta GA, 1986), 2:167-168.

Thus, even though latter-day Orthodox sages deviate from a philological reading of Judaism's canonical legal texts with regard to fetal status, their deviation represents an inner Israelite theological/ethical development. Rather than view the fetus as property in a world in which human life has become debased, they assign fetal life an enhanced value, over and above the Talmudic precedent, because person and property are, as demonstrated by Greenberg, two radically distinct categories.

According to Rabbinic legal thought, any and all statutes of *Halakhah* may be violated in order to save a human life, save the violations of idolatry, sexual immorality and murder (*BT Sanh.* 74a). If one becomes an idolater, one allows oneself to become a manipulated object of another by adopting an ideology whereby one's personhood is violated.[77] Willful murder represents one individual treating the other as an object, as though one's own subjectivity is superior to the other's. And in violations of sexual morality, the other is treated as an object of pleasure, not as a subject with whom one bonds. The Biblical obligation to "love one's fellow as oneself" (*Lev.* 19:18) is ultimately a moral exhortation to view the "other" amongst one's Israelite clans-people as a "subject," a *persona* rather than an object of property, and the internalization of this moral sensibility by humankind would result in a radically improved human society.

[77] Maimonides, *MT Hil. Avodah Zarah* 1:2.

Penal Law, Evidence, Responsibility

JEWISH INFORMERS IN THE OTTOMAN EMPIRE IN THE 16th-17th CENTURIES

*Leah Bornstein-Makovetsky**

The vast responsa literature written in the Ottoman Empire during the 16th and 17th centuries conveys much information about the great extent of informing and betrayal in Jewish society, affecting both property and people, for such purposes as personal gain, self-protection, survival or revenge. Individuals informed on their community or its leadership, particularly in relation to charges that the community was avoiding payment of a true tax to the authorities or that the Jewish courts were overstepping their legal powers.[1]

* Bar-Ilan University, Ramat-Gan.

1 For example: tax evaders in Arta in the first half of the 16th century informed the authorities that the community was avoiding state taxes. See Benjamin b. Mattathias, *Resp. Binyamin Ze'ev*, nos. 249, 286, 294-295; L. Bornstein-Makovetsky, "Life and Society in the Community of Arta in the Sixteenth Century" (Heb.), *Pe'amim* 45 (1991) 142. On informing about sages see J. Hacker, "Jewish Autonomy in the Ottoman Empire: Its Scope and Limits" (Heb.), in Sh. Almog, I. Bartal *et al.* (eds.), *Transition and Change in Modern Jewish History: Essays Presented in Honor of Shmuel Ettinger* (Jerusalem, 1987), 364.
In a 1664 document, Hayyim Benveniste, who officiated as one of the two rabbis of Izmir, complained that since his arrival in Izmir he had been hounded by a local Jew who informed against him, "and he has in general informed on the whole community of the city." D. Tamar, *Studies in the History of the Jewish People in Eretz Israel and in the Orient* (Jerusalem, 1982), 119-120 (Heb.); Y. Barnai, "Rabbi Haim Benveniste and the Rabbinate of Izmir in His Time" (Heb.), in M. Rosen (ed.), *The Days of the Crescent. Chapters in the History of the Jews in the Ottoman Empire* (Tel Aviv, 1996), 169. Other relevant sources

In some cases Jewish offenders who had violated Ottoman criminal law were handed over to the Muslim courts or Ottoman authorities. These cases involved a certain percentage, apparently not large, of serious crimes, such as coin-clipping and prostitution, concerning which the community felt that the offenders could not be concealed or that the criminal in question was dangerous and had to be dealt with by the Ottoman legal authorities.

Jewish society fought against manifestations of informing and betrayal by individuals through communal ordinances, which condemned informers, prescribed such punishments as excommunication, banishment and ostracism, and permitted the community to harass informers and even surrender them to the authorities.[2]

The responsa literature stresses the danger that faced both those betrayed and the Jewish public at large as a consequence of informing by individuals, especially in criminal cases involving relatively minor offenses, mainly on the grounds that "The nations do not have mercy on the Jews."[3] Some decisors mention that in such instances the Jews punished informers, sometimes by flogging.[4] In most sources dealing with informers the discussion centers on remedial measures and compensation for the victims. The rabbis were well aware that it was to the advantage of the Jewish community to conceal most offenses against the law, in order to prevent harm both to the individual and to the community, and to avert damage to the standing of the Jewish community in the eyes of the authorities. Communal leaders were empowered by the community to negotiate

are: E. Ben Zimra, "Informing and Betrayal in Jewish Life in the Time of the *Aharonim*" (Heb.), in *Dr. Aviad-Wolsfberg Memorial Volume* (Jerusalem, 1986), 113-114, 117-120.

2 See, e.g., the communal regulations of Sofia at the end of the 16th century: Solomon Hakohen, *Resp. Maharshakh,* IV (Salonika, 1652), no. 29; the 16th-century regulations of Safed: Moses Mitrani, *Resp. Mabit,* III (Venice, 1630), no. 207; the communal regulation of Siderokapisi (1632), canceled on the day of issue: *Resp. Solomon leBeit haLevi* (Salonika 1652), *Yore De'ah*, no. 7. The communal regulations of Arta in the 16th century forbade the Jews of that city to enter the homes of the Governor's officials unless invited to do so; Bornstein-Makovetsky, "Life and Society" (*supra*, n. 1), 142.

3 *Resp. Maharshakh,* IV, no. 29.

4 Yom Tov Zahalon, *Resp. Maharitaz* (Venice, 1694), no. 255.

with the authorities; they generally knew how to safeguard communal secrets and interests.[5]

Concern for the welfare of the community was especially acute in times of crisis, e.g., during the rapid spread of the Shabbatean movement in the 17th century, a period of rampant informing.[6] This situation is aptly reflected in the responsa literature, as well as in sermons and ethical writings of the period, which point to a decline in personal ethics and religion in Jewish society, though the extent of the decline is difficult to gauge at present. In most cases the most serious punishments handed out to informers by the communal rabbis were fines, excommunication or banishment.[7]

One very serious case occurred in Izmir (Smyrna) in 1664, involving R. Hayyim Benveniste, then one of the two rabbis of Izmir. Benveniste, referring to one of his persecutors, who had also informed on the whole community, writes that he did not want to sentence him to death but sentenced him to be "cast to the galleys," i.e., to row in the boats of the Ottoman navy – this punishment, considered almost as severe as death, was acceptable in the Ottoman legal code from the time of Suleiman I "the Magnificent" (1520-1566) until the 18th century.[8]

5 On these leaders, the *parnasim*, see L. Bornstein, "The Jewish Communal Leadership in the Near East from the End of the 15th Century to the End of the 18th Century," dissertation, Bar-Ilan University (Ramat-Gan, 1978), 215-239, 570-596 (Heb.).

6 See below, text at nn. 37-40.

7 See Yom Tov Zahalon, *Resp. Maharitaz Hadashot* (Jerusalem, 1980), I, no. 26 (b).

8 See above, n. 1. This punishment was known as *kurek* in Turkish, in Jewish sources: "sent to the galleys." It was apparently used in particular when the Ottoman navy was in need of more hands. Among the offenses liable for such punishment were sexual and other serious offenses for which the *Shari'a/Kanon* had prescribed the death penalty; U. Heyd, *Studies in Old Criminal Law, ed.* V. L. Menage (Oxford, 1973), 305-307. Hebrew sources occasionally mention banishment of political or criminal offenders to Rhodes. Most probably, some of these were sentenced to be oarsmen in the Ottoman navy, which had a base on Rhodes; others lived out their lives on the island or until the Sultan ordered their banishment rescinded. See Joshua Benveniste, *Resp. Sha'ar Yehoshua, Hoshen Mishpat*, ed. Ezra Bar Shalom (Jerusalem, 1982), no. 27; M. Benayahu, "The Court Jew Rabbi Moshe Benveniste and R. Judah Zarko's Poem about His Expulsion to Rhodes" (Heb.), *Sefunot* 14 (1981) 125-183; Bornstein,

However, R. Jacob Culi, who lived in Constantinople during the years 1714-1732, did not rule out corporal punishment or even the death penalty in serious cases. He writes:

> Even though nowadays we are unable to execute people, as the Sanhedrin did when the Temple existed, nonetheless, we have the right to slay an informer before he goes and informs. We caution him not to go and inform, but if he persists and is brazen and states that he is unmoved by all, it is a meritorious act to slay him. Whoever slays him first is considered to have done something praiseworthy. Whoever can cut out his tongue or poke out his eyes, so that he should not be able to inform, should do so. If there is not enough time, he should be slain outright. Though it is the rule that evidence is heard only in the presence of the accused, in the case of an informer, evidence is heard even in his absence. The witnesses' testimonies need not be examined minutely, even though they do not tally in all details. Even if there is no time to caution him, this is of no consequence, for if one is nevertheless cautious, harm may accrue to the Jews.[9]

Clearly, such severe treatment was applicable only to a person liable to cause great damage to the Jewish community. Culi in fact goes on to say that a person involved in forgery may also be surrendered to the authorities.[10]

It seems reasonable to assume that during the 16th and 17th centuries Jews secretly killed dangerous informers in the Ottoman Empire as they did later, in the 18th century, according to evidence that has reached us from Salonika.[11] Execution of informers was already common among the Jews of Christian Spain, and their descendants did the same in the Ottoman Empire after the Expulsion from Spain.[12]

"Leadership" (*supra,* n. 5), 75-82. Offenders were also exiled to Lepanto, Nauplia, Kavala and other cities in Greece; Heyd, *op. cit.,* 306.

9 Jacob Culi, *Me'am Lo'ez* (Jerusalem, 1967), *Gen.* 1:18.

10 See n. 9.

11 Abraham Gatigno, *Resp. Zeror haKesef* (Salonika, 1756), *Hoshen Mishpat,* no. 12; I. S. Emmanuel, "History of the Jews of Salonika" (Heb.), in D. Rekanati (ed.), *Zikhron Saloniki* (Tel Aviv, 1972), 66-67. See also Jacob Culi, cited above.

12 On the prevalence of the practice in Christian Spain see Maimonides, *MT Hil.*

One aspect of our topic is the surrender of Jews guilty of violating certain Ottoman laws to the civil authorities, by individuals and communities, during the 16th and 17th centuries. In most cases such action placed the Jewish criminal in great danger, because Ottoman law demanded severe punishment: flogging, amputation of limbs, compulsory enlistment as oarsmen in the Ottoman fleet and even execution. Decisors dealing with such cases frequently cited the Talmudic dictum: "The law of the kingdom is binding," which was unreservedly accepted as *Halakhah* in both Talmudic and post-Talmudic periods. The implication of this principle is that the *Halakhah* accords legal force to certain rulings of non-Jewish origin.[13]

Though decisors did at times ignore this principle, it is clear from the tenor of their statements that, as a general rule, the law of the kingdom was to be observed. Indeed, with regard to a few Ottoman laws the rabbis, as we have intimated, permitted informing on Jewish offenders and surrendering their property and persons to the local authorities, the central government in Istanbul or Muslim courts. Sh. Shilo has pointed out that a significant proportion of 16th-century Halakhists in the Ottoman Empire restricted the applicability of the principle to obligations to the king, land ownership and royal benefits. Some decisors, including Moses Alsheikh and Hayyim Benveniste, recognized the state's right to put to death those guilty of certain crimes as "Martyrs" (Heb. *harugei malkhut*).[14]

Throughout the whole extent of the Ottoman Empire, the Jews and their religious leaders considered the kingdom a sovereign entity, whose laws were to be observed. Nevertheless, in reality there were clearly laws which the majority of citizens did not observe; indeed,

Hovel uMazik 8:11: "And it is a frequent occurrence in the cities of the West either to slay informers who must be feared to make denunciations, or to deliver them into the hands of the non-Jews [i.e., non-Jewish courts] to have them slain, flogged, or imprisoned as their guilt requires." See also I. Baer, *The History of the Jews in Christian Spain* (Tel Aviv, 1959), 138-139, 168-169, 265-268 (Heb.); Y. Assis, "Crime and Violence in Jewish Society in Spain" (Heb.), *Zion* 50 (1985) 221-240; E. Ben-Zimra, "Informing and Betrayal in the Teachings of the Sages of Sepharad" (Heb.), *Rabbi I. Nissim Memorial Volume, Halakhah and Minhag, Jewish Law* (Jerusalem, 1985), 297-321.

13 N. Rakover, "*Dina deMalkhuta Dina*" (Heb.), *Sinai* 69 (1971) 246.

14 Sh. Shilo, *Dina deMalkhuta Dina* (Jerusalem, 1975), 144 (Heb.).

the authorities themselves were generally not over-zealous in this respect. From the cases discussed it is apparent that, according to most decisors, only persons guilty of serious crimes posing a threat to the Jewish community at large should be surrendered to the government. In other words, as in other parts of the Jewish world, the principle "The law of the kingdom is binding" was applied mainly to laws whose infringement by a few or many Jews could wreak the wrath of the authorities not only on the offenders themselves but on the entire Jewish community. It was considered legitimate to inform against persons guilty of the following offenses: adultery, prostitution, return to Judaism after conversion to Islam, dealing in forged currency, coin-clipping and rebellion against the kingdom. A few illustrative cases will now be considered.

Informing on Prostitution

The Ottoman authorities demanded that all citizens adhere strictly to the laws of morality. Especially severe punishment was meted out to adulterers in the Muslim penal code. Adultery was regarded as a criminal offense, and the secular legislation (*Kanon Na'amah*) of the Ottoman Empire administered a variety of punishments, principally fines, but the religious judicial system prescribed the death penalty. The stoning of adulterers is mentioned in many *fetwas*.[15]

The Jewish community was required to conform with the law and surrender to the authorities Jews, both male and female, who had committed adultery or prostitution. Decisors wrestled with the question of whether to adhere to such demands of the government. Indeed, a significant portion of offenders could be hidden from the authorities, since the Jewish community constituted a closed society, resident in districts populated mainly by Jews.

However, informing on adultery was not uncommon; as knowl-

[15] Heyd, *Studies* (*supra*, n. 8), 41, 48, 52, 95-103, 109, 134, 143, 146, 181, 240, 246, 263, 272, 277. The system was certainly stricter in cases of relations between Jewish men and Muslim women. This may be deduced from events in one of the Imperial cities in 1647, when the Turks took vengeance on Jews who had cohabited with Muslim women and the matter caused fear and anxiety in the city's Jewish community in general. See Aaron Hakohen Perahiah, *Resp. Parah Mateh Aharon* (Amsterdam, 1803), I, no. 1.

edge of such offenses reached the ears of non-Jewish neighbors it could not be concealed, and it was preferable that the community itself surrender the offenders to the authorities. For example, a 17th-century responsum mentions a Jewess from Belgrade who was suspected of prostitution and was removed from the city "because of danger from the Gentiles," i.e. fear that the authorities require her to be brought to trial.[16]

In another case, from the 18th century, the lay leaders of a certain community (most probably Izmir) handed over a Jewish adulteress to the Ottoman governor because news of the case had become public. The governor sent a policeman to seize and imprison her and also to arrest the adulterer. After the woman had been incarcerated, there was a rumor that the Governor intended to expel both offenders from the city – a step welcomed by the *parnasim*.[17]

In various cases, requests were addressed to the Muslim courts and authorities, as a last resort, to impose decisions handed down by Jewish courts.[18] The central question was whether it was permissible to surrender a Jew to the authorities when corporal punishment or the death penalty awaited him or her as a result. In addition, there was a danger that the offenders might convert to Islam in order to escape severe punishment – a danger threatening any Jew handed over to the Muslim courts. Thus, R. Judah Hallewa (Safed, 1545), wrote: "If, as a result of surrendering the offender to the gentiles, he will revoke his faith, then the outcome is defilement in place of purity and he will inform on the rest of the Jews."[19]

It is worthy of mention, however, that, relatively little evidence exists of the surrender of adulterers and other such offenders through informers or the religious courts. It is apparent that the latter, as well as the communal rabbis, opposed such steps being taken if there was

[16] Samuel Pinto, *Responsa*, Ms Moscow-Ginzberg 398, fol. 17a.

[17] Joseph Hazan, *Resp. Hikrei Lev*, Latter Edition, I (Salonika, 1853), *Even haEzer*, no. 3.

[18] On enforcing obedience to religious laws in the Jewish community with the assistance of the Ottoman authorities see Bornstein, "Leadership" (*supra*, n. 5), 173-174, 209. For the measure of judicial autonomy granted to the Jewish religious courts see Hacker, "Jewish Autonomy" (*supra*, n. 1), 349-388.

[19] M. Idel, "Rabbi Yehudah Hallewa and his *Zafenat Pa'aneah*" (Heb.), *Shalem* 4 (1984) 123.

a risk that the offenders might be hanged.[20] Only in cases of unmitigated adultery, when the offender did not mend his ways or it had become known to the non-Jews, did the community hand over the offender to the authorities; and even then, this was done mainly when it was clear that he or she would not be executed but given a relatively light sentence, such as a fine, or even a stretch of time as an oarsman in the Ottoman fleet.[21] Thus, we know of a case in the first half of the 17th century, when a betrothed virgin – regarded as married according to local custom – was raped; the community leaders handed the rapist over to the authorities, who sentenced him to the galleys.[22]

In sum, we can conclude that rabbis officiating in the Ottoman Empire applied the principle of "The law of the kingdom is binding" to the surrender of adulterers only when failure to comply threatened the entire community.

Informing on Apostates Returning to Judaism

Until the second half of the 17th century, trials of non-Muslim subjects were conducted in certain cases before the *divan-i-humayun* – the most important court in the Ottoman Empire, presided over by the Sultan. At times these cases were heard before another court (*divan*), presided over by the Grand Vizier. The privilege of appearing before these courts was granted to Jewish subjects who had been wrongly accused of blood libel, disrespect to Islam, and return to Judaism after having converted to Islam.[23]

Islamic law prescribed the death penalty for converts to Islam who returned to their previous faith. Indeed, return to Judaism on the part of apostates was uncommon. A relatively small number of apostates returned to Judaism covertly, and the majority of those that who did

[20] Moshe Amarillio, *Resp. Devar Moshe*, II (Salonika, 1742), nos. 1, 2.

[21] See, e.g., the punishment by the Muslim courts of three betrothed women in Arta who had been made pregnant by their fiancés; they were immigrants from Italy who had settled in Arta during the twenties and thirties of the sixteenth century. *Resp. Binyamin Ze'ev*, no. 303; Bornstein-Makovetsky, "Life and Society" (*supra*, n. 1), 138. On punishment by sending to the galleys see above and n. 8.

[22] Me'ir De Boton, *Responsa* (Izmir, 1740), no. 52.

[23] Heyd, *Studies* (*supra*, n. 5), 223-228, 262.

so changed their places of residence (within the Ottoman Empire) to escape Muslim prosecution.[24] The community greatly feared informing about such apostates. There were instances of Jews who, in order to settle scores with other Jews, alleged they had returned to Judaism after converting and thereby put their lives at risk.[25]

In addition, there are scattered reports of communal leaders who informed on apostates who had returned to Judaism, out of fear that the authorities would exact revenge against the whole community, accusing it that it had facilitated the apostates' return to Judaism. One such case occurred in Chios around the beginning of the 18th century, when the communal leaders handed over to the authorities a young apostate who had returned to Judaism, fearing that if the youth were discovered the community would be punished. The rabbi who decided the case, Elijah Israel of Rhodes, justified the action, on the grounds that the apostate had insisted on returning to his home, despite the warning of the island communities. The communal leaders were apprehensive lest the boy be recognized by Muslim merchants, who would most certainly charge the community with enabling him to return to Judaism. The rabbi therefore ruled that the communities were right to act first and surrender the fugitive to the authorities before he reached the community.[26]

Clearly, then, the rabbis did not rely on one cut-and-dried principle in regard to the law against apostates returning to Judaism. De-

[24] See L. Bornstein-Makovetsky, "Conversion to Islam in the Ottoman Empire Communities and Conversion to Christianity in Italy and Ashkenaz in the 16th and 17th Centuries" (Heb.), *Pe'amim* 57 (1994) 29-47; idem, "Conversion to Islam and Christianity in Jewish Society in the Ottoman Empire during the 16th-18th Centuries" (Heb.), *Misgav Yerushalayim Publications* (forthcoming).

[25] See, e.g., Abraham di Buton, *Resp. Lehem Rav* (Izmir, 1740), no. 114; Hayyim Shabbetai, *Resp. Torat Hayyim*, I (Salonika, 1715), no. 25. In 1664, R. Hayyim Benveniste refers to a Jew in Izmir who endangered his life by accusing him that he had converted to Islam; see D. Tamar, "The Dispute Between R. Hayyim Benveniste and R. Aaron Lapapa" (Heb.), *Tarbiz* 41 (1972) 411-423.

[26] Elijah Israel, *Resp. Uggat Eliyahu* (Leghorn, 1830), no. 22. There is also a well-known case of an apostatized boy of Jerusalem in the 17th century, whom the community had to surrender to the Muslims; see M. Rosen, "The Incident of the Converted Boy – A Chapter in the History of the Jews in Seventeenth-Century Jerusalem" (Heb.), *Cathedra* 14 (1980) 65-80.

cisions were made according to the danger with which the returnee endangered the entire local Jewish community.

Forged Currency

The Ottoman authorities took a most stringent attitude to coin-clipping and forgery, regarding them as crimes against the state. *Fetwas* and the responsa literature attest to the execution of coin-clippers and forgers, not to speak of lighter punishments, such as flogging, amputation of limbs and long terms of imprisonment. The sultans issued *firmans* (edicts) against forgery and coin-clipping in 1564, 1572 and 1582. The courts accepted any testimony, whether from Jew or Christian, against Jews and Christians in this connection, and hence informing about coin-clipping and forgery was widespread. The punishment was administrative (*siyaset*), in conformity with the *Kanon*, which prescribed heavy punishment, to be administered by the sultan's administrative staff. Amputation of hands or service in the galleys were considered appropriate punishments for these offenses, and they could not be commuted to a fine.[27]

During the last third of the 15th century and later, Jews were increasingly involved in everything connected with the issue of imperial coins and money-changing,[28] and they were under constant surveillance on suspicion of coin-clipping and forgery. Communal rabbis, including R. Samuel de Medina (RaShDaM) of Salonika, treated the law prohibiting forgery of currency and coin-clipping in accord-

[27] Heyd, *Studies* (*supra*, n. 8), 81, 121, 196-198, 261 n. 85, 265, 270, 305; Samuel de Medina, *Resp. Rashdam, Hoshen Mishpat*, no. 364.

[28] H. Jacobsohn, *Jews on the Caravan Routes and in the Silver Mines of Macedonia. The Jewish Communities of Serres and Siderokapisi in the 15th and 16th Centuries* (Tel Aviv, 1984), 50-53, 63-75, 80-95 (Heb.); M. Rosen, "The Corvee of Operating the Mines in Siderokapisi and Its Impact on the Jewish Society of Salonika in the Sixteenth Century" (Heb.), in Rosen (ed.), *The Days of the Crescent*, 13-38 (Heb.); M. A. Epstein, *The Ottoman Jewish Communities and their Role in the Fifteenth and Sixteenth Centuries* (Freiburg, 1980), 107 ff.; M. Winter, "The Relations of Egyptian Jews with the Authorities and with the Non-Jewish Society," in J. M. Landau (ed.), *The Jews in Ottoman Egypt (1517-1914)* (Jerusalem, 1988), 381 ff.; E. Bashan, "Economic Life from the 16th to the 18th Century" (Heb.), in Landau (ed.), *op. cit.*, 93 ff.; A. Cohen, *The Jewish Community of Jerusalem in the 16th Century* (Jerusalem, 1982), 183 (Heb.). These articles contain extensive references on the topic.

ance with "The law of the kingdom is binding." Some communities enacted regulations concerning these offenses, for fear of endangering the Jews throughout the Empire.[29]

One such regulation was enacted by the Jewish community of Siderokapisi (Sidrokastron) in the 16th century, forbidding trading in forged currency, i.e., money of untrue weight, and indeed any use of such currency. The matter was regarded as a matter of life and death: any offender was to be excommunicated, his blood forfeit and his property confiscated. Anyone aware that such a crime had been committed was required to report it to the head of the community and two council members. The community appointed an official with the task of supervising its implementation.

On one occasion, a non-Jew came with clipped money and claimed before Reuben that he had obtained it from Simeon. Reuben seized the money by force and brought it to the Muslim court, headed by the Qadi, who had been appointed specifically to the post of *nazir* (= superintendent). The court was the meeting place for important city officials, including the Inspector of the Mint, whose task was to supervise the quality of silver bars, and the local police chief. Reuben loudly announced that Simeon was producing such currency daily and had indeed minted the money in his (Reuben's) possession the night before. Reuben, in reply to the community's query as to why he had betrayed Simeon, justified his action on the grounds that he was complying with the regulation. The community's response was that the matter should be submitted to the communal leader and council members. The question raised was: "Is Reuben to be regarded as a betrayer and informer who has surrendered his fellowman to execution and placed the mark of sin on all the community, and is he to lose his property on a number of counts...?" It became clear that there was no proof that the coins had been minted only recently. In his responsum, de Medina stressed the obligation to keep the Sultan's laws and to fear and fulfill his commands, "just as he is

[29] *Resp. Rashdam, Yoreh De'ah*, no. 124. Evidence of the established community's fear lest Jews deal in forged currency and the measures they employed comes from Bursa, in the first half of the 16th century: Tam ibn Yahya, *Resp. Ohalei Tam* (Venice, 1622), nos. 140, 186; Jacob Beirav, *Responsa* (Jerusalem, 1958), no. 3.

commanded to fulfill the commandments and decrees of the king of the universe." Forgers, he pointed out, robbed the public and caused desecration of the Divine Name among the nations because they were defying the Sultan's commands. He also raised the possibility of regarding the informer in this case as a *rodef* (lit.: "pursuer," i.e., potential murderer), since he was endangering others; indeed, Reuben had violated the regulation by willfully informing, "and there is no higher degree of informing."[30]

The same regulation is mentioned in a responsum of R. Solomon Hakohen (MaHaRSHaKH), who was queried concerning a father and son who engaged in coin-clipping. The members of the community, including the two suspects, had been sworn to refrain from such actions and, in fact, swore they had never engaged in them. However, witnesses testified that the father and son were still doing so and had sworn falsely. The *Bet Din* summoned them, declared that they were "destroying" the city and excommunicated them. R. Solomon wrote in his responsum that he would have preferred not to have been asked "about the sentence of a person performing such despicable and ugly activity in the eyes of Providence and god-fearing men, whose punishment I deem to be so severe that if his fate were in my hands I would rend him like a fish..." They were therefore to be banned and all social contact with them cut off until they repented. R. Solomon, noting that the criminal occupation of coin-clipping had spread and there was fear of retaliation by the authorities, was clearly of the opinion that the law should be meticulously observed in the context of the "law of the kingdom is binding," though he did not explicitly mention the dictum.[31]

Further evidence from the years 1566 and 1567 describes a certain Jew who informed against another Jew, with whom he was in dispute concerning the forgery of currency. The case was transferred to the jurisdiction of a Muslim court. R. Samuel de Medina sentenced the informer to three days of excommunication and demanded that he publicly beg forgiveness from the person against whom he had in-

[30] *Resp. Rashdam, loc. cit.* On the management and supervision of the mines at Siderokapisi, see also note 28.

[31] *Resp. Maharshakh*, II, no. 31.

formed.[32] A similar case was considered by R. Samuel Kalai, rabbi of Arta (Greece), who characterized the informer as a spiller of blood and *rodef*; however, he added, once he had informed, he should not be executed, but should make good the damage he had caused. Much harm could accrue to the Jewish community in general because of informing on forgery, he pointed out, and many Jews had been harmed by this libel in the past. Accordingly, he threatened such offenders with excommunication and confiscation of their property.[33]

The hardening attitude of Jewish religious courts toward the phenomenon may be gauged from a case that occurred in Istanbul in September 1624. A certain resident of the city took money from a Jew, threatening him that he knew he was in possession of forged Ottoman money. R. Yehiel Bassan of Istanbul noted there were many precedents of people charged before the courts of possessing forged money and found innocent after they had shown who had given the money. However, he wrote, a person who dealt in counterfeit money was to be considered "a pursuer of the Jewish people"; in this case, Bassan believed the informer's plea that he had informed out of concern for the good of the public, citing Maimonides, "that it is a meritorious act to hand him over as he is harming the public." In this instance the informer's argument was accepted and he was not even fined. As it turns out, there was an ordinance in Istanbul that dealers in forged currency were themselves considered informers, "who inform on the whole of Israel through their evil deeds, and it is permissible and indeed meritorious to hand them over to the royal authorities."[34] A similar ruling was handed down by R. Joseph Mitrani (MaHaRIT), Chief Rabbi of Istanbul.[35]

The strict attitude of the rabbis in this connection is also discernible from the previously cited commentary of Jacob Culi. He wrote, in the same passage, that it was permissible to surrender forgers to

[32] *Resp. Rashdam, Even haEzer*, no. 122.

[33] Samuel Kalai, *Resp. Mishpetei Shemuel* (Venice, 1599), no. 55.

[34] Yehiel Bassan, *Responsa* (Constantinople, 1737), no. 84.

[35] Joseph Mitrani, *Responsa*, II (Fürth, 1768), *Hoshen Mishpat*, no. 90. On the punishment of several Jews from Leghorn in Izmir by three communal officials on suspicion of dealing with forged currency, in the 17th century, see Moses Benveniste, *Resp. Penei Moshe,* III (Constantinople, 1719), no. 58.

the authorities, since they were to be considered as informers and their offense, once known to the government, might severely harm the Jewish community. First, he cautioned, the offender should be warned; but if he persisted in his actions, it was permissible to surrender him to the authorities, declaring that he alone – and not the Jewish community in general – was engaging in forgery.[36]

Spreading Rumors of Jewish Disloyalty to the Sultan

The Jews were regarded by the Ottoman authorities as very loyal citizens, in contrast to the Christians, whose loyalty was suspect.[37] Slander about disloyal Jews, particularly if several members of a community were suspected, could therefore tip the scales in the government's attitude toward the Jews. This was the case, for example, in Izmir around 1660, when the opponents of R. Hayyim Benveniste not only attacked his home and physically assaulted the residents, but went on the Sabbath to the Qadi and informed against him, leading to his imprisonment. After Benveniste had been released, his opponents brought up a new charge, claiming that in one of the six communities of Izmir it was customary to bless not the Sultan but the "Seniorina" (as the Kingdom of Venice was called). A further accusation was that Immanuel Na'amias, of the Portuguese community in Izmir, collected the poll tax not on behalf of the Sultan but for the Spanish king. After Na'amias had been redeemed from the "non-Jews," he traveled to Istanbul, where he procured a decree from the Sultan that the whole Jewish population should reimburse the expenses he had incurred during the dispute. R. David Estrosa, who ruled this case, wrote that if Na'amias had been found guilty on the basis of the slander that he was a "rebel against the state," he would have been sentenced to death according to the law. Luckily, he had successfully bribed the authorities and hence the city's Jewish communities had to reimburse him fully. He severely castigated the informers, pointing out that "all those who cause their fellowmen to

[36] See above, n. 9.

[37] See M. A. Epstein, *Ottoman Jewish Communities* (*supra*, n. 28), 26-29; B. Braude & B. Lewis, eds., *Christians and Jews in the Ottoman Empire* (New York, 1982).

surrender their possessions to a non-Jew are in fact surrendering their lives."[38]

Jewish fears of arousing the enmity of the authorities on the grounds of disloyalty were also prominent in a hearing that took place at the height of the Shabbatean fervor, in view of the accusation that the Jews had a "king" of their own, Shabbetai Zevi. The government was liable to misconstrue the enthusiasm for Shabbetai Zevi as disloyalty to the Sultan. Such sentiments were expressed in a responsum concerning an accusation leveled by a Jew against the community of Gallipoli, according to which the community members were not paying true taxes and that they had a king of their own. The rabbis of Istanbul were afraid to sentence the informer, fearing that he would allege that they were exceeding their judicial autonomy. They wrote that the "rumor-monger" was endangering the Jewish population and was liable to cause a disaster through his rumors.[39]

Also noteworthy too is Hayyim Benveniste's ruling concerning an informer of Izmir, who claimed that the Jews were rebelling – he did not actually go to the authorities to inform, but shouted the words in Turkish during an altercation with a friend. The questioners asked whether the communal leaders were permitted to excommunicate him. Benveniste replied that it was permissible to kill him, but his reservations in this connection are apparent and he preferred other punishments:

> Briefly stated: this man is deserving of capital punishment, and if the court can arrange that his death be carried out by non-Jews, they may do so. Alternatively, if he can be saved through amputation of one of his limbs, such as the excision of his tongue, hand or leg or taking out his eye, or the like, this, too, is permissible and in fact meritorious. Should they find it appropriate to take a different course of action in order to

[38] Daniel Estrosa, *Magen Gibborim* (Salonika, 1754), fols. 12a, 64a; Barnai, "Rabbi Haim Benveniste" (*supra,* n. 1), 165-166.

[39] *Responsa of Turkish Sages,* Jewish Theological Seminary Ms R. 0296, fol. 227a. On the political situation at this time see G. Scholem, *Sabbatai Sevi, The Mystical Messiah* (Princeton NJ, 1973), 668 ff.; Tamar, "The Dispute" (*supra,* n. 25), 411-423.

disaffiliate him from the Jewish people, they are permitted to do so.

Benveniste demanded that the full rigor of the law be applied to the informer, for any lenience would result in continuing damage to the community. He dubbed the offender a "leper," speaking "as it were against Providence and the Jewish people," and ruled that he should be regarded as a potential murderer according to Talmudic and rabbinical law. The case was one of a confirmed, violent informer, and hence it was permissible to kill him even after he had informed, despite the fact that he had not been cautioned; furthermore, evidence could be heard in his absence. Benveniste nevertheless cited the opinion of Nahmanides, to the effect that, since he had not informed directly to the authorities, there was still room to free the informer from the death sentence.[40]

Conclusion

In view of the material recorded in this article, we may conclude that the Halakhic authorities in the Ottoman Empire during the 16th and 17th centuries restricted the surrender of informers to the non-Jewish authorities to persons guilty of severe violations of the law, where there was fear of revenge being taken on the Jewish population at large. The dictum "The law of the kingdom is binding" was applied only to a portion of the laws, and informing was in fact held to be appropriate in the case of such serious offenses as adultery, prostitution, return to Judaism after conversion to Islam, trading in forged currency, coin-clipping and rebellion against the state.

[40] Hayyim Benveniste, *Resp. Ba'ei Hayyei, Hoshen Mishpat*, I (Salonika, 1788), no. 228. Apparently, there were also false charges raised by Jewish informers that the Jews cursed the Sultan; e.g., we have a report of a Jew who converted to Islam and threatened another Jew that unless the latter gave him money, he would inform the Turks that he had cursed the Sultan; *Resp. Rashdam, Hoshen Mishpat*, no. 359.

CIRCUMSTANTIAL EVIDENCE*

*Yehoshua Ben-Meir***

Circumstantial evidence is evidence that cannot be used as proof unless certain conclusions are drawn from it.[1]

Circumstantial evidence can be divided into several types: physical evidence, such as fingerprints, medical examination, and so forth; behavior of the accused, such as flight of a suspect, lies told by the defendant,[2] the defendant's silence;[3] presumptions (*hazakot*) – presumptions of law and presumptions of fact,[4] such as the presumption that a person intends the consequences of his action.

* The present article is a revised and expanded version of one chapter of an extensive survey of circumstantial evidence in Jewish Law, *"Re'ayah Nesibatit baMishpat haIvri,"* which appears in 18 *Dinei Yisrael* (1997). The present article contains references to that survey.

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1 See Y. Kedmi, *Al Re'ayot biFelilim – Kovetz Hartza'ot* (Jerusalem, 1988); Y. Kedmi, *Al haRe'ayot* I (1991), 397.

2 Cr.A. 264/67, *Medinat Yisrael v. N. Kaduri Arami* 21(2) P.D. 565, at 567; Cr. A 154/78, *Peretz v. haYo'etz haMishpati* 33(1) P.D. 57, at 60.

3 *Hok Seder haDin haPelili [Nusah Meshulav],* 5742-1982, *Sefer haHukkim* of 5742, Section 162, p. 43.

4 A presumption of fact constitutes circumstantial evidence so strong that the conclusion reached from it need not be demonstrated anew each time the circumstances that give rise to the presumption are demonstrated: Cr. A. 284/59, *Shem Tov v. haYo'etz haMishpati* 14 P.D. 683, at 685; *Diyyun Nosaf* 4/69, *Noiman v. N. Kohen* 24(2) P.D. 229, at 290. Israeli courts have also ruled that the fact that a murder occurred can be demonstrated by circumstantial evidence: See Cr. A. 543/79, 622/79, 641/79, *Nagar veEhav v. Medinat Yisrael,* 35(1) P.D. 113.

It goes without saying that various forms of circumstantial evidence acceptable in secular courts are not acceptable in Jewish law. Jewish law states not only that a defendant's silence cannot incriminate him; but even that the defendant's own admission is not acceptable in criminal proceedings.[5] Neither does Jewish law accept the presumption that a person intends the consequences of his actions; thus criminal punishment is possible only after warning (*hatra'ah*) has been given.[6]

Here, however, we are concerned with a question of principle – is the testimony of two witnesses the only proof recognized in Jewish law, or does Jewish law perhaps recognize certain types of circumstantial evidence or, in the language of Jewish law, logical inference (*umdenah*[7]) and the knowledge of the court (*yedi'at beit din*)? To rephrase the question, in the Torah we read:

> If anyone kills a person, the manslayer may be executed only on the evidence of witnesses; the testimony of a single witness against a person shall not suffice for a sentence of death (*Num.* 35:30).
>
> A person shall be put to death only on the testimony of two or more witnesses; he must not be put to death on the testimony of a single witness (*Deut.* 17:6).
>
> A single witness may not validate against a person any guilt or blame for any offense that may be committed; a case can be valid only on the testimony of two witnesses or more (*Deut.* 19:15).

5 Concerning the source of this rule, see *Encyclopedia Talmudit* (2nd edition, Jerusalem, 1973), I, cols. 189-193 and 548-551; A. Anker, "Self-Incrimination in Jewish Law – A Review Essay," 4 *Dinei Yisrael* (5733) 107-124.

6 According to the opinion of R. Yosi bar Yehudah, "a warning is required only to distinguish between those who transgress with criminal intent and those who transgress without criminal intent" (*BT Mak.* 9b). Although the Sages hold that warning is prescribed by biblical fiat and is required in all cases, it is reasonable to presume that even on that assumption, the reason for the biblical requirement is the necessity to distinguish between criminal and non-criminal intent (or because the death penalty is prescribed only for one whose intent is so severe as to be classed as rebellious), but that the method is prescribed for all cases without exception.

7 The Aramaic word *umdenah*, Hebrew *omed* or *omdan*, is variously translated: conjecture based on circumstantial evidence, appraisal, logical inference, estimate, assessment, evaluation, knowledge without observation.

Do these verses require actual witnesses, or perhaps only evidence equivalent to witnesses, that is to say, various types of appraisal and presumption – in short, circumstantial evidence? Can we take these verses to mean that there is a minimal requirement for evidence – that it be at least equivalent to the testimony of two witnesses? If this be our reading of the verses, then no evidence inferior to the testimony of witnesses will be accepted. But *umdenah mukhahat* – a virtual certainty – which is stronger than the testimony of witnesses, will be acceptable.

In the laws of evidence, as in many other areas, many Rabbinic ordinances had already been passed before the talmudic era. Sometimes the Talmud tells us clearly that a particular law is of Rabbinic origin.[8] At other times, however, the question of whether a particular regulation was of Rabbinic or biblical origin was already disputed in mishnaic times.[9] Therefore, in order to clarify the fundamental biblical position with regard to circumstantial evidence, we must analyze areas of law in which the rabbis' authority to legislate was limited. Such areas are the laws of personal status (*davar sheba'ervah*) and penal law (*onshin*).

Umdenah in Penal Law

Jewish law explicitly states that "we do not follow logical inference – *umdenah* – in penal matters."[10] *Umdenah* is listed in the Mishnah[11] as one of the things witnesses are warned to avoid:

> How are witnesses cautioned?[12] Witnesses in capital cases were brought in and cautioned [as follows]: "Perhaps what you say is based only on inference[13] or hearsay or evidence from the mouth

8 See, for example, *BT Sanh.* 2b, concerning investigation and inquiry (*derishah vahakirah*).

9 See *BT Sanh., ibid.,* and commentaries on the discussion there, concerning the legal implications of the disagreement between the tannaim as to whether *eruv parshiyot katuv kan.*

10 See Yehoshua Ben-Meir, *Dinei Yisrael, op. cit.* (note *, above), n. 129 and text between nn. 129-137, as to whether it is possible, in penal matters, to distinguish between capital cases and cases requiring corporal punishment.

11 *M. Sanh. 4:5.*

12 Rashi: cautioned against testifying falsely.

13 Hebrew *omed.*

> of another witness, or even from the mouth of a trustworthy person....[14]

The Talmud explains:[15]

> Our Rabbis taught: What is meant by "based only on inference"? [The judge] says to them: Perhaps you saw him running after another into a ruin, you pursued him, and saw him with a sword in his hand and blood dripping from the sword, while the victim was writhing [in the throes of death]. If this is what you saw, you saw nothing. We have learned in a *baraita*: R. Shimon ben Shetah said, "May I never see comfort[16] if I did not see a man pursuing another into a ruin, and when I ran after him and saw him, his sword was in his hand with blood dripping from it, and the victim was writhing [in the throes of death]. I exclaimed to him, Wicked man! Who killed him? It was either you or I. But what can I do since your blood does not rest in my hands. For it is written in the Torah, "A person shall be put to death only on the testimony of two witnesses" (*Deut.* 17:6).[17] May He who knows one's thoughts exact vengeance from him who killed his fellow man! It is reported that before they moved from that place, a snake came and bit [the murderer] so that he died.

R. Shimon ben Shetah's *umdenah* seems to be virtual certainty, that is to say, circumstantial evidence leading to the certain conclusion

[14] This and further translations adapted from *The Babylonian Talmud* (The Soncino Press, London).

[15] *BT Sanh.* 37b.

[16] "May I never see comfort" is a talmudic oath formula.

[17] Shimon ben Shetah's narrative seems to imply that his testimony would not have been sufficient for the suspected murderer to be condemned to death, because no other witness observed the incident and the Torah decreed "On the testimony of two witnesses. . . ." However, the talmudic discussion seems to be concerned with the fact that Shimon ben Shetah did not actually see an act of murder with his own eyes but only the result of that act. See *Tosafot, Sanh. ad loc.*, s.v. *she'Ein Damkha*; Ritba, *Shevu.* 34a, s.v. *Leima Rabbi Yosi haGelili.* See also H. S. Hefetz, *"Gidrei Umdenah vaHazakah beDinei Nefashot baMishpat haIvri,"* 8 *Dinei Yisrael* (5737) 45 n. 14; idem, *Re'ayot Nesibatiyot baMishpat haIvri* (unpublished doctoral dissertation, Hebrew University, Jerusalem, 5734), 11 n. 4.

that the pursuer killed the victim.[18] Nevertheless it is not acceptable as testimony in a capital case.

Is There a Distinction between Criminal Law and Civil Law?[19]

According to the Talmud, the law seems to recognize no difference between the rules of evidence in capital cases and the rules of evidence in monetary cases:[20]

> Rabbi Hanina said, "By law, both monetary cases and capital cases require investigation and inquiry (*derishah vahakirah*), as is said, 'You shall have one law...' (*Lev.* 24:22). What, then, is the reason they said that in monetary cases investigation and inquiry are not required? So that the door will not be shut before borrowers."[21]

The obvious conclusion is that in monetary cases, as in capital cases, circumstantial evidence is not acceptable.

The Talmud itself discusses the relationship between the *umdenah* of R. Shimon ben Shetah and *umdenot* in monetary cases. The Early Authorities noted an apparent contradiction between the discussion in *Sanhedrin*[22] and the discussion in *Shevu'ot,*[23] though they disagreed over how to resolve it.[24]

Regarding the acceptability of *umdenot* as proof, Maimonides rules clearly that one does distinguish between capital cases and all others (namely, monetary cases, personal status, and so forth) as to the types of testimony recognized by the Torah. In Maimonides'

[18] Hefetz, *"Gidrei Umdenah"* (note 17 above), n. 23; idem, dissertation (note 17 above), 11 n. 4.

[19] Throughout the present paper, the term, "civil law" corresponds to the Hebrew *dinei mamonot.*

[20] *BT Sanh.* 3b. See also Rashi *ad loc.,* s.v. *"sheNe'emar Mishpat Ehad Yihyeh Lakhem"* (cf. Lev. 24:22); *MT Hil. Edut* 3:1.

[21] From here it is clear that the lowering of evidentiary standards in civil cases is Rabbinic in origin.

[22] *BT Sanh.* 37b.

[23] *BT Shevu.* 34a.

[24] See Hefetz, dissertation (note 17 above), 11 n. 4. See also Ben-Meir, *op. cit.* (note * above), text between nn. 105-110.

opinion, this distinction is based upon a special law stated with regard to capital cases. As he writes:[25]

> The court does not impose the penalty of death on mere inference (*omed hada'at*) but on the conclusive testimony of witnesses. Even if the witnesses saw [the assailant] chasing the other, gave him warning, and then lost sight of him, or they[26] followed him into a ruin and found the victim writhing [in his death throes], while the sword dripping with blood was in the hands of the slayer, the court does not condemn the accused to death, since the witnesses did not see him at the time of the slaying. Concerning this and similar cases, Scripture states: "Do not bring death on those who are innocent and in the right" (*Ex.* 23:7). Similarly, if two witnesses testify that the accused committed idolatry – one saw him worship the sun and warned him, and the other saw him worship the moon and warned him, their testimony is not joined together [to convict him of idolatry], as is said, "Do not bring death on those who are innocent and in the right": since there is a possibility of clearing him of the charge and proving him innocent, slay him not.[27]

Maimonides holds that *umdenah* is acceptable in monetary cases and cases of personal status.[28] Concerning capital cases, however, Maimonides holds that *umdenah* is excluded by *Ex.* 23:7, "Do not bring death on those who are innocent and in the right."

Clearly, Maimonides believes that *Ex.* 23:7 creates a special rule of evidence for penal cases. Nevertheless, it may be (particularly in

[25] *MT Hil. Sanhedrin* 20:1. Maimonides gives fuller treatment to this issue in *Sefer haMitzvot,* Negative Commandment 290 (see also Nahmanides' objection *ad loc.*). See also Hefetz, dissertation (note 17 above), 50-64 and (summarizing this approach) 266; idem, *"Gidrei Umdenah"* (note 17 above), 47-52.

[26] According to *Ketav Yad Teiman*: "he." In other words, the pursuer followed the victim. See R. Shemu'el Tanhum Rubenstein, ed., *Mishneh Torah* (ed. *Rambam la'Am,* Jerusalem 5722), *Hil. Sanhedrin* 10:1 n. 4.

[27] Translation adapted from *The Code of Maimonides,* Yale Judaica Series, Abraham M. Hershman trans., vol. XIV, *The Book of Judges,* 1949.

[28] And perhaps even for constituting witnesses (*edei kiyyum*), see Ben-Meir, *op. cit.* (note * above), text following n. 25, n. 53, text at n. 53, n. 114 and n. 206. On Maimonides' resolution of the contradiction between the two talmudic discussions, see *ibid.*, text preceding n. 114.

light of Maimonides' remarks in *Sefer haMitzvot*) that he believes the Torah to have instituted a legal policy of extra exactitude, deliberation and maximum certitude of guilt in capital cases but to have "entrusted the Sages"[29] to establish evidentiary standards for every different circumstance in light of what is possible, given the realities of that circumstance. Be that as it may, it is clear that, for Maimonides, penal proceedings are exceptional and evidentiary standards in that area are stricter than in other areas of law.

It is the opinion of the *Tosafot,*[30] however, that, according to the conclusion of the talmudic discussion, there is no difference in the acceptability of *umdenah* between capital cases and monetary cases. On that basis, the *Tosafot* conclude that, just as the *umdenah* of R. Shimon ben Shetah is not acceptable as evidence in capital cases, so it (or its equivalent – the *umdenah* of Rav Aha) is not acceptable as evidence in monetary cases. As a result of this approach, as we shall see below, the *Tosafot* were constrained to come up with the novel assertion that there exists a type of *umdenah* so certain that it will be accepted as evidence even in capital cases.

The Mishnah[31] lists several cases regarding which the Sages legislated that a person who sues another is not required to prove his claim, but is believed, rather, on the strength of an oath, and hence can "swear and recover." One of these is the case of a person who is wounded. The Mishnah explains:

> What is the case of one who is wounded? If witnesses testified that he came under [an assailant's] hand whole and emerged wounded, and [the victim claims], "You wounded me," and [the assailant] replies, I did not wound you. The wounded person swears and recovers.

The Talmud[32] establishes that an oath is required only where the wound is located in a place where, at least theoretically, it could be

[29] As explained by *Hagahot Maimoniyot;* see text at note 56 below.

[30] *Tosafot Shevu.* 34a, s.v. *de'it leih; Tosafot Sanh.* 3b, s.v. *keman keRav Aha.* On the *Tosafot's* resolution of the contradiction between the two talmudic discussions, see Ben-Meir, *op. cit.* (note * above), text following n. 110.

[31] *M. Shevu.* 7:1. See also *MT Hil. Hovel uMazik* 5:4 (and Ra'avad ad loc.).

[32] *BT Shevu.* 46b. See also *MT ibid.,* 5:5.

self-inflicted. Where, however, it is perfectly certain that the wound was not caused by the victim, the wounded person recovers without swearing. That is to say, if witnesses see two persons enter a room alone, both uninjured, and one emerges with a wound on his back, he swears and recovers. The victim must swear because he may have inflicted the wound upon himself by cutting himself "on the wall." If, however, the wounded person emerges with bite marks on his back, it is absolutely clear that the other wounded him, and the wounded person recovers without having to swear.

Since the Talmud establishes that this *umdenah* – which confers complete certainty – constitutes sufficient evidence to recover monetary compensation, the *Tosafot* rule that such an *umdenah* is sufficient in capital cases as well. For, in the opinion of the *Tosafot,* there is no difference between capital cases and monetary cases with regard to the acceptability of *umdenot* as evidence. Therefore, an *umdenah* that constitutes decisive evidence in a monetary case may also constitute decisive evidence in capital cases. Hence, if the victim emerges from the room with a bite on his head, and that bite causes brain damage from which the victim dies, the *Tosafot*[33] hold that the *umdenah* will be accepted as evidence, on the basis of which the accused may be put to death.

Ramah[34] disagrees with the *Tosafot,* explaining that an *umdenah* that creates absolute certainty is testimony on the basis of knowledge and not observation. Such testimony, Ramah holds, is acceptable only in monetary cases and not in capital cases.[35]

[33] The *Tosafot* presume the Sages ruled that the plaintiff in such cases recovers with an oath, but where the plaintiff recovers by law – not on the basis of Rabbinic legislation – he recovers without having to take an oath. In other words, where a plaintiff recovers without taking an oath, he does not do so on the basis of Rabbinic legislation. Another possible explanation of the rule would be that the Sages relaxed the burden of proof upon the injured person and ruled that he is believed on the basis of his oath, while in instances where there is absolute certainty that the defendant wounded him, the oath is superfluous – hence the Sages ruled that the plaintiff can recover without an oath. See Hefetz, dissertation (note 17 above), 16-17 and notes *ad loc.*

[34] R. Moshe haLevi, *Yad Ramah, Sanh.* 37b, s.v. *uMetamhinan ukeTa'amekh. Urim veTumim* 90:14 concludes that Rashba, like Ramah, disagrees with the *Tosafot.* But see R. David Fedder, *Imrei David* 23.

[35] On Ramah's resolution of the contradiction between the talmudic discussions,

According to Maimonides,[36] who learns from *Ex.* 23:7 that *umdenah* is not acceptable as evidence in capital cases (in contrast to monetary cases, where *umdenah* is acceptable), there is no place whatever for the *Tosafot's* question. True, from the Talmud it is clear that if the victim emerges from the closed room with a bite on his head, it is absolutely certain that he was wounded by the person who was alone with him in the room, and that certainty is sufficient to recover monetary compensation.[37] Nevertheless, because of *Ex.* 23:7, "do not bring death on those who are innocent and in the right," even an absolute certainty of this sort cannot serve as evidence in penal cases.

The *Tosafot's* opinion notwithstanding, the conclusion that emerges is the following: There is general agreement that *umdenah* is not accepted in capital cases, at least, concerning the actual act or the perpetrator's identity. This is true even for an *umdenah* with a high degree of certainty, such as the *umdenah* of Shimon ben Shetah. According to the *Tosafot,* however, an *umdenah* whose degree of certitude is absolute is acceptable in capital cases.

see Ben-Meir, *op. cit.* (note * above), n. 120. As opposed to Maimonides, Ramah apparently holds that the rule that *umdenah* is acceptable in civil cases but not in capital cases, is derived from *Lev.* 5:1, "one who has either seen or learned," and not from *Ex.* 23:7, "do not bring death on those who are innocent and in the right."
Nahmanides, in his comments on *Sefer haMitzvot,* Negative Commandment 290, seems to hold that an *umdenah* of certainty is not acceptable even in civil cases. Thus, Nahmanides will explain that the law that a person bitten on his back is compensated without having to swear is Rabbinic in origin, see note 33 above. So we must understand this rule according to the opinion of Maharik as well, see Ben-Meir, *op. cit.* (note * above), n. 30 and text at n. 30. According to this approach (and also according to the approach of the *Tosafot*), the talmudic discussion in *Shevu'ot,* as well the talmudic discussion in *Sanhedrin,* according to their conclusions, hold that there is no difference concerning *umdenah* between civil and capital proceedings, and hold that, in principle, *umdenah* is not acceptable in either, though it is acceptable in certain specific circumstances in civil cases by Rabbinic legislation. (But cf. Nahmanides' opinion in *davar sheba'ervah*; see also Ben-Meir, *ibid.,* ch. 2, *"Umdenah bedavar sheba'ervah (baStatus),"* and n. 59. The matter requires further study.)

36 Text at note 25 above.

37 It is not clear from Maimonides' wording (note 32 above) whether this law is biblical or Rabbinic in origin. See notes 33 and 35 above.

However, as will be shown presently, there is an explicit talmudic ruling that seems to contradict this conclusion.

The Case of Adultery – The Posture of Adultery

The Mishnah, Tractate *Makkot,* states:[38]

> A Sanhedrin that executes an accused once in seven years is considered a destructive Sanhedrin. Rabbi Eliezer ben Azaryah says, "Once in seventy years." Rabbi Tarfon and Rabbi Akiva say, "Had we been members of the Sanhedrin, no person would ever have been executed." Rabbi Simeon ben Gamliel said, "They too would have been among the shedders of Jewish blood."

The Talmud explains the opinion of R. Tarfon and R. Akiva as follows:[39]

> What would they have done [to ensure that no one ever would have been executed]? R. Yohanan and R. Eliezer both say: ["They would query the witnesses,] 'Did you see whether the victim was healthy? Perhaps he was terminally ill.'"[40] R. Ashi said, "Even if you say that [you examined the victim and ascertained that] he was healthy, perhaps the sword entered his body where there was already an opening [and this cannot be ascertained by examination]." In the case of forbidden sexual relations, what would they have done [to ensure that no one ever would have been executed]? Both Abbaye and Rava say, ["They would have queried the witnesses,] 'Did you see it as a paint stick in a tube?'"[41]
>
> And the Rabbis [who disagree with R. Tarfon and R. Akiva], how would they rule [in cases of forbidden sexual relations]?[42] [They would rule] in accordance with Samuel's principle. For

[38] *M. Mak.* 1:10.

[39] *BT Mak.* 7a.

[40] There is no death penalty for killing a person who is terminally ill. See *Encyclopedia Talmudit* (Jerusalem, 5733), XXII, cols. 1-25.

[41] Rashi: witnesses do not actually see this.

[42] Rashi: what testimony would the Rabbis consider sufficient to convict one accused of forbidden sexual relations and condemn him to death?

> Samuel has said,[43] "For adulterers, it is sufficient to be seen in the posture of adultery."[44]

Samuel's principle, "For adulterers the posture of adultery is sufficient," is quoted as an established rule of evidence by all codifiers. Maimonides writes:[45]

> The witnesses are not required to see the adulterers enter each other as a paint stick is inserted in a tube. Once they see them in close embrace in the manner of those engaged in the sex act, the adulterers are executed on the strength of this evidence. We do not say that perhaps the sex act was not initiated, for this posture constitutes presumptive evidence[46] that it was.[47]

The rule – for adulterers the posture of adultery is sufficient – clearly contradicts the rule that in capital cases, conviction may not be based upon *umdenah*, even where the *umdenah* is as strong as that of Shimon ben Shetah. According to the *Tosafot,* we can resolve this contradiction by simply asserting that the "posture of adultery" gives rise to an *umdenah* which is absolutely certain, and therefore acceptable in capital cases. This solution, however, raises a difficulty: it is not likely that the posture of adultery creates a stronger *umdenah*

[43] In another context.

[44] Rashi: that they lie in intimate physical contact and behave as though they are having relations.

[45] *MT Hil. Issurei Bi'ah* 1:19.

[46] Hebrew: ... *hezkat tzurah zo shehe'erah.*

[47] *Minhat Hinnukh,* Commandment 35:33 (ed. Makhon Yerushalayim 5748, Commandment 35:4); Commandment 129:33; Commandment 266:15 *ad fin*; Commandment 559:9 *ad fin,* comments that in the case of a "designated bondmaid" (*shifhah harufah*), no transgression occurs until there is a complete act of intercourse (*gemar bi'ah*). Since nowhere do we find that the "posture of adultery" rule does not apply to relations with a designated bondmaid, it appears that the posture of adultery is presumptive evidence of completion of intercourse. Accordingly, we must conclude that Maimonides is writing briefly when he explains that the posture of adultery constitutes presumptive evidence that intercourse was initiated. See *Or Same'ah, Issurei Bi'ah* 1:19; *Iggerot Moshe, Even haEzer* I, 21, p. 46, col. 2; 22, p. 50, cols. 1-2. Concerning the meaning of the posture of adultery, see *Otzar haPosekim* 20:1:10 (vol. IX, p. 16).

than the *umdenah* of Shimon ben Shetah.[48] The *umdenah* created by the posture of adultery clearly does not create absolute certainty.

Moreover, Maimonides' opinion that, owing to *Ex.* 23:7, *umdenah* may not be used in capital cases, as well as Ramah's view that even an *umdenah* which implies certainty is unacceptable in capital cases, appear to contradict the "posture of adultery" rule.[49]

Interestingly, there exists a rule similar to the "posture of adultery" rule for witnesses to marriage:[50]

> Witnesses to a couple's seclusion together are considered witnesses that the couple had relations.[51]

In this context, however, the rule is not necessarily problematic: First, some authorities[52] hold *umdenah* to be acceptable in matters of personal status, even for "constituting witnesses."[53] Maimonides apparently agrees that *umdenah* is acceptable for constituting witnesses in matters of personal status, and perhaps even in penal law for a sentence of corporal punishment.[54] In capital cases, however, Maimonides rules that no *umdenah* is acceptable – not even one that creates a virtual certainty (*umdenah mukhahat*). For that reason, it is the "posture of adultery" rule – not the rule that witnesses to a couple's seclusion are considered witnesses that the couple had relations – that seems to contradict Maimonides' approach.

48 Today, most probably, it would be universally agreed that the posture of adultery does not create an *umdenah* of certainty that intercourse was initiated, certainly not that intercourse was completed (see note 47 above). Such presumptions possibly change with manners and mores.

49 Although the Earlier Authorities relate to the "posture of adultery rule," the first authority clearly to raise the contradiction between this rule and the rule illustrated by Shimon ben Shetah's *umdenah* was *Minhat Hinnukh,* Commandment 82:1 *ad fin* (ed. Makhon Yerushalayim, Commandment 82:2). After *Minhat Hinnukh, Marheshet* II:39:8, raises the problem. See also *Encyclopedia Talmudit,* vol. XIII, col. 707.

50 *BT Kid.* 65b. See also text at notes 77 and 60 below.

51 *Hen hen edei yihud – hen hen edei bi'ah.*

52 See Ben-Meir, op. cit. (note * above), ch. 2, *"Umdenah bedavar sheba'ervah (baStatus).* "

53 *Edei kiyyum,* witnesses whose presence is necessary for an act to be constituted. For example, an act of marriage (*kiddushin*) is not valid unless performed in the presence of witnesses.

54 See note 10 above.

Moreover, even if *umdenah* is not acceptable for constituting witnesses, or even if *umdenah* can never serve as evidence in matters of personal status, no objection should be raised to Maimonides' approach from the rule concerning witnesses to marriage. Clearly, if the Torah requires that witnesses to marriage witness the couple's having sexual relations, *umdenah* will be sufficient. For it is inconceivable that the Torah would require every marriage ceremony to include witnessing the sex act (even witnessing the posture of adultery, certainly not "as a paint stick in a tube"), since "Her ways are pleasant ways. . ." (*Prov.* 3:17).[55] In the case of suspected adultery, however, it is conceivable that the offenders would not be liable for the death penalty unless they had been witnessed "as a paint stick in a tube."

An extensive review of the Earlier Authorities and the Later Authorities yields several possible explanations for the exceptional nature of the "posture of adultery" rule. We will now present these possibilities and briefly point out the problems associated with each.

Two explanations were already suggested by the Earlier Authorities. Discussing the principle that witnesses to a couple's seclusion together are considered witnesses that they had relations, the author of *Hagahot Maimoniyot* writes:[56]

> It is specifically in the case of the sex act that we say that witnesses to a couple's seclusion together are considered witnesses that the couple had relations. That is because we can say, "Can fire touch straw and not ignite it?" Moreover, he is

[55] The Talmud derives a number of regulations from this verse. See *BT Yev.* 87b (see also *BT Suk.* 32a; *BT Yev.* 15a). See also *Otzar haPosekim* 42:32:1, s.v. *uviTeshuvat Ba'al Helkat Yo'av shebeAni ben Pahma* (vol. XIV, p. 50, column 2).

[56] *Hagahot Maimoniyot, Teshuvot haShayakhot leSefer Nashim* 1. My quotation of *Hagahot Maimoniyot* is from the Frankel edition, *Sefer Nashim,* p. 424, column 2. This same opinion is cited with omissions in *Mordekhai, Gittin* 451. See also *Resp. Beit Shemu'el, Even haEzer* 42:12; and *Hagahot R. Akiva Eger, Even haEzer* 42:9. The view of *Hagahot Maimoniyot* is widely cited by the Later Authorities. A few notable instances would include *Iggerot Moshe, Yoreh De'ah* I 47, p. 83, col. 1; *ibid., Even haEzer* I, 22, p. 50; 24, p. 58, col. 2 – p. 59 col. 1; 82:4, p. 203, where R. Feinstein analyzes *Hagahot Maimoniyot's* two explanations and the differences between them.

not embarrassed before her.[57] Furthermore, we cannot observe the paint stick in the tube, as that would be a disgrace (*genai*), and the Bible trusted the Sages to determine what would be acceptable [evidence that the new couple did indeed have relations]. We have a similar principle in Tractate *Makkot,* where it is established that adulterers are executed once they have appeared in the posture of adultery, even though the witnesses did not see them as one sees a paint stick in a tube. Although it could be said that there was mere contact of body parts [without penetration],[58] we presume that which is nearly certain and execute.[59]

The author of *Hagahot Maimoniyot* proposes two possible explanations for the "posture of adultery" rule:[60]

1. The posture of adultery is an *umdenah* that confers certainty. Persons having reached that posture can no longer control their drives, just as when fire makes contact with straw, the straw is certain to be ignited.
2. The posture of adultery does not create an absolute certainty that the sex act occurred, since it is possible that "there was mere contact of body parts." However, the Sages concluded that the Torah would not have demanded that witnesses see "the paint stick in the tube." Owing to both the physical difficulty of such observation and the fact that it is disgraceful, it is unreasonable to think that the Torah would have made it necessary, even in a case of immorality.[61] Therefore, the Sages concluded that the Torah was satisfied with testimony to the posture of adultery.

The first explanation is appropriate only to the *Tosafot's* approach

[57] *Libo gas bah.*

[58] *Derekh eivarim ba alehah.*

[59] *Talinan bemilta dehavei karov levadai vekatlinan...* .

[60] *Hagahot Maimoniyot's* third explanation, "Moreover, he is not embarrassed before her," applies only to a married couple and concerns only the law that witnesses to a married couple's seclusion are considered witnesses to their having had relations.

[61] In my opinion, in the case of adultery as well, the basis is *Prov.* 3:17 ("Her ways are pleasant ways..."). See note 55 above.

that an *umdenah* of certainty is acceptable in capital cases.[62] The second explanation, however, seems to apply to the approach of Maimonides as well as to that of the *Tosafot*. The presumption of the second explanation is that in principle, the death penalty would not normally be administered on the basis of an *umdenah* such as the posture of adultery. Only in the case of adultery are offenders condemned to death on the strength of the posture of adultery alone, since the Torah did not require witnesses to observe the "paint stick in the tube" – such an observation being disgraceful.

Nevertheless, the second explanation seems to work only according to Maimonides' approach and not according to that of the *Tosafot*. Indeed, for the second explanation we must presume that, in principle, *umdenah* – knowledge without observation – is acceptable as proof. Otherwise, the court could not execute adulterers. This is the view of Maimonides, who holds that only because of *Ex.* 23:7 is circumstantial evidence unacceptable as proof in capital cases. In the case of adultery, however, if one excluded circumstantial evidence, offenders would never be executed, since it is not reasonable for the Torah to demand that witnesses see the paint stick in the tube. Thus, only in the case of adultery did the Sages conclude that *Ex.* 23:7 was inapplicable. Only in such cases, so the argument goes, do we fall back upon the basic rule of evidence: that circumstantial evidence of convincing probative weight (though it may not confer absolute certainty) can provide the basis for a conviction.[63] According to the *Tosafot,* however, *umdenah* is not acceptable at all, even in monetary matters (recall that according to the present explanation, the posture of adultery does not create an *umdenah* of absolute certainty). On that approach it is difficult to understand how the Sages, on their own authority, could rule that adulterers might be executed on the strength of such an *umdenah*.

According to our line of reasoning, then, it emerges that *Hagahot Maimoniyot's* two explanations explain the "posture of adultery" rule according to the two basic approaches to use of *umdenah* in capital

[62] See note 30 and text at n. 30 above. *Minhat Hinnukh, loc. cit.* (note 47 above), suggests the same approach and cites the *Tosafot* in support.

[63] See *Iggerot Moshe, Yoreh De'ah* I, 47.

cases. The first explanation justifies the rule according to the *Tosafot's* opinion that, in principle, circumstantial evidence is not acceptable at all as proof (even in monetary cases), unless it is an *umdenah* that confers certainty, in which case it is acceptable even in capital cases. The second explanation justifies the rule according to Maimonides' opinion that circumstantial evidence is generally acceptable in Jewish law, but that in capital cases, *Ex.* 23:7 bars execution of the defendant other than upon the testimony of two witnesses (even where there is an *umdenah* that confers certainty).

Let us analyze the various explanations.

A. The posture of adultery constitutes an umdenah of certainty

As mentioned, the difficulty with this explanation is that it is not supported by reality. Experience does not support the presumption that the posture of adultery offers absolute certainty that sexual intercourse has occurred (as the author *Hagahot Maimoniyot* himself writes in his second explanation, it is possible that there was mere "contact of body parts").

Halakhot Gedolot rules:[64]

> Matters of personal status cannot be decided on the basis of fewer than two witnesses; a woman may not be prohibited to her husband unless [the witnesses] see the paint stick in the tube.

The Rosh objects to this:[65]

> That is not correct: even for the purposes of capital punishment, it is sufficient for the witnesses to see them in the posture of adultery..., and since in capital cases, concerning which is written, "The assembly shall protect the manslayer" (*Num.* 35:25), such testimony is sufficient, it must certainly be sufficient to prohibit a woman to her husband.

[64] *Sefer Halakhot Gedolot* (ed. Makhon Yerushalayim 5752), *Hilkhot Mi'un,* 345. See also *Tosafot, Ket.* 9a, s.v. *Mipenei mah; Resp. Yehudah Ya'aleh* II (*Even haEzer-Hoshen Mishpat*), 151.

[65] Rosh, *Yev.* 2:8. See also *Tur Even haEzer* 178:16 (ed. Makhon Yerushalayim, p. 585); and *Beit Yosef ad loc.*

A number of Later Authorities[66] defend the view of *Halakhot Gedolot,* on the basis of the rule that a person who commits a capital crime cannot be executed unless warned. That is to say, the witnesses must inform the adulterers: "Know that the act you are committing requires you to be executed, and if you do it, we shall testify against you in court, and you will be put to death." To this, the adulterers must respond to the witnesses, "Although we shall be killed, it is our intent to commit this offense." In such a case, where the adulterers are warned and express their willingness to die for the satisfaction of their need, one can indeed be absolutely certain that they carried out their intention, that sexual intercourse actually occurred. Warning, however, is not required in order to prohibit a woman to her husband, and without warning there is no certainty that the act ended in intercourse. As we have noted, it is, after all, possible that the adulterers managed to overcome their desire and stopped short of full intercourse. Therefore, if a warning is given – and hence there is a possibility of capital punishment – the adulteress will certainly be prohibited to her husband. If there is no warning, however, there is no certainty that intercourse occurred, and the suspected adulteress cannot be prohibited to her husband.[67] Thus, what *Halakhot Gedolot* means to say is that if there is no warning,[68] testimony to the posture of adultery does not constitute an *umdenah* of certainty. Thus, only testimony that the paint stick was seen in the tube will be sufficient to prohibit a woman to her husband.

According to this explanation, the posture of adultery does not in itself create an *umdenah* of absolute certainty that sexual intercourse occurred. If, however, the act was accompanied by warning and that

[66] *Noda biYehudah, Mahadurah Tinyana, Even haEzer* 11; *Or Same'ah, loc. cit.* (note 47 above); *Marheshet* II:5:4-5.

[67] Needless to say, the suspected adulterers would not be liable for capital punishment in this case. Even if it were somehow possible to overcome the lack of warning, the *umdenah* would not be sufficiently certain.

[68] In our time, there is no warning, since there is no capital punishment. Therefore, even if witnesses do issue a warning, the transgressors will not take it seriously, since they know they cannot be executed. Thus, even if they are warned, there is no certainty of sexual intercourse, since they have not subjected themselves to the death penalty.

warning was acknowledged, there may indeed be absolute certainty that intercourse occurred.

B. One cannot observe the paint stick in the tube, as that would be a disgrace

According to this explanation,[69] the acceptability of the "posture of adultery" *umdenah* is based upon an explicit legal policy not to demand clearer proof. Observation of the paint stick in the tube is not required, as such observation would be disgraceful. On this approach, the Torah did not disqualify *umdenah* absolutely, that is, for all capital cases. The Torah established the principle of strictness in the rules of evidence – "Do not bring death on those who are innocent and in the right" – but "entrusted the Sages" to decide precisely how this imperative would be fulfilled, what would be acceptable as proof and what would not. In murder cases, where it is reasonably possible to observe the actual act, the Sages disqualified *umdenah*. In cases of adultery, however, where observation of the actual act is not only extremely rare but disgraceful, the Sages accepted the posture of adultery as sufficient proof.

In a similar vein, Hefetz writes[70] that, since it is extremely difficult and rare for witnesses to see the paint stick in the tube, the posture of adultery is considered sufficient on the principle of the best evidence available.[71]

C. The posture of adultery is a statutory presumption[72]

An innovative explanation was offered by one of the leading authorities of the previous generation, R. Joseph Rozin, known as the

[69] See text at note 60, following the quotation from *Hagahot Maimoniyot.*

[70] See Hefetz, *"Gidrei Umdenah"* (note 17 above), pp. 55-57.

[71] See Ben-Meir, *op. cit.* (note * above), n. 162 and text at n. 162. A similar view may be taken of the talmudic principle: "Lashes are administered on the basis of presumptions (*hazakot*); offenders are stoned and burned on the basis of presumptions" (*BT Kid.* 80a; see also *Encyclopedia Talmudit,* vol. XXIII, cols. 714 ff.). According to this approach, the principle may be based on the legal policy to make criminal punishment possible in practice. Therefore, when the court must determine familial relationships – testimony of witnesses being rare in such cases – the Sages accept presumption as sufficient. See note 83 and text at note 83 below.

[72] *Hazakah mishpatit.*

Rogachover.[73] According to the Rogachover, there are two categories of testimony: "the category of law (*din*) and the category of reality." In some cases, for a prohibition to take effect, there is a need for "reality" – an act of sexual intercourse. Sometimes, however, a statutory presumption (*Praesumptio juris*) of intercourse is sufficient.

When a statutory presumption that intercourse has occurred is sufficient, even if it is known for certain that no intercourse occurred in fact, the legal outcome will not be affected (*Praesumptio juris et de jure*). It is on this basis that a widow is not considered a virgin *vis-à-vis* various laws,[74] even if there are witnesses that she never had relations with her husband, whereas *vis-à-vis* laws that require an act of intercourse in fact, she is not considered to have had relations with her husband.

The posture of adultery is a statutory presumption that an act of intercourse has occurred. Thus, a presumption of fact cannot serve as proof in capital cases, whereas a statutory presumption can serve as proof even in capital cases.

A statutory presumption must be legislated; that is, it must appear in the Torah. Such presumptions are not among the matters "entrusted to the Sages." From the phrase, "and [he] lies with her" (*Deut.* 22:23, 25, 28), the *Sifrei*[75] concludes: "any lying"; this is the source for the "posture of adultery" presumption. That is to say, if the alleged adulterers were observed in the posture of adultery, they may be executed even if the witnesses clearly saw that there was no sexual intercourse.[76] Similarly, the rule that witnesses to a couple's

[73] *Resp. Tzafenat Paane'ah* I (ed. Warsaw) 23, p. 20b; *Tzafenat Paane'ah al haRambam, Hilkhot Issurei Bi'ah* XIX, 3, p. 146b.

[74] For example, there is no fine for the rape of a widow; she has the status of *halalah* if she were married to a person with whom relations would render her such; her *ketubbah* in a subsequent marriage is 100 *dinars,* and so forth.

[75] *Sifrei Devarim* 241 (regarding a married woman); 242 (regarding a betrothed woman – *arusah*); 244; 245 (regarding a fine). There are a number of variant readings; see *Sifrei* ed. Ish-Shalom; and *Sifrei* ed. Finkelstein.

[76] Rabbi Feinstein, in *Iggerot Moshe, loc. cit.* (note 56 above), is not certain whether witnesses can contradict a presumption created by the posture of adultery. However, his uncertainty is based on *Hagahot Maimoniyot's* first explanation.

seclusion are considered witnesses that the couple had relations[77] is based, according to the Rogachover, upon this same statutory presumption.

On this approach, the disagreement between Maimonides and *Halakhot Gedolot,* as to whether a woman observed by witnesses in the posture of adultery is prohibited to her husband, turns on how we apply this presumption of law. Does the "posture of adultery" rule apply to prohibiting a woman to her husband, as it does to administering capital punishment for adultery; or does the law require sexual intercourse in fact before a woman can be prohibited to her husband? If intercourse in fact is required in order to prohibit a woman to her husband, as held by *Halakhot Gedolot,* she cannot be prohibited by virtue of the posture of adultery, the reason being that the posture of adultery provides only an *umdenah* that intercourse has occurred, and that is *not* an *umdenah* of certainty. Such an *umdenah* is not sufficient to prohibit a woman to her husband. Moreover, even on the view of Maimonides, that the "posture of adultery" rule also applies to prohibiting a woman to her husband, that is true only when the posture of adultery is observed by witnesses. If the husband himself observes his wife in the posture of adultery, the presumption of law does not apply, and the *umdenah* that she has engaged in sexual intercourse is not sufficiently certain to prohibit her to him. Therefore, even for Maimonides, a woman is not prohibited to her husband unless he observes the paint stick in the tube.

According to this line of reasoning, in the second half of the first chapter of *Hilkhot Issurei Bi'ah,* Maimonides assembles a series of laws which constitute exceptions to the general rules of evidence. These laws are the following:

1. *The age of intercourse*[78]
Three years and one day for a female; nine years and one day for a male. In order to punish a defendant, witnesses are required to prove that he is not a minor. As to his act being

[77] See note 51 above.

[78] *Hil. Issurei Bi'ah* 1:13. It should be noted that, like all such standards in Jewish Law, the age of intercourse is an arbitrary standard, not an *umdenah* or presumption.

considered intercourse, however, an arbitrary age is chosen as a matter of legal policy, to permit punishment with no need for investigation, as "the matter is disgraceful."

2. *The posture of adultery*[79]
Although there is clearly no punishment for adultery unless intercourse has at least been initiated (*he'erah*), once witnesses see a man and woman in the posture of adultery, there is a presumption that intercourse has occurred. This presumption, according to Maimonides, is a presumption of law, that is to say, irrebuttable (*Praesumptio juris et de jure*). In other words, if a man and woman were observed by witnesses in the posture of adultery, even where there are witnesses that intercourse was never initiated, the couple may be executed. The presumption of law creates a legal fiction that intercourse has at least been initiated.

The legal policy behind this presumption can be explained – as done by *Hagahot Maimoniyot* – on the assumption that requiring witnesses to see the paint stick in the tube would virtually abolish legal punishment for adultery. This, however, is not sufficient to explain the Rogachover's claim that *Halakhah* created a fictitious initiation of intercourse, even when there are witnesses to the contrary – particularly in light of his approach that the presumption applies only to testimony. As explained, the Rogachover holds that, according to Maimonides, when a husband himself sees his wife in the posture of adultery, she does not become, from that moment on, prohibited to him – because there is no certainty that intercourse has in fact occurred. (According to *Halakhot Gedolot,* even where there are witnesses to the posture of adultery, there is no presumption of intercourse, and the woman is not prohibited to her husband – even though she can be executed on just this presumption!)

We might suggest that, in the Rogachover's view, *Ex.* 23:7, "do not bring death on those who are innocent and in the right," is not a general instruction to the Sages to formulate strict rules of evidence in capital cases, but rather a categorical disqualification of *umdenah*

[79] *Ibid.*, 1:19.

in capital cases.[80] According to this reasoning, the meaning of this injunction is that two witnesses, and two witnesses alone, constitute acceptable proof in capital cases; there is no possibility of executing a defendant on the basis of any sort of *umdenah*.

This would explain why the Rogachover could not take the posture of adultery to be a rebuttable presumption of law (*Praesumptio juris tantum*): he holds that such a presumption is unacceptable as proof in capital cases. Constrained by his understanding of *Ex.* 23:7, the Rogachover must conclude that only an irrebuttable legal fiction (*Praesumptio juris et de jure*) may be accepted as proof in capital cases, since no sort of *umdenah* will be considered sufficient.

Another possible explanation of this approach is that the legal policy of accepting the posture of adultery as proof goes beyond the need to permit punishment for adultery. If one accepted testimony to rebut testimony to the posture of adultery, that would result in detailed cross examination of witnesses to adultery,[81] and this too would be considered disgraceful to the court. Moreover, in their apprehension of such cross examinations, witnesses might try to see the act of intercourse with certainty or, alternatively, refrain from testifying. For that reason, *Halakhah* rules that the posture of adultery is irrebuttable (and the Rogachover actually derives this directly from the biblical text).

According to these explanations, the logic of the posture of adultery rule would apply only to penal issues. A woman is prohibited to her husband even on the basis of information that would not be acceptable under the rules of evidence, if the husband himself believes that an adulterous act has occurred.[82] Hence there was no need to extend this presumption to prohibiting a woman to her husband, and – in the opinion of *Halakhot Gedolot* —the posture of adultery rule applies only to penal cases. According to Maimonides, on the other hand, it is a rule of evidence; thus, once witnesses have observed a man and woman in the posture of adultery, the presumption operates and the woman is prohibited to her husband. However, where the

[80] That is, *Gezerat hakatuv*.

[81] Precisely as advocated by R. Akiva and R. Tarfon according to the discussion in *BT Mak.* 7a.

[82] See *MT Hil. Ishut* 24:17-18.

husband himself observes the posture of adultery, there is no connection to the rules of evidence, and there is no reason to establish presumptions of law – or presumptions of any other sort – that there was an act of intercourse. If the husband believes that an act of adultery has occurred, his wife is prohibited to him; if he believes that there was no adultery, she is not prohibited to him.

3. *Offenders are stoned and burned on the basis of presumptions.*[83]
This rule, too, is based upon a presumption that was established as legal policy in order to permit criminal punishment. In the words of the Talmud:[84] "Not because we are certain that the child is hers,[85] but rather because he is attached to her."[86] It is not clear whether the Rogachover would consider these presumptions as well irrebuttable presumptions of law (*Praesumptio juris et de jure*), or whether, even in his view, if witnesses testify that the child is not hers, the two will not be put to death (rebuttable presumption of law, *Praesumptio juris tantum*).

4. If a *kohen* has warned his wife not to seclude herself with a particular man, if she secludes herself with that man, one witness's testimony that the two had relations is sufficient to prohibit her to her husband.[87]

[83] *Hil. Issurei Bi'ah* 1:20-22.

[84] See note 71 above.

[85] In other words, not because the presumption creates circumstantial evidence equivalent to the testimony of two witnesses.

[86] "It happened that a woman came to Jerusalem with a child on her shoulder. She reared him, and the two had sexual relations. They brought them before the court, [and they were convicted and] stoned – not because we are certain that the child is hers, but because he is attached to her." *BT Kid.* 80a.

[87] *Hil. Issurei Bi'ah* 1:22. If her husband subsequently has relations with her, he will be flogged for cohabiting with a woman prohibited to him, though she was prohibited on the testimony of only one witness.
See responsa cited in note 73 above: "There are two categories in which a woman [is prohibited] to her husband – *tum'ah* and *zonah*." *Tum'ah* [= impurity], according to the Rogachover, is a prohibition in the category of law, i.e., a statutory presumption. The status of *zonah* [= prostitute] is a prohibition created by intercourse in fact. The Rogachover uses this distinction to explain

In spite of the reasonable assumption of guilt (*raglayim ladavar*) created by the husband's warning and the wife's subsequent seclusion, one witness does not create certainty. Nevertheless, one witness is declared acceptable by dint of the legal policy to prevent adultery (which is rarely committed before witnesses). Clearly, this is not an irrebuttable but a rebuttable presumption of law (*Praesumptio juris tantum*), and it remains possible, by the testimony of two witnesses, to prove that no intercourse has occurred.

5. *A father is believed when he states to whom he has betrothed his daughter.*[88]

Unlike the testimony of two witnesses, a father's testimony does not establish fact; hence, a woman cannot be executed on the basis of such testimony. However, since a father is permitted to betroth his minor daughter to whomever he pleases, his statement concerning the man to whom he has betrothed his daughter is believed as a matter of legal policy, and it is deemed sufficient to permit her to marry the man indicated by her father.

Additional examples cited by the Rogachover – such as cases where a woman's marriage creates an irrebuttable presumption of law that she has had relations with her husband, though in actuality she has

the disagreement between Maimonides and Ra'avad. According to Maimonides, the woman is prohibited to her husband as a *zonah*; according to Ra'avad, on the basis of *tum'ah*. The question, according to the Rogachover, is whether in a case where there is some basis for believing the witness (*raglayim ladavar*; created by the warning and subsequent seclusion) one witness is believed to establish that intercourse has occurred in fact, or only to create a statutory presumption. The Rogachover asserts that this distinction will have practical implications in the case of *tzarat sotah* (the rival wife – in a polygamous marriage – of a suspected adulteress). If the husband of the two women dies without seed, the *tzarat sotah* is exempt from performing *halitzah* (to release her brother-in-law from the obligation of levirate marriage), if it is established that the *sotah* engaged in intercourse in fact. If, for example, a *sotah* is prohibited to her husband on the basis of warning and the testimony of one witness that she cohabited with the man concerning whom her *kohen* husband warned her, Ra'avad and Maimonides will disagree. According to Maimonides, the *sotah's* rival will be exempt from *halitzah*; according to Ra'avad, she will not. See the Rogachover's lengthy treatment.

88 *Hil. Issurei Bi'ah* 1:23.

not[89] – can be explained on the basis of a legal policy to prevent testimony being given in court as to whether a married woman had relations with her husband. Such testimony would also invade the individual's privacy, and hence would also be considered disgraceful.

D. Distinction between knowledge at the time of the act and knowledge of a result

In order to resolve the contradiction between the *umdenah* of Shimon ben Shetah and the "posture of adultery" rule, R. Moshe Feinstein[90] distinguishes between knowledge gained at the time of observation and knowledge gained by virtue of a result.[91] He proposes the following distinction:

1) *Circumstantial evidence* which creates knowledge for the court. Such evidence is acceptable as proof in various civil matters. In matters of personal status (according to certain approaches)[92] and in penal law, the court's knowledge is not permitted to serve as proof; hence circumstantial evidence is not acceptable. The court's knowledge is not acceptable in these instances not because circumstantial evidence cannot create certainty but rather because of divine fiat (*gezerat hamelekh*),[93] which prescribes that matters of personal status and penal law be adjudicated on the basis of two witnesses only.
2) *Testimony based upon circumstantial evidence.* Such testimony is acceptable as proof. When witnesses testify to a married couple's seclusion together and to the conclusion – from the fact of the couple's seclusion – that the couple had sexual relations, such testimony will be accepted as proof. This is because, as mentioned above, there is no problem with the certainty of the circumstantial evidence. Testimony that a married couple living together had sexual relations is based upon human experience which creates a presumption of fact.

89 See note 74 above.
90 *Iggerot Moshe, Yoreh De'ah* I, 48, p. 84; *Even haEzer* I, 82:5, pp. 204-205.
91 Or other information acquired after the fact.
92 See Ben-Meir, *op. cit.* (note * above), nn. 92-94 and text between them.
93 *BT B.B.* 59a.

> For that reason, such testimony will be acceptable, and the witnesses may even be able to serve as constituting witnesses.[94]

This is the case when the presumption of fact – the *umdenah* – enables the witnesses to understand what they have observed. As mentioned above, observation of a married couple going into seclusion, combined with an *umdenah*, implies the conclusion that we are in fact observing a married couple, living a married life, including sexual relations. Similarly, when witnesses see adulterers behaving as adulterers behave, the witnesses' human experience creates an *umdenah*, a presumption of fact, that what they have observed is a man and a woman engaged in sexual relations. Since that is the meaning of what the witnesses have seen, their testimony concerning what they have seen is acceptable even in capital cases.

Sometimes, however, an act observed by witnesses does not in and of itself create an *umdenah* concerning what the witnesses are observing. Only afterwards, when they see the result, do they understand what they have already observed. In such cases, the court does, in fact, gain knowledge of what transpired. However, there is no testimony to what transpired. Testimony must relate to observation of an act. Inferring what transpired from the result is an activity performed

[94] Rabbi Feinstein does not explicitly distinguish between circumstantial evidence and circumstantial testimony. It seems to me, however, that without such a distinction there is no legal basis for his distinction between knowledge at the time an act is observed and knowledge that depends on a result of the act observed.

According to our line of reasoning, a photograph taken of a murder is not acceptable proof in penal cases, because the film is observed after the fact and there are no witnesses who observed the act. Of course, even when there are witnesses, the court reaches its conclusions concerning what happened after the fact, but that information is based upon the testimony of witnesses who observed the act as it occurred (if the court itself observes the act, its observation may be sufficient to convict; this follows *a fortiori*, on the principle that testimony heard by the court cannot be stronger than the court's own observation; see *BT R.H.* 25b). When only a photograph of an act is available, there are no witnesses; the court does, however, attain knowledge of the act. Thus, a photograph will be acceptable evidence in a civil case. In matters of personal status, as well as in penal matters, witnesses are required, and a photograph, as explained, does not replace witnesses. See note 106 below.

See *Otzar haPosekim,* 18, p. 54, col. 3, concerning witnesses who observe a marriage through its reflection in a mirror.

by the court, not witnesses. Observing A holding a sword and pursuing B does not lead to the highly probable conclusion that A will murder B. Perhaps B will escape; perhaps A, having trapped B, will think better of killing him. Even seeing the result – a man with a bloody sword in his hand standing over another who has obviously been stabbed – does not prove that the bearer of the sword killed the victim. Perhaps A entered, found B dead, and picked up the sword.

The truth is that when we see A, sword in hand, pursuing B, and immediately afterward[95] we find A, with a now bloody sword in his hand, standing over B, we may indeed conclude from this observation that A has stabbed B. But that is a conclusion we reach by interpreting our observation (that A pursued B with a sword) in light of the result: B's death by stabbing. Such interpretation, however, is not the responsibility of the witnesses but of the court. It is not testimony, then, but rather knowledge gained by the court from testimony. Therefore, in the *umdenah* of Shimon ben Shetah, though there is circumstantial evidence, there is no testimony – and since the Torah decreed, "A person shall be put to death only on the testimony of two or more witnesses...," the death penalty can be administered only on the basis of testimony. Therefore, although the probability of this *umdenah* is no lower than the probability of the "posture of adultery" *umdenah*, it is not acceptable as proof, since the Torah decrees that an accused may be executed solely on the basis of testimony, not on the basis of the court's knowledge.[96]

[95] See *Otzar haPosekim,* 4, concerning whether there is any practical difference between an observation that occurs following a negligible interval (*tokh kedei dibbur*) after the act witnessed, and an observation that occurs after a greater interval. The logic of distinguishing between these two observations is apparently based upon the distinction between observing the act and observing its result: observation after a negligible interval may be considered equivalent to observing the act itself (see also Ben-Meir, *op. cit.* [note * above], n. 181).

[96] In a similar vein, *Marheshet, loc. cit.* (note 49 above), writes that in the *umdenah* of Shimon ben Shetah the testimony exists only as a combination of two observations – observation of the pursuit and observation of the result. Such testimony is considered special testimony (*edut meyuhedet*), not acceptable in capital cases. The posture of adultery, on the other hand, entails only one observation and is therefore acceptable in capital cases. This approach explains why Maimonides disqualifies both *umdenah* (i.e., the *umdenah* of Shimon ben Shetah) and special testimony on the basis of *Ex.* 23:7 – *umdenah* is disqualified

This particular explanation works well according to the opinion of Maimonides. It does not, however, fit the opinion of the *Tosafot*. The *Tosafot* conclude (from the case where a wounded person can swear and recover damages) that if witnesses see two uninjured persons, A and B, enter a room together, alone, and later the witnesses see A emerging with bite marks on his head, such testimony will be sufficient to convict and execute B (if A dies from the bite). Here the *umdenah* is based upon observation of the result[97] and thus constitutes circumstantial evidence and not circumstantial testimony. According to R. Moshe Feinstein, this should be acceptable only in civil proceedings, not in capital cases. Clearly, then, the *Tosafot* do not recognize this distinction, and in their view the only consideration is the level of probability. An *umdenah* of absolute certainty – such as where A was bitten by B, or the posture of adultery – is acceptable in both civil and capital cases. An *umdenah* of lesser certainty – such as the *umdenah* of Shimon ben Shetah and the *umdenah* of R. Aha – is not acceptable even in civil cases.

It appears that Rashi, too, does not recognize the distinction proposed by R. Moshe Feinstein. As mentioned above, R. Ashi asserts that a judge on the Sanhedrin could have prevented the administration of capital punishment by asking,[98]

> Even if you say that [you examined the victim and ascertained that] he was healthy [when murdered], perhaps the sword entered his body where there was already an opening [and this cannot be ascertained by examination].

Explaining R. Ashi's assertion, Rashi writes,

> They will say they *examined him after his death* to ascertain that he did not have one of the eighteen fatal organic injuries [when murdered]."

According to R. Ashi, the fact that the victim was healthy at the time he was murdered is a fact established by testimony, based upon the

because it is special testimony. See also *Resp. Ahi'ezer* I, 25:6-8.

97 It also constitutes special testimony; see note 96 above.

98 See text at note 40 above.

observation of the witnesses. Rashi, however, writes that the examination upon which this piece of information is based takes place after the victim's death. Rashi offers this explanation because he sees no possibility that the witnesses could have examined the victim while he was still alive, given that the examination itself would have killed him. Additionally, if the victim were examined during his lifetime, we could always suspect that he became fatally organically ill after the examination but before he was murdered. In any case, Rashi is clearly not concerned with the fact that a portion of the testimony is based upon knowledge gained after the fact.[99]

E. The certainty of the umdenah depends on the plea

Yet another explanation can perhaps be suggested. When witnesses see the posture of adultery, it is highly probable that they are witnessing sexual intercourse, though they cannot be absolutely certain. But if the suspected adulterers confirm that, when observed, they were indeed engaged in intercourse, their confirmation would create an *umdenah* of absolute certainty that what the witnesses had observed was in fact sexual intercourse. When this happens, their testimony is acceptable. If, however, the adulterers deny that they were engaged in intercourse, or even if they are silent and simply do not confirm[100] that they were engaged in intercourse, sufficient certainty has not been created for the *umdenah*, and the witnesses' testimony is not acceptable.

Of course, it is a fundamental principle of Jewish criminal law that a person cannot be put to death on the strength of his own admission.[101] Nevertheless, this principle does not totally negate the pos-

[99] Nor can it be argued that whether the victim was fatally ill at the time of the murder is incidental to the act, since the court requires that very information as one of its mandatory interrogations (*bedikot*). It is worth noting that this difficulty also applies according to the explanation of *Marheshet* (note 96 above): As Rashi explains R. Ashi's statement, the testimony required would fit *Marheshet's* description of special testimony, since it exists only as a combination of two observations. According to *Marheshet,* such testimony is disqualified.

[100] Needless to say, there is no certainty if the adulterers contradict each other – if one claims there was intercourse and the other claims there was not.

[101] See note 5 above.

sibility that a defendant's plea is critical. Among the Earlier Authorities,[102] we find that certain claims made by a defendant will lead to his acquittal. Where a defendant does not make these claims, however, the court does not make the claims for him but rather convicts the defendant. Of course, the approach suggested here entails assigning even greater significance to the defendant's plea, to the extent that his admission of guilt will also be considered. In the case of adulterers, however, conviction would not be based on the defendants' admission itself but rather on the testimony of witnesses who observed an act. The adulterers' admission is effective, however, in defining what the witnesses have observed. In such a case – where the admission is not the deciding factor in the conviction but only strengthens the *umdenah* of what the witnesses have seen – perhaps the admission is acceptable.

Some support can apparently be found for this approach. Maimonides rules:[103]

> If the offender admits that he inflicted the wound, he must pay for all five effects, since witnesses were present and testify that the plaintiff was unwounded when he came into the offender's hands at the time of the quarrel and wounded when he emerged. However, if there were no witnesses present, and the plaintiff says, "You wounded me," and the offender admits this of his own accord, he is exempt from paying for the injury and the

[102] *Tosafot, Yev.* 116a, s.v. *hakha haishinan dilma begamla parha azal; Tosafot, Yev.* 24b s.v. *Amar Rabbi, ad fin. Tosafot, Yev.* 93b, s.v. *Mai hazit,* hold that a claim of certainty (*bari*) is believed to controvert a presumption (*hazakah*). The *Tosafot* contradict this opinion, however, *Yev.* 88b, s.v. *vehaba aleha*; see also Maharsha *ad loc.*; *Penei Yehoshua, Ket.* 22b, s.v. *veadayin tzarikh lemoda'i*; *Kuntres Aharon ad loc.*, 72, writes that the purpose of every warning is to prevent the adulterer from claiming, "I am certain that she is not a married woman; I am certain she is not my sister," and that in a claim of certainty, he would be believed to controvert a presumption (see *Encyclopedia Talmudit,* vol. XIII, columns 732-733). See also *Resp. Yehudah Ya'aleh* II (*Even haEzer-Hoshen Mishpat*) 91, s.v. *veatah ahazor al harishonot*; and *Resp. Ribash* 234.

[103] *MT Hil. Hovel uMazik* 5:6, concerning a wounded person who can swear and recover compensation. See also Ra'avad *ad loc.*

> pain, but he must pay, because of his own confession, for the enforced idleness, humiliation, and medical treatment.

The point here is that although one who comes forward and admits to being obliged to pay a fine[104] is exempted from payment, if he admits to an incident concerning which witnesses testify only that the plaintiff was "unwounded when he came into the offender's hands at the time of the quarrel and wounded when he emerged," he is nevertheless not exempted. This is so even though the witnesses, by themselves, do not have the power to obligate him to pay anything, since they did not actually see him wound the plaintiff. Nevertheless, the offender here is not considered as a person who admits to being obliged to pay a fine. The reason appears to be that the witnesses have created an *umdenah* that the defendant did indeed wound the plaintiff – though it is not an *umdenah* with enough certainty to obligate the defendant to pay (recall that for Maimonides, by biblical law, an *umdenah* that constitutes a virtual certainty can obligate monetary payment). If, however, the defendant admits to wounding the plaintiff, his admission strengthens the *umdenah*; hence he is obliged to pay the fine on the strength of testimony, not on his own admission.[105]

This is precisely parallel to our suggestion concerning adulterers. In the case of adultery, there are witnesses, but their *umdenah* does not create a virtual certainty that they have observed an act of intercourse. However, when the defendants admit they were engaged in intercourse, their admission strengthens the *umdenah*. Now there are witnesses to an act of intercourse, and the adulterers are executed upon the testimony of witnesses. Although Maimonides rules that offenders cannot be executed on the basis of *umdenah*, where the defendants admit to sexual intercourse, the execution is not considered to be based upon *umdenah* – as it is not considered to be based upon

[104] In this case, compensation for injury and pain.

[105] This ruling may also be explained as simply a special case of a person who admits to being obligated to pay a fine, after which admission witnesses come forward and testify. Nevertheless, Maimonides' wording seems to support the explanation I have suggested.

admission – since the witnesses are now certain that they have observed intercourse and testify to what they have seen.[106]

According to this line of reasoning, it is possible that even in the *umdenah* of Shimon ben Shetah, a murderer who admits his crime will be executed, since his admission will strengthen the *umdenah* concerning what the witnesses saw. This would explain Shimon ben Shetah's declaration: "Wicked man! Who killed him? It was either you or I" – had the suspected murderer admitted his crime, he would have been executed for it.[107]

This approach also explains the view of *Halakhot Gedolot*. Concerning punishment for adultery, we ask the defendants whether they have engaged in intercourse. If they admit that they have, it becomes absolutely certain that the witnesses observed an act of intercourse; hence the defendants can be executed.[108] Similarly, for a woman to be prohibited to her husband, she must admit to committing adultery, so that sufficient certainty will be created that she is in fact prohib-

[106] According to this approach, it is possible that if witnesses observed the posture of adultery and a gynecological examination (circumstantial evidence) showed that intercourse with the accused man had occurred, such evidence would transform the witnesses' observation into fully acceptable testimony to the occurrence of intercourse. The reason is that it is not logical that such evidence should be inferior to the defendants' own admission (given that in Jewish Law a defendant's admission to a criminal charge is not acceptable at all!). Thus, testimony of these witnesses, combined with circumstantial evidence, could lead to conviction and execution of the accused adulterers. Similarly, circumstantial evidence based upon ballistic or pathological findings could be combined with the witnesses' observation that one person had shot another with a pistol, thus providing sufficient evidence for conviction and execution, even though the witnesses do not actually see the bullet's trajectory (although it is reasonable to presume that even in the absence of such circumstantial evidence, witnesses to a murder are not obliged to observe the bullet's trajectory). See notes 94 above and 107 below.

[107] See note 15 and text there. Indeed, Maimonides should have ruled explicitly that if the murderer admits to his crime he will be executed on the testimony of the witnesses. See also above, notes 94 and 106.

[108] According to this explanation, suspected adulterers will not be executed on the basis of testimony to the posture of adultery, unless they admit to having had relations. As is known, classical Jewish Law requires that, in order to be punished, potential offenders must be warned and acknowledge the warning (see note 6 and text at note 66 above). In most cases the defendant admits to his crime, see *M. Sanh.* 6:2 and *BT ad loc.*, 44b.

ited to him. However, even when a woman claims, "I had sexual relations with such-and-such a person," she is not believed.[109] The Rabbis were concerned that a woman might make such an "admission" because she has become attracted to another man and wishes to terminate her marriage. Thus they ruled[110] that a woman's admission to having committed adultery is not believed. Therefore, a woman who admits to adulterous relations is not believed and is considered to have remained silent and not confirmed the accusation against her. According to *Halakhot Gedolot,* when a woman remains silent, there is no *umdenah* of certainty. An *umdenah* of certainty can be created only by an admission. Thus, the woman cannot be prohibited to her husband.[111]

[109] *M. Ned.* 11:12. See also Maimonides, *Hil. Issurei Bi'ah* 24:18.

[110] In *Resp. Tzafenat Pane'ah,* p. 11, col. 2, the Rogachover writes that even prior to the Rabbinic legislation mentioned, where there is neither warning nor seclusion, a married woman is not believed to declare that she has committed adultery.

[111] Where there are witnesses and the required warning has been given and acknowledged, so that the woman's admission will lead to her execution, it is reasonable to presume that her admission to adultery also prohibits her to her husband; where her admission renders her liable for capital punishment, the suspicion that perhaps she has become attracted to another man is no longer relevant. *Halakhot Gedolot's* opinion relates only to the possibility of prohibiting a woman to her husband where there is no danger of incurring capital punishment on the strength of her admission.

INTER-GENERATIONAL RESPONSIBILITY

*Richard A. Freund**

Collective vs. Individual Responsibility

Moral responsibility is one of the fundamental questions of philosophy. According to major philosophical theories, a person is normally judged morally responsible for his/her own actions. There are, however, circumstances, in which a person is judged morally responsible for actions that he or she did not personally commit. In this latter case, indirect responsibility is a form of collective responsibility. Other possible cases are as follows:

a. A person commits a crime and bears the brunt of moral culpability, but another person is seen as having created the conditions or secondarily aiding, abetting, assisting or initiating a process or series of events that ultimately led to (or will in the future lead to) the commission of a crime.
b. A person commits a crime and is not able fully to compensate the victim(s) of a crime during his/her lifetime, and the punishment falls to a second party.

These two cases seem to parallel the cases of collective/intergenerational responsibility as found in the Bible and the Ancient Near East.

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An *Urtext* of Collective Responsibility in the Bible

The question of establishing an *Urtext* or original location for the collective responsibility verse found in *Ex.* 20 and 34, *Num.* 14 and *Deut.* 5 is a difficult if not impossible task. It is the opinion of this writer that the relevant words, "visiting the guilt of the parents upon the children" became a part of the Decalogue of *Ex.* 20 and *Deut.* 5 at an early period, although the Decalogue does not appear to be the original location of the injunction. The "original" location of the injunction appears to be in regard to the sin of the Golden Calf. The sin of the Golden Calf is described in *Ex.* 32, and the juxtaposition of the sin and the collective responsibility pronouncement in *Ex.* 34 is extremely suggestive. This point was not missed by medieval commentators. After Moses' intervention on behalf of the people after the sin of the Golden Calf and the subsequent presentation of the second set of tablets, the revelation of the nature of the Divine and Divine Justice is expressed in the so-called "thirteen attributes" in *Ex.* 34:7:

> The Lord! the Lord! a God compassionate and gracious, slow to anger, abounding in kindness and faithfulness; extending kindness to the thousandth generation, forgiving iniquity, transgression, and sin; yet He does not remit all punishment, but visits the iniquity of parents upon children and upon children's children, upon the third and fourth generations.

The same formula is found in an extremely abbreviated version in the Decalogue, both in *Ex.* 20:5-6 and *Deut.* 5:8, with significant lacunae:

> I the Lord your God am an impassioned God, visiting the guilt of the parents upon the children, upon the third and upon the fourth generations of those who reject Me, but showing kindness to the thousandth generation of those who love Me and keep My commandments.

Num. 14:18 has a longer variant of the formula:

> The Lord! slow to anger and abounding in kindness; forgiving iniquity and transgression; yet not remitting all punishment, but

> visiting the iniquity of fathers upon children, upon the third and fourth generations.

Although the *Num.* 14:18 passage is the closest to that in *Ex.* 34, it still lacks key elements, such as the expressions: "the Lord! a God" (the second pronouncement of the Tetragrammaton plus "God" [Heb. *elohim*]), "compassionate and gracious," "and faithfulness; extending kindness to the thousandth generation," "and sin (Heb. *ve-hatta'a*)."

The *Ex.* 34 passage, on the other hand, suggests no conditions or mitigating circumstances for the visitation of the iniquity of parents upon children[1] (compare the wording in the Decalogue "...of those who reject Me, but showing kindness to the thousandth generation of those who love Me and keep My commandments"), although similar phraseology ("...extending kindness to the thousandth generation") before the *poqed avon avot* pronouncement could be seen as affecting the entire clause.

The *Ex.* 20, *Num.* 14 and *Deut.* 5 passages in the Pentateuch all contain the final formula of "visiting the iniquity of parents upon the children..., upon the third and fourth generations," but all lack the words: "and upon children's children." *Ex.* 34 is the only passage containing the phrase "children's children." Without this phrase, the other passages seems to lack logical and poetic symmetry, in the sense that a whole generation is missing (the parents' iniquity is visited only upon the first, third and fourth generations).

It is difficult to say which is the more difficult reading; with or without "children's children." The phrase also occurs in an abbreviated poetic parallel in *Psalms* 103:17. *Ex.* 20:5 and *Deut.* 5:10 add the words: "of those who reject Me" and "but showing kindness to the thousandth generation of those who love Me and keep My commandments,"[2] lacking in *Ex.* 34:7 and *Num.* 14:18. These phrases appear to be later interpretive insertions, similar to some of the in-

[1] From now on I shall use the Hebrew formula *poqed avon avot* to designate this concept.

[2] The Masoretic text of *Deut.* 5:10 has "His commandments," but the *qeri* corrects this to "My commandments." This is significant, since the interpretive formula may have originally derived from *Ps.* 103:17-18: "...for the children's children of those who keep His covenant and remember to observe His commandments."

terpretive sections of *Deut.* 5:15 (another interpretive insertion is found in *Ex.* 20:11 and in the Dead Sea Scrolls[3]), but dissimilar in structure. In sum, it would seem that the original version of this passage did not include the interpretive glosses of *Deut.* 5 and *Ex.* 20.

The "thirteen attributes" formula: "The Lord! the Lord! a God compassionate and gracious, slow to anger, abounding in kindness and faithfulness; extending kindness to the thousandth generation, forgiving iniquity, transgression, and sin," without the clause "yet He does not remit all punishment, but visits the iniquity of parents upon children and upon children's children, upon the third and fourth generations" or the phrase "showing kindness to the thousandth generation," occurs throughout the Bible in different forms.[4]

Source Criticism and the Ancient Near East

The *poqed avon avot* formula has been assigned since the 19th and early 20th centuries to an early stratum of JE.[5] *Ex.* 20:5 and *Deut.* 5:9, which also contain the *poqed avon avot* formula, although associated by many with P and Dtr/D, respectively, are seen by most scholars as belonging to an early E "Ten Commandments" source with elaborations.[6] The other two passages we have discussed, *Ex.* 34:7 and *Num.* 14:18, are both held to be J texts.[7] The collective responsibility standard may be found in both narratives and legal material. As it appears in the narratives concerning the sin of Achan and the punishment of his sons and daughters, and the execution of Saul's

[3] The fourth commandment has a conflation; see S. A. White, "The All Souls Deuteronomy and the Decalogue," 109 *Journal of Biblical Literature* (1990) 206.

[4] For example, *Jonah* 4:2 and *Joel* 2:12-13. These two passages have the same ending, "renouncing punishment" and lack the *poqed avon avot* motif. For other occurrences, see *Neh.* 9:17-18, *Ps.* 86:15, 103:8-9, 17-18, 145:8-9. The interpretive ending in *Ps.* 103:17-18 is essentially a positive version of the pentateuchal formulation and corresponds to the interpretive apodosis of *Ex.* 20:5 and *Deut.* 5:10 indicated above. The standard of collective responsibility is unapologetically reiterated in *Ps.* 109:13-14: "May his posterity be cut off; may their names be blotted out in the next generation. May God be ever mindful of his father's iniquity and may the sin of his mother not be blotted out."

[5] R. E. Friedman, *Who Wrote the Bible?* (New York, 1987), 197.

[6] *Ibid.*, 258.

[7] *Ibid.*, 251, 253.

descendants, for example (*Josh.* 7:24-25 and *II Sam.* 21:1-9, respectively), the concept of inter-generational punishment seems to be an acceptable practice.

The principle of collective and familial responsibility, stretching beyond the individual, is found both in ancient Israel and in the rest of the Ancient East. The concept is found especially in Hittite texts.[8]

One might conclude on the basis of this that the J, E or JE concept of inter-generational justice was a construct of the early Israelite system, derived from Ancient Near Eastern parallels, that had become an outdated concept by the time of the Exilic prophets. Similar arguments have been raised concerning parents' rights concerning their children in general, in the earliest historical strata of the Bible, which also seem to have changed by time of the Prophets and the Hagiographa. Ideas found in *Gen.* 22:1-19, *Ex.* 22:29-30, *Judges* 11:30-31, 39; *I Kgs.* 16:34 and *II Kgs.* 3:27, suggest that children's rights were extremely limited in certain periods of biblical history and that, in general, they could not be said to have equaled the rights of contemporary adults. Certain biblical verses (such as *Deut.* 21 and *Judges* 12) imply total parental control over children, while other parts of the Bible suggest that children do possess some independent "rights."[9]

Suddenly, *poqed avon avot,* which probably had been the standard (individual responsibility was probably a minority opinion) for nearly 1000 years in the Ancient Near East, was modified in the period of Ezekiel and Jeremiah (6th century BCE). In the 6th century, the prophets Ezekiel and Jeremiah make a series of pronouncements that conflict with earlier statements. In *Jer.* 31:29-30:

> In those days, they shall no longer say, "Parents have eaten sour

[8] See, for example, the Hittite "Instructions for Temple Officials" and the 14th-century BCE text of the plague prayers of Mursilis, J. B. Pritchard, *Ancient Near Eastern Texts Relating to the Old Testament* (Princeton NJ, 1969) (*ANET*), 207-208, 395. It is important to note that there was some type of remedy for the transgression of the father. Acknowledgment of sins and confession in some kind of ritualistic setting seems to be have been a remedy for the children.

[9] For more on this question see Chapter 7: "Rights: From the Bible to Modern Judaism," R. A. Freund, *Understanding Jewish Ethics,* Vol. II (New York, 1993).

> grapes and children's teeth are blunted." But every one shall die for his own sins: whosoever eats sour grapes, his teeth shall be blunted.

The same proverb and message is found in Ezekiel's writings with a slight difference. The Ezekiel passage (18:1-4) states:

> The word of the Lord came to me: What do you mean by quoting this proverb upon the soil of Israel, "Parents eat sour grapes and their children's teeth are blunted"? As I live – declares the Lord God – this proverb shall no longer be current among you in Israel. Consider, all lives are Mine; the life of the parent and the life of the child are both Mine. The person who sins, only he shall die.

The argument and language of Ezekiel are so distinct here in disapproving of the standard of inter-generational punishment that it appears to be only partially agreed to by Jeremiah. Further on (18:14-20), Ezekiel continues:

> Now suppose that he, in turn, has begotten a son who has seen all the sins that his father has committed, but has taken heed and has not imitated them: He has not eaten on the mountains or raised his eyes to the fetishes of the House of Israel; he has not defiled another man's wife; he has not wronged anyone; he has not seized a pledge or taken anything by robbery; he has given his bread to the hungry and clothed the naked; he has abstained from wrongdoing; he has not exacted advance or accrued interest; he has obeyed My Rules and followed My Laws – he shall not die for the iniquity of his father, but shall live. To be sure, his father, because he practiced fraud, robbed his brother, and acted wickedly among his kin, did die for his iniquity; and now you ask, "Why has not the son shared the burden of his father's guilt?" But the son has done what is right and just, and has carefully kept all My laws: he shall live! The person who sins, he alone shall die. A child shall not share the burden of a parent's guilt, nor shall a parent share the burden of a child's guilt; the righteousness of the righteous shall be accounted to

> him alone, and the wickedness of the wicked shall be accounted to him alone.

In addition, Ezekiel seems to oppose what might have been a standing counterpart to inter-generational punishment, i.e., inter-generational merit. So, in *Ezek.* 3:18-20:

> If I say to a wicked man, "You shall die," and you do not warn him – you do not speak to warn the wicked man of his wicked course in order to save his life – he, the wicked man shall die for his iniquity, but I will require a reckoning for his blood from you. But if you do warn the wicked man, and he does not turn back from his wickedness and his wicked course, he shall die for his iniquity; but you will have saved your own life. Again, if a righteous man abandons his righteousness and does wrong, when I put a stumbling block before him, he shall die. He shall die for his sins; the righteous deeds that he did shall not be remembered; but because you did not warn him, I will require a reckoning for his blood from you.

From the earliest period of Israelite history right up until the time of Jeremiah and Ezekiel, one standard seems to have held sway, but thereafter two standards seem to coexist in biblical texts. One finds, for example, in *Lam.* 5:7: "Our fathers sinned and are no more; and we must bear their guilt...," but in *Job* 21:19-21 (and 27:14): "You say, God is reserving his punishment for their sons. Let it be paid back to him that he may feel it. Let his eyes see his ruin, and let them drink the wrath of Shaddai! For what does he care about the fate of his family, when his number of months runs out?" The Job passages imply a recognition of the earlier standard, but an overturning of that standard in Job's argument. The book of Job is thought to be a mixed text, containing an early skeleton of a text to which additions were made at later periods. Lamentations, however, is a vintage 6th-century BCE text. The two standards were apparently known and dealt with in some manner in texts edited by the 6th century BCE.

Inter-generational/collective responsibility sometimes meant multi-generational punishment. It is not to be taken as a literal stand-

ard, applying to only one generation of one family. In *Isa.* 53:6 we have the more general: "We all went astray like sheep, each going his own way; and the Lord visited upon him the guilt of all of us (*avon kullanu*)"; and in *Jer.* 14:20: "We acknowledge our wickedness, O Lord – the iniquity of our fathers (*avon avotenu*), for we have sinned against You." Jeremiah continues to return to the theme by denouncing the existing standard: (32:18) "You show kindness to the thousandth generation, but visit the guilt of the fathers upon their children after them..."

This on-going debate over the rectitude of the two standards might simply be a text-critical footnote of the Bible, were it not for one strange part of the collective vs. individual responsibility question. Since the Jewish legal system is based in part (and indirectly) upon a meticulous reading and interpretation of the Torah (Pentateuch) texts, the two standards collide in a new and perhaps unimagined way in the text of Deuteronomy. Apparently because of editing considerations, the later (6th-century) standard of individual responsibility appears in the Torah right alongside the earlier standard! In *Deut.* 24:16, we read: "Parents shall not be put to death for children, nor children be put to death for parents: a person shall be put to death only for his own crime."

The question is, how could the two pronouncements "*poqed avon avot*" of Exodus, *Deut.* 5 etc. and *Deut.* 24 be understood in the same interpretive framework?[10] This question was tackled in a number of different ways by the Rabbinic commentaries; but in the period before Rabbinic texts were codified, several other Jewish texts attempted a synthesis of the two standards.

Before moving on to the analysis of these later interpretive texts, one can draw a few conclusions concerning the use of the two principles in the biblical period. First, it seems that the original context of the phrase *poqed avon avot* may have been in connection with the sin of the Golden Calf in *Ex.* 32. Since the people of the first generation were obviously not destroyed in the desert, it seems that the

[10] It is possible to argue (as Rabbinic commentators do, see discussion below) that they are actually supplementing one another. The *Deut.* 24 passage is dealing with not putting to death children for parents' sins while *Deut.* 5 holds to inter-generational responsibility.

threat of punishment imposed upon a second, third or fourth generation may have been a good literary and legal deterrent for future generations. The original theological context was not all sins of the fathers, but specifically idol worship. Its placement in the Decalogue (with a small caveat of interpretation) seems to confirm that assessment. The use of the standard in the case of the "spy account" of *Num.* 14, however, seems to indicate that the original context was expanded to include other sins as well. It is this latter usage which was the most problematic and may have led to abuses. The standard seems to have been known and in use until the 6th century BCE, although there is some indication that interpretive parts had mitigated the view.

Since both Ezekiel and Jeremiah lived at the time of the destruction of the First Temple in the 6th century BCE, one might attribute the change in the idea of individual and collective responsibility to the social and political conditions prevailing in this later period. Whatever the reason, the earlier standard was not "erased" from the collective consciousness of the biblical writers. It was used through the Persian period and appears to be a point of major discussion in later Hellenistic and Roman writers. The need for a clear "corrective" language in *Deuteronomy* seems to imply that the minor interpretive efforts were not completely successful in averting abuses. The examples from *Nehemiah, Lamentations and Job* especially suggest that the view of collective responsibility continued to exist side by side in the Exilic period. In addition, a short survey of texts written in the Hellenistic and Roman period reveals that the two standards may have coexisted in the Hellenistic and Roman periods as well.

Jewish Texts of the Hellenistic and Roman Period

In *Wisdom of Solomon* 3:10-4.6, *Ben Sirah* 41:5-7 and the book of Judith, the idea of *poqed avon avot* is taken for granted. In *Judith* 7:28, for example:

> We call to witness against you heaven and earth and our God, the Lord of our ancestors, who punishes us for our sins and for the sins of our fathers, that you do what we have said today.

The Vulgate translation of the book of *Judith* (7:19-20), however,

has a much longer insertion (or interpretation) here. It is clearly an attempt to adapt the text to the *Jeremiah/Ezekiel* standard by asking for personalized Divine punishment:

> We have sinned with our fathers, we have done unjustly, we have committed iniquity. Have mercy upon us, because you are good, or punish our iniquities by chastising us yourself, and do not deliver them that trust in you to a people who do not know you.

The view of the Pseudepigrapha includes inter-generational suffering in some of the writings, with an additional reasoning. Namely, a form of the later, Christian doctrine of "original sin/iniquity" (of Adam) is invoked to give some meaning to inter-generational punishment. So in *IV Ezra* 7:118: "O thou Adam, what have you done? For though it was you who sinned, the fall was not yours alone, but ours also, who are your descendants."

But the other view, of individual responsibility and punishment, is upheld, specifically against the "original iniquity" charge found in IV *Ezra*. In *II Baruch* 54:15-19:

> For although Adam first sinned and brought untimely death upon all, yet of those who were born from him each one of them has prepared for his own soul torment to come, and again each one of them has chosen for himself glories to come... Adam is therefore not the cause, save only of his own soul, but each of us has been the Adam of his own soul.

The idea of some permanent sin being punished at a later period is one which will reappear in a number of incarnations in later literature. In the Rabbinic literature it is usually associated with the events related in the book of *Exodus* regarding the Golden Calf, while in early Church literature the idea of "original sin" is related to the events of the book of Genesis regarding the serpent and Adam and Eve.[11]

The Dead Sea Scrolls provide another important viewpoint for our understanding of the idea of collective responsibility in the Hellenis-

[11] Augustine, *De Genesi Ad Litteram, Imperfecturs Liber* 1:3.

tic and Roman period. The *4QDtn,* or so-called "All Souls Deuteronomy scroll," contains the Decalogue and the *poqed avon avot* citation.[12] Its presence there testifies to a text of the Decalogue which is close to the MT text (although containing a conflation in the fourth commandment),[13] but does not reveal much more about the significance of the concept in the biblical text of the Qumran caves. The sectarian literature of the caves, however, does bear witness to the singular importance of this standard. The dualism of human existence (between the Sons of Light/truth and the Sons of Darkness/deceit) is only one of the topics treated in one of the major Qumran documents, the so-called *Rule of the Community*. In the *Rule of the Community* document, a future punishment is predicted over and over again. The word for the particular "punishment" to be meted out is referred to repeatedly as *ha-pequdah,*[14] "the visitation," which is obviously derived from *poqed avon avot* and may be understood as multi-generational in scope.

This idea of an eternal purification process, stretching back through the preceding generations and forward to include future generations, is central to the theology of these texts. It is found not only throughout the general rules of the community, but also in a liturgical text entitled *4QWords of the Luminaries*[a] *(4Q504 [4QDibHam*[a]*]).*[15] It follows that the issue of *poqed avon avot* may have had special importance for the Dead Sea sects. First, the Hebrew word used in relation to the punishment, *ha-pequdah,* seems to be a *terminus technicus,* apparently standing for a multi- generational purification or punishment process.[16] In the Hebrew Bible, the form *ha-pequdah* appears in *Hos.* 9:7, where it is clearly referring to an inter-generational/collective punishment – the text is clearly dealing with a "cumulative" crime and the exacting of punishment beyond

[12] S. A. White, "The All Souls Deuteronomy and the Decalogue," 109/2 *Journal of Biblical Literature* (1990) 193-206.

[13] *Ibid.*, 206.

[14] *The Dead Sea Scrolls,* Vol. 1: *Rule of the Community and Related Documents,* ed. J.H. Charlesworth (Louisville, 1994), 15-19.

[15] *The Dead Seas Scrolls Translated,* ed. F. G. Martinez (Leiden, 1996[2]), 415.

[16] The word *pequdah* appears over thirty times in the MT, in three varying definitions.

the one generation who have committed the crime. What is more, that very text is interpreted as inter-generational punishment in *4QHosea Pesher*^{a} *(4Q166[4QpHos*^{a}*],* fragment 1 column I, 10ff.) as well.[17]

The *Damascus Document* contains the reference a significant number of times,[18] as do the *Thanksgiving Hymns,*[19] the *Wisdom Poems,*[20] and the *4QPurification Rules.*[21] The most sophisticated version of the idea is found a number of times in the *Damascus Document.*[22]

While it is true that the root *pqd* appears in the Hebrew Bible in two other meanings,[23] its major meaning may be linked to inter-generational punishment. It is not, therefore, difficult to assume that the *Rule of the Community* and the *Damascus Document,* which place such a high value on group discipline, would see the purification of the individual from collective sins (which may have been heaped upon his soul for generations) as a particularly important goal. In addition, as seen above in relation to the Hittite texts, a ceremony for purification according to some form of ritualistic ac-

[17] *Dead Sea Scrolls Translated* (*supra*, n. 15), 192.

[18] Copies from the Genizah: *Ibid.*, 38-39: Column VII end – Column VIII.

[19] *Ibid.*, p. 319, 1QH V 16; p. 326, IX 16-19.

[20] *Ibid.*, p. 385 4QSapiental Work A^{c} (4A417[4QSap.Work A^{c}]), Frag. 1 col. I; p. 386, Frag. 2 col. I; p. 390, Frag. 43 (= 4Q417 2 I); p. 392, Frag. 126 col. II.

[21] *Ibid.*, p. 434, and the 4QPurification Rules B^{a} 94q275[4QTohorot B^{a}]) "6 in his destruc[tive] visitation [...]."

[22] *Ibid.*, p. 45.

[23] The verb *pqd* has three basic meanings in over 100 independent citations in biblical texts. Some include: a. "remembering" or providence, b. "numbering" or census taking, and c. Divine "visitation" or punishment.
a. The verb is used in connection with "remembering"/providence in Gen. 21 regarding Sarah, in *Gen.* 50 with regard to the death of Joseph, the Israelites in Egypt in *Ex.* 3 and 4, Moses' treatment of the bones of Joseph in *Ex.* 13, Hannah's pregnancy in *I Sam.* 2, in relation to David in *I Sam.* 20, and in a general sense of Divine remembering in *Ruth* 1:6, *Ps.* 80:15 and 106:4.
b. The verb is used for census taking or counting of the Israelites in *Ex.* 30, the numberings of pieces of the Tabernacle in *Ex.* 38, and throughout the book of Numbers for the counting of the Israelites, the numbering in *II Sam.* 24, the census of *I Kgs.* 20 and *I Chron.* 21.
c. Besides *Ex.* 20 and 34, *Num.* 14, and *Deut.* 5 (and the punishment of the sin of the Golden Calf in *Ex.* 32), all of which include the phrase *poqed avon avot,* the major use of the verb refers to Divine "visitation" for the purposes of punishment.

knowledgment and confession was known in Antiquity. This "purification" may have involved a confession of sins and a ceremony of rededication to the new community. It may, therefore, have been one of the major issues that distinguished the Dead Sea sects from their brothers and sisters in Jerusalem during the Hellenistic and early Roman period.

In the first century CE, Philo[24] and Josephus,[25] whose writings both contain lengthy interpretations of the Bible, make little or no reference to the collective responsibility standard. In the same period, the Aramaic targums had already attempted a resolution of the two conflicting concepts of *Ex.* 20.5 etc. and *Deut.* 24 and *Ezekiel/Jeremiah et al*, in a number of ways. Thus, in *Ex.* 20:5, *Targum Neofiti* states:

> ...avenging the sins of the fathers upon the rebellious children, upon the third generation and upon the fourth generation of those who hate Me, when the children follow their fathers in sinning.

Targum Pseudo-Jonathan and *Neofiti* both add the word "rebellious," although it does not appear in the Hebrew, in order to reconcile why a child could be punished for the actions of his/her fathers. More importantly, both Targums for Deuteronomy and Exodus add the words "when the children continue to sin as their fathers" in the second half of the sentence, to insure that the principle of innocent children being punished for the actions of parents is obviated (although that idea could be inferred from the Masoretic Text). This assumes that the standard of *poqed avon avot* was not accepted in its plain version, without the interpretative cue.

In the Aramaic Targum to *Jer.* 31:28 and *Ezek.* 18:2 it was so important that the standard not be misunderstood that, instead of the

[24] *On the Virtues* 41:226-227, *The Decalogue* 23:111-120, *Special Laws* III 29-30, 153-168, all accept the standard of individual responsibility and explain it meticulously as the standard of Judaism. One reference, in *On Sobriety* 10:47-48, however, does apply the collective responsibility standard as part of a historical analysis; but in general the idea is dismissed as being inconsistent with standards of human conduct of the period.

[25] There is only one relevant reference: *Antiquities* IX,ix,1. Josephus, despite his obvious interest in biblical history, does not seem to be aware of the *poqed avon avot* standard at all.

standard MT text: "Parents have eaten sour grapes and children's teeth are blunted," we read "Parents have sinned and children have been punished."

One clear first-century use of the concept of collective responsibility appears in the New Testament. The text is extremely relevant to any Jewish discussion of the concept and it is presented as a reflection of the priests' polemical attitude. This text's appearance in the NT implies that the standard of *poqed avon avot* was still relevant in the thought of the Gospel writers. Matthew 27:25 states, regarding the crucifixion:

> So when Pilate saw that he was gaining nothing, but rather that a riot was beginning, he took water and washed his hands before the crowd, saying, "I am innocent of this man's blood, see to it yourselves." And all the people answered, "His blood be upon us and on our children!"

The importance of this verse is that it appears in none of the other Gospel accounts of the crucifixion! The fact that the scene is paralleled in Luke and Mark without this citation is relevant, since the verse has played a significant role in the later anti-Judaic and anti-Semitic polemics of the Church.[26] The Church Fathers (1st through 3rd century CE) seem also to have used both standards in creating an interpretive system which reflected an appreciation of the historical precedents and the justice perspectives inherent in both.[27]

[26] See J. A. Fitzmeyer, "Antisemitism and the Cry of 'All the People' (Matthew 27.25)," 26 *Theological Studies* (1965) 667-671.

[27] *Dialogue with Trypho,* chap. 140, cites *Ezek.* 18:20 (the individual responsibility formula) as part of a greater refutation of the Jewish concept of "the merit of the fathers/*zekhut avot,*" which seems to have been one of the arguments used by Jews against the early Christians. Clement of Alexandria, in *The Instructor,* book I, chap. VIII, cites the *poqed avon avot* standard to demonstrate the all-powerful nature of God; but Tertullian developed an entirely unique way of integrating the two different views in his *Tractate Against Marcion,* book II, chap. 15. Tertullian attempted to "rescue" the Hebrew Bible and the OT concept of a just God for use by early Christians against Marcion's attacks, by attempting to demonstrate how the early and later standards of collective and individual responsibility are both good, logical and just, fitting together in the context of later NT writings.
The 2nd-century Origen, *De Principiis,* book IV, chap. I.8, and 3rd-century

Rabbinic Texts and Methods

Rabbinic midrashim and medieval interpretations of the pentateuchal verses attempted to create a system of justice which used three methods in dealing with the verses.

1. The first method was to accept the individual responsibility standard as supplemented by the collective responsibility standard in the absence of repentance. As one might expect, midrashim are an excellent source for the reconciliation of the verses. Midrashim such as *Pesiqta DeRav Kahana* 25:4 hold to this method, but the citation of the *Deut.* 24 text in the context of the Tannaitic midrash of *Sifrei Deuteronomy Ki Tetze* 280 does not cite the words *poqed avon avot...* (see below), while the later redacted section in *BT Sanh.* 27b does include both the *Deut.* 5 and 24 view in a fully argued section. A similar method is followed in *BT Ber.* 7a.

2. The second Rabbinic method is to accept the standard of collective responsibility standard as different from the individual responsibility standard, but suggest different explanations of how they have come to coexist within the Jewish legal system. Two sub-methodologies have been developed to accommodate both.

a. The first sub-methodology sees the *poqed avon avot* standard as the product of Divine frustration with the human and has Moses "correct" the Divine frustration. This methodology is well known both in the text of the Bible itself and in Rabbinic interpretation. So Abraham bargains with God in *Gen.* 18, Moses pleads with God in *Num.* 14 after the debacle of the spies' return to the camp with their discouraging message; and Moses again argues with God over the destruction of the people following the Golden Calf incident in *Ex.* 32. In each case God presents a position but later changes that posi-

Cyprian, *The Epistles of Cyprian,* ep. 51.27, use the standards in different ways. Origen simply presents the collective responsibility standard and claims that the heretics use the *poqed avon avot* standard in its literal sense, whereas, he states, it needs further spiritual interpretation. The heretics use the verse to prove that God is only strictly just and not good (as Marcion and others held); but in its spiritual interpretation it means much more. By the beginning of the third century, Cyprian was facing a new challenge of heresy, which no longer challenged the nature of the texts (as in the Marcionite heresy) but rather demanded a reassurement of the ultimate grace of God and power of repentance. Cyprian cites only *Deut.* 24 and *Ezek.* 18.

tion after hearing arguments to the contrary. In the case of this section Moses tries to convince God not to apply the standard of *poqed avon avot* and God is convinced. This is the approach of *Num. Rabba* 19:33 and *Tanhuma Deut. (Shofetim)* 19:33 (Warsaw).

b. The second sub-methodology has Moses presenting the standard of *poqed avon avot,* with the prophet Ezekiel later correcting the earlier pronouncement. Such is the view of *BT Mak.* 24a and *JT Mak.* 7a.

c. A variation on these sub-methodologies has the standard being implemented, but the prophet Elijah presents a *post facto* argument for saving young children from their fate. This is the view of *Eccl. Rabba* 4:1 (12b). This later midrash appears to be a reworked version of the earlier *Mekhilta of Rabbi Simon bar Yohai* to *Ex.* 20:5, which holds that "if the fathers were virtuous, God suspends (judgment) for the children, but if not, He does not suspend it for them."[28]

3. The final Rabbinic method of dealing with the issue is "selectively" to ignore one or the other principle:

a. The individual responsibility standard is cited without the need to reconcile it with the collective responsibility principle. This generally happens in the Midrash collections, where the citation is analyzed on its own. Thus, for example, the Tannaitic midrash *Sifrei Deuteronomy Ki Tetze* 280 does not cite the words *poqed avon avot...,* explicitly ending with: "...a man who sins, he shall die" – parents die for their iniquity and children die for their own iniquity.

The later *BT Sanh.* 27b, which employs much of this Tannaitic interpretation, combines it with the *poqed* references but ignores the final midrashic statement (see above). Nevertheless, just because a homily is found in the Babylonian Talmud does not mean that it uses both citations. An example is *BT Shab.* 55a.

b. The collective responsibility principle of *poqed avon avot* is most often cited without the need to reconcile it with the individual responsibility principle. This is the most frequent type of example, because of the nature of the midrashic interpretations. Since *poqed avon avot* appears in the Torah more often than the *Deut.* 24 citation

[28] *Mekhilta d'Rabbi Simon b. Yohai,* ed. J. N. Epstein (Jerusalem: *Mekize Nirdamim,* 1955), 147-148.

and in more frequently interpreted places (such as the Ten Commandments!), it is obvious why this is more fully elaborated in Rabbinic texts than the other positions. While the *Num. Rabba* 9:44, 9:47, *Tanhuma Exodus (beShalah)* 21 (Buber ed.), *Tana DeBei Eliyahu* 5:2 and 5:4 are just straightforward commentaries using the *poqed avon avot* principle, they often use it with a sense of the compromise position inherent in their argument. The *Mekhilta baHodesh* 6, *Sifrei Num. (Shelah)* 6 and *Tosefta Sot.* 4:1 deal with specific interpretative issues of the *poqed avon avot* formula. In the case of the *Num. Rabba* and *Tosefta Sot.* passages, for example, the formula is related to a secondary issue in the punishment or non-punishment (merit) of the *Sotah*.

Medieval Jewish Commentators

The early medieval commentators (*rishonim*) may or may not have known all of the midrashic and talmudic passages presented here. What is clear is that, in addition to their own interpretive powers, they had to contend with the influences of Christianity and Islam, in particular, which may have impacted on some of their insights into these concepts of justice. In unusual circumstances, the collective and individual standards appear in varying contexts. In Rashi's commentary to *Deut.* 24:16, "Parents shall not be put to death for children, nor children be put to death for parents: a person shall be put to death only for his own crime," he goes as far as quoting the *BT Sanh.* 27b (first method above), presenting the issue as the testimony of children against parents and parents testifying against children, but then admits that the words: "a person shall be put to death only for his own crime" refer to an adult (lit.: *ish,* man); but "one who is not yet an adult" (meaning a child), states Rashi, "dies for the iniquity of his father, and minors die for the iniquity of their parents at the hand of Heaven," citing a midrashic interpretation of Deuteronomy.

In an unusual development of the interpretation of intergenerational punishment, Rashi, in his interpretation of *Ex.* 32:34, juxtaposes two sections of *Exodus* to form a justification for the punishment. The interpretation seems to play upon the use of the word *poqed* = visit, make an accounting. After the sin of the Golden Calf,

God declares: "...My angel shall go before you. But when I make an accounting, I will bring them to account for their sins." Rashi states (quoting the tradition of *BT Sanh.* 102b):

> Now I have listened to you not to destroy them altogether, but always, always when I bring them to account for their sins, "I will bring them to account" for a little of this sin, together with the other sins, so that no punishment comes upon Israel in which there is not a little of the punishment for the calf.

This interpretation of Rashi, which seems to be based on the *BT Sanhedrin* tradition, brings us back to the idea, expressed in the Apocrypha, of a semi-permanent "original" sin whose punishment is meted out to future generations to come.

Maimonides' legal code, *Mishneh Torah,* is not a verse-by-verse commentary, but a general conceptual compendium which does not depend on one verse or another for justification. This is important, since Maimonides could (and did) therefore simply divest his legal code of a conflicting citation or view. However, he did not do so in his treatment of the concept of inter-generational punishment. The most important passage for an understanding of Maimonides' view in this connection appears in *Hil. Teshuvah* 6:1:

> There are many verses in the Torah and the writings of the Prophets which appear to be contradicting a major principle... And so I shall explain a major principle, from which you shall know the meaning of all these verses. When one person or the people of a city commit a sin, and the sinner is doing so intentionally... the Holy One blessed be He knows how to exact punishment. There is a sin regarding which the law is that punishment be exacted for his sin in this world, (inflicted upon) that person's body or wealth or upon his small children, because a person's small children, who do not yet possess knowledge or are yet free from the performance of religious duties, are considered his property, and it is written [in Ezekiel], "a person (Heb. *ish* = adult) who sins, only he shall die" – [punishment is only exacted] when a person comes of age. And there is a sin regarding which the law is that punishment is exacted in the

> World to Come, and the person who commits that sin experiences no affliction in this world. And there is a sin for which punishment is exacted in this world and the World to Come.

In *Guide of the Perplexed* I:54[29] Maimonides makes the point even clearer:

> For the thirteen attributes are all of them, with one exception, attributes of mercy – the exception being: visiting the iniquity of the fathers upon the children [*Ex.* 34:7]. For it says: And that will by no means clear the guilty [*loc. cit.*]. The meaning is: and He will not utterly destroy – an interpretation deriving from the words: And utterly destroyed, she shall sit upon the ground [*Isa.* 3:26]. Know that His speech – visiting the iniquity of the fathers upon the children – only applies to the sin of idolatry in particular and not to any other sin. A proof of this is His saying in the ten commandments: unto the third and fourth generation of them that hate Me [*Ex.* 20:5]. For only an idolater is called hater: for every abomination to the Lord, which He hates [*Deut.* 12:31]. He restricts Himself to the fourth generation only because the utmost of what man can see of his offspring is the fourth generation. Accordingly, when the people of an idolatrous city are killed, this means that an idolatrous old man and the offspring of the offspring of his offspring – that is, the child of the fourth generation – are killed. Accordingly Scripture, as it were, predicated of Him that His commandments, may He be exalted, which undoubtedly are comprised in His actions, comprise the commandment to kill the offspring of idolaters, even if they are little children, together with the multitude of their fathers and grandfathers. We find this commandment continuously in the Torah in all passages.

Maimonides here redefines the idea of inter-generational punishment to apply only to idolatry and to no other crimes (although one might infer that even a blameless great-grandchild might be killed in this

[29] Cited, with some modifications, from the translation by Sh. Pines (Chicago & London, 1963), 127.

type of scenario). This became the standard for medieval interpretations of this verse and its import.

Although the idea of children dying for the sins of their parents seems to have generally been interpreted out, or else the verse was ignored, in the medieval legal codes, the verse does appear in the *Zohar,*[30] where it is reinterpreted as part of the mystical Zoharic system but retains its original quality of inter-generational punishment. The concept seems to have been revived in the pre-modern Jewish ethical literature[31] and in the writings of the Maharal of Prague.[32] It is interesting to note that although the verse is not cited in the *Shulhan Arukh* (the 16th-century legal compendium which forms the basis of modern Jewish law) itself, it found its way into the 19th-century *Qizzur Shulhan Arukh* (an abbreviated version of the 16th-century legal code), using the language of the ethical literature and the Maharal, in *Hilkhot Kibbud Av vaEm,* chap. 143:[33]

> Also, the father who truly has compassion on his children will involve himself in Torah study and Good deeds, and will please God and mankind, and his children will be proud of him. But he who does not walk in the right path brings disgrace upon his children. Also, children die because of the iniquity of the fathers, as it is written: "Visiting the iniquity of the fathers on children."

Conclusions

It is difficult to achieve a socio-economic evaluation of a philosophical concept such as collective vs. individual responsibility, but the results of this study necessitate the drawing of conclusions. A concept of collective retributive justice and punishment may have devel-

[30] *Zohar*, pt. II 91b and 113a, for example.

[31] *Sha'arei Teshuvah,* Sha'ar III, #159; *Orhot Zaddiqim, HaSha'ar haShemini, Sha'ar haAchzariut,* end.

[32] *Tif'eret Yisra'el,* Sha'ar 38, pp. 116-117; Sha'ar 43, p. 133; *Netivot Olam,* I, *Netiv haTorah,* chap. 17, p. 74; *Ibid.*, II, *Netiv haTeshuvah,* chap. 6, pp. 165-166; *Netiv haYesurim,* chap. 2, pp. 177, 188; and in his *Hiddushei haAggadot* as well.

[33] *The Metsudah Kitzur Shulchan Aruch,* with a linear translation by R. Avrohom Davis (New York, 1992), 11.

oped to insure that the obligations of individuals to the group, necessary to maintain an integrated economy, be fulfilled. As societies began to move to larger, "city"-dwelling economies, where individuals and their social units were less dependent upon one another for day-to-day necessities, collective responsibility appears to have given way to a standard of individual responsibility. In those ancient societies where there were competing ruling elites, the collective justice standard was also used to justify wiping out an entire line of competition.

While the extremely well-defined systems of status, class and other categories of society in Antiquity affected the way the concept of moral responsibility developed in the first millennia BCE, it was clearly a fundamental part of the moral system of most groups. It is also clear that in the Ancient Near East a strictly defined moral responsibility of the individual within his/her group was the rule. In general, a well-defined sense of moral responsibility and an ancient sense of genetic/biological interrelatedness extended the responsibility and liability for one's own actions to one's family or group, and especially to one's rightful heirs. The basic concept of inheritance and its inviolability may have contributed to the notion of an inter-generational or collective responsibility both in the Bible and the Ancient Near East. In short, if one was able to inherit the "benefits" of one's group or family, one was also liable for the debts or crimes of the group or the family members. Although an absolutely free will was not seen as particularly important in this early period, the existence of a partially free will (affected by Divine Providence), which allowed for the possibility of an individual committing crimes and being held liable for them, was part of most Ancient Near Eastern legal systems as well as of the Bible.

The standard of collective justice did not disappear with the movement to city-states. In the latest strata of the Bible, and in post-biblical society as reflected in the Apocrypha, the *Rule of the Community,* Targums and Hellenistic-Jewish writings, it appears to have coexisted with the standard of individual responsibility. In the writings of the rabbis and medieval commentators, it apparently continued to exist within the Jews' legal system, as a relic of their historical

past, as a deterrent for wayward children and as a reminder of the cohesive and interrelated nature of the small minority of Jewish society within the non-Jewish majority society. Another reason why it persisted may be because "the Jews (as a group)" throughout the medieval and pre-modern period continued to be held responsible by the non-Jewish majority society for the actions of individual Jews. In this way, the individual was responsible for his/her own actions, but the effects of one person's actions upon the whole of Jewish society continued to be felt.

THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT...?

Counsel's Ethical Responsibilities to Help Judge and Jury Arrive at the Truth

*Bernard W. Freedman**

> *Men stumble over the truth from time to time, but most pick themselves up and hurry off as if nothing happened.*[1]
>
> Sir Winston Churchill

The truth has many faces, and justice is often a prerogative of what side you are on.[2] The legal system is created and its foundation is cast upon the incredibly complex fabric of life. Upon that fabric the law imposes a host of changing policy considerations, economic theories, international concerns, civic fiscal problems and responsibilities, all mixed with and guided by constitutional privileges, rights and immunities; concepts of the proclivities of human nature and the wisdom of society as it exists at that time, while seen and examined through history and legal precedent.

The question of the ethical responsibilities of Counsel to assist the

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1 *Columbia Dictionary of Quotations* (New York, 1987), 305.

2 "...Justice is the interest of the stronger," Plato, *The Republic,* Book I, in: *Five Great Dialogues* (New York, 1942), 239.

judge and/or jury in arriving at the truth does not permit a simple answer. The easy answer is "no." A lawyer cannot have a direct ethical responsibility to "assist the trier of fact to arrive at the truth," as that in itself would create a conflict between lawyer and client by compelling the former, through imposed ethical duties, to become a judge of the facts as he or she uncovers them, and to make decisions perhaps contrary to the interests of the client, to whom Counsel owes a duty of loyalty and confidence[3] as well as zealous representation.[4]

The construct of the system of litigation within American jurisprudence requires "the truth" to be revealed within the framework of the law of evidence. Some "truths" are excluded as being inherently untrustworthy, and too easy to manipulate – so lacking in credibility and substance that the trier of fact is not permitted to depend on such evidence in arriving at a decision. Other categories of evidence, due to inherent difficulties of proof, or social and moral principles, are deemed to be true, and thus do not have to be proven.[5]

The system, though not set up to compel ethical responsibility on the part of Counsel to assist the trier of fact to arrive at the truth, does prohibit a lawyer from engaging in tactics geared to creating a falsehood. The lawyer cannot "knowingly" present false testimony,[6] he cannot conveniently "lose evidence" (spoliation of evidence); and

[3] *American Bar Association Model Code of Professional Responsibility,* Canon 4: "A lawyer should preserve the confidences and secrets of a client." DR (Disciplinary Rule) 4-101 defines "confidence" as "any information protected by the attorney-client privilege." "Secret" refers "to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

[4] *Ibid.*, Canon 7: "A lawyer should represent a client zealously within the bounds of the law."

[5] These are referred to as conclusive and rebuttable presumptions, such as the rebuttable presumption that a letter correctly addressed and mailed is presumed received (California Evidence Code 7641) and the conclusive presumption that the child of a wife cohabiting with her husband, who is not impotent, is the child of that marriage (California Evidence Code 7621).

[6] *American Bar Association Model Code of Professional Responsibility,* DR 7-102: " ...a lawyer shall not... Knowingly advance a claim or defense that is unwarranted... Conceal or knowingly fail to disclose that which he is required by law to reveal... Knowingly use perjured testimony or false evidence..."

if a lawyer discovers his or her client to be purposefully deceiving the court, the lawyer must disengage from representation.[7]

Yet, in actuality the lawyer does assist the trier of fact in arriving at the truth by properly participating as an advocate within the confines of the lawyer's role and purpose. It is not the role of the lawyer supposedly to know what the truth is and then be in a position to assist the trier of fact to arrive at it. Justice should be the product of a system which leads to the truth. The legal system is then structured in such a way as to enable the truth to reveal itself in a recognizable form.

The truth has certain distinguishing characteristics. When envisioned, the truth brings with it a whole picture of an event. There is a sudden realization of more than the mere fact stated. It is a small piece of a picture which alters the way everything else in the picture is understood. After seeing it you cannot go back. As Søren Kierkegaard described it:

> The truth is a snare: you cannot have it without being caught. You cannot have the truth in such a way that you catch it, but only in a way that it catches you.[8]

One core element of our legal system is that we have jurors acting as representatives of the community, who are neither participating in asserting someone's interests nor responsible for the presentation of evidence. Indeed, they are told not to talk about the case at all until the evidence is concluded. Thus, during the presentation of a case, their minds are freed from the necessity of formulating questions or responding to theories. In short, they are not "involved." All of their energy and attention can be focused on the evidence, the eyes, the gestures, the tone and intimation of the testimony and demeanor of the witnesses. Thus, the jury has the greatest opportunity to be "caught" by the truth.

[7] *Ibid.*, DR 2-110(B): A lawyer shall withdraw from employment if "He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise taking steps for him, merely for the purpose of harassing or maliciously injuring any person... or that will result in violation of a Disciplinary Rule."

[8] Søren Kierkegaard, *The Last Years: Journals 1853 – 1855* (London, 1965), 133.

To ask a lawyer to assist in exposing something which he or she probably does not know or understand would put that lawyer in an impossible if not ridiculous position. Moreover, if the lawyer believes he or she knows what the truth is, such "opinions" must be kept to themselves, if the system is to have any chance of actually working.

During every trial the jury is repeatedly given an admonition not to form or express any opinions until all the evidence has been presented to them and the case given to them for their deliberations. There is a good reason for this admonition. Once a person forms an opinion he or she has, in essence, made a judgment, and further thought and consideration are halted or at least tainted by that judgment.

Moreover, the law itself is not always clear. Different fact situations at different times require that the law be challenged or new law created to meet the needs and judicial sensibilities of the case. Thus, it is part of the lawyer's job to envision the applicability, or inapplicability, of the present law and, if necessary, carve out a new procedure or cause of action.

The lawyer has a purpose in the system of justice. The lawyer is a tool which, when effective, acts as a gadfly to the truth – to spark a moment that will awaken the trier of fact to a sense of the truth. While dancing through the various procedures and filtering through the law of admissible evidence, the lawyer assists the judge and jury by creatively presenting and vigorously challenging the evidence in such a way as to lead, if not compel, the trier of fact to assess the evidence in a manner that has the character of truthfulness.

The effective lawyer assists the trier of fact by investigating and uncovering evidence that is being held back by opposing Counsel unless that evidence is demanded in the proper format. Then, and only then, does the opposing lawyer have the obligation to disclose it.

The lawyer must, then, sift through the produced materials and recognize the importance and relevancy of the evidence to the issues in dispute. This is often a momentous task, as the materials produced can amount to thousands of pages of complex documents, computer

databases, as well as physical evidence which requires sophisticated analysis and reenactment by a myriad of scientific specialties.

Then, and perhaps most importantly, the effective lawyer must bring this all together into a pristine line of questioning, in a way that is understandable by a lay jury and in a fashion that produces in the minds of the jurors a vision enabling them to distinguish truth from falsehood, to the extent that they are convinced that the realization of "truth" is uniquely theirs.

The moment of confrontation in the cross examination of a witness may be a beautiful or tragic experience, depending upon the "truth" the lawyer seeks to auger into the vision of the trier of fact. As Shakespeare describes in *Hamlet,* "O 'tis most sweet when in one line two crafts directly meet."[9] It is here that the lawyer provides the jury and judge with a chance to observe the real demeanor and attitude of the witness who is being challenged, confronted and tested before their eyes. In this way the trier of fact is not limited to a rehearsed rendition of "facts" that are proffered as true.

The word "truth" is defined as 1) conformity to knowledge, fact, actuality, or logic; 2) fidelity to an original standard; 3) reality, actuality, 4) a statement proven to be or accepted as true.[10] Yet, to what or whose "knowledge" do we conform ourselves? Whose perspective are we to trust?

Many adhere to the belief that the truth is something we can know, observe and understand. Yet experience tells us that our version of the truth undergoes drastic alterations in interpretation, depending upon who is being judged and the biases or favoritism we entertain toward the person or subject-matter under consideration.

Others argue that the concept of truth is simpler, that it stems from the clear and simple ability to discern right from wrong, good from evil. Again, however, we run into the problem that the determining factors between "right and wrong" and "good and evil" depend upon our orientation and interests, which are interwoven with the events of life. Are we doing business or stealing? employing people and thus providing a livelihood for them, or exploiting the downtrodden? are

[9] William Shakespeare, *Hamlet*, Act III.4 (Penguin Books, 1980), 153.
[10] *American Heritage Dictionary,* Second College Edition (Houghton Mifflin Co.).

we benefiting from nature's vast resources or destroying our environment? are we pioneering the frontiers of medicine, or are we experimenting with someone's life for profit? are we committing premeditated murder, or defending ourselves and our families? are we pursuing the sanctity of our nation by going to war, or are we mindless terrorists? are we punishing a murderous criminal, or are we killing a victim of mental illness and child abuse?

Humankind has always had difficulty with such questions. The law is constantly changing because it is constantly being challenged by our evolution. Yet, certain traits and characteristics of human nature remain. We must be able to apply the law in light of the changes in society and technology, as well as to discern the impact of such changes on the human condition.

In the Bible, in the book of *Genesis,* God tells Adam and Eve that they can eat from any tree in the garden of Eden, save from the tree of knowledge of good and evil. If they eat from this tree they "...will surely die." Yet, without the knowledge of good and evil, right from wrong, how are they to discern what is forbidden from what is permitted? How are they to know "the truth"?

The serpent, who is noted in the Bible to be "the shrewdest of all the wild beasts," comes to Eve and tells her:

> You are not going to die, but God knows that as soon as you eat of it your eyes shall be opened, and you will be like God, who knows good and evil. When the woman saw that the tree was good for eating and a delight to the eyes, and that the tree was desirable as a source of wisdom, she took of its fruit and ate. She also gave some to her husband and he ate. Then the eyes of both of them were opened... (*Gen.* 3:4-7).

If we are capable of knowing right from wrong, it is not the lawyer's job to decide. It is the job of the lawyer to open the eyes of the judge and jury.

In the story of the Garden of Eden, Adam and Eve are unknowingly in a dilemma. Before eating from the tree they do not have the knowledge of good and evil. They do not have that power of reason. Yet, by their very nature they were, as we are, susceptible to the

desire for that knowledge. Desire is born from what one does not have. Thus, when the serpent tells Eve that she can have the knowledge of good and evil, that her eyes will be open, she then has the desire for that wisdom. This story is a symbol of the dilemma of the truth. The judge and the jury may believe, as many people do, that they already know the truth, that they understand life and can judge it fairly, that if they are just provided with the "facts," without embellishment, they will be able to arrive at a just decision. However, they cannot.

It is the task of each lawyer in a case to open the eyes of judge and jury to the reality that the truth is not so easy. The lawyer must create the desire in each juror to want to know, to need to understand.

Our system of justice is an adversarial system. Each side, or interested party, is individually represented and has the opportunity to present its case through its lawyer. There may be two sides, there may be ten. Yet, no truth will surface in a trial unless the lawyer succeeds in opening the eyes of the trier of fact in such a way that they can be caught in the snare of true understanding. Otherwise, a trial becomes a personality contest and the verdict will be based upon fear, bias or guesswork.

It is the lawyer's task to be passionate for the cause. It is the job of the judge and the jury to be dispassionate in their assessment of the evidence and in arriving at their judgment. The system provides the jury with a carefully crafted presentation of evidence from each interested party in the case, while each party in the case is given a full and fair hearing. The jury is then given instructions on the applicable law, to assist them in assessing the evidence. For that reason the jury is in the best position for a careful and thoughtful deliberation and "weighing" of the evidence.

The beauty of the legal system lies within the sanctity of the attorney-client relationship. Any party in litigation, many of whom may be tried and convicted in the minds of the public through media presentation of speculation and bits and pieces of "information," is afforded the right to have a lawyer, a person of wisdom and loyalty (hopefully), to stand with him or her in the darkest hours, when he or she may otherwise be abandoned. It is at such a moment that the

lawyer does have the highest ethical duty – to that client – to do everything possible to put forth all evidence helpful to the cause, to question and shatter all evidence contrary to the best interest of that client, and by doing so permit the trier of fact the greatest potential to arrive at the truth, which, in our legal system, is called justice.

Law and Medicine

SURROGATE MOTHERHOOD

*J. David Bleich**

I. Infertility and the Obligation to Procreate

Despite the passage of time since the New Jersey case of Baby M[1] captured the attention of millions of Americans, both the human and legal questions posed by surrogate motherhood remain largely unresolved. Medically, the procedure is not at all complex and represents a simple method of coping with female infertility. A woman who is willing to serve as a surrogate, usually in return for a fee, is found and an agreement is reached. She is artificially inseminated with the semen of the infertile woman's husband, carries the baby to term and subsequently surrenders the baby to the couple. In such cases, the husband is the biological father but the wife has no natural relationship with the child. With the development of *in vitro* fertilization, it is now possible, in some limited circumstances, for the wife to be the biological mother as well.[2] If the wife's fertility problem is not

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1 *Matter of Baby,* 217 N.J. Super. 313; 525 A.2d 1128 (1987), *aff'd in part and rev'd in part,* 109 N.J. 396, 537 A.2d 1227 (1988).

2 The primary focus of this discussion will be upon surrogacy arrangements in which the gestational mother is the biological mother. The question of maternal identity in situations in which the gestational mother is not the biological mother is addressed in this writer's *Contemporary Halakhic Problems,* I (New York, 1977), 106-109; II (New York, 1983), 91-93; and IV (New York, 1995), 237-272.

related to production of ova, her own ovum can be fertilized in a petri dish with her husband's sperm and then transferred to the womb of the surrogate, who serves as host for purposes of gestation. When all parties are content with the terms of the agreement, there is no occasion for public attention to be focused on the arrangement. But, at times, as was the case with regard to Baby M, the surrogate undergoes a change of heart and refuses to deliver the baby to the father and his wife, or attempts to recover custody of the child after the child has been surrendered. In either event, the emotional turmoil is readily understandable and the legal dilemma is obvious.

The problems of surrogate motherhood, as issues of *Halakhah,* must be placed in proper perspective. Perhaps, this can best be done by means of an anecdote. Many years ago, I was approached by the rabbi of a hasidic congregation. The problem concerned a couple in his community. Unfortunately, the man and his wife were unable to have children. The rabbi arranged for the gentleman to meet with me. In the course of our conversation, the gentleman requested my assistance in obtaining a child for adoption. Time went by and several months later this person sought me out again. This time he thanked me for my efforts and proceeded to inform me that he and his wife were no longer seeking a child for adoption. Taken by surprise, I asked him why he had undergone a change of heart. The gentleman, who frequently consulted a hasidic leader or *rebbe* with regard to personal matters, told me that he had informed the *rebbe* of his desire to adopt a child. The *rebbe's* response in its entirety consisted of a single sentence: *"Vemen vilst du a tova ton, der Ribbono shel olom, oder zikh alein*? – For whom do you wish to do the favor, the Master of the universe or yourself?"

The question prodded the man to whom it was addressed to serious introspection and reconsideration of his motives. Recognition of the fact that he was not really seeking to perform a *mitzvah*, and indeed that adoption and conversion of a non-Jewish child does not constitute fulfillment of a *mitzvah* incumbent upon a Jew, led him to the awareness that his motives were neither spiritual nor altruistic. To be sure, his desire was entirely natural, quite human and readily un-

derstandable; but seen in that perspective he no longer perceived his need to be imperative.

Hasidic mentors often prove to be psychologically insightful. There can be no question that lack of children leaves a painful void. Paternal and maternal inclinations are deeply ingrained in the human psyche and cry out for expression. Such needs should neither be decried nor minimized. Rachel of old cried out in deep anguish, "Give me children, or I shall die" (*Gen.* 30:1). Nevertheless, it is necessary to evaluate the means adopted in satisfying that need. The means must be measured against the results in assessing the propriety of the procedures that must be employed in achieving the desired goal.

Elsewhere[3] this writer has endeavored to demonstrate that the essence of the Biblical commandment to "be fruitful and multiply" that is binding upon males is simply to engage in coital activity with the prescribed frequency, and that the birth of children is merely the *terminus ad quem* beyond which sexual activity is no longer mandated by virtue of the Biblical commandment. Recognition that the commandment to "be fruitful and multiply" (*Gen.* 1:28 and 9:7) requires only conventional sexual activity within the context of a marital relationship yields the conclusion that no form of assisted procreation is mandatory. Although *Halakhah* may demand employment of extraordinary and heroic measures in prolonging life, with regard to the generation of life it requires only that which is ordinary, normal and natural. However, as long as the methods employed in assisted procreation do not entail transgression of Halakhic strictures, such methods are discretionary and permissible.

It is readily demonstrable that, even if the husband desires to avail himself of some form of assisted procreation, the wife is under no obligation to cooperate by submitting to procedures that place any unusual and undue burden upon her or expose her to risks other than those associated with natural pregnancy. Assuredly, no person is required to assume the risks associated with a surgical procedure for the purpose of fulfilling any *mitzvah.* That principle is clearly reflected in the comments of Tosafot, *Pes.* 28b, s.v. *avel,* who declare that it is reasonable to assume (*mistavra*) that a *tumtum* need not un-

[3] 29/4 *Tradition* (Summer 1995) 53-56.

dergo abdominal surgery in order to fulfill the commandment of circumcision. A *tumtum* is described in Talmudic sources as a person whose gender cannot be determined due to the absence of external genitalia. It was presumed that incision of the abdomen would reveal the presence of either male or female anatomical structures. It was further presumed that if the individual was found to be a male, the organs might be released and caused to descend with the result that circumcision would become feasible. Yet, despite the presumed feasibility of the procedure, the authors of Tosafot take it for granted that there is no obligation for a person to submit to such measures, despite his ongoing failure to fulfill the *mitzvah* of circumcision. The obvious consideration upon which this position is predicated is that, although performance of *mitzvot* necessarily entails certain burdens, in terms of both expenditure of financial resources and personal inconvenience, the onus of undergoing a surgical procedure is beyond the pale of duty.

Resp. Helkat Yo'av, I, *Dinei Ones,* sec.7, extends this principle to performance of a *mitzvah* in face of any significant threat to health, declaring that a person need not assume the risk of falling victim to a serious illness in discharging a religious obligation. That conclusion is readily understood in light of the limit placed upon the financial burden that must be assumed in fulfillment of a *mitzvah.* A person need not expend more than twenty percent of his or her net worth in order to fulfill a positive commandment.[4] Indeed, according to some authorities, a person is required to expend no more than one tenth of his fortune for such a purpose.[5] A rational individual would cheerfully spend at least a fifth of his financial resources in order to avoid serious illness or to avoid the burden of a major surgical procedure. Hence it may be stated that, conversely, incurrence of serious illness is tantamount to expenditure of more than a fifth of one's fortune. Accordingly, a person need not assume the risk of succumbing to a serious malady in order to perform a *mitzvah.*

Fulfillment of the commandment to be fruitful and multiply does not require assumption of a burden greater than that required for ful-

[4] See Rema, *Orah Hayyim* 656,1.
[5] Cf. *Magen Avraham, Orah Hayyim* 656,7.

fillment of any other positive commandment. Women, who are not bound by the *mitzvah* of procreation,[6] are held to a different, and indeed lesser, standard in fulfilling reproductive obligations. Although the *mitzvah* to populate the universe (*shevet*) may apply to females as well as to males, that *mitzvah* is not in the character of a mandatory obligation. The Gemara, *Hag.* 2b, declares, "For indeed the universe was created solely for procreation, as it is said, 'He created it not a waste. He formed it to be inhabited' (*Isa.* 45:18)." Populating the universe is a divine *desideratum* and human activity undertaken to achieve that *telos* constitutes fulfillment of the divine will. Nevertheless, absent an obligation to "be fruitful and multiply," activity designed to achieve that goal is in the nature of a discretionary *mitzvah* (*mitzvah kiyyumit)* rather than a mandatory obligation (*mitzvah hiyyuvit*). A wife's reproductive obligations are a product of the covenant generated by the marital relationship. As such, they are limited to pregnancy, child-bearing and child-rearing involving risk, stress and emotional anguish no greater than the norm. Thus *Iggerot Moshe, Even haEzer*, III, no. 12, rules that a woman confronted with an inordinate statistical risk of bearing a child afflicted with a severe congenital abnormality may insist upon utilizing permissible contraceptive measures, on the grounds that she is not contractually bound to assume a burden of that nature even though her husband is desirous of doing so. Accordingly, a woman is certainly not required to undergo a laparoscopy in order to remove ova as part of an attempt to overcome infertility. Similarly, she is under no obligation to accept the medical risks inherent in hormone treatment designed to produce multiple ova.[7] For similar reasons, it would seem that a wife is under no obligation to assume the duty to raise the child of a woman with whom her husband has entered into

6 See, *inter alia, MT Hil. Ishut* 15:2 and *Sefer haHinnukh, mitzvah* 1.

7 Nor, pursuant to the edict of Rabbenu Gershom forbidding divorce other than with the wife's consent, does the husband have the right to divorce his wife on grounds of infertility. Although dispensation in the form of a *hetter me'ah rabbanim* for the husband to enter into a polygamous relationship in order to fulfill his obligation to "be fruitful and multiply" might well be forthcoming, there is ample authority that relieves the husband of availing himself of that opportunity. See *Pithei Teshuvah, Even haEzer* 154,27, and *Otzar haPosekim, Even haEzer* 1:26.

a surrogate motherhood relationship. Thus a wife may effectively veto her husband's desire for a surrogate relationship.

II. Artificial Insemination and Adultery

Assuming the consent and desire of all parties, the permissibility of surrogate motherhood hinges upon the resolution of a number of Halakhic questions. Since surrogate motherhood involves insemination of a woman with the semen of a man who is not her husband, the first Halakhic issue encountered is identical to that involved in a far more common means of overcoming male, rather than female, infertility, viz., AID, or artificial insemination using the semen of a donor.

The empirical possibility of conception *sine concubito* was recognized by the sages of the Talmud. In questioning the permissibility of marriage between a high priest and a pregnant virgin, the Gemara, *Hag.* 14b, accepts the possibility that pregnancy might have occurred in a "bathhouse" other than by means of sexual intercourse, i.e., the woman may have been impregnated in the course of bathing in water in which the male had previously ejaculated.[8] One midrashic source, the *Alfa Beta de-Ben Sira,* reports that Ben Sira was conceived in such a manner.[9] His father is reported to have been the prophet Jeremiah. Jeremiah experienced an ejaculation in the course of bathing and his own daughter, who later used the same bathwater, was impregnated.[10]

[8] Cf., however, *Mishneh leMelekh, Hil. Ishut* 15:4, who asserts that the possibility of pregnancy occurring in this manner is a matter of dispute and is both inherently contradicted by other Talmudic discussions, and normatively rejected in the adoption of the rule imputing bastardy to the child of a married woman whose husband had no access to her for twelve months prior to its birth. See also R. Moshe Shick, *Maharam Shik al Taryag Mitzvot,* no. 1, sec. 3. *Mishneh leMelekh's* arguments are rebutted by various later authorities. See, for example, R. Jonathan Eybeschuetz, *Bnei Ahuvah, Hil. Ishut* 15:6 and R. Jacob Ettlinger, *Arukh laNer, Yev.* 12b. See also *Tashbatz,* III, no. 263; cf. *Resp. Mahari Asad, Yoreh De'ah,* no. 179.

[9] Published in J. D. Eisenstein, *Otzar Midrashim* (New York, 5688), 43. That report is quoted by a noted fourteenth-century scholar, R. Jacob Ben Moses Moellin, in the first of the addenda (*likkutim*) to his *Sefer Maharil.* That work is cited, in turn, by numerous later sources.

[10] Cf., however, R. David Gans, *Tzemah David,* in his entry for the year 3448, who challenges the reliability of that report and advances a number of alternative

Although some authorities differ,[11] the consensus of rabbinic opinion is that there is no technical infringement of the prohibition against adultery other than by means of vaginal penetration by a male.[12] That position is confirmed by a statement of a thirteenth-century rabbinic scholar, R. Peretz of Corbeil, in his work *Hagahot Semak*, cited by *Bah, Yoreh De'ah* 195; *Taz, Yoreh De'ah* 195,7; *Bet Shmu'el, Even haEzer* 1,10; and *Helkat Mehokek, Even haEzer* 1,8, cautioning a woman not to recline upon bedsheets used earlier by a male other than her husband lest those sheets be soiled by the man's still moist semen. The concern is expressed in terms of fear that the woman may become pregnant and that in the course of time "a brother may marry his [half-]sister." The fact that *Hagahot Semak* expresses concern for a possible incestuous relationship but is silent with regard to a concern for bastardy and its associated marital disqualification or that the woman be forbidden to her husband on account of an adulterous act is taken by later authorities as evidence reflecting the notion that, since bastardy results only from adultery (or incest), the prohibition against adultery is limited to sexual intercourse.

Nevertheless, Nachmanides, in his commentary on the verse "And unto the wife of your fellow you shall not give your semen for seed to defile her through it" (*Lev.* 18:20), notes that the Biblical admonition concerning adultery is couched in language quite different from that found in multiple verses occurring in the same Biblical sec-

theories regarding the identity of Ben Sira and the age in which he lived. See also R. Solomon ibn Verga, *Shevet Yehudah* (Hanover, 1924), 2.

11 See R. Judah Leib Zirelson, *Ma'arkhei Lev,* no. 73; R. Ovadiah Hadaya, *No'am*, I (5718), 130-137, reprinted in idem, *Resp. Yaskil Avdi,* V, *Even haEzer*, no. 10; R. Joel Teitelbaum, *HaMa'or*, Av 5724, 313; idem, *Resp. Divrei Yo'el,* II, nos. 107-110; R. Samuel Aaron Yudelevitz, *No'am,* X (5727), 57-103; and R. Abraham Lurie, *HaPosek,* Heshvan-Kislev 5710, 1754-1756.

12 See, for example, R. Shalom Mordecai Schwadron, *Resp. Maharsham,* III, no. 268; R. Aaron Walkin, *Resp. Zekan Aharon*, II, no. 97; R. Joshua Baumol, *Resp. Emek Halakhah*, no. 68; R. Ben Zion Uziel, *Mishpetei Uzziel, Even haEzer*, I, no. 10; and R. Eliyahu Meir Bloch, *HaPardes,* Sivan 5713, 13. For a survey of these and other sources see R. Michal Stern, *HaRefu'ah leOr haHalakhah,* I (Jerusalem, 5740), part 2, 56-68. For a comprehensive bibliography of the rabbinic periodical literature devoted to artificial insemination see Nahum Rakover, *Otzar Mishpat,* I (Jerusalem, 5735), 322-333.

tion dealing with consanguineous relationships. In those instances the Biblical phrase employed is "you shall not lie with" or "you shall not uncover the nakedness of," each of which is a euphemism for the sexual act, and indeed that Biblical section opens with the verse "No man shall draw near to the relative of his flesh to uncover nakedness" (*ibid.* 18:6). Only with regard to the concluding prohibition in that section, namely, adultery, does Scripture speak of "semen" and "seed." If that phraseology is taken literally, the essence of adultery would be understood as consisting of the deposit of the ejaculate in the genital tract of a married woman. Nachmanides explains that, unlike the considerations underlying other sexual prohibitions, adultery is forbidden because of the consequences resulting from the deposit of semen, i.e., conception. A woman who has had multiple sexual partners, explains Nachmanides, will perforce not be able to ascertain the father of her child with certainty. Thus, for Nachmanides, the rationale underlying the prohibition against adultery is the blurring of paternal identity, and it is that concept that is reflected in the description of adultery as the deposit of semen by a stranger to the marital relationship.[13] Thus it follows that artificial insemination,

[13] However, implantation of an embryo in the uterus of a host mother subsequent to fertilization, since it does not involve deposit of semen, is a different matter. Cf., however, Yitzchak Mehlman, "Multi-Fetal Pregnancy Reduction," *Journal of Halacha and Contemporary Society* 27 (Spring, 1994) 43 f., who reports an oral communication by R. Aaron Soloveichik to the effect that, in his opinion, the status of an embryo during the first forty days of gestation is identical to that of the male "seed." Assuming, as R. Soloveichik apparently does, that during that forty-day period the embryo does not have the status of a fetus, the conclusion that it has the status of "seed" is intellectually alluring and indeed almost intuitive: the male seed undergoes a metamorphosis and becomes a fetus; until it actually becomes a fetus it remains "seed." That position, however, is contradicted both by the authorities who apparently maintain that, unlike semen, an embryo may be destroyed during that period with impunity, as well as by the conflicting authorities who maintain that destruction of an embryo even in that early stage of gestation constitutes feticide. Thus, to cite one example, unlike R. Soloveichik, R. Yehiel Ya'akov Weinberg, *Seridei Esh*, III, no. 127, places no restriction upon termination of pregnancy during the first forty days. Those authorities apparently maintain that, in light of the description of the embryo during that period by the Gemara, *Yev.* 69b, as "mere water," the sperm loses its status as "seed" upon fusing with the ovum, with the result that, according to those authorities, the nascent embryo is neither "seed" nor fetus. However, R. Yair Bacharach, *Resp. Havvot Ya'ir*, no. 31, and R. Jacob Emden, *She'elat*

even if it does not constitute a technical Halakhic violation,[14] is contrary to the spirit of the law. Following Nachmanides's own explication of the Biblical command "You shall be holy" (*ibid.* 19:20) as an admonition not to be "a degenerate within the bounds of Biblical license,"[15] AID, even if it does not constitute actual adultery, must be regarded as quasi-adulterous in nature and hence a prohibited form of procreation.[16]

Rabbi Joseph Elijah Henkin asserts that the act of insemination is prohibited on other grounds.[17] The admonition "be fruitful and multiply" occurs twice. In its first occurrence (*Gen.* 1:28) it is addressed to Adam; the second time (*ibid.* 9:7) it is addressed to Noah and his sons upon their emergence from the ark. The repetition to Noah, opines Rabbi Henkin, is for the purpose of establishing a limitation upon the parameters of procreation. Addressing Noah, God tells him, "Go forth from the ark, you and your wife and your sons and your sons' wives with you" (*ibid.* 8:16). That passage underscores the fact that Noah and his sons each emerged from the ark with his wife, i.e., that the inhabitants of the ark emerged as members of family units. It was in that context, i.e., as members of distinct and identifiable families, that Noah and his sons were commanded to "be fruitful and multiply."

Accordingly, procreation, declares Rabbi Henkin, is designed to take place only within the family unit, in such a manner that the genealogy of the offspring is known in a determinate manner. Promis-

Ya'avetz, I, no. 43, who maintain that feticide in all stages of pregnancy is prohibited as a form of "destruction of the seed," clearly maintain that the fetus is endowed with the halakhic status of "seed" during the entire period of gestation. It might cogently be argued that, according to those authorities, embryo transfer at any stage of gestation is no different from AID insofar as the issue of adultery is concerned.

14 One authority, *Resp. Ma'arkhei Lev*, no. 73, understands Nachmanides' comments quite literally in declaring not only that AID constitutes adultery, but that the physician performing the insemination, in effect acts as an agent of the donor in committing adultery.

15 See Nachmanides, *Commentary on the Bible, Lev.* 19:20.

16 See R. Eliezer Waldenberg, *Tzitz Eliezer,* IX, no. 51, sec. 4. Cf. R. Moshe Feinstein, *Iggerot Moshe, Even haEzer*, II, no. 11.

17 See R. Josef Elijah Henkin, *HaMa'or*, Tishri-Heshvan 5725, 911, reprinted in idem, *Kol Kitvei haGrya Henkin* (New York, 5746), II, 100-101.

cuous relationships are to be eschewed because of the resultant ambiguity regarding parental identity. Consorting with multiple males blurs parental identity. Artificial insemination with the semen of an anonymous donor similarly renders identification of the father virtually impossible. That consideration, declares Rabbi Henkin, serves to render AID impermissible for married and unmarried women alike.

Rabbi Henkin similarly points to the terminology employed in the prohibitions "*lo tihyeh kedeshah*" and "*lo yihyeh kadesh*" (*Deut.* 23:18). Those passages are read literally as prohibiting both female and male prostitution. Some rabbinic scholars, including Targum Onkelos *ad loc.*, interpret the verse as prohibiting sexual liaisons between a slave and a freeman or a freewoman.[18] Rabbi Henkin notes that, unlike the terminology employed in the various prohibitions against incestuous unions, there is no direct reference in these passages to the sexual act *per se*. Accordingly, asserts Rabbi Henkin, it must be concluded that the primary concern is not the sexual act itself but rather the concern is with regard to promiscuity and the resultant absence of a Halakhically identifiable paternal-filial relationship. Any act, including artificial insemination, argues Rabbi Henkin, that leads to the birth of a child whose father cannot be identified must be abjured as the moral equivalent of prostitution.

III. Artificial Insemination and Bastardy

Putting aside the sexual propriety of the surrogate relationship, once parties have entered into such a relationship and a child is born, what is the status of the issue of a surrogate relationship?

The earliest source addressing the underlying issue is the previously cited admonition of *Hagahot Semak* to the effect that a woman should not recline upon the bedsheets of a male other than her husband. The concern expressed is that the woman may become pregnant and, with the passage of time, a brother may unknowingly enter into a marital relationship with his half-sister. That, to be sure, is a significant concern. Equally significant is a consideration that *Hagahot*

[18] Maimonides, *Sefer haMitzvot, Mitzvot lo ta'aseh,* no. 350, understands *"lo yihyeh kadesh"* as a reiteration of the prohibition against homosexual acts.

Semak passes over in silence, namely, that any child conceived in that manner is a *mamzer* by virtue of being the progeny of a married woman and a male who is not her lawful husband; hence is forbidden to contract a marriage with any person of legitimate birth. Since that concern is universal and far more immediate than the concern expressed by *Hagahot Semak,* the failure of *Semak* to state that concern should presumably be accepted as a clear indication that he did not consider it to be relevant. Accordingly, *Hagahot Semak* must have regarded a child born to a married woman but sired *sine concubito* by a male other than her husband as free of the taint of bastardy. Hence, it must be inferred that *Hagahot Semak* regarded *mamzerut* as attendant solely upon an adulterous or incestuous act. Since physical penetration of the female by the male is a necessary element of adultery, any child born *sine concubito* is not a *mamzer*, because the child is technically not the product of an act of adultery.

Conversely, it follows that those few authorities who adopt the position that there can be adultery without an actual act of sexual penetration would regard the child conceived in that manner as a *mamzer.*[19] One authority, R. Jacob Breisch, *Resp. Helkat Ya'akov*, I, no. 24, cites a statement of Tosafot, *Yev.* 77b, asserting that bastardy is not necessarily contingent upon transgression of the prohibition against an adulterous or incestuous relationship. Tosafot cite the non-normative Talmudic opinion that a child of a Jewish woman and a non-Jewish father is a *mamzer.* That relationship entails neither capital punishment nor the Biblical penalty of excision (*karet*). Indeed, according to the Talmudic opinion that maintains that the commandment "And you shall not intermarry with them" (*Deut.* 7:3) applies only to members of the seven indigenous nations of the land of Canaan, such acts are not interdicted by an express Biblical command. If so, query Tosafot, on what grounds can the issue of such a union be declared bastards? In one resolution of that problem, Tosafot posit that *mamzerut* flows not from particular illicit acts, but from any union between individuals disqualified from contracting a

[19] See above, note 11. See also *Zekher Hagigah, Hag.* 15a; *Resp. Bar Leva'i,* II, no. 1; and R. Elijah Meir Bloch, *HaPardes*, Sivan 5713, 13. For a discussion of these various sources see *HaRefu'ah leOr haHalakhah*, I, part 2, 68-76.

valid marriage with one another. *Helkat Ya'akov* argues, in effect, that, since transgression is not a necessary condition of bastardy, there is no independent reason to assume that an antecedent sexual act is such a condition. He argues that, quite to the contrary, bastardy is simply the result of the Halakhic status of the parents vis-à-vis one another. It should be noted that this argument is based upon one theory advanced by Tosafot in resolution of a particular problem and may well represent a concept not accepted by other authorities who present alternative answers to the query posed by Tosafot.

IV. Semen Procurement

There is yet another aspect of the process of artificial insemination that may serve to preclude surrogate motherhood in many, if not most, situations.

The prohibition against onanism serves to proscribe ejaculation other than in conjunction with the act of intercourse. However, many authorities recognize at least some exceptions to the prohibition based primarily upon a discussion of the Gemara in *Yev.* 76a. Elsewhere[20] this writer has analyzed the reasoning employed by the numerous authorities who permit ejaculation for purposes of AIH (artificial insemination utilizing the semen of the husband), indeed, even for semen testing in conjunction with diagnosis and treatment of infertility. That analysis also discusses the methods of semen procurement sanctioned by *Halakhah* for such purposes.

The consideration underlying those permissive views is that at least some forms of non-coital ejaculation may be sanctioned when undertaken for the purpose of fulfilling the commandment to "be fruitful and multiply." Left unclear is the question of whether ejaculation for a lesser purpose is deemed to be wanton and hence "for naught." R. Jacob Emden, *She'ilat Ya'avetz,* I, no. 43, maintains that ejaculation for any "grave need," including avoidance of severe pain, is not wanton destruction and hence permissible. Most authorities, however, maintain that the *telos* of emission must be procreative in nature.[21] The question is whether any ejaculation that is not

[20] 29/4 *Tradition* (Summer 1995) 48-51. See also *HaRefu'ah leOr haHalakhah*, I, part 2, 36-43.

[21] See *HaRefu'ah leOr haHalakhah*, I, part 1, 113-119. Cf., however, *Tzitz*

designed to fulfill the Biblical command to "be fruitful and multiply" constitutes ejaculation "for naught," or whether other forms of procreation that do not serve to fulfill the commandment, but do serve to populate the universe in the sense of "He created it not a waste. He formed it to be inhabited" (*Isa.* 45:18), also serve to legitimize the emission of semen. Ordinarily, those *teloi* go hand in hand; populating the universe (*shevet*) also serves to fulfill the mandate to "be fruitful and multiply." But that need not always be the case. A person who engages in procreation that does not result in a Halakhically recognized paternal-filial relationship has not "multiplied" himself, since he has no Halakhically recognized relationship with his biological progeny. Nevertheless, he has certainly contributed to augmentation of the population of the universe.

For those authorities who maintain that only birth of children as a result of natural intercourse serves to fulfill the command to "be fruitful and multiply," permissibility of AIH hinges upon whether non-coital ejaculation is permissible solely in order to fulfill the commandment to "be fruitful and multiply," or whether fulfillment of *shevet* is sufficient to legitimize the emission of semen.[22] On the assumption that the sexual act is not a necessary condition of fulfillment of the commandment to "be fruitful and multiply," because a paternal-filial relationship exists even in the absence of a sexual act,[23] some forms of non-coital ejaculation may be employed in order to fulfill the Biblical command. However, ejaculation for the purpose of inseminating a non-Jewish woman does not serve to achieve that end. The issue of a Jewish father and a gentile mother, even if con-

Eliezer, XIII, no. 102, and the sharp rejoinder of *Iggerot Moshe, Hoshen Mishpat*, II, no. 69, sec. 4.

[22] Some few authorities maintain that AID does establish a paternal-filial relationship between the donor and the child born of such a procedure but that, since no sexual act is involved, the donor does not thereby fulfill his obligation with regard to procreation. See R. Jacob Emden, *She'ilat Ya'avetz,* II, no. 97, sec. 3; R. Hayyim Joseph David Azulai, *Birkei Yosef, Even haEzer* 1,14; *Maharam Shik al Taryag Mitzvot*, no. 1; *Bigdei Yesha*, no. 123; and *Bigdei Shesh, Even haEzer* 1,11.

[23] Authorities who espouse the latter view include *Resp. Emek Halakhah*, I, no. 60; R. Shelomoh Zalman Auerbach, *No'am*, I, 157; and R. Judah Gershuni, *Or haMizrah*, Tishri 5739, 1522, reprinted in idem, *Kol Tzofayikh* (Jerusalem, 5740), 367.

ceived in a normal, natural manner, is not regarded as the issue of the Jewish father for purposes of *Halakhah,* hence the birth of such a child does not constitute fulfillment of the Biblical commandment concerning procreation. The birth of such a child does, however, serve to populate the universe.

If, as is frequently the case, the surrogate is a non-Jewish woman, the child is obviously not Jewish and presumably, if surrendered to the childless couple, would be converted to Judaism. Nevertheless, the father does not fulfill the commandment to "be fruitful and multiply" even upon conversion of the child. Hence, if non-coital emission of semen can be countenanced only for purposes of fulfilling the Biblical commandment regarding procreation, impermissibility of semen procurement for insemination of a gentile woman would itself serve to bar a surrogate relationship with a surrogate who is not Jewish.

V. Artificial Insemination and Paternity

A closely related issue is the question of the existence of a Halakhically recognized paternal-filial relationship between the semen donor and the child born of artificial insemination. A host of Halakhic matters hinge upon recognition or non-recognition of a paternal-filial relationship, including but not limited to: inheritance; mourning; exemption of the donor's wife, in the absence of other issue, from levirate marriage; priestly and levitical status; and, most ominous of all, consanguinity. Nor should the question of obligations a father owes a child, including the obligation of financial support, be overlooked.

Once again, the earlier cited comment of *Hagahot Semak* serves as the primary source for resolution of this question. To be sure, *Hagahot Semak* does not directly address the issue of paternal relationship, but his stance with regard to that question is abundantly clear. The concern to which he gives expression is that of a possible consanguineous marriage between a brother and a sister or, to be more precise, between a half-brother and a half-sister. The fear is that a child born *sine concubito* will not know the identity of his or her biological father and hence will be ignorant of a biological relationship with any half-siblings who may exist, i.e., any other chil-

dren sired by the same man. But, it must be remembered, a fraternal relationship is really epiphenomenal; a fraternal relationship, by definition, is the relationship that exists between two persons who enjoy a common filial relationship with a single father or mother. Thus, if no Halakhically recognized relationship exists between a male who procures semen and the child born as a result of insemination of the ejaculate, a child conceived in that manner could not have Halakhically recognized paternal siblings and hence there could be no fear that the child might marry a paternal sister. From the fact that *Hagahot Semak* regards such a concern as cogent it must necessarily be deduced that he espouses the view that a paternal-filial relationship arises *sine concubito*. Thus, according to *Hagahot Semak*, although the male who ejaculates in bath water or on bedclothes, or who becomes a sperm donor and thereby causes a married woman to conceive, has not committed adultery and, despite the fact that the child is not regarded as the bastard issue of an adulterous union, the male is nevertheless regarded as the father of the child.[24]

Nevertheless, one of the classical commentators on *Even haEzer, Helkat Mehokek* 1,8, expresses doubt with regard to whether or not a paternal-filial relationship exists in such instances. Moreover, there is some dispute regarding the actual position of *Hagahot Semak*. The primary expositor of the view denying the existence of a paternal relationship is R. Hayyim Joseph David Azulai, *Birkei Yosef, Even haEzer* 1,14.[25] *Birkei Yosef* cites a variant manuscript reading of the text of *Hagahot Semak*. According to that reading, *Hagahot Semak* cites the concern regarding prevention of a future consanguineous marriage in the context of the ban against the remarriage of a widow or divorcee within three months of termination of her earlier mar-

[24] See *Bet Shmu'el, Even haEzer* 1,6. This view is accepted by most authorities including, *inter alia*, *Tashbatz*, III, no. 263; *Resp. Bet Ya'akov*, no. 124; *Bnei Ahuvah, Hil. Ishut* 15:6; *Resp. Ben Ya'akov*, no. 122; *Turei Even, Hag.* 15a; *Arukh laNer, Yev.* 10a; R. Malkiel Zevi Tennenbaum, *Resp. Divrei Malki'el*, IV, no. 107; R. Jacob Isaac Weisz, *Resp. Minhat Yitzhak*, I, no. 50; *Tzitz Eliezer*, IX, no. 51; and R. Israel Zeev Mintzberg, *No'am*, I, 129.

[25] See also *Resp. Bar Leva'i, Even haEzer*, no. 1; *Mishpetei Uzziel, Even haEzer*, I, no. 19; R. Menahem Kasher, *No'am*, I, 125-128; idem, *Torah Shelemah*, XVII, 242; and R. Moshe Aryeh Leib Shapiro, *No'am*, I, 138-142. For further sources see *HaRefu'ah leOr haHalakhah*, I, part 2, pp. 14-29.

riage. That prohibition is expressly predicated upon a concern for certainty in establishing paternal identity and, according to *Birkei Yosef*, is cited solely by way of example or analogy. According to *Birkei Yosef*, if a child is conceived *sine concubito*, the biological father is not recognized as the Halakhic father and *Hagahot Semak* merely expresses the view that the sages of the Talmud would have decried any act that leaves a child bereft of a Halakhically recognized father just as they legislated against relationships that might give rise to ambiguous paternity.

VI. Suppression of Maternal Identity

Once a child is born as a result of surrogate motherhood, may the identity of the mother be suppressed?

That question, too, has its counterpart with regard to children born as a result of artificial insemination. If, as the vast majority of rabbinic authorities agree, a paternal-filial relationship does exist when a child has been born as a result of artificial insemination, is it necessary to disclose the identity of the father? As AID is customarily practiced in the United States, the donor is assured of anonymity and, in general, there is no way that the child can discover the identity of his or her father. In surrogate mother arrangements, sealing the records, if permitted, would have the same result.

Suppression of paternal identity is one of the considerations that led rabbinic decisors to ban AID. R. Moshe Feinstein, *Iggerot Mosheh, Yoreh De'ah*, I, no. 162, voices a similar concern in decrying sealed adoptions.[26] At least until recent years, adoption agencies and the American legal system joined forces in the attempt to prevent adopted children from ever learning the identity of their natural parents. It would appear that *Iggerot Moshe* regards any attempt to suppress parental identity as a violation of a Biblical commandment. Although polygamy is Biblically permissible, the Gemara, *Yev.* 37b, declares that a man may not maintain a wife in every port, i.e., he may not maintain multiple families and households whose members do not know of one another's existence. The concern is that, with the passage of time, children of the various households may grow to ma-

[26] See also R. Shelomoh Goren, *HaTzofeh*, 7 Adar I, 5744.

turity and contract a marriage without realizing that they share a common father. In prohibiting such arrangements, the Gemara adduces the verse "lest the earth be filled with licentiousness" (*Lev.* 19:29) as the consideration upon which the ban is predicated. *Iggerot Moshe* apparently asserts that the prohibition is not merely Rabbinic in nature and simply reflective of the concern expressed in the cited scriptural passage; rather, the ban represents the instantiation of an actual Biblical prohibition.[27] According to *Iggerot Moshe*, any act carrying with it the potential for suppression of a familial relationship, of such a nature that it may possibly lead to a consanguineous relationship, is Biblically proscribed. As such, suppression of the identity of natural parents in adoption proceedings, anonymous sperm donations and surrogate relationships in which the identity of the mother is not disclosed are equally forbidden as a violation of "lest the earth will be filled with licentiousness."

VII. Surrogacy and Baby-Selling

Conception by means of artificial insemination presents Halakhic problems with regard to the permissibility of the means utilized in causing pregnancy to occur in the context of surrogate relationships. Enforcement of the surrogacy contract providing for custody of the child presents an additional cluster of issues. Although the contract may provide for impregnation in a manner that *Halakhah* regards as illicit, Jewish law does not regard illegal contracts as *ipso facto* unenforceable.

The enforceability of surrogate motherhood contracts in the American legal system is generally regarded as hinging in the first instance upon the question of whether the agreement is to be construed as a contract for the sale of a baby or as a contract for performance of personal services. Has the surrogate, who receives a fee for her services, simply agreed to make her uterus available for gestation of the fetus, or has she contracted for the sale of a baby upon birth? If the

[27] Cf., however, *Bet Shmu'el, Even haEzer* 13,1, who asserts that the ban against remarriage of a woman within three months of her divorce or of the death of her husband, which is predicated upon the same consideration, is Rabbinic in nature.

latter, not only is the contract unenforceable, but fulfillment of its terms constitutes a penal offense.[28]

However, since baby-selling, while undoubtedly repugnant, is not a criminal act in Jewish law, the question of whether the provisions of an illegal contract are enforceable need not be addressed. That baby-selling is not a criminal act in Jewish law is poignantly illustrated by a recommendation made in *Sefer Hasidim* (Jerusalem, 5720), no. 245.

Jewish tradition recognizes a number of nonmedical and nonscientific *segullot* or remedies in the nature of metaphysical forms of intervention, designed to avert the natural result of life-threatening maladies. One of those is *shinnuy hashem,* changing the patient's name. That *segullah* is based upon the concept that no person dies other than pursuant to a decree of the Heavenly court. The procedures of the Heavenly court, we are told, mirror those of terrestrial courts in their procedural aspects. Change of name is designed to render such a decree nugatory on the grounds that a change of name entails a change of identity. The original decree cannot be carried out, because it can be applied only against the named individual. The patient who has undergone a change of name is a different person, against whom no decree has been issued. As a different person, he is entitled to a new hearing. In effect, the name change provides the basis for a writ of *habeas corpus* before the Heavenly tribunal. On rehearing, the Heavenly court may find some new merit, presumably

[28] See *Matter of Baby,* 109 N.J. at 422; 537 A.2d at 1240. See also Barbara Cohen, "Surrogate Mothers: Whose Baby Is It?" 10/3 *American Journal of Law and Medicine* (Fall 1984) 247-248; and Mark Rust, "Whose Baby Is It? Surrogate Motherhood After Baby M," 73 *American Bar Association Journal* (1987) 53-55. A number of states have explicitly exempted surrogacy agreements from provisions criminalizing baby-selling. See below, note 35.
In one case, brought by the attorney general of Kentucky to clarify the state's law on surrogacy, the Supreme Court of Kentucky found that surrogate contracts did not violate state baby-selling statutes, because the child produced by the arrangement is the natural child of the father. See *Surrogate Parenting Ass'n. v. Com. Ex. Rel. Armstrong,* 704 S.W.2d 209 (1986). According to that reasoning, it would then follow that, if the wife is the sole contracting party, the contract would be illegal. Similarly, if the surrogate was impregnated by donor sperm because of the husband's infertility, the contract would be illegal.

not of sufficient strength to abrogate an already entered judgment but sufficient to prevent the entry of an unfavorable decree *de nouveau.*

In Jewish tradition, an individual's name is composed of a combination of his own name and his patronym or matronym. Accordingly, a change of name can be effected either by changing a person's given name or by changing the patronym or matronym. A patronym can be effectively changed by substitution of fathers, i.e., by acquisition of a new father in place of the original, biological father. A matronym can be effectively changed by substitution of mothers, i.e., by acquisition of a new mother in place of the original, biological mother.

Living in an age in which infant mortality was rampant, *Sefer Hasidim* provides instructions for changing a person's name by substituting new parents for the original ones. *Sefer Hasidim* advises parents, concerned because they have had children who have died in infancy, to arrange for a close friend to present them with a *shekel*, a loaf of bread, a piece of meat and a jug of wine and to acquire the child from them in return. From that point on, declares *Sefer Hasidim*, the infant will be deemed, at least for purposes of the Heavenly court, to be the child of the adoptive parents. The procedure involves what is at least *pro forma* the sale of a child. Were a person to undertake such a procedure today, and were he to do nothing more, the district attorney would certainly have no interest in the matter. However, Jewish law, unlike other systems of law, concerns itself with form no less than with substance. Hence, were baby-selling recognized as a crime by Jewish law, even a purely formal and indeed sham sale of a child could not be countenanced.

VIII. Enforceability of Surrogate Contracts

There are nevertheless other considerations that serve to render surrogate motherhood contracts unenforceable in Jewish law.

Typically, for reasons that are obvious, the contract is executed before the woman is inseminated. At that point, the fetus is not yet in existence. *Halakhah* does not recognize the validity of the conveyance of an entity that is not yet in existence. Hence, were the contract to be construed as a sale, the sale would be void, with the result that the woman has the prerogative of reneging on her undertaking. If, on the other hand, the agreement is to be construed as an employment

contract that provides for compensation for services rendered, apart from the right of a worker to abrogate such a contract, provision of such services at the behest of the father does not serve to convey a proprietary interest in the child.

More significantly, children are not property and do not represent a property interest that can be transferred. Child custody, although often a matter of dispute between a couple no longer living together as man and wife, is regarded by Judaism primarily as an obligation rather than a right.[29] To the extent that child custody involves an issue of the rights of an individual, the rights involved are those of the child. The duty of a parent to care for and to support a child may be said to give rise to a concomitant right vested in the child to receive such care and support. Thus, although both conceptually and for certain aspects of Jewish law, there may well be a distinction between a duty and a resultant right, in general, duties and rights may be regarded as two sides of the same coin.

Since determination of which spouse shall be the custodial parent is in effect adjudication of how a child's right can best be exercised; any contract between the parents must be regarded as a nullity if it in any way prejudices the rights of the child. It is self-evident that two contracting parties do not have the power to dispose of, or in any way prejudice, the rights of a third party who is not a party to the contract. It is for that reason that *Resp. Mabit*, II, no. 62, cited by *Be'er Hetev, Even haEzer* 82,6, rules that a woman who, as part of a divorce settlement, enters into an agreement in which she renounces custodial prerogatives, may subsequently renege and is not bound by her initial undertaking.[30]

Similarly, a surrogate contract providing for surrender of the baby by the natural mother represents an agreement by the natural mother not to seek custody. As such, it is unenforceable, with the result that,

[29] Thus, R. Ben-Zion Uziel, *Resp. Mishpetei Uzziel, Even haEzer*, no. 91, writes: "Neither the sons nor the daughters of a person are owned by him in the same way that he owns his property or livestock... they are the inheritance of the Lord, given to parents in order to receive an education in Torah, *mitzvot* and daily life."

[30] See also *Osef Piskei Din*, ed. Z. Warhaftig (Jerusalem, 1950), 11; *P.D.R.* III, 358; XI, 161; XI, 172-173. See also *P.D.R.* XIII, 337.

if the mother declines to surrender the child voluntarily, the *Bet Din* must perforce treat the controversy as a dispute between two parents, each of whom asserts a prerogative to custody of the child. Thus, the case before the *Bet Din* is not a contract dispute but a custody dispute, to be resolved on the basis of Halakhic canons governing matters of custody.

Halakhah posits a number of general rules governing the award of custody. Mothers are presumptively entitled to custody of girls, on the theory that the mother is better qualified to serve as a role model and to provide the type of practical and moral guidance necessary in the rearing of a daughter, while the father is presumptively entitled to custody of male children, because it is the father's obligation to teach his son Torah.[31] The latter principle is, however, tempered with a tender years doctrine reflecting the consideration that children below the age of five, both male and female, require nurturing care that can best be provided by a mother. As stated in *Resp. Maharashdam, Even haEzer,* I, no. 123, and Rema, *Even haEzer* 82,7, those principles are merely the reflections of a simple, more general principle, namely, that custody is to be determined on the basis of the best interests of the child. Those particular provisions simply reflect the presumption that, in the generality of cases, both parents are equally fit and competent in all other respects. Hence, *ceteris paribus*, the factors that are enumerated must be regarded as determinative of the child's best interests. However, in the real world, seldom, if ever, are all other matters equal. Consequently, there is a long list of responsa, beginning with *Resp. RI Migash*, no. 71; *Attr. Resp. Ramban*, no. 38; *Resp. Maharam Padua*, no. 53; and including, *inter alia*, the earlier cited *Resp. Maharashdam* and *Resp. Radbaz*, I, nos. 64, 226, 263 and 360, as well as numerous decisions of the Israeli rabbinic courts,[32] indicating that custody must be deter-

[31] Hence, when it is obvious that the father will not fulfill that obligation, he has no presumptive claim to custody. Indeed, in one case, the Rabbinical District Court of Jerusalem ruled that when the child is educated by teachers rather than by the father and spends the entire day in school, with the result that "the father has no time left to teach his son," he has no superior claim to custody; see *P.D.R.* VII, 17.

[32] See *Osef Piskei Din Rabbaniyim*, p. 11 and p. 32; *P.D.R.* I, 56, 61, 66, 75-76,

mined on the basis of the best interests of the child, and that such determination must be made on a case by case basis and only upon the weighing and balancing of all relevant factors.[33]

IX. A Solution to the Societal Dilemma

For reasons that do not necessarily parallel the *mores* of Judaism, there is a strong inclination in many sectors of contemporary society to prohibit, or at least to discourage, surrogate motherhood arrangements.[34] Criminalization of the arrangement, accompanied by appro-

147, 157-158; III, 353, 358-360; XI, 154, 157, 158-159, 161-162; XI, 172-173, 366, 368-369; and XIII, 336-337. See also *Resp. Misphetei Uzziel, Even haEzer*, no. 83, and R. Ovadiah Hadaya, *Resp. Yaskil Avdi*, III, *Even haEzer*, no. 8.

[33] For a detailed survey of sources establishing this principle see Eliav Shochetman, "On the Nature of the Rules Governing Custody of Children in Jewish Law," 10 *Jewish Law Annual* (1992) 115-117.

[34] A significant minority of states have legislation addressing surrogacy agreements. Some simply deny enforcement of all such agreements. See Ariz. Rev. Stat. Ann. §25-218 (A) (West 1991); D.C.Code Ann. §16-402(a) (1997); Ind. Code Ann. §§31-20-1-1, 31-20-1-2 (Michie 1997); Mich. Comp. Laws Ann. §722.855 (West 1993); N.Y. Dom. Rel. Law §122 (McKinney Supp. 1997); N.D. Cent. Code §14-18-05 (1991); Utah Code Ann. §76-7-204 (1995). Others expressly deny enforcement only if the surrogate is to be compensated. See Ky. Rev. Stat. Ann. §199.590(4) (Michie 1995); La. Rev. Stat. Ann. §9:2713 (West 1991); Neb. Rev. Stat. §25-21, 200 (1995); Wash. Rev. Code §§26.26.230, 26.26.240 (1996). Some states have simply exempted surrogacy agreements from provisions making it a crime to sell babies. See Ala. Code §26-10A-34 (1992); Iowa Code §710.11 (1997); W. Va. Code §48-4-16(e)(3) (1996). A few states have explicitly made unpaid surrogacy agreements unlawful. See Fla. Stat. ch. 742.15 (1995); Nev. Rev. Stat. §126.045 (1995); N.H. Rev. Stat. Ann §168-B:16 (1994 & Supp. 1996); Va. Code Ann. §§20-159, 20-160(B)(4) (Michie 1995). Florida, New Hampshire and Virginia require that the intended mother be infertile. See Fla. Stat. ch. 742.15(2)(a); N.H. Rev. Stat. Ann. §168-B:17(II) (1994); Va. Code Ann. §20-159(B), 20-160(B)(6). Arkansas raises a presumption that a child born to a surrogate mother is the child of the intended parents and not the surrogate. See Ark. Code Ann. §9-10-201(b), (c) (Michie 1993).

There are few appellate court opinions regarding the enforceability of traditional surrogacy agreements subsequent to the decision of the New Jersey court in the case of Baby M. In *In re Marriage of Moschetta*, 25 Cal. App. 4th 1218 (1994), the court declined to enforce a traditional surrogacy agreement because it was incompatible with California parentage and adoption statutes. More recently, the Supreme Judicial Court of Massachusetts declared surrogate contracts to be unenforceable, on the grounds that consent to custody cannot be recognized unless given on or after the fourth day following the child's birth, and because

priate penal sanctions, might be one way of dealing with the problem. Yet criminalization is regarded as too harsh and, in any event, is not likely to be effective.

The Halakhic considerations entering into an analysis of surrogate motherhood contracts suggest a solution to the societal problems posed by the specter of such arrangements, a solution that recommends itself equally well to a society whose institutions are not necessarily predicated upon the provisions of *Halakhah*.[35]

As has been shown earlier, most rabbinical authorities are of the opinion that there exists a paternal-filial relationship between a semen donor and a child born of artificial insemination. It then follows that the donor is obligated with regard to financial support of his biological child. *Halakhah* also provides that the father is liable for child support whether or not he is awarded custody of the child. Moreover, if the mother is awarded custody, she is entitled not only to reimbursement for expenses incurred on behalf of the child but also to compensation for her services as a wet nurse. Although Halakhah does not provide for payment of alimony *per se*, it does provide for financial assistance to the mother of young children.

The financial responsibility for raising a child devolves upon the father. When the mother is awarded custody it is because such is in the best interests of the child. However, as recorded in *Shulhan Arukh, Even haEzer* 82,7, a custody award in favor of the mother does not extinguish the father's financial responsibility. Since the mother is no longer married to the child's father, she is not required to provide child-rearing services without remuneration. Payment to the mother as guardian of the child, since that too is necessary for the child's welfare, is an expense that may be assigned to the father.

Adoption of the policy inherent in these provisions of Jewish law with regard to child support and custody would have a chilling effect upon surrogate agreements. As recorded in *Shulhan Arukh, Even*

payment of money to influence the mother's custody decision renders the agreement as to custody void. See *R. R.* v. *M. H. & Another*, No. SJC-07551, 1998 WL23540 (Mass. Jan. 22, 1998).

[35] Indeed, the Halakhic provisions set forth herin pertain only in situations in which both parties are Jewish. The Halakhic provisions are presented not as normative prescriptions for a non-Jewish society, but as a model for social legislation.

haEzer 82,5 and 82,8, a mother has the prerogative of refusing to accept custody. Hence, in a surrogate arrangement, if the neonate suffers from a congenital defect or abnormality, the mother may well decline to accept custody and thereby leave responsibility for the child entirely in the hands of the father. In every case, if the woman who has agreed to surrender the child as part of the surrogate agreement undergoes a change of heart and seeks custody, she may very well prevail. If awarded custody, she is entitled both to child support and to a fee for her services in rearing the child. As a result, a male contemplating such an arrangement has no guarantee that he will actually have a child to raise. However, he will be absolutely certain of incurring financial obligations to the child born to the surrogate as well as of incurring an obligation for what constitutes, in effect, alimony payments to a woman who was never his wife. Thus, the man is assured of financial responsibilities but has no guarantee of custody of the child. The prospect should be sufficiently onerous to discourage most people from pursuing such an agreement.

In point of fact, in the early days of recourse to artificial insemination as a remedy for infertility, legislation was enacted in most American jurisdictions for the direct purpose of rendering sperm donors immune to financial claims for support of progeny born as a result of artificial insemination. Such legislation reflected a societal decision to encourage AID as a means of coping with infertility. If society is determined to discourage surrogate relationships, that goal can be achieved by amending existing sperm donor legislation to make it clear that the immunity from financial claims conveyed by such statutes does not extend to persons entering into written or oral surrogate agreements.

X. A Final Comment

One further observation is in order. Surrogate relationships are often described as a modern-day counterpart of concubinage that was prevalent in days of yore. There is no question that, in Antiquity, and in the Biblical period in particular, when a woman proved to be barren, her husband frequently took a concubine for purposes of procreation. The Biblical narrative concerning Abraham and Hagar seems to be a

case in point. Nachmanides, in his commentary on *Genesis* 16:2, offers the following observation:

> "And Abraham hearkened to the voice of Sarah." Even now [Abraham] did not intend that he be fulfilled through Hagar by having progeny through her. Rather, his sole intention was to do the desire of Sarah, so that she be fulfilled through [Hagar], that she derive happiness of spirit from the children of her handmaiden.

Hagar is here described as the surrogate who will bear the children, while Sarah will experience the gratification and pleasure of raising those children.

Nachmanides, however, offers a second observation as well. Commenting on the verse "And Sarah oppressed her" (*Gen.* 6:6), he remarks: "Our mother [Sarah] sinned in this matter." Sarah is described as having desired to displace Hagar and to raise Hagar's child as her own. But, in practice, the arrangement does not succeed. The child is not Sarah's; it is Hagar's. People may believe that they are capable of transcending biological realia, but, in practice, they find that they cannot.[36] Despite the best intentions of all concerned, biological facts give rise to psychological consequences and human beings frequently find it impossible to rise above, or to suppress, natural instincts and emotions.

The phenomenon of a mother who reneges on a surrogate agreement should not be at all surprising. The woman may be a surrogate wife or a surrogate reproductive partner, but the term "surrogate mother" is a misnomer. There is nothing in the nature of surrogacy in her maternity; she is a natural mother, both biologically and psychologically. At the time when she enters into the contractual relationship the surrogate may believe herself capable of renouncing her motherhood and of surrendering the child. However, when confronted with the reality of her motherhood, she may understandably find herself incapable of doing so. Men and women are human, not superhuman, and should not be called upon sacrificially to deny natural human instincts and emotions.

[36] Cf. Nehamah Leibowitz, *Iyyunim beSefer Bereshit* (Jerusalem, 5729), 111-112.

ARTIFICIAL INSEMINATION, IVF AND SURROGATE MOTHERHOOD: IMPLICATIONS FOR INHERITANCE LAW

*Yosef Rivlin**

Among the more broadly discussed issues of the past few years are artificial insemination and surrogate motherhood. Most of the relevant discussion, however, has been confined to the legal implications for *mamzerut*, family lineage (*yihus*) and marital status. Questions that have bearings on the subject of inheritance law have been pushed aside, with a certain degree of justification: 1) The more serious issue of personal status resulting from artificial insemination and surrogate motherhood should appropriately precede consideration of the financial implications. 2) There appears to be a working (though quite moot) assumption that the financial aspects of these issues derive from the personal status aspects; hence resolution of the latter will resolve the former as well. 3) Owing to the anonymous nature of sperm donation, part of the financial discussion is purely theoretical. 4) Within the relatively less serious nature of the financial aspects, those relating to inheritance law appear to be of even less consequence. This is especially true in light of the apparent freedom of every individual to formulate a "will" and distribute his property as he sees fit.

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Nevertheless, I believe that the time has arrived to focus attention on those aspects of the question which relate to inheritance law.

Artificial Insemination

The central question arising in the context of artificial insemination and fertility is whether the child is legally related to the sperm donor. The basis of the Halakhic discussion is provided by early sources which discuss the question of whether a woman can become impregnated by a man without sexual contact. In the literature, this possibility is termed "impregnation in a bath" (*nit'abberah be'ambatya*).[1] This miraculous eventuality is connected in Aggadic literature with legends surrounding the birth of Ben Sira,[2] and it provided the basis for complex Halakhic analyses. Thus, for example, the Tosafists ask on one occasion how one's mother-in-law could possibly annul her marriage by means of *mi'un*. For the term "one's mother-in-law" presumes the existence of a married daughter, while divorce by *mi'un* implies that the woman is still a minor. The Tosafists attempt to provide a concrete illustration of this law, via the case of a mother-in-law who has not yet had sexual relations, her motherhood being the result of "impregnation in a bath." In other words, the "mother-in-law," who was married off by her mother or brother while still a minor, may leave her husband through *mi'un*, despite having given birth to a daughter who has herself married.[3]

Again, in response to the Talmud's question in another context as to how the descendant of a second-generation Egyptian could be allowed to marry a Jew, R. Jacob Ettlinger (Germany, 19th century), in his work *Arukh LaNer*, observes: "Behold, it is possible that the Jewish woman became pregnant by the second-generation Egyptian in a bath!"[4] Another example occurs in *Turei Even* by R. Aryeh Leib Gunzburg (Lithuania, 18th century), who offers the following riddle: How could a woman become bound by a levirate bond to her own son? His reply is that the woman became pregnant by her fa-

1 *BT Hag.* 15a.
2 Cf. "Alpha-Beta DeBen-Sira," in *Otzar HaMidrashim*, ed. Y. D. Eisenstein (New York 1928), 1:43-44.
3 *Tosafot, Yev.* 12b, s.v. "*De'afilu leR. Yehudah.*"
4 Ad *Yev.* 10a.

ther-in-law – again, "in a bath." Hence, the son who is subsequently born is considered her husband's brother, so that subsequently, upon her husband's death, her son becomes her levir.[5] The upshot of all of these cases is, in any event, that a child born as a result of this process of impregnation is considered the offspring of the sperm "donor."

Although many Halakhic authorities have addressed the question, most, as already noted, address the non-financial, personal-status (*issur*) aspect thereof. Thus, R. Peretz of Corbeil (France, 13th century) is cited to the effect that the reason a woman should take care not to lie on a sheet upon which a strange man has slept is the concern lest she be impregnated by the latter's sperm. The overall concern, however, is "lest a brother wed his paternal sister." In other words, a child born under such circumstances, unaware of the identity of his true father, might marry his biological sister.[6]

Other authorities touch upon the issue from other points of departure. For example, has a man who has had children by this means fulfilled the commandment of procreation? Again, is a child born of the seed of a *mamzer* also considered a *mamzer*? Or, based upon a similar line of argument, perhaps the prohibition against artificial insemination is based upon the concern that the wife of a sperm donor may enter illegitimately into a levirate marriage? Some authorities make a distinction between "impregnation in a bath" and artificial insemination. However, the tendency in most responsa (for all of the above-noted purposes) is to view the offspring of artificial insemination as the full offspring of the sperm donors.

Given the fairly straightforward determination of the status of the AI offspring in the above contexts, it is reasonable to conclude that the same should hold for inheritance law as well: a child conceived through artificial insemination should be considered the child of the donor for purposes of inheritance.[7] Indeed, this was the conclusion

5 Ad *Hag.* 15a.

6 The tradition is cited in *Bayit Hadash* ad *Tur Yoreh De'ah*, Sec. 195. See the discussion by M. Corinaldi, 18-19 *Shnaton HaMishpat HaIvri* (1992-1994) 295-327 (Hebrew).

7 For a fuller discussion see Y. Rivlin, *HaYerushah veHaTzava'ah BaMishpat HaIvri* (Ramat-Gan, 1997), part I, ch. 6.

of R. Simeon b. Zemah Duran (Algiers, 14th-15th century) in his collection of responsa, *Tashbatz*. Duran was questioned regarding a woman who had given birth to a daughter, although she had not yet cohabited with her husband. One way to explain her pregnancy was to argue that she had been impregnated "in a bath." Duran accepted this argument in his responsum, concluding that the daughter was fully legitimate (*mutteret lavo ba-kahal*), so that she was both her father's heir and prohibited from marrying one of his close relations.[8]

There are also, however, authorities who hold that a child born of artificial insemination is not always considered the donor's child. These, too, base their contention on the Talmud, in this instance a passage in Tractate *Yevamot*. Discussing the law that a woman, not herself of priestly stock, having married a *kohen*, may continue to eat *terumah* when widowed provided the marriage has produced legitimate progeny, the *Mishnah* declares that, in this sense, a *mamzer* "permits" his mother to eat *terumah*.[9] Commenting upon this ruling, the Talmud is forced to adduce a case in which the mother, though guiltless, nevertheless has progeny which is a *mamzer*, namely: it is her grandson who is a *mamzer*. However, if a child born of "impregnation in a bath" is considered to be legitimate offspring of the "donor," why does the Talmud not cite that case in resolving the difficulty?[10] In addition, R. David Pardo (Leghorn, 18th century), author of *Hasdei David*, and R. Abraham Pinto (Salonika, 18th century), author of *Apei Zutarei*, both rule that a child born from artificial insemination is not considered the donor's offspring for purposes of inheritance.

In terms of family law, a basic and essential distinction should be made between the use of a husband's semen or that of a donor. As far as inheritance law is concerned, however, the distinction is insignificant. The essential thrust of the extant Halakhic discussion revolves around the permissibility of performing artificial insemination, and whether the child produced will suffer the stigma of *mam-*

[8] *Resp. Tashbatz* III, no. 263.
[9] *M. Yev.* 7:5.
[10] See Ben-Zion Meir Hai Uziel, *Pisqei Uzziel BiSh'elot HaZeman*, no. 53.

zer in the event that a woman is impregnated with the sperm of someone other than her husband.

This is not the place to recapitulate the positions and arguments put forward on this question by contemporary Halakhic authorities. Suffice it to say that, even if the offspring of such a procedure is indeed deemed a *mamzer*, this fact alone does not disqualify him from inheriting. Indeed, specifically those legal opinions that consider the child a *mamzer* are rooted in the assumption that that child is related to the sperm donor, which is the very consideration permitting him to inherit!

Since the general tendency among decisors has been to view the child as offspring of the sperm donor, even in regard to inheritance, there should be no difference whether the donor was actually the husband of the child's mother or a third party. Hence, if the donor's identity is known, the child is legitimately considered his heir. A dissenting argument, however, has been offered by R. Menahem Mendel Kasher (Israel, 20th century). He suggests that when a man donates or sells his sperm to a woman other than his wife, he is effectively renouncing ownership thereof. Hence the donor no longer retains any kinship with the offspring, *a fortiori* any financial or testamentary relationship.[11] No other decisors mention this distinction, though several share Kasher's contention that the child does not inherit the donor.

As we have noted, however, most authorities hold that the child *does* indeed inherit. In reality, though, the entire discussion is theoretical, since sperm donors are almost always anonymous.[12] In that event, it is clear that the burden of proof of inheritance rests upon the child, and that in the absence of a positive identification of the actual donor the child cannot inherit. Even where the point at issue is more narrowly defined, e.g., when the choice lies between a known donor and the mother's husband (for example, if there is some doubt whether the doctor included samples of the latter's sperm in the injection), the child will inherit neither the donor nor the moth-

[11] M. Kasher, "Lineage of the Offspring" (Hebrew), 1 *No'am* (1958) 125-128. Cf. Corinaldi, *op. cit.* (n. 6, above), who supports Kasher's argument.

[12] As a matter of fact, many physicians actively eliminate any chance of identifying the donor by mixing sperm from several different donors in each injection.

er's spouse. This conclusion is based upon the legal principle underlying a Talmudic passage which discusses the paternity of a premature baby, born seven months after the mother's remarriage, the latter having taken place immediately after her divorce or widowhood. In that case the child (who was born fully developed), could be seen as having been the full-term child of the first husband or the result of a seven-month pregnancy by the second husband. As paternity is in doubt here, the other heirs are entitled to claim that their supposed sibling is actually the offspring of the other husband, so that the child receives nothing.[13]

The suggestion by some authorities that the semen of a non-Jewish donor be used has no impact on the theoretical nature of the question of inheritance. In that instance, too (perhaps more than in other cases), the donor is legally anonymous; in any event, *Halakhah* recognizes no kinship between a Jewish child and a Gentile father as far as inheritance is concerned.[14]

Artificial Conception

As distinguished from artificial insemination, *in-vitro* fertilization (IVF) is achieved outside the womb. The encounter of sperm and ovum occurs in the laboratory, in a test-tube, and only subsequent to fertilization is the zygote implanted in the mother's womb. If the donor of the ovum is the recipient of the fetus, there is no problem in identifying the legal mother, and the child will inherit her upon her demise. The only question which arises in this scenario is that of kinship with the sperm donor. Based upon our previous discussion, and in light of the lack of distinction in Halakhic literature between *in corpore* or *extra corporem* fertilization, the conclusion must be that the offspring is kin to the sperm donor. This is indeed the conclusion of R. Obadiah Yosef, cited by M. Drori: "Therefore, it appears that a test-tube baby is considered the child of its parents in every regard. This is so, however, only if extreme care was taken that the sperm

[13] However, if the child himself dies, the two presumptive fathers divide his estate. Cf. *MT Hil. Nahalot* 5:3.

[14] At least, such is the opinion of most authorities. See *BT Kid.* 17b; *MT Hil. Nahalot* 6:9-10; *Sh. Ar., Hoshen Mishpat*, sec. 283 par. 1.

was that of the husband alone."[15] However, in light of the conclusion of R. Eliezer Waldenberg (Israel, 20th century) that artificial insemination and IVF should be considered as distinct procedures, one might also reason that if the fertilization is achieved *ex utero*, the child would have no relationship whatever to the father.[16]

Surrogate Motherhood

The major contemporary Halakhic discussion concerning surrogate motherhood revolves around instances in which the donor of the egg, i.e., the biological mother, is not identical with the woman in whose womb the fertilized egg is implanted and who carries the pregnancy to term. All discussions of the Halakhic question of surrogate motherhood are based on the following passage in *BT Yevamot* (97b):

> Twin brothers who are proselytes... neither carry out the *halitzah* ceremony nor undertake levirate marriage, and neither of them is prohibited from marrying his brother's wife... If they were conceived not in sanctity [i.e., before their parents' conversion] but born in sanctity, they neither carry out *halitzah* nor undertake levirate marriage, but each is forbidden to marry his brother's wife.

The Halakhic distinction between the opening and closing sections of this passage, as regards the prohibition against marrying a brother's wife, is due to the fact that the mother was converted in the interval between the twin boys' conception and birth. The authorities consider this case an appropriate precedent for the case of surrogate motherhood, referring to the donor of the ovum as "Timna the Gentile," while the surrogate mother is called "Ruth the Jewess." In this instance, the implantation of the fertilized ovum occurred immediately after "Timna" had immersed herself in a *mikveh* (ritual bath) for purposes of conversion, emerging as "Ruth the Jewess." This analogy leads to the conclusion that the legal mother is the host or birth mother.

However, there are four distinct approaches toward the interpreta-

[15] M. Drori, "Genetic Engineering: Preliminary Consideration of Legal and Halakhic Aspects" (Hebrew), 1 *Tehumin* (1980) 280-296.

[16] *Resp. Tzitz Eliezer* 15, no. 45.

tion of this Talmudic passage in the literature and, as a result, as many different views on the question of maternity and blood-relationship. From the point of view of probability, pure and simple, one can present the following possibilities:

1. The donor is the sole mother.
2. The host or birth mother is the sole mother.
3. Both are considered mothers of the child.
4. Neither is legally the mother.

Most contemporary Halakhic decisors choose one of the first two possibilities, with what appears to be a marked tendency to consider the surrogate mother as the actual mother. The chief proponent of this view is R. Zalman Nehemiah Goldberg, of the Supreme Rabbinical Court of Israel. Moreover, he explicitly refers to the implications of his position for the laws of inheritance, asserting that "as regards the question of inheritance, the result is the same as that regarding blood relationship, namely, the determining factor is the surrogate mother."[17]

On the other hand, R. Jacob Ariel, in a recent article, joined the school of thought which asserts that nothing can detach the child from its biological mother. Hence, he argues, the child is considered totally the offspring of the donor mother, and this includes questions of inheritance.[18] Still others are of the opinion that, since there remains some doubt as to the actual maternity of the child, one should impose all of the strictures of blood relationship from both sides; this would imply that the child would be forbidden to marry blood relations of either mother. As to inheritance, since monetary matters are involved here, the burden of proof would rest with the child.

The fourth school of thought upholds the maternity of the donor, i.e., the biological mother. However, the point here is that the very same authorities assume that blood relationship can be effected only by means of *in-utero* conception. Hence, since in this case fertiliza-

[17] Z. N. Goldberg, "Maternal Lineage in Surrogate Motherhood" (Hebrew), 5 *Tehumin* (1984) 248-259.

[18] J. Ariel, "Artificial Insemination and Surrogate Motherhood" (Hebrew), 17 *Tehumin* (1996) 171-180.

tion has occurred outside the body, the child is not related to the donor and thus effectively has no mother at all.[19]

Besides these four basic schools of thought, there are also compound approaches. Hence, just as there are authorities who hold that though for purposes of blood-relationship such a child has two mothers, though none for purposes of inheritance, so others hold that a child may have a definite mother for the former but none for the latter.[20] As there appears to be no definitive decision with regard to this question, the direct implication for purposes of inheritance is that a child born to a surrogate mother will inherit neither his or her biological mother (= the donor of the egg) nor the surrogate mother.

As an example to sharpen the various distinctions made above, imagine a family in which three sons have been born to the same father and mother through non-natural conception. One was the product of artificial insemination, directly into the mother's womb. The second was the result of IVF of the mother's ovum. The third was brought into being through the IVF of a donated ovum, which was subsequently implanted in the mother's uterus.

In regard to their rights to inherit the father, all of the sons are equal; similarly, in the event that any of them dies prematurely, the father will inherit him. However, only the first two children may inherit their mother. Let us suppose that the house collapses on both parents, killing them. If the mother dies first, the children divide the entire estate equally, since the husband first inherits his wife, and upon his death the sons inherit him. However, if the father predeceases the mother, the former's estate is equally shared by the sons, while that of the mother is divided solely among the older two, who are unquestionably her offspring. Therefore, in the event that there is no ascertained order of death, the rules of definite versus questionable inheritance come into play, and the third son receives nothing from the mother's estate.

Today there exists yet another fertilization procedure, known as Gamete Inter-Fallopian Transfer (GIFT), in which ova are removed

[19] Cf. Y. Ben-Meir, "*In Vitro* Fertilization and the Relationship of the Child to the Surrogate Mother and the Biological Mother" (Hebrew), 8 *Sefer Asia* (Jerusalem 1995), 153-168.

[20] A. S. Abraham, *Nishmat Avraham* IV (Jerusalem 1983), 183-186.

from the ovaries, combined with semen and immediately returned to the fallopian tubes. Since the process of fertilization occurs within the fallopian tube and not *ex corpore*, it would appear that the subsequent offspring should be considered the child of the mother, even in the opinion of Rabbi Eliezer Waldenberg.[21]

Cloning

Modern science is currently speaking of the possibility of "cloning" a person, i.e., creating a human being without the need to combine two sex cells. The offspring would be the biological twin of the donor cell. In the cloning process, a normal cell is duplicated and inserted into an ovum whose nucleus has been removed, so that the ovum has no influence over the development of the child. The donor of the cell is considered the "father." An interesting question in this connection is what happens when the donor is a woman? In the context of dealing with the question of androgynous persons, the author of *Minhat Hinukh* investigates several issues: Is the mother the person who bears a child and the father the one who begets it? Or, are motherhood and paternity determined by sex? In that case, the donor of the cell begets the child. If so, it is possible that the begetter of a child is the father, even if that person is a woman! Or, must we say that a woman is necessarily a mother, under any circumstances? These questions have practical ramifications in the area of inheritance in Jewish Law. As is well known, a son may inherit his mother, but the reverse is not true.[22] If the donor of the cell, in the case of cloning, is legally considered the father and not the mother of the offspring, then it is possible that she may inherit him.

Shtuki

In all of the above cases, an important question is whether Jewish Law allows a mother to inherit her predeceased son in the event that his paternity is not known. As already mentioned, under normal circumstances a mother cannot inherit her son. This is based upon the Talmudic principle: "One's father's family is legally one's family,

[21] Ben-Meir, *op. cit.* (n. 19 above).
[22] *M. B.B.* 8:1.

while one's mother's family is not so considered."[23] The dominant Halakhic approach is that neither the mother nor the members of her family can inherit her son, even if the father's identity is unknown. Some authorities hold that the estate of a minor child who dies in this situation is ownerless, somewhat like the estate of a convert, so that ownership is open to the first holder. If so, the mother too may acquire possession of this property by being the first to claim the now ownerless estate. What is more, Rabbi E. Batzri cites a unique opinion, according to which, in the case of unknown paternity (*shtuki*), the mother indeed inherits the son, along the lines of direct kinship.[24] This unusual opinion has an immediate implication in relation to the identity of the mother in the case of surrogate motherhood. The answer would not be solely dependent upon the determination of whether a certain person is "the mother" or "not the mother," but rather on various combinations of partial and less partial maternity.[25]

Yet another related question concerns the rights of inheritance of maternal siblings. As is well known, maternal siblings do not inherit one another. However, one might argue that, in the event that a *shtuki* may inherit his mother, nothing should prevent maternal siblings from inheriting one another.

Recognition

In cases where the familial status of an individual is unclear, one may have recourse to the law of recognition ("*yakir*"). According to this, the father has a right to establish whether or not he is the father of a given child. *Prima facie*, one could avail oneself of this principle in cases of artificial insemination and fertilization as well, and indeed there are scholars who recommend this legal consideration as a solution to problems of inheritance. However, it seems wise to apply the rule cautiously. The rule of *yakir* applies only when there has been

[23] *BT B.B.* 109b.

[24] E. Batzri, III *Dinei Mamonot* (Jerusalem 1990), 202.

[25] There is precedent for such considerations, as in a case cited by Rabbi A. Kaleb, based upon a comment of *Siftei Kohen* (*Shakh*), that there may be brothers, one of whom is wholly related to the mother while another is only "partially" related to her. See A. Kaleb, "Who is the Child's Mother?" (Hebrew), 5 *Tehumin* (1984) 260-267.

no clear statement that the child in question is *not* the person's son. However, if the child has been deemed *not* to be his son, the rule would not apply.[26] Therefore, it appears to me, that if the Halakhic-legal situation is such that the child is not considered to be related to the donor, we may consider this as an approximate presumption or testimony that the child is not his, in which case the father may not invoke his rights of *yakir*.

Other Ramifications

In order properly to examine other ramifications of these cases for inheritance law, we must consider the following hypothetical case. Suppose that a man, on his deathbed, requests a quantity of his semen, presently preserved in a frozen state, to be transferred to his female companion, who will be impregnated with it after his death. The questions raised by this scenario are: 1) Is such a request legally binding? 2) May other family members object? 3) If a child is born, does he thereby inherit him? 4) May a donor draw up a will *in benefactio* for a quantity of sperm?

Prima facie, a quantity of sperm should be included as part of a man's estate, which is inheritable. Moreover, we have already noted that R. M. Kasher considers a man to have proprietary rights over his semen, which he may transfer or abandon.[27] Therefore, if the will is drawn up correctly, the quantity of sperm passes legally into the domain of the beneficiary. Similarly, a man may sell a quantity of his sperm, or give it as a gift if the proper modes of transference (*kinyan*) are observed. However, it is clear that there is no legal reason to oblige the female companion to become pregnant with that sperm. Nor is there any obligation to fulfill thereby the last wishes of the departed. On the other hand, if the woman does decide to become pregnant thereby, the other members of the family may not legally prevent her from doing so.

[26] This would apply whether the denial of paternity was effected by the father (in which case he may not retract), or based upon the testimony of witnesses, who may not be contradicted by the father. See B. Rabinowitz-Teomim, *Hukkat Mishpat*, pp. 48-49.

[27] Above, n. 13.

According to the Law of Inheritance,[28] a child born from such circumstances does not inherit the deceased. The law refers to a child born within three hundred days of the testator's demise and denies rights of inheritance to one conceived after his demise.[29] There are legal scholars who do admit of such a right for this offspring. R. Shlomo Zalman Auerbach was of just this opinion, namely, that, contrary to the case of levirate marriage, in the instance of inheritance such a child would inherit the predeceased father.[30]

Based upon R. Auerbach's decision, the objection of the other family members to the pregnancy will be clear. Thus, for example, the deceased's brother who (in the absence of the new child) would have inherited his brother, will definitely object to the insemination. Following this line of thought, we might ask, what will be the status of a brother who goes so far as to destroy the semen in order to prevent such an eventuality? Apart from the issue of destruction of the woman's property, he has also ensured via his actions that all of his late brother's estate will pass over into his possession (assuming that their father is no longer alive). Obviously, the Law of Inheritance does not address this possibility; but in this context paragraph 5 of that law deserves close attention. It states that disqualification from inheriting not only obtains with regard to a murderer of the testator, but also applies to anyone who attempts such murder, along with anyone convicted of destruction of an instrument, i.e., the will. Can we consider the case of destruction of semen as being any less serious? In both instances the brother, who is also the potential or presumptive heir, seeks to advance the realization of his claim.

In sum, there can be no doubt that the law will be forced to deal with both of these implications: the right of inheritance of the "portion of semen" when born, and the right of inheritance of a person who destroys the semen.[31]

Returning to the discussion of the inheritance rights of a child born posthumously from a sperm deposit, it is important to note that the child cannot claim the double portion to which a firstborn son is en-

[28] State of Israel, Law of Inheritance, 1965.
[29] *Ibid.*, para. 3.
[30] S. Z. Auerbach in 1 *No'am* (1958) 145-166.
[31] Regarding all of this, see Rivlin, *op. cit.* (above, n. 7).

titled. This is because no child born posthumously is considered a firstborn for that purpose. Similarly, the posthumous child cannot detract from the portion granted a child born while the father was yet alive.[32]

We can now proceed to the final question posed above: On the assumption that a man has legal heirs and commands that his property be bequeathed to a portion of his sperm, is such a bequest legally valid? This brings us to the issue of the legal status of the fetus. A bequest to a portion of semen is the same as one to a fetus, since both refer to items which are not yet existent (*davar shelo ba la'olam*). The approach cited in the name of Rabbi Yose is that a fetus may be endowed with a bequest. There is some debate among the Amoraim as to the parameters of this statement. Although the Talmud concludes that a fetus may not be endowed with a testamentary bequest, nevertheless, if the fetus is the testator's child, the bequest is valid.[33] However, in light of the limits placed upon the rights of acquisition possessed by a fetus, we may deduce that there are differences between the latter and unfertilized semen. Maimonides writes that a person who endows his unborn child with a bequest may do so only if his wife is already pregnant.[34] Later medieval authorities add that this act of endowment only pertains after the passing of the first forty days of pregnancy, prior to which the fetus is considered non-valid (*maya be'alma*) and as such may not acquire anything.[35] Hence it follows that a man's bequest to his sperm is not legally valid.

Summary

In the opinion of most writers, if a couple are incapable of marital relations and the husband's sperm is injected into his wife's uterus, the child born subsequently is considered to all intents and purposes that of the father: His widowed wife will be exempt from *halitzah* and his son will inherit him.[36] If the sperm is injected after the donor

[32] *BT B.B.* 142b.
[33] *Ibid.* 141b-142b. See also *MT Hil. Mekhirah* 22:10.
[34] And such is the normative ruling. See *MT, ibid.* 11.
[35] *Shakh, Hoshen Mishpat,* Sec. 210 sub-par. 2.
[36] Less pressing is the question as to whether the man has fulfilled the Biblical commandment to procreate. A majority seems to believe that he has not.

dies, the wife is not thereby exempted from levirate marriage, though, according to Rabbi S. Z. Auerbach, the child is considered the father's legal heir. In all of these cases there is no question that the child is the birth mother's. Even in the event that the sperm is provided by a donor other than the husband, and without entering into considerations of *mamzerut*, most (if not all) authorities rule that the child inherits the donor.[37]

According to most authorities, there is no difference between artificial insemination *in utero* and *in vitro* fertilization, with the exception of Waldenberg, who holds that IVF breaks the connection between both parents and the child, so that he will inherit neither.

As far as surrogate motherhood is concerned, opinions appear to be almost equally divided in both quantity and quality. Besides the many who declare that the surrogate mother is the legal mother, others assert that the connection with the ovum donor, the biological mother, remains. Therefore, at least insofar as inheritance is concerned, the child will inherit neither the donor nor the surrogate mother. Clearly, the case of contested inheritance may be resolved through the exertion of the testator's unlimited prerogative to bequeath his estate to whomever he wishes.

[37] With the exception of R. M. Kasher, who holds that the donor, by the very act of donation, has renounced any proprietary rights over his semen, implying a break between father and offspring regarding inheritance.

EUTHANASIA: WITHHOLDING TREATMENT A LEGAL AND ETHICAL ANALYSIS

*Sharon Levy**

Advances in science and technology mean that people can be saved when in the past they would have died. This is a blessing, yet it has also produced dilemmas for families, doctors and, ultimately, the courts, for people can be kept alive in what others may judge to be pitiful and unacceptable states. I wish to look at decisions made in two specific areas: first, where babies are severely disabled and will need invasive treatment to live; second, where adults are in a persistent vegetative state (PVS). In this state a patient is not dead by any current definition[1] – the brain stem is operative, so that the body functions reflexively, but the cerebral cortex, which is that part of the brain controlling cognitive function and sensory capacity, is destroyed. A patient in PVS cannot see, feel or hear. He or she is unconscious until death, which may not come for many years.

I have selected these two areas as I have no wish to cloud the discussion with questions of autonomy. In both situations the patient cannot make any decision – it is for others to make decisions on

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1 In England there is no statutory definition of death, but in October 1996 the Conference of Royal Medical Colleges and their Faculties (UK) concluded in a later addendum to the original Report that brain stem death amounts to death. See "Memorandum on the Diagnosis of Death," 1 *British Medical Journal* (1979) 332. There is continuing debate on the issue from a Halakhic perspective.

his/her behalf. In both cases parents or other relatives are having to come to terms with tragic and unexpected situations: the birth of a severely disabled child, who is in pain, or a healthy life cut short by accident.

The question then arises as to whether a decision can be made to withhold treatment in either situation, knowing that this will result in the patient's death. Doctors and health care professionals face not just an ethical quandary but also a legal problem. A doctor withholding treatment when under an obligation to provide it could face a charge of homicide. This is one particular reason that the courts are called upon to adjudicate in this area. Neither can one ignore the fact that the problem at hand is an economic one. These categories of patients are kept alive at great financial cost. It is estimated that there are some 1,500 patients in PVS in Britain.[2] Though they will not recover, they may live for many years. The courts deny that decisions on the legality of withholding treatment are taken on economic grounds, but I suspect a sub-text, especially in Britain, where the health service is facing a deep financial crisis. Lord Browne-Wilkinson[3] considers that it is not for a judge, required to reach a view as to what is for the benefit of an individual whose life is in issue, to take account of allocation of limited resources. However, he also questions whether it is right to devote money to sustaining the lives of those who are and always will be unaware of their own existence, rather than to treating those who can be benefited, given that there are limited resources for medical care.

I would first like to consider the Halakhic position, and then to see how far British law departs from this. I will also examine whether the departure, such as it is, is made on sustainable grounds.

As an English lawyer I am reasonably confident, at least, to the civil standard of balance of probabilities of my interpretation of English law, but I find it daunting to be interpreting Halakhic law before those whom I revere as undisputed experts in this area. Nevertheless, as there is much Halakhic authority for proceeding when one thinks

2 See comment of Andrew Grubb following *Re G, Medical Law Review* (1995) 82.
3 *Airedale NHS Trust v. Bland* (House of Lords), 2 *Weekly Law Reports* (1993) 381-382.

others have faster tongues and better understanding, I feel I can proceed.

The clear principle which emerges from Jewish teaching is that life is sacred. Each human life is of infinite importance and the value of life is not dependent on any particular quality of that life. Secular legal discussion is dominated by talk of rights, rights to a certain quality of life. Judaism rejects such theories. We have a duty to live our lives as they are given to us by God, not just so long as they possess any particular characteristic. Because of this, in the two situations I have detailed, there is no question of withholding treatment, once it has begun. In both situations the patient is not dying – so the Halakhic rules regarding removing obstructions to dying are not applicable.[4] There is a duty to save life irrespective of its quality, subject to availability of resources, and once that task is begun treatment cannot be stopped.

English courts have accepted the paramount importance of the sanctity of life. In the most authoritative case in each of the two areas I am dealing with,[5] the principle is reaffirmed. As an example, it is stated that it is never permissible to take active steps to end a life.[6] The very fact that the courts feel a need to begin their deliberations by considering the doctrine shows its importance as a source of law. In similar vein, a renowned secular legal thinker, Ronald Dworkin,[7] clearly feels the need to maintain the principle of the sanctity of life as a justification for decisions made at the end of life – albeit he does so by a reinterpretation of that principle that would not be universally acceptable.

So sanctity of life is a prime consideration. But in both areas under discussion, British courts ultimately reject the concept in favor of quality-of-life arguments. On what basis do English courts do this?

English courts say that the sanctity of life is not absolute and point

4 R. Moses Isserles on *Shulhan Arukh, Yoreh De'ah* 339,1.

5 *Bland* (n. 3 above) regarding PVS patients; *Re J (a Minor)*, 3 *All England Reports* (1990) 930 regarding disabled neonates.

6 *Bland* (above) per Lord Goff, 368; *Re J* (above) per Lord Donaldson, 938.

7 Ronald Dworkin, *Life's Dominion – An Argument about Abortion and Euthanasia* (London, 1995).

to exceptions in cases of war or self-defense.[8] This is, at first sight, a useful parallel to enable the doctrine to be rejected in medical cases. But it does not follow: situations in which one may take a life are very limited, and such limited exceptions cannot intelligently justify abandonment of the doctrine. If a Jewish person undertakes to observe the Sabbath except where life is at stake, the exception cannot be used to justify rejecting the rules of the Sabbath in other situations. The general rule stands firm with defined and limited exceptions. The fact that there are some exceptions to the rule does not imply that other exceptions can be added to the list without more. So what justifications are given for doing so?

Disabled Neonates

With regard to severely disabled newborns, the English authority is the case of *Re J*,[9] in which a premature baby suffered brain damage at the time of birth. He had severe disabilities including blindness and deafness. He was unlikely to sit up, hold his head upright or develop any intellectual abilities. He might be able to smile and cry and he could feel pain. His life expectancy was up to his late teens. The issue was whether he should be reventilated in the event that his breathing stopped. The court directed that where a child was a ward of court and suffered from such serious physical disabilities that life would be intolerable if he or she were to live, so much so that, if in a position to decide, the infant would choose to die, the court could then direct that no treatment need be given to prolong life. The court would perform a balancing exercise to decide the child's best interests, looking at the question from its point of view, taking into account the desire to survive, the pain and suffering involved in the treatment and the pain and suffering and quality of life if life were prolonged. Applying this test to the case of *Re J*, the court decided it was in the baby's best interests to withhold ventilation.

In cases such as this there is a court officer, the Official Solicitor, appointed to represent the interests of the child. He put forward the view,[10] which would in fact have Halakhic authority, that it is never

[8] *Bland* (above) per Lord Goff, 467.
[9] 3 *All England Reports* (1990) 930.
[10] *Ibid.*, 930.

justifiable to withhold consent to treatment which would enable a child to survive a life-threatening condition, whatever the child's quality of life. This was referred to by the court as the absolutist[11] approach and was ultimately rejected.

Choice of words is important. In these cases the courts are reluctant to talk of treatment imposing death, talking instead of the right to choose a course of action which will fail to avert death. They speak of death with dignity.[12] The implication could be that a life of pain has no dignity – but this is not so. It is when dealing with pain that a sufferer often exhibits most dignity.

The court realized that there was a problem in deciding that some lives are not worth living. It quoted with favor the view of Judge Asch in the American case of *Re Weberlist*[13] that a test of civilization is its concern with the survival of the unfittest. Yet the court would not support the so-called absolutist approach. Having used this term, which carries implications of unreasoned implacability, dogma and obstinacy, the court felt able to say that there were presumptions, even overwhelming presumptions, but few if any absolutes.[14] In other words, sanctity-of-life arguments are given validity, but rejected in favor of quality-of-life theories. The duty of life incumbent under *Halakhah* is subsumed in a rights discourse. In the weighing exercise carried out to determine the baby's fate it was thought, whilst accepting the strength of the desire to live and asserting the sanctity of life, that there would be no benefit to be gained from increasing the child's suffering.

This decision must be judged for what it is. It is not a medical decision: the medical decision is the child's prognosis, while the decision as to what to do with that prognosis is ethical. The courts are very much aware of the sanctity of life but are not prepared to uphold life at all costs; they will weigh in the balance the harm caused by continuing treatment. The courts emphasize that sanctity-of-life arguments will only be outweighed in extreme cases, for example, it

[11] *Ibid.*, 934 per Lord Donaldson MR.

[12] *Ibid.*, 936 per Lord Donaldson MR, discussing *Re Superintendent of Family and Child Service and Dawson,* 145 DLR 3d 610 (1983).

[13] 360 N.Y.S. 2d 783 (1974).

[14] Above n. 10, 937.

has not occurred in simple Down's Syndrome cases.[15] This is halachically unacceptable, but the process can be understood and has its own logic. The courts are very much influenced by the fact that invasive techniques cause pain and will be used to prolong a life of suffering in a child for an indeterminate time, with no apparent benefit to the child. This will in turn cause distress to the child's family and no doubt also to the child's doctors and other health care givers. Whilst the decision is halachically reprehensible, it is an attempt at empathy and sensitivity.

Adults in a Persistent Vegetative State

Now let us turn to the case of patients in PVS, in particular, the English case of *Airedale NHS Trust v. Bland.*[16] To set the background: England is, despite popular belief to the contrary, a very religious country. The religion, called football, has similarities to Judaism: You need to be a man to fully participate; a *minyan* is needed, consisting of eleven men dressed in ritual garments. I believe it also involves the congregation singing traditional songs with great fervor. As a woman, I can only observe with amazement.

However, one important game, which attracted many spectators, had tragic consequences. Largely because of police negligence, too many people were crushed into too small an area. Many people died. Antony Bland did not die, but was left in a persistent vegetative state, being kept alive by means of medically-provided hydration and nutrition, administered by IV tube. Doctors agreed that there was no hope of recovery or improvement and that Antony Bland could remain in this state of unconsciousness for many years.

The hospital authority asked for declarations that the feeding could stop and treatment should only be given to enable the patient to die with dignity. The court held that feeding was treatment, and that treatment need only be given in so far as it benefited the patient. Treatment could thus stop, as existence in PVS was of no benefit to the patient.[17] The principle of sanctity of life was considered, but it was stated that the principle is not absolute and in any event would

[15] See *Re B,* 3 *All England Reports* (1990) 927.
[16] 2 *Weekly Law Reports* (1993) 316.
[17] *Ibid.* 378, per Lord Lowry.

not be violated by ceasing to give medical treatment to a PVS patient who had been in this state for three years.[18] The reasons for this deduction were not given.

The case raises many important issues and illustrates the problems that arise when one departs from the so-called absolutist approach.

First, the determination that feeding is treatment and so can be stopped has caused consternation in many quarters. Many people consider feeding to be a basic human right, separate from medical treatment.[19] It is obvious the judgment meant that Antony Bland would starve to death, albeit made comfortable and assisted with medication. This issue led to disagreement in the House of Lords Select Committee, which had been set up to consider medical ethics in the area of euthanasia. The question was resolved, or shelved, by deciding that, if other decisions were made – presumably the withdrawal of antibiotics so the patient would die from infection – the problem would not arise.[20] This begs the question as to whether that course of action is acceptable.[21]

Second, removing the tubes from Antony Bland could be construed as an act. The overriding principle that acts causing death can never be permitted[22] must then also face reevaluation. The judges' way out of the dilemma was to rule that removing the tubes was not an act but an omission to treat Antony,[23] and an omission would only be culpable if there were a breach of duty to act to save him. The courts held that there was no such duty, as the doctors need only act if it was in Antony's best interests to do so.[24]

A third problem now emerges. Antony Bland was in no pain. He could have been maintained in his current state for years – admittedly, a state devoid of social interaction with others. Now the an-

[18] *Ibid.* 362, per Lord Keith.

[19] R. Eliezer Waldenberg, *Responsa Tzitz Eliezer*, 13:89; J. M. Finnis, 109 *Law Quarterly Review* (1993) 335; "Declaration on Nutrition and Hydration – Moral and Pastoral Reflections. A Statement by the Bishops of the USA," *Report of the Select Committee on Medical Ethics*, vol. 3 (1993-1994) p. 77.

[20] *Report of the Select Committee on Medical Ethics,* vol. 3 (1993-1994) para 257.

[21] Halakhically speaking, it is probably unacceptable, see n. 19 above.

[22] See n. 6 above.

[23] Above, n. 3, at p. 369 per Lord Goff and p. 384 per Lord Browne-Wilkinson.

[24] Above, n. 3, at p. 372 per Lord Goff.

swer to a question often depends on how the question is formulated. The courts refused to put the question in terms of whether it was in Antony's best interests to die. That must be in anyone's worst interests. So the question was rephrased, asking whether it was in his best interests to continue receiving treatment. Clearly, the treatment would never improve his condition. It was obviously invasive, and again the term undignified was used.[25] Thus the decision could be made.

Once more, as in *Re J*, the courts were making an ethical decision based on a medical prognosis. The decision in *Bland* means that, once PVS is diagnosed, patients will die. A correct diagnosis is clearly imperative,[26] and there have been problems with that;[27] but once the diagnosis is made, a life in PVS is deemed a life not worth living. The weighing process involved in *Re J* does not occur, as no benefits are perceived to exist that might be weighed against harm. But the patient feels no pain and is in no discomfort. So who benefits by the death? Who feels the indignity of the treatment? Surely – those persons who are transferring their perceptions of a patient in PVS to the patient himself.

The decision in the Bland case was followed by a subsequent British case, *Frenchay Healthcare NHS Trust v. S.*,[28] where a question arose as to whether feeding tubes in a patient, in PVS as a result of a suicide attempt, should be reconnected. The court had to make a rapid decision. Because of the time scale, the Official Solicitor had no opportunity to carry out an independent report, and medical evidence was inconclusive. There was evidence that the patient was pulling at his tube and so was not acting in a mere reflexive manner. Hence it was possible that he could feel distress and was suffering. Some medical evidence did not conclusively diagnose PVS. The

[25] Above, n. 3, at pp. 371-372 per Lord Goff.

[26] The Royal College of Physicians issued *Guidelines for Diagnosis and Management of Permanent Vegetative State* in March 1996. Lord Goff, at p. 373 of the *Bland* judgment, referred to the then current guidelines issued in September 1992 by the Medical Ethics Committee of the British Medical Association.

[27] See K. Andrews, "Misdiagnosis of the Vegetative State: Retrospective Study in a Rehabilitation Unit," 313 *British Medical Journal* (July 6, 1996) 13-16.

[28] 1 *Weekly Law Reports* (1994) 601.

court, however, took the view of the doctors who knew him best that he was in PVS and ruled that the tube need not be reconnected.

In another English case, *Re G*,[29] the court ordered that if doctors viewed it in the best interests of a patient to be allowed to die, this would be ordered despite objection from the family. In that case the patient's mother and wife disagreed, yet it is considered that the principle of the case applies even if all relatives are agreed the patient should live.[30]

Cases that reach court often present extreme factual situations, as happened *Re J* and *Bland*, and whilst the courts insist they are adjudicating solely on the facts before them, the principle is subsequently applied to cases which are not so extreme. No-one could fail to have sympathy for the parents of Baby J and Antony Bland, who wished to see their children free of pain or released from a life that had apparently become devoid of all purpose. Yet, in confirming the incremental erosion of the sanctity of life, as has occurred in the *House of Lords Select Committee Report*, Parliament and the judiciary are following a dangerous path, in which a life is valued and cherished not for its very existence but for its ability to meet criteria of worth, whatever those are.

Let us return now to the theme of this conference – the doctrine of sanctity of life in its Jewish meaning *is* a source of contemporary law. No case in this area is complete without its confirmation as a foundation of decision making. Yet the way it is inevitably discounted leads to the conclusion that pragmatism, rather than principle, leads the way: the underlying pragmatism of cost; the pragmatism of an end, a death, rather than allowing a difficult life to continue; and the pragmatism of saving relatives' distress at witnessing the pain or changed life of a loved one. Pragmatism is inevitably so much easier than principle; but is it the right choice?

[29] *Medical Law Review* (1995) 80.
[30] See Commentary, *ibid.*, 81.

MEDICAL ETHICS

*Rivka Katz**

Why should we be ethical? Ethical behavior has three purposes: the immediate, the fundamental and the motivating. In his book *Ethics and Human Relationships*, Norman D. Hirsh[1] states that the immediate purpose is helping other human beings. The fundamental purpose of ethics is constructive human relationships.[2] Finally, as Hirsh goes on to say, the motivating purpose of ethical decision-making is revealed by examination of difficult ethical situations.[3]

This article deals mainly with examples of difficult ethical situations confronting the medical profession.

People concerned with the experiencing of feelings and values, rather than just learning about them in a descriptive sense, speak of "developing sensitivity to ethical values." Sensitivity can be defined as the capacity to respond to the social and cultural environment; it is a personal, unique quality in perception and response. The moral

* Tel Aviv. I would like to thank Zvi Ilani and J. Weinberger of the Bar-Ilan Centre for Computers and Judaica, as well as Varda Ben-Shachar, B.A. Nursing and Sociology, for their assistance in their respective fields of expertise.

1 Norman D. Hirsh, *Ethics and Human Relationships* (New York, 1976), 11.

2 "The purpose of religion is constructive human relationships" (Professor Cronbach of Hebrew Union College, cited by Hirsh, *loc. cit.*).

3 "Even though constructive relationships are the fundamental purpose of ethics, they are not the motivating purpose. An examination of a difficult ethical situation reveals the motivating purpose in ethical decision-making"; Hirsh, *ibid.*, 18.

and ethical questions that confront doctors and nurses comprise a vast field and require penetrating study, accompanied by a feeling of awe and an awareness of the burden of responsibility. Let us consider a few of the innumerable moral dilemmas with which physicians are confronted.

1. Should a doctor reveal that a patient's driving is dangerous because of illness? How should a neurologist act upon diagnosing that a patient has epilepsy and should not be allowed, say, to drive a car, because of the danger to him/herself and others? On the one hand, one has doctor/patient confidentiality, and on the other, the danger to the patient as well as to the public. What if the patient is a taxi-driver or has some other occupation for which driving is essential? If the doctor informs the licensing authorities, the patient's license is bound to be revoked and he or she will be unable to make a living.

2. Another difficult dilemma occurs when a girl, about to be married, has no reproductive organs. Her fiancé is unaware of the problem and the girl has asked the doctor not to tell him. Is the doctor obligated to tell the young man of his future wife's problem? A parallel situation would occur when the young man about to be married is sterile and will not be able to have children. Is it the doctor's duty to tell the prospective bride if the young man refuses to tell her himself?

Both these dilemmas involve a broader problem, namely, the fact that truth may sometimes be troublesome. Is it permitted to lie for a good purpose, such as maintaining peaceful relations? Does the end justify the means in the case of personal veracity? Whether to tell a patient the truth about his/her condition is a basic philosophical and moral question: the consideration of whether or not to reveal the truth will be based on various ethical approaches.

In considering the benefits, we must take into account the patient's wish to know his/her condition, to be able to plan and make suitable arrangements concerning life and family, and to participate in decisions about further medical treatment after being told the truth.

Conversely, as to the possible harm of telling the truth, the effects

that the truth will have on the patient's emotional state and physical condition must be taken into account.

3. This brings us to a further dilemma: does a cancer patient's physician have the duty to disclose information and to provide the patient with a full explanation? There is a contract between doctor and patient, and good relations must be maintained between them.[4] The wishes, feelings and expectations of both doctor and patient as to the success of medical treatment should be considered, as well as the patient's ability to understand.

Every moral system recognizes that under certain conditions communication of a falsehood is not only not reprehensible, but is actually a moral imperative. Put differently, certain circumstances may justify telling a lie. This was in fact recognized by the Sages of the Talmud and the Midrash. Norman Frimer, in a brilliant analysis of a Rabbinic homily concerning such questions,[5] describes the Sages' insights and their incredible ability to see the human personality in the full mystery of its complex makeup.

It should be noted that, although, as we have concluded, communication of a falsehood to another individual may at times be justifiable and even commendable, self-deception should never be condoned.

Western philosophy emphasizes the human element in its ethical thinking. One of the central factors in this approach is the right of free choice, one's right to decide for oneself and be responsible for one's own fate. Is it permissible, then, to force a patient to undergo medical or nursing treatment of proven therapeutic value?

4. In a situation where the doctor has decided that a patient needs a certain drug and the patient refuses to take it, should the drug be administered forcibly? Who determines what is best for the patient – the patient, based on subjective feelings, or the doctor, based on medical opinion?

Patients' beliefs and values may well come into conflict with those

[4] These questions have been discussed by Nili Tabac, 8 *Medicine and Law Journal* (May, 1993) (in Hebrew) 13-15.

[5] Norman Frimer, "A Midrash on Morality or When is a Lie Permissible," 13/4 and 14/1 *Tradition, A Journal of Orthodox Jewish Thought* (Spring-Summer, 1973) 23-34.

of the medical team treating them with whom medical decisions ultimately rest. Nevertheless, the individual's beliefs must be respected. Indeed, according to the Penal Laws of 1977, paragraph 378:

> He who strikes a person, touches, pushes or applies any other form of force upon his body, directly or indirectly, without the person's consent or with consent obtained under false pretenses is considered to have assaulted him. This includes the use of heat, light, electricity, gas, odors or any substance.

This implies that any treatment or even physical contact with the patient, without consent, in a way that might cause damage or discomfort, is considered an assault. For this reason, the consent of a patient who has full understanding of the treatment and its alternatives, and knows the risks involved, must be obtained, without the application of any pressure.

In 1984, the General Director of the Israeli Ministry of Health introduced new guidelines, requiring that any patient requiring hospitalization, surgery or any medical treatment sign a special consent form (in the case of a child, an unconscious patient or an insane one the form may be signed by a legal guardian).

A recent paper, based on a judgment handed down by Justice Talgam (759/92),[6] considered these questions in connection with the conflict between the rights of a woman named Miriam Zadok over her body, privacy and dignity and the right and duty of the attending physician to act according to the dictates of his conscience. Miriam Zadok, suffering from Alzheimer's disease, requested that her life not be prolonged by artificial means if and when her condition deteriorated to such an extent that she could not remain alive without intervention. Justice Talgam ruled that a terminal patient's request not to be connected to life-support apparatus should be honored under certain conditions.

This decision limits the attending physician's right or even duty to prolong life by artificial means – a right which had previously been

[6] Yuval Karniel, "Who is in Control? The Rights of the Individual over His Own Life" (in Hebrew), 8 *Medicine and Law Journal* (May, 1993) 10-12.

taken for granted. The role of the physician is limited to a professional one: to determine whether the conditions specified by the patient exist. Miriam Zadok's right over her body was expressed in the duty of all concerned, including the attending physician, not to treat her against her wishes. However, the judgment did not give her the right to prevent the attending physician from alleviating suffering or temporary distress. This decision enables conscious terminal patients to control their destiny. Indeed, as stated in a recent article, "We respect the patient's autonomy more than we did in the past, and consider his/her preferences and quality of life in clinical decision-making."[7]

The U.S. journalist Charles Krauthamer, considering what he calls "the politics of life and death in the nursery,"[8] quotes Paul Ramsey: "If physicians are going to play God... let us hope they play God as God plays God." After briefly surveying the "Baby Doe" case, he concludes his article as follows: "The real ethical scandal is not what might have happened to Baby Jesse, but what happens daily to Baby Does. Society prefers neurological perfection. But a baby can live without it. Unless, that is, we let the baby die first."

In another article,[9] Krauthamer considers a related question – the right to kill, in connection with another celebrated case. A woman named Nancy Cruzan has been lying in a vegetative state, immobile, insensate and unconscious, for more than six years. Had she left specific instructions that she did not want to live this way, the case would never have reached the U.S. Supreme Court; the hospital would have disconnected the feeding tube that now keeps her alive, secure in the knowledge that it was merely carrying out her own will. But Nancy left no such instructions.

Letting people die on their explicit instructions is one thing; letting them die on one's own judgment alone is quite another. It carries danger. Krauthamer claims that if we impute the wish to die to peo-

[7] Jochanan Benbassat, "Paradigmatic Shifts in Clinical Practice in the Past 40 Years" (in Hebrew), *Harefuah: Journal of the Israel Medical Association* (May, 1996).

[8] Charles Krauthamer, "The Politics of Life and Death in the Nursery — What to do about Baby Doe?" *Washington Post*, December 15, 1989.

[9] Idem, "The Right to Kill," *Washington Post*, December 15, 1989.

ple in Nancy's persistent vegetative state, the next class of people to be involuntarily put to death, when we judge their life not worth living, might be patients in various stages of unconsciousness.

In this particular case, the court upheld the right of the State of Missouri to continue artificial nutrition and hydration, as there was no clear and convincing evidence that Ms. Cruzan herself would have wished otherwise.

In this time of incredible medical progress, when new methods of therapy can prolong life as never before, new ethical dilemmas have arisen to challenge experts in civil law, ethics and Jewish Law. As Lord Immanuel Jakobovits, then Chief Rabbi of Great Britain, stated at a colloquium: "Of course I recognize that doctors are human beings with minds and feelings, but that does not necessarily qualify them as moral experts to decide who is to live or to die, which is a purely moral issue."

The position of Jewish Law on this issue rests on fundamental principles of Judaism, among them the principle that a person's body is not entirely his or hers; rather, it belongs to the Holy One Blessed be He – the Creator of mankind – and thus one is not entitled to do whatever one pleases with one's own body.

Nurses and doctors, as professionals, have a legal authority and responsibility toward their patients. The treatment that they give must be skilled, responsible and meet accepted professional standards. This brings us to yet another dilemma: Do doctors and nurses have the responsibility to draw attention to a colleague's shortcomings?

Let us say that a nurse in a hospital observes certain doctors not performing their duties or, by deviating from the accepted required order of treatment, increasing a patient's suffering. Should the nurse report these observations? The core of the concept of responsibility is the notion of answerability: whether or not a person will respond to his/her own conscience, to another, or to the community for omissions or commissions, actions or failures to act. Put briefly, there are three elements to responsibility – causation, obligation and accountability. First, we impute responsibility to a person for that person's acts. Second, the act in question is one which is governed by rules,

legal or moral. Third, the person is accountable in the sense that, in consequence of the act, it may be his/her duty to perform other acts of rectification or reparation. If a sense of responsibility can be instilled in the student during the educational process, a responsibility that requires a kind of transcendence of self, the student may indeed discover the humanity of others and, in so doing, recover his or her own humanity.

Technical and moral issues in medicine have always been intertwined, inseparable, and mutually reinforcing. Moral decisions must, therefore, be integrated into the totality of the medical decision, no less than technical considerations. A basic curriculum of medical ethics should center on the kinds of moral problems that physicians encounter most frequently in practice. In any philosophy of living, the most crucial issue is that of education. Education deals with the development not only of the mind but also, no less importantly, of the heart and character. Consequently, ethical education must be particularly sensitive to human nature, this being the object of its influence.

According to Lawrence Kohlberg's theory of Cognitive-Moral Development,[10] there are three kinds of morality: a morality of restraint, a morality of conformity and a morality of principle. These three moralities are represented by three levels into which stages are grouped. Kohlberg maintains that moral thought passes through natural sequence or stages. There is no sudden leap into higher levels of reasoning, but rather a steady progress towards broader and more flexible ways of looking at moral problems; and this development is not automatic. It is stimulated by the experience of moral conflict, exchange of different views and exposure to better moral reasoning.

Kohlberg's research shows that the most effective way of developing moral reasoning involves the use of moral dilemmas. Spontaneous discussion of such dilemmas will lead to upward movement in reasoning, since participants already at higher stages of moral rea-

[10] Lawrence Kohlberg and Elliot Turiel, "Moral Development and Moral Education," in *Psychology and Educational Practice*, ed. G. Lesser (Glenview IL, 1971); Lawrence Kohlberg, "Continuities in Childhood and Adult Moral Development, Revisited," in *Moralization: The Cognitive Development Approach*, ed. L. Kohlberg and E. Turiel (New York, 1973).

soning will stimulate the thinking of those at a lower stage. Medical students should be confronted, therefore, with the kind of moral dilemma likely to arise in their profession. If exposed to moral discussions throughout their medical studies, they will be better equipped to make moral decisions later, as full-fledged physicians.

Moral discussions provide the opportunity for participants, whether students, physicians or nurses, to become aware of themselves and others as individuals with distinct thoughts, feelings and emotions. They will learn to recognize and consider other people's rights, ideas, feelings and points of view as well as their own.

At all levels of what is right on the Kohlberg scale, there is some reason for regard for law and some reason for regard for rights. The question that would always be asked in every dilemma is: "What is just and fair in this particular case under discussion, and why?"

In any legal order based on principles of decent, honorable conduct of human beings, the execution of justice involves the need for equity, arising "out of the lag between the recognition of such standards in systems of... morals... and the acceptance of such standards in law. It is in the broad intermediate area between strict law and ideal morality that the principles of equity serve to narrow the gap between law and morals by incorporating into the law the standards of essential morality."[11]

There are decisive differences between moral principles and moral rules. Moral rules permit exceptions and may not be binding in every situation. A moral principle, however, is always obligatory. It is universal. To illustrate: one might say that telling the truth is a moral rule, but where it is extremely dangerous to tell the truth the rule against lying may have to be put aside. On the other hand, killing for the sake of killing is always wrong – that is a moral principle.

Kohlberg has dealt with the question of whether one should save one's wife or friend's life even if doing so requires extreme measures, such as stealing or otherwise violating the law. The right to life is basic and is at the post-conventional stage 5 on the Kohlberg

[11] Ralph A. Newman, "The Nature of Pure Equity," in *Of Law and Man*, ed. Shlomo Shoham (New York & Tel Aviv, 1971), 171-189.

Scale. The moral rule (= do not steal) is in this case serving a lesser value than the fundamental right to life.

Two eminent rabbis of the 18th and 19th centuries considered whether there are any circumstances under which one is permitted to use other people's money without permission. What is the law when a person's life is endangered and can be saved only by using another person's money? Is a starving person permitted to steal in order to save life?

Rabbi Judah Ayash (18th century)[12] replied that "one may use someone else's funds so as to avoid dying by starvation, even if at the moment he has no money to repay, but he must resolve, *before* he takes the money, to make restitution after he has earned some money."

Rabbi Shalom Mordecai Schwadron[13] (19th century), to whom a similar question was addressed, also stressed that *at the time* one is appropriating someone else's funds to save oneself, one must resolve to repay the debt as soon as possible.

Both these examples show that, although there is a serious moral rule against stealing, there are circumstances when that moral rule is set aside; the sanctity of life supersedes or transcends the right to property. Material values are meaningless when compared with individual worth. The right to life is a universal principle.

In the field of Jewish Law (*Halakhah*), calls for assistance in dealing with ethical and moral issues are dealt with in a vast body of Halakhic responsa, which normally address themselves to immediate, practical questions. Despite the passage of time, the opinions of the Sages of the Talmud and of Halakhic authorities of the past, reflecting the moral system of Judaism, are still valid and relevant. Dilemmas of all the categories discussed above have been considered in one

[12] Rabbi Judah Ayash (*Beit Yehudah*) was an outstanding rabbi in Algiers. In his responsa he corresponded with scholars in Italy, Morocco and Egypt. In 1756 he settled in the Land of Israel, dying there in 1760.

[13] Rabbi Shalom Mordecai Hakohen Schwadron (known as Maharsham) was born in 1835 in Galicia, Poland, and died in 1911. His name was widely known throughout Europe and America as an outstanding Halakhic authority, with a wide knowledge in all fields of Jewish knowledge, as well as in modern technology and chemistry.

way or another in responsa, right up to the present time. Naturally, no Halakhic conclusions should be drawn from our discussion, and any actual Halakhic problem should be brought to the attention of a qualified rabbi.

In conclusion I would like to quote from a recent article on "Nature and Nurture":[14]

> Since humanistic qualities of physicians are desirable ones, the characteristics of empathic-compassionate physicians are that they regard human life as unique and of extraordinary importance. They stand in reverent awe of the human being and treat every person with dignity and respect.

On what better note could I conclude this paper than with the maxim from *Ethics of the Fathers* 4:1: "Who is respected? He who respects others."

[14] Shimon Glick, "The Empathic Physician — Nature and Nurture," in *Empathy and the Practice of Medicine*, ed. Howard M. Spiro *et al.* (New Haven CT and London, 1993), 85-101.

Influence of Jewish Law on Other Legal Systems

MOSAIC EQUALITY IN AMERICA

*Neil H. Cogan**

For far too long, historians of seventeenth- and eighteenth-century American political and legal thought neglected the relationship between the Bible and thought in this formative period in America. There was important scholarship on classical republicanism, Lockean liberalism and the Scottish Enlightenment. But not the Bible, not religion.

Recently, however, there has been a turn to the Bible. For example, Joshua Mitchell[1] has described the reliance of Hobbes and Locke upon biblical texts. Robert A. Ferguson[2] finds religious voices in the American Revolution. And Jefferson Powell[3] has noted the reliance of American legal theory in the nineteenth and twentieth centuries upon religious traditions. However, Mitchell, Powell and others have emphasized in their arguments the reliance of political and legal thought upon Christian sources only. By contrast, this article is part of a larger project that examines the reliance of seventeenth- and eighteenth-century American legal theory upon Jewish sources, and particularly upon Mosaic narratives and codes – hence the connection with this Conference.

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1 *Not by Reason Alone* (Chicago, 1993).

2 *The American Enlightenment,* 1750-1820 (Cambridge, 1997).

3 *The Moral Tradition of American Constitutionalism* (Durham, 1993).

I have noted in an earlier paper[4] that fundamental law in the American Colonies and early State constitutions was (and still is) various, that is, the fundamental laws of Colonies and the States have varied from one another in significant respects. For example, speech, privacy and criminal process provisions often vary considerably. I argued in the earlier paper that the variousness of fundamental law was acceptable to early Americans, in part at least, owing to a perception of and an acceptance by Americans, largely Christians, of the Mosaic law's own seeming variousness in its statement of fundamental law, such as in the several accounts of the Ten Commandments. Christian Americans acquired this perception from Christian theologians, from eighteenth-century critical scholars, and even from Spinoza.

My thesis in this article is that the narrative of the Creation of Adam and Eve provided not simply an important argument for, but rather a fundamental perspective about, the equality of persons in early American legal thought. That narrative's dramatic lines – "And God created man in His image, in the image of God He created him; male and female He created them" (*Gen.* 1:27) – informed American Christian readers that all persons (and both genders) share common and equal ancestors, created in the likeness of God.

For American Christian readers, the Mosaic perspective of equality was further illumined by the frequent injunctions to give equal treatment to the stranger that dwells with Israel. The *mitzvah* – "The stranger who resides with you shall be to you as one of your citizens; you shall love him as yourself, for you were strangers in the land of Egypt: I the Lord am your God" (*Lev.* 19:34) – enjoins Israel to allow the stranger participation in the community.

My thesis in the earlier paper, in this paper and in the project generally is not to find some causal relationship between Jewish legal sources and contemporary legal rules. With all due respect to the distinguished scholars taking differing views, it is my judgment that the search for causal relationships will typically be unsuccessful and unproductive. Rather, my thesis is that religious sources, including biblical narratives and codes, provided perceptions and perspectives, at least in seventeenth- and eighteenth-century America; that identify-

[4] Neil Cogan, "Moses and Modernism," 92 *Michigan Law Review* (1994) 1347.

ing those sources has value; and that understanding how Americans – with their own histories, traditions and goals – adapted those perceptions and perspectives to their own condition has value, too. In doing so, we must always keep in mind the several influences upon American political and legal thought noted earlier and must always speak with care about significance.

The perspective of "in God's image," as well as "you shall love him as yourself" and others, were understood, interpreted and implemented by Jewish communities as well. These understandings, interpretations and uses were not necessarily known to the non-Jewish world; even were they known, they would be and were not necessarily shared, because of differing histories, traditions and goals of those communities. Although my principal interest in this chapter is in how Americans, predominantly Christians, perceived Mosaic narratives and codes, and how American traditions and goals shaped those perceptions, I will make some brief comparative remarks.

The points I would like to make here may be summarized as follows:

1. Hebrew biblical narratives were a common source for English literature in the sixteenth through eighteenth centuries, including, most notably, the Creation story in Milton's *Paradise Lost*.

2. Hobbes and Locke discussed the Creation story at length. Locke, in particular, devoted much of his *First Treatise* to its discussion. Locke's first principle, that persons are free and equal, rests significantly upon the perspective gained from the Creation story.

3. The first principle or right of many Colonial fundamental laws, State Declarations of Rights and Constitutions, as well as the Declaration of Independence, is a principle of equality [hereinafter: "the principle of equality"]. The prominence of the principle and its understanding rest in part upon the perspective gained from the Creation story directly or from that story indirectly, through Locke and through Christianity, particularly the teaching of Paul.

4. Other perspectives, for example, those derived from doctrines related to sin in Christianity and ideals related to property in liberalism, shaped American legal thought about equality, too. To take one issue, that of standing in court, the American law of whether all persons have standing equally or whether a limited group has standing has been shaped by notions of property and wrongdoing.

Biblical Narratives in English Literature

As Gabriel Sivan has shown, narratives of the Hebrew Bible were frequent themes in English literature of the sixteenth through eighteenth centuries.[5] There were late sixteenth-century plays such as *Jephthes sive votum* (1542), *New Enterlude of Godly Queene Hester,* about Queen Esther (1561), *Ezechias* (1564), *A Looking Glass for London and England,* about Jonah (1594), *The Love of King David and Fair Bethsabe* (1599), *Judas Maccabaeus* (1601), and *Solomon and the Queen of Sheba* (1607).

During the period of Puritanism, in the seventeenth century, narratives of and references to the Hebrew Bible appear in works by George Herbert, John Donne, Thomas Browne and Sir Walter Raleigh. In the Commonwealth and Restoration periods, narratives were exploited for political purposes, such as in Abraham Cowley's *Davideis* (1656) and John Dryden's *Absalom and Achitophel* (1681).

In the eighteenth century, there were oratorios, such as Charles Jennens' *Israel in Egypt* (1738), Thomas Morell's *Joshua, A Sacred Drama* (1748), and Oliver Goldsmith's *The Captivity* (1764).

Of most importance to this paper, in 1667, John Milton brought references to the Hebrew Bible to a wide audience in America, as well as England, in his epic poem of the Creation story, *Paradise Lost*. Milton's poem contains frequent reference to *imitatio Dei*. For example, in Book VIII,[6] beginning at line 219, Raphael says to Adam, "for God on thee abundantly his gifts hath also pour'd, inward and outward both, his image fair: speaking or mute all comeliness and grace attends thee, and each word, each motion forms... For God, we see, hath honor'd thee, and set on Man his Equal Love..."

[5] *The Bible and Civilization* (Jerusalem, 1973).
[6] John Milton, *Paradise Lost,* ed. Merritt Y. Hughes (New York, 1962).

In the same book, beginning at line 381, Adam says to God, "Hast thou not made me here thy substitute, and these inferior far beneath me set? Among unequals what society can sort, what harmony or true delight?" And the Almighty, Raphael says, replies, "...for none I know second to mee [sic] or like, equal much less. How have I, then, with whom to converse, save with the Creatures which I made, and those to me inferior, infinite descents beneath what other Creatures are to thee?" And Raphael answers God, in small part, that man should beget "like of his like, his [referring to God] Image multipli'd, in unity defective, which requires collateral love, and dearest amity."

Milton, who was writing *De Doctrina Christiana* contemporaneously with *Paradise Lost*, paralleled Christian doctrine as set forth by Paul in *Galatians* 3:28, "There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female: for you are all one... ." But, in accordance with doctrine, too, he recognized that man has an appetite for sin and men's appetites for sin allow distinctions between them. As Milton says in Book XI, beginning at line 515, "Th[e]ir Maker's Image... then forsook them, when themselves they vilified, to serve ungoverned appetite, and took his Image who they served, a brutish vice... . Therefore so abject is th[e]ir punishment, disfiguring not God's likeness, but their own, or if his likeness, by themselves defac't, while they pervert pure Nature's healthful rules to loathsome sickness, worthily, since they God's Image did not reverence in themselves."

Thus, Milton's readers hear from a powerful voice that people, created in God's image, were equal to one another but their equality could be defaced and disfigured by sin. This learning came from other sources, too.

The Creation Narrative in Political Thought

Several political philosophers of the seventeenth and eighteenth centuries discussed the Creation story at length. For Thomas Hobbes, for example, the Creation story provided a basis for man's fall and his need for authority.

For John Locke, by contrast, the narrative of the creation of Adam and Eve was, explicitly, central to his argument against the divine

right of kings and his argument for the equality of persons by nature. These arguments, in his *First* and *Second Treatises*, respectively, have not been typically read in tandem.

In the *First Treatise,*[7] Locke argues that there is no biblically-granted dominion of one person over another. He argues that the dominion over animals was given to all persons, not to Adam alone. In Book 1, Chapter 4, Section 30, Locke says, "[i]n the 26th Verse [of *Genesis,* Chap. 1], where God declares his intention to give this Dominion, it is plain he meant, that he would make a Species of Creatures, that should have Dominion over the other Species of this Terrestrial Globe: The words are, *And God said, Let us make Man in our Image, after our likeness, and let them have Dominion over the Fish,* &c." Later in the same section, Locke says, "God makes him *in his own Image after his own Likeness,* makes him an intellectual Creature, and so capable of Dominion."

Moving to the *Second Treatise,* we read Locke's argument that in the State of Nature, all persons are in a "State of perfect Freedom to order their Actions, and dispose of their Possessions... ." That state of perfect freedom is "a *State* also *of Equality*, wherein all the Power and Jurisdiction is reciprocal, no one having more than another: there being nothing more evident, than that Creatures of the same species and rank promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another without Subordination or Subjection... ."[8]

These sections of the *First Treatise* and the *Second Treatise* cannot properly be read in isolation from one another. The State of Nature, for Locke, was a God-created state in which all persons are equal in their liberty and in which all derivative rights are equally shared. As John Simmons has argued, however, Locke left room for inequality arising from man's character traits, including his acquisitiveness of property.[9]

Mosaic Equality in the Colonies

The first principle or right of many Colonial fundamental documents,

[7] *Two Treatises of Government,* ed. Peter Laslett (Cambridge, 1988), 161-162.
[8] *Ibid.,* 269.
[9] *The Lockean Theory of Rights* (Princeton NJ, 1991), 79-87.

State Declarations of Rights and Constitutions, as well as the Declaration of Independence, is the principle of equality. The prominence of the principle and its understanding rest in part upon the perspective gained from the Creation story directly and from that story indirectly, through Locke and through Christianity, particularly the teaching of Paul.

At the beginning of this Conference, the Justice Minister remarked that several of the Colonies looked directly to the Torah for law. It is true that Massachusetts Bay and New Haven did adopt, briefly, criminal laws from the Torah. And while I would not disagree that these events and this observation are important, what I choose to emphasize is that the Colonists, some of whom (in New England) described themselves as New Israelites, were familiar with Mosaic narratives and codes. And what I would emphasize, too, is their placement – and the placement by State Constitution framers and by Jefferson – of equality of persons, as granted by God, as the foundation principle of all rights.

To take the example of State Constitutions, as I have shown in my book, *The Complete Bill of Rights,*[10] Massachusetts' Constitution of 1780 declares in Article I that "[a]ll men are born free and equal...;" and New Hampshire's of 1784, Pennsylvania's of 1775, Vermont's of 1777, and Virginia's of 1776, each declare in Article I that "[a]ll men are born equally free and independent...." The origin and order of these words, "free" and "equal," in Locke's *Second Treatise* are unassailable.

In addition, I would emphasize that Locke collaborated directly and actively with the framers of the Carolinas', New Jersey's and Pennsylvania's fundamental colonial documents, and that those documents similarly placed equality as a first principle.

Also worthy of emphasis is the fact that, despite the common requirements of tithing and other support for established churches during the Colonial years and even after the Revolution, the perspective of equality of persons led to tolerance of religions and peoples, and to the consequent influx of diverse peoples into the Colonies and the early States. Eventually, the perspective of equality and what Israelis

[10] *The Complete Bill of Rights* (Oxford, 1997).

often call "the facts on the ground," in this case, the religious diversity of the American population, together – the perspective and the facts – led to the non-establishment of religion as a basic right of, and derived from, equality.

William Nelson notes that nineteenth-century abolitionists argued that a variety of rights were derived from the equality of persons and "often confused... logically discrete concepts...."[11] I suggest that the "logical" relationship of the concepts had good antecedents.

Mosaic Equality and Jefferson and Madison

For both Jefferson and Madison, the rights referred to as the Rights of Englishmen were derived from the equality of persons, which in turn was learned not by reason alone, but from God's texts as well.

In the Declaration, of course, Jefferson wrote that "[w]e hold these truths to be self evident: that all men are created equal; that they are endowed by their creator with certain inalienable rights... ." Jefferson's original language was not "certain" rights but "inherent" rights, making it all the more clear that the rights were inherent in the equality of persons. That Jefferson was adverting in part to the Creation story is evident from his reference to the Creator and his earlier reference to nature's God. Nonetheless, as Charles Miller has argued,[12] Jefferson allowed for inequality arising from social conditions.

Madison, in introducing the Bill of Rights, noted that the rights "do no more than state the perfect equality of mankind."[13] Yet, he argued, the rights needed to be set out in detail, for reasons which he then took many pages to explain. It is noteworthy, as Jay Fliegelman has discussed,[14] that the Creation story was a prominent theme of literature during the American Revolution, emphasizing equality of persons and the revolt against hierarchies.

Jefferson and Madison were influenced by other, often countervailing, perspectives, as well, such as classical republican-

[11] *The Fourteenth Amendment* (Cambridge, 1988), 36.
[12] *Jefferson and Nature* (Baltimore, 1988), 56-87.
[13] *The Complete Bill of Rights* (above, n. 10), 53.
[14] *Prodigals & Pilgrims: The American Revolution against Patriarchal Authority* (Cambridge, 1982), 161-162.

ism, Scottish moral philosophy and Christianity. As Chancellor James Kent said:

> The notion that every man that works a day on the road, or serves an idle hour in the militia, is entitled as of right to an equal participation in the whole power of government, is most unreasonable, and has no foundation in justice.[15]

Nonetheless, it is apparent that the Creation story was influential, too.

Some Comparative Thoughts

Be-tzelem Elokim, "in God's image," has had significant impact for Jewish communities. In the Mishnah, *Sanhedrin* 4:5, we are taught that no-one may say, "My father is superior to yours," but rather that each of us has one father; each of us has such equal value that we may say that the world was created for our sake and that to destroy one life is to destroy the world.

Be-tzelem Elokim has implications for a host of Jewish principles, for example, in the area of status of persons, the status of the king and high priest, and the status of litigants. In the area of danger to life, there is the principle that an individual cannot be sacrificed for the sake of the group.

I wish to focus briefly upon the duty to rescue a person in danger. Under Jewish law, one cannot stand idly by when another is drowning in a river or is being attacked by robbers. One cannot stand idly by when another is endangered by a person with intent to kill or to ravish. The American common law, which allows one to stand idly by, is to the contrary. In my area, constitutional law, the United States Supreme Court has held that the States likewise have no constitutional duty to rescue citizens who are in danger. In America, I submit, the perspective of equality and the implied worth of each individual is tempered by liberal individualist notions of fault, namely, the fault of the individual who submitted himself to danger or the family that allowed a child to be in danger. It is tempered also by

[15] *Reports of the Proceedings and Debates of the Convention of 1821* (Albany NY, 1821), 221.

perhaps uniquely American notions of independence and choice, choice about whether to get involved with other persons and with their problems or whether to look out only for oneself.

As Susan Stone has noted,[16] Jewish communities and the American community have different histories, goals and traditions, and hence the perspective of equality learned from the Creation story does not result in the same rules in the Jewish and American communities. Nonetheless, these comparative tasks are valuable, and conferences such as this one are important for understanding the direction and future of our communities.

[16] Suzanne Last Stone, "In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory," 106 *Harvard Law Review* (1993) 813.

SELF-INCRIMINATION AT COMMON LAW – ITS ORIGIN IN JEWISH LAW

*Jonathan Fisher**

The purpose of this paper is to show how the common law privilege against self-incrimination has been derived from a fundamental principle of Jewish law. The paper is divided into four parts. Part 1 sets out the principles of Jewish law from which the contemporary privilege against self-incrimination is derived. In Part 2 the way in which Jewish law principles came to be incorporated into common law is considered. The contemporary application of the privilege is considered in Part 3. Part 4 considers the influence of Jewish law in attempts to resolve the contemporary dilemmas which arise in this complex area of the law.

Principles of Jewish Law Underlying the Privilege Against Self-Incrimination

Mosaic Law

There is no doubt that the origin of the contemporary privilege against self-incrimination can be traced back to a fundamental principle of Jewish law set out in *Ex.* 23:1. The principle is the first of three provisions set out in that section, which is directed to the integrity of the judicial process. A modern translation of the Hebrew reads as follows:

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> Do not accept a false report, do not extend your hand with the wicked to be a venal witness (*ed hamas*).

At first blush, the connection between this injunction and the privilege against self-incrimination is not readily discernible. The medieval French commentator Rashi does not refer to the competence or otherwise of witnesses who may give evidence, either voluntarily or by compulsion, in a Court of law.

On the first part of the injunction ("Do not accept a false report") Rashi, following the Mekhilta (*Midrash Tannaim*), notes that this is a prohibition against listening to a slanderous tongue, as well as hearing the testimony of one party before the other party is present. As to the second part of the injunction ("...do not extend your hand with the wicked to be a venal witness"), Rashi explains it to mean that a person must not promise to be a witness for a person making a false claim against another. This exhortation not to become involved with the giving of false testimony should not be divorced from a related injunction, which appears six verses later, at *Ex.* 23:7:

> Distance yourself from a false word; do not execute the innocent or the righteous, for I shall not exonerate the wicked.

By directing that a court must not "extend its hand with the wicked to be a venal witness," Mosaic law is putting forward an ideal which is far more prosaic than a mere warning against the acceptance of false testimony. More fundamentally, Mosaic law is saying that a false witness, in the sense of a witness tainted with "*hamas,*" must not be allowed at all to give evidence in a court of law. As explained in the classic thirteenth-century work *Sefer Ha-Hinnukh*:[1]

> ...We should not accept the testimony of a sinful man, nor should we do anything at all on account of his testimony. For it is stated, *you shall not set your hand with a wicked man to be* ed hamas, *a malicious [false] witness* (*Ex.* 23:1); and this was explained to mean "Do not set a malicious, lawless man as a witness," that is to say, one possessed of *hamas* – thus excluding

[1] Commenting on the above injunction (see, e.g., *Torat Hayyim, Sefer Shemot,* Pt. 2 [Jerusalem, 1988], pp. 292-293).

> those who seize property illegally and robbers, who are to be disqualified to bear witness.... The root reason for this precept is obvious: Any person who has no concern for himself and will not care about his evil deeds, will have no care or concern for others. Therefore it is not proper to believe him about anything.

In terms of tracing the origin of the privilege against self-incrimination, considering the matter from a secular standpoint, one point should be made at this stage. As far as Mosaic law is concerned, if a person is a false witness, in the sense of being *ed hamas,* he is, *simpliciter*, incompetent to give evidence in a court of law. *Per contra,* in modern legal systems, much emphasis is placed on the weight and credibility to be placed on the evidence of a witness who has testified in a legal case. If the witness has a bad character (*ed hamas*), his evidence will be heard but the court will not place much emphasis on it.

That is not to say that the link between the contemporary privilege against self-incrimination and Mosaic law is tenuous. On the contrary, the link with the injunction in *Ex.* 23:1 is well rooted and can be firmly established. It is in the Talmud that the link is forged.

Talmudic Law

In contrast to modern legal systems, which deal with the problem in the context of substantive law, the Talmud considers the problem in terms of the law of evidence: can an accomplice to a crime testify against his co-accomplice in a criminal trial where, of necessity, his evidence will implicate himself in the commission of the crime?

In answering this question, the Talmud (*BT Sanh.* 9b) draws heavily on the Mosaic injunction of *Ex.* 23:1. Rav Yosef says that an accomplice to a crime is ineligible to testify against his co-accomplice because Mosaic law enjoins, "Do not use a sinner as a witness." There is a dispute between Rav Yosef and Rava on an associated point, but both agree on the fundamental issue: a person cannot give evidence against himself in a criminal case.

Before leaving the Talmud, there is a further point that should be noted at this stage, relating to the terms in which the Mosaic injunction in *Ex.* 23:1 is summarized by Rav Yosef when citing the injunc-

tion to sustain his opinion. The twelve Hebrew words of the Mosaic injunction are reduced to four Hebrew words which translate broadly as "Do not use a sinner as a witness." The point is extremely significant, because it will be seen that the privilege against self-incrimination crept into the common law under cover of a Latin maxim, "*nemo tenetur prodere seipsum,*" sometimes expressed also as "*nemo tenetur accusare seipsum.*" This Latin maxim was intended to represent a direct translation of Rav Yosef's summary of the Mosaic prohibition: "A witness cannot accuse himself."

Biblical accounts of royal justice

There are three further sources to be considered in an examination of the principles of Jewish law in this area. They concern reliance on a confession by an accused to wrongful conduct, which has resulted in the pronouncement of a sentence of death. In two of the cases the death sentence was carried out.

The first such example is to be found in *Josh.* 7 which relates the dismal story of Achan and the stolen booty. The second biblical episode of reliance on a confession is found in *I Sam.* 14:43, which describes what happened after Jonathan, disobeying Saul's prohibition, tasted honey. The final example is to be found in *II Sam.* 1:6, which tells the sorry tale of David avenging the death of Saul.

These instances are explained by Maimonides[2] as an application of the King's license to improve society according to the needs of the time. These instances, where kings executed offenders despite the fact that a court would not have convicted them according to Mosaic law, demonstrate that kings did not regard themselves as bound by normal court procedures; they are to be regarded as examples of the use of regal power.

As to post-talmudic times, references can be traced in various responsa to the admission of confessions in non-capital cases, in circumstances where no other evidence was available against the accused and where the needs of the time were said to justify their admission. These responsa are the subject of further consideration later in this paper.

[2] *MT Hil. Melakhim* 3:8.

Incorporation of the Privilege Against Self-Incrimination

Canon Law

As already stated, the privilege against self-incrimination was incorporated into common law by an application of the Latin maxim "*nemo tenetur prodere seipsum,*" sometimes also expressed as "*nemo tenetur accusare seipsum.*" This maxim almost certainly owed its origin to Rav Yosef's four-word summary of the Mosaic law in *Ex.* 23:1.

Initially, the Christian Church adopted a rather more florid formulation of the Latin maxim. Thus, a statement of St. Chrysostomos, in his commentary to the *Epistle to the Hebrews,* includes the following directive:

> I do not tell you to display your sin before the public like a decoration, nor to accuse yourself in front of others [*Non tibi dico ut ea tamquam pompam in publicim proferas, neque ut apud alios te accuses*].[3]

This rule was incorporated into Gratian's *Decretum*, which was a restatement of early canon law, in a slightly shorter form:

> I do not tell you to incriminate yourself publicly or to accuse yourself before others [*Non tibi dico, ut te prodas in publicum, neque apud alios accuses*].[4]

These formulations gave way to the shorter maxim "*nemo tenetur prodere seipsum,*" which translates broadly as "nobody is held to incriminate himself." That this rule of canon law has its etymology in Mosaic law is patently obvious, especially when the more general influence of Jewish law on the Christian Church is taken into account.

Narrow influence: The earliest report of an invocation of the Latin maxim of *nemo tenetur prodere seipsum* in an English case can be found in John Foxe's account of John Lambert's trial for heresy in

[3] John Chrysostomus, *Homiliae in Epistulam ad Hebraeos* 31, 3, in 63 *Patrologiae Graecae,* ed. J. P. Migne (1862), 213, 216.

[4] Gratian, *Decretum,* 2nd Part, Causa 33, Qu 3 (*de poenitentia*) c. 87, 1 *Corpus Juris Canonici,* ed. Friedberg (1879), 1184.

1532.[5] The next recorded mention of the maxim occurs at the time of Archbishop Whitgift's prosecution of clergy suspected of not conforming to the twenty-four articles of faith, which had become a central feature of Elizabethan life. It was at around this time that common law lawyers began to challenge the inquisitorial procedures of the High Commission for Causes Ecclesiastical. Under Elizabethan law, a person suspected *per famam* or *per clamosam insinuationem* could be compelled to testify as to his innocence by answering a series of searching interrogatories. The judges expressed concern about the legality and operation of the *ex officio* oath and the matter became the subject of public controversy. A famous lawyer, Lord Coke, successfully asserted in a case in 1589 that the *ex officio* oath could not be administered in an ecclesiastical prosecution for incontinency before the spiritual court – *Cullier and Cullier.*[6] The law report discloses Coke's citation of the maxim "*nemo tenetur prodere seipsum*" in support of his argument. A few years later, when sitting as a judge on an application for a writ of *habeas corpus* to the High Commission Court in the case of *Burrows v. The High Commission,*[7] the maxim having been cited in argument, Lord Chief Justice Coke (as he had become) said that the Elizabethan statute was a penal law, "and so they are not to examine one upon oath upon this law; thereby to make him to accuse himself."

Not surprisingly, references to the origins of the principle tended to be directed at the Latin maxim, which had been derived from the established principles of canon law. But this does not derogate from the influence of Jewish law principles underlying canon law.

Wider influence: The influence of the injunction set out in *Ex.* 23:1 on the development of the common law came to influence the approach of English law towards the sworn testimony of an accused during the seventeenth and eighteenth centuries.

Whereas the privilege against self-incrimination was quite clearly being applied by the end of the 16th century, it is not until the reign

5 5 Foxe, Acts and Monuments 221, edited by Cattley (1838).
6 32 & 33 Cr Eliz 201.
7 [1616] 3 Bulst 42.

of James II that a decisive change can be discerned in the attitude of the courts towards an accused's ability to give self-serving testimony. In 1678, during *Coleman's Trial,*[8] Lord Chief Justice Scroggs asked the accused whether he had any witness to prove his assertion that he had come home on the last day of August. When the accused answered that he did not have a witness to establish this fact, the Lord Chief Justice responded "Then you say nothing."[9] The incompetence of an accused had been established in the King's Courts at common law, and in 1680 it was noted in Emlyn's edition of Hale's *Pleas of the Crown* that "a man concerned in point of interest is not a lawful accuser or witness in many cases."[10]

It was perhaps at this time that the influence of Jewish law reached its high watermark. The general reawakening of interest in principles of Jewish law should not overlooked. Although Jews were not readmitted into England until after Manasseh ben Israel's famous petition to Oliver Cromwell in March 1655, awareness of Jewish law had continued throughout the Tudor period. Later in the century, John Selden, an active participant in English political life, led a revival of interest in the principles of Jewish law. Selden's last effort in the field of Rabbinics, *De Synhedriis Veterum Ebraecorum,* was published in three volumes between 1646 and 1656. In a passage on self-incrimination and the testimony of an accused, Selden stated the fundamental principle of Jewish law to be as follows:

> By an old law, moreover, it becomes established that no person should be delivered up to be executed... or for punishment by lashes by his own confession, but by the testimony of others.... Maimonides adds: "This is a divine decree."[11]

Under the influence of the Mosaic injunction, the incompetence of an accused person continued to be applied in the common law courts for approximately 200 years, finally succumbing to the intellectual rigor of arguments put forward by Jeremy Bentham in his *Rationale of Judicial Evidence,* 1827. The competence of an accused to testify

[8] 7 How St Tr 1 at page 65.
[9] See also *Colledge's Trial* – 8 Ho St Tr 549 at 681.
[10] *Pleas of the Crown* 1:302.
[11] John Selden, *De Synhedriis Veterum Ebraecorum* 2:545.

was first declared by statute in New England in 1864,[12] but the reform did not reach the "old country" until 1898, when the Criminal Evidence Act was passed.

Therefore, in modern common law systems, in contrast to the position in Jewish law, an accused can give evidence in his own defense but he cannot be compelled to do so. However, as regards the privilege against self-incrimination, the principles of Jewish law continue to influence the development of modern common law. Apart from certain exceptional cases where the British Parliament, for example, has expressly abrogated the privilege, a witness can exercise the privilege against self-incrimination where he might incriminate himself during the course of his testimony in any civil or criminal proceedings.

Contemporary Influence of Jewish Law on the Privilege

English Common Law

That the modern application of the privilege against self-incrimination can be traced to Mosaic law has been well established. In Ex parte Cossens, *In the Matter of Worrall,*[13] the Lord Chancellor, Lord Eldon, accepted that the privilege against self-incrimination was without doubt "one of the most sacred principles in the law of this country." The reference to the notion of sanctity underscores the religious foundation of the privilege in canon law, and before that in Mosaic law.

Despite attempts to restrict its operation, the privilege continues to be recognized as a fundamental principle of English common law. Less than two years ago, the scope of the privilege was considered once again by the House of Lords in *Re Arrows Ltd (No 4) Hamilton v. Naviede.*[14] One of the judges, Lord Browne-Wilkinson, took the opportunity to restate emphatically the contemporary understanding of the principle in the following terms:

> One of the basic freedoms secured by English law is that (subject to any statutory provisions to the contrary) no one can be forced

[12] Me St. 1864 c 280.
[13] [1820] Cases in Bankruptcy 53.
[14] [1994] 3 All ER 814.

> to answer questions or produce documents which may incriminate him in subsequent criminal proceedings.

Lord Browne-Wilkinson noted that the principle had been carried over into the jurisprudence of all common law countries, including the United States, and that it was one of the basic rights protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 6(1) of the Convention provides as follows:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....

The fundamental nature of the privilege has been reiterated by the European Court of Human Rights in *Murray v. United Kingdom*[15] in which it was declared that

> there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure....

The privilege against self-incrimination appears in other charters of Human Rights. Article 14(3)(g) of the International Covenant on Civil and Political Rights, 1966, adopted by the United Nations with force from the 23rd March 1976, provides that

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality.... Not to be compelled to testify against himself or to confess guilt.

So far as the position in the United States is concerned, the privilege against self-incrimination has been incorporated into the Constitution as a fundamental right under the "due process" provision. The Fifth Amendment, ratified on the 15th December 1791, provides that "no

[15] *Murray v. United Kingdom* (Application No. 18731/91), [1996] 22 EHRR 29.

person shall... be deprived of life, liberty, or property, without due process of law."

It is clear from a consideration of the seminal cases in the United States Supreme Court that the modern application of the privilege against self-incrimination is derived exclusively from the ideals and principles of Jewish law. The point can be demonstrated by a consideration of the judgment of Mr. Chief Justice Warren, delivering the opinion of the court, in *Miranda v. Arizona,*[16] which concerned the interrogation of an accused whilst in police custody. Towards the beginning of his opinion Chief Justice Warren cited at length from the judgment of the Supreme Court in *Brown v. Walker.*[17] The citation is worthy of attention, because it unambiguously demonstrates the derivation of the privilege in the United States from its common law origins in England:

> The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons....

The influence of Jewish law in the development of this approach was great indeed. In *Garrity v. New Jersey,*[18] which was argued just six months after *Miranda v. Arizona* had been decided, Mr. Justice Douglas referred in a footnote in his judgment to a passage in Norman Lamm's article, "Self-Incrimination in Law and Psychology,"[19] which focused on the concerns of Jewish law "to protect the confessant from his own aberrations which manifest themselves, either as completely fabricated confessions, or as exaggerations of the real facts."

It is difficult to conceive of a better illustration of the influence of Jewish law ideals and principles on the development of the privilege against self-incrimination in American jurisprudence than that contained in Mr. Justice Douglas's opinion.

[16] 384 U.S. 436 (1966).
[17] 161 U.S. 591 (1896).
[18] 385 U.S. 493 (1967).
[19] N. Lamm, "Self-Incrimination in Law and Psychology," *Judaism* (Winter, 1956); subsequently revised in idem, *Faith and Doubt: Studies in Traditional Jewish Thought* (New York, 1986), chap. 10.

Not surprisingly, this key principle of Jewish law has influenced the development of secular law in modern Israel. As Justice Benjamin Halevi commented in *Kiryati v. Attorney General,*[20] after considering the development of the principle from the form put forward by Rav Yosef in the Talmud (*BT Sanh.* 9b), "with the reception of the common law in this country .... the principle [has] returned to its original home."

The Conflict Between the Privilege and the Public Interest

Jewish Law

On occasion, adherence to the strict ideals and principles set down by Jewish law, to be applied in the pursuit of justice, has proved difficult. The problem arose directly at the end of the 13th century when R. Shlomo b. Adret (known as the Rashba), a leading scholar of the age, was asked whether a Jewish court of law established with the authority of a secular state could receive evidence from the relatives of an accused. The Rashba answered the question in the affirmative, since it was the obligation of the court to act "according to what is required at the moment by leave of the state."[21]

R. Isaac b. Sheshet Perfet (the Ribash), another leading rabbi of the age, was prepared to support a conviction for murder where there were no witnesses but strong circumstantial evidence, "because the situation requires it."[22] The strong circumstantial evidence could include an admission by an accused before conviction, if the Jewish court had been established by a secular authority to keep the peace "according to the exigencies of the hour." This is borne out by a consideration of another answer given by the Ribash in connection with a case concerning a Jew who was suspected of being an informer.[23]

Thus, where the demands of Jewish law could not be satisfied and a Jewish court was acting by the authority of a secular (i.e., royal) authority, adherence to the strict principles of Mosaic and talmudic law could be compromised where the exigencies of the hour required.

[20] [1964] 18(3) PD 477.
[21] *Resp.* Rashba 4:311.
[22] *Resp.* Ribash 251.
[23] *Ibid.*, 234.

Erosion of the Privilege in Contemporary Legal Systems

Exactly the same reasoning led the British Parliament to enact legislation which significantly erodes the privilege against self-incrimination in cases of business crime. The conflict between the operation of the privilege and the public interest in punishing crime is raised most acutely in the context of financial fraud and the regulation of investment, because it is in these cases that evidence of fraud is so difficult to obtain.

It is against this background that the British Parliament passed a series of measures which erode the privilege against self-incrimination in cases involving business crime. Procedures have been established under the Companies Act 1985 and the Insolvency Act 1986 for examinations to be conducted by inspectors and/or liquidators in order to elicit the true facts from those who know them.

Although the statutes establishing such inquisitorial rights for the purpose of discovering the true facts about the conduct of a company or a director are silent on the question of whether the privilege is to apply, the British courts have been ready in recent years to hold that Parliament has, by implication, overridden the ancient privilege against self-incrimination. It has recently been held that a witness cannot rely on the privilege in order to refuse to answer questions put by inspectors under the Companies Act 1985 – *Re London United Investment plc*[24] – or by liquidators on an examination under the Insolvency Act 1986 – *Bishopsgate Investment Management Ltd. v. Maxwell.*[25] Specific powers were created by the British Parliament to combat serious fraud in the Criminal Justice Act 1987. The House of Lords recently decided, in *Smith v. Director of Serious Fraud Office,*[26] that the privilege against self-incrimination has been implicitly overridden by the 1987 Act. Critics of the Act have likened these interrogatory procedures to the administration of the *ex officio* oath by Star Chamber.

Whilst attention has been focused on business crime, in order to demonstrate how contemporary developments in English law have

[24] [1992] 2 All ER 842.
[25] [1992] 2 All ER 856.
[26] [1992] 3 All ER 456.

mirrored the problems encountered by Jewish jurists in the 13th and 14th centuries, it should be noted that equally fundamental issues must be addressed in other areas of the law. In both Britain and the United States, body samples have been excluded from the scope of the privilege against self-incrimination.

A departure from strict adherence to biblical laws of evidence has been justified in Israel on the strength of rabbinic responsa. In *Nagar v. State of Israel,*[27] Justice Menahem Elon concluded that a conviction for murder could be based on confessions made out of court and on circumstantial evidence.

Conclusion

Whilst it is true that the common law came to reject certain fundamental principles concerning the incompetence of an accused to testify and the admissibility of confessions in criminal cases, the privilege against self-incrimination owes its derivation exclusively to the principles of Jewish law revealed at Mount Sinai.

Furthermore, the contribution of Jewish law in this area is far from extinct. Whilst the flexibility and diversity of rabbinic law may be used to demonstrate how departures from the privilege against self-incrimination can be justified in modern legal systems, this is far from the ideals and juridical values to which Jewish law aspires. Though it is tempting for governments of modern legal systems to erode the privilege against self-incrimination and the right to silence on the grounds of exigencies of the hour (in Britain the law was altered by Section 35 of the Criminal Justice Act 1994, to allow an adverse inference to be drawn from an accused's silence after 10th April 1995), the temptation should be resisted.

The difficulties encountered when governments of modern legal states depart from the privilege against self-incrimination have been demonstrated by the experience of the British government in *Saunders v. United Kingdom,*[28] which arose out of the Guiness affair. In that case the accused was interviewed by inspectors appointed to conduct an investigation under the Companies Act 1985. The accused

[27] [1981] 35(1) PD 113.

[28] *Saunders v. United Kingdom* (Application No. 19187/91), [1996] EHRR CD23.

was subsequently prosecuted and the trial judge admitted into evidence the transcripts of interviews that the accused gave the inspectors before he was charged. The Court of Appeal upheld the trial judge's decision – *R. v. Saunders, Parnes, Ronson, Lyons.*[29] The European Commission of Human Rights took a different view, saying that the admission into evidence of the interview transcripts offended against Article 6(1) of the Convention. In a concurring opinion, Mr. Loucaides made specific mention of the Latin maxim "*nemo tenetur prodere seipsum*" and its connection with Article 6 of the Convention which enshrined the presumption of innocence.

It behooves modern governments to pass legislation which is, on the one hand, sufficient to protect the public against the malevolent activities of the *ed hamas,* whilst at the same time paying proper attention to ideals and values of Jewish law that have come to be known in this area of the law under the generic label of the privilege against self-incrimination. As Mosaic law revealed long before Jerusalem became the capital city of the Jewish people, the erosion of this fundamental right will serve only to undermine the integrity of the judicial process in the long term.

[29] [1996] Crim L R 420.

THE INFLUENCE OF JEWISH LAW ON ISLAMIC LEGAL PRACTICE

*Osman Zümrüt**

History tells us how earlier cultures influence later cultures through writing and the documentation of contemporary events. Sometimes earlier cultures may even give birth to new cultures. "The situation in the Middle East occupies a unique place in history."[1] When Middle Eastern civilizations were at their peak, first Moses, then Jesus and later Muhammad admonished the disobedient people to believe in a single God. These admonishments constitute the roots of present civilizations, because people had begun to rebel against idols, both animate and inanimate; in a religious sense, and perhaps unconsciously, they were experiencing the sense of freedom for the first time. Up to the present day, our civilization identifies itself in terms of its spiritual roots, and so it cannot ignore the Middle Eastern spirit out of which it has grown.

Humankind was created as body and soul; humans developed their culture by using their minds rather than their bodies. The body is nourished through feeding, the soul, through religion, morality, and so on. This led every tribe and nation to develop different religious

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1 George E. Kirk, *A Short History of the Middle East from the Rise of Islam to Modern Times* (New York, 1963), 4.

beliefs. Some tribes believed in a single God, others believed in gods and goddesses of war, agriculture, law, love, weather and so on.

A review of Islamic law reveals similarities with some elements of Jewish Law. This is especially seen when the Mishnah and the Islamic law books (*fiqh*) are compared, e.g., in their discussion of dietary laws. For example, the eating of pork is forbidden according to the laws of both religions.

Islam and Judaism, which instruct people to worship a single God, share two general aims. The first is that all human beings should be free (worshiping none but a single God). The second is the removal of conflicts, disputes and quarrels and the insurance of peace. Both religions recognize that humankind is a holy creation; even persons who do not believe in God are considered holy. Both religions claim that their holy books and their prophets were sent to serve human beings.

In fact, these two aims are the main principles on which modern law is based. Human liberty is one of the most crucial responsibilities of law. To maintain peace, law has developed a number of rules and regulations. "Rules which govern complex civilizations are known as laws."[2]

Jewish civilization developed a legal system before the Romans and the Germans. Wherever there are human beings, there is a religion, and wherever there is a religion, there are a society and law. The Latin proverb *ubi societas, ibi Jus* (Where there are people, there is law) was pronounced centuries ago.[3] At the same time, "law is the most important element that shapes social life."[4] But religion does the same. Consequently, it had a part in the development of human institutions in general, and of law in particular.[5]

Proceeding now to the question of whether one legal system can influence another, one can define the concept of influence in this con-

2 George G. Coughlin, *Your Introduction to Law* (New York, 1970), 1.

3 René David, *French Law*, translated by Michael Kindred (Baton Rouge LA, 1972), 71.

4 Ahmet Mumcu, *Insan Haklari ve Kamu Özgürlükleri* (Ankara, 1994), 4.

5 A. V. Dicey, "The Relation between Law and Public Opinion," in Bernard Berelson and Morris Janowitz, eds., *Reader in Public Opinion and Communication* (Glencoe IL, 1966[2]), 121.

text either as one system dominating and shaping the other, or as one system being similar to the other. Hence, in order to determine whether one system has influenced another or not, similarities and parallelisms between the systems must be examined very carefully. It is our goal here to demonstrate the influence of the Jewish legal system on Islamic legal practice by tracing and identifying the similarities and parallelisms between the two systems.

The fact that the Jewish legal system influenced that of Islam can be attributed to two main factors. First, both systems depend on divine revelation; second, the Jewish legal system preceded that of Islam in time.

A sensitive point deserves emphasis here. Namely: Jewish influence on the Islamic legal system should not lead the Jewish people to feel superior, and neither should it make Muslims feel inferior. Any analogy that is revealed should be attributed neither to Islam nor to Judaism, but to God, the fount and source of both religions. This truth must be consciously realized by the followers of both religions. In every religion, there are intolerant, ignorant and selfish, fanatical fundamentalists. If we have an honest faith in God, we should meet at a point that transcends both Jewish and Islamic legal systems. But we have to teach this truth to ignorant believers. People should never justify their wars by religious differences. After all, it was the same God Who gave us both religions, and we are His servants.

According to all legal systems, a person who commits a crime must be punished. This is the most important rule of any legal system: any criminal will be punished, regardless of his religious beliefs. Hence, both the Bible and the Holy Qur'ân prescribe penalties for certain crimes. The Qur'ân quotes passages from the Bible about Jewish criminals and their fates, in order to warn Muslims not to commit the same crimes and sins. Indeed, the Qur'ân asserts that if a Muslim commits a crime or a sin, he too will be punished. I specifically mention this because certain ignorant, fanatical, fundamentalist Muslims use these verses from the Qur'ân to put down all of the Jews. In fact, however, the Qur'ân praises those Jews who have not sinned and notes that they are superior to other people before God.

Similarities and parallels must exist if one wishes to demonstrate the influence of one legal system on another.[6] As Libson has written, "the standards of rights and equality are generally the same among people who live close to one another but are from different cultures."[7] Similarities may also be important in regard to the definition of legal terms, structures and forms. "From these data historians can develop concepts that identify both patterns of change and patterns of continuity."[8]

Examples relating to the Islamic legal system may be found in Sarakhsi's *Mabsut* and Kasani's *Bada'i*ᶜ *al-Sana'i*ᶜ.[9] With this goal in mind, as far as possible, I have attempted to broaden the comparison to include the commentaries on the Bible and the Holy Qur'ân.

The primary sources of both Islam and Judaism are written: The primary source of the Islamic legal system is the Holy Qur'ân, that of the Jewish legal system, the Torah. The laws that God revealed to Moses, which constitute the Oral Law, are set out in the Mishnah, while the traditions of Islam, the sayings of Muhammad, may be found in the *Hadîth* books as *Sunna*. There may be no contradiction between Written Law and Oral Law in either Judaism or Islam: both claim the same divine origin and have the same authority and binding force.

The *Hadîth* books were organized into sections in a manner similar to that of the Mishnah. While modern secular law aims only at resolving disputes between human beings, religious law aims at putting an end to disputes both between human beings and between the individual and God.

The Qur'ân states that it was sent to verify and approve of former

6 William M. Wentworth, "A Dialectical Conception of Religion and Religious in Modern Society," in Jeffrey K. Hadden and Ason Shupp eds., *Secularization and Religion and the Political Order and Fundamentalism Reconsidered*, Vol. III (New York, 1989), 46.

7 Gideon Libson, "Islamic Influence On Medieval Jewish Law," 73 *Studia Islamica* (1991) 5-24.

8 Peter Karsten and John Modell, *Theory, Method and Practice in Social and Cultural History* (New York, 1992), 34.

9 Abû Bakr ibn Masᶜûd al-Kasâni, *Badâ'i*ᶜ *al-Sanâ'i*ᶜ (Cairo, 1327-1328/1909-1910); Muhammad ibn Muhammad al-Sarakhsî, *Al-Mabsût* (Cairo, 1324-1331/1906-1913).

holy books: "And unto thee have We revealed the Scripture with the truth, confirming whatever Scripture was before it, and a watcher over it...."[10] "So judge between them by that which Allah hath revealed, and follow not their desires, but beware of them lest they seduce thee from some part of that which Allah hath revealed unto thee. And if they turn away, then know that Allah's will is to smite them for some sin of theirs. Lo! many of mankind are evil-livers."[11] This verse of the Qur'ân implies that people may give way to their emotions and behave arbitrarily. Allah is saying here that Judaism is a social and legal system, as is Islam. Allah did not create Muslims as a unique nation to test them: Judaism, Christianity and Islam are variations of the same system.

The Jews, as *Banû Isra'îl*, are mentioned forty-three times in the Qur'ân. The original Hebrew word *yisra'el* = Israel means "servant of Allah,"[12] The Qur'ân considers Jews and Christians different from the other nations as they are followers of the Holy Book (*ahl al-kitâb*).

In later Islamic tradition and literature, too, there are many indications of Muhammad's favorable attitude to the Jews. For example, a story is told that a Jew once offered Muhammad water. After drinking the water, Muhammad prayed for his benefactor, saying, "May Allah make you beautiful." And indeed it is said that the Jew became a wise man and his hair never grew white.[13] Another tradition tells that when Muhammad died, it was found that his armor had been given to a Jew as security for a loan, and was restored in return for thirty dry measures of barley.[14] It is clear from this tale that Muhammad was in contact with Jews until his death. Muhammad sent a Jew to Ethiopia as an ambassador,[15] and, finally, he never forced any

[10] Qur'ân: *The Table Spread* V:48.
[11] *Ibid.* 49.
[12] Ramzi Naᶜnaᶜa, *Al-Isra'îliyyât wa-Asarûha fi Kutûb al-Tafsîr* (Beirut, 1390/1970), 72.
[13] Al-Kattâni, *Al-Tarâtibu al-Idariyye* (Rabat,1346/1930), 1:102.
[14] Al-Bukhâri, *Sahîhu al-Bukhâri*, Vol. II, *Hadîth* No. 2916.
[15] Muhammed Hamidullah, *Islamda Devlet Idaresi* (Istanbul, 1963), 92.

Jews to convert to Islam.[16] In later Islamic history, the Caliph al-Mukhtadir allowed non-Muslims to express their thoughts freely.[17]

Nevertheless, in the early days of Islam, when the Prophet Muhammad and his companions were in power, there were spiritual and material conflicts between the Jewish and Muslim communities, and of course this unfortunate situation still persists today. We can state, however, that there has not been much friction between the Turks and the Jews in history.

Islamic history recognizes that Jewish law and thought influenced the emergence of sects in Islam and the spread of cultural developments.[18] This influence inspired scientific discussions in the Islamic world,[19] and the exchange of ideas even extended to religious matters. For example, we know that Ibni Abbas, a respected Muslim commentator on the Qur'ân, exchanged ideas with Jewish theologians.[20]

The Jewish legal system influenced not only the Islamic legal system but also all branches of Islam, such as exegesis, *Hadîth* and theology. It was in this way that certain concepts and methods from Roman and Byzantine Law, the Canon and the Eastern Churches, as well as Talmudic, Rabbinic and Sassanian law which appear in the doctrines of the second century A.H. penetrated the nascent religious law of Islam. The influence of Jewish law upon Islamic law is noticeable not only in the field of religious worship but also in the field of methods of legal reasoning, in such principles as *qiyas* (analogy), *istishab* (a method of legal reasoning particular to the Shafi'i school

16 Adam Mez, *Al-Hadaratu al-Islamiyye fi al-Qarn al-Râbi' al-Hijri* (Cairo, 1957), 1:59.

17 Abu Rayya, *Adwa' ᶜala al-Sunnati al-Muhammadiyya*, 108; Mehmed Hatipokhlu, *Hadiste Yahudi Katkisi* (*The Jews' Contribution to Hadîth*), unpublished, 1-2.

18 Talat Koçyidit, *Hadisçilerle Kelamcilar Arasindaki Münaka shalar* (*Discussions Between Hadîthians and Theologians*) (Ankara, 1969), 71-72.

19 Ismail Cerrahokhlu, *Tefsirin Dodushu, Tefsir Usûlu* (Ankara, 1971), 237; Ibn Kasir, *Tafsîr al-Qur'ân al-Azm* (Beirut, 1385/1966), 1:58; Ahmad Amin, *Zuhûru al-Islâm* (Cairo, 1962), 2:37; el-Kinani, *Tenzihu' Sheriati 'l-Merfu'a ani 'l-Ahbari' Sheriati 'l-Mevdû'a* (Egypt, 1375/1959), 1:191.

20 Al-Zahabi, *Tazkûrat al-Huffâz* (Beirut, 1376/1956), 1:36.

and to the "Twelver" Shiites), and *istislah* (taking the public interest into account).[21]

Similarities and parallels can be noted not only in the identity of terms but also in legal techniques, constructions and formulations. Such parallels are frequently reflected in the headings of the chapters of Islamic legal literature.

In this paper I have attempted to emphasize such similarities and parallels with the sincere intention of contributing to a closer relationship and dialogue between Jews and Muslims. What we need is to base our relations on sound grounds. If we do not come closer in thought and knowledge, we can never succeed in practice. The Anatolian poet Ashik Veysel explains this truth in a poem which almost everyone in Turkey knows by heart:

> If there were no differences in thought among man
> There would be no need for anyone to read or write
> Or to untie this knot
> Or the wolf and lamb would walk together in friendly terms.

If we know what lies behind conflicts and peace, we can solve our problems more easily.

As the sender of the two religions is the same God, if there is anyone who deserves to be praised it is God Himself. God created everything in the universe for the use of human beings except forbidden things – this is common to both the Bible and the Qur'ân. As God forbids quarrels, disputes and conflict among human beings forever, all our efforts must be aimed at realization of peace, to halt wars and prevent conflicts among the descendants of Abraham. As religions, Judaism and Islam should never – theoretically speaking – clash with one another. Their Holy Books (the Bible and the Qur'ân) do not allow such a conflict; those conflicts that do arise are caused by the members of each religion claiming superiority.

Religious change and the changed place of religions in society, far from signaling the demise of "religion," encourage a variety of religious persuasions to sprout and flourish, each appealing to a different segment of society. But because "my" religion is always better than

[21] Joseph Schacht, *An Introduction To Islamic Law* (Oxford, 1964), 21.

"yours," and "old" religion is almost always better than "new," changes are often viewed as moral decay, or secularization, by pundits, theologians, social scientists and preachers.

To sum up, three important points are worth remembering:

1. The Qur'ân repeatedly emphasizes the influence of Jewish religion on Islam. Similarities, parallels and differences between Judaism and Islam must clearly be determined. Once that has been done, we can meet at the same point to live in peace, regardless of the differences. Of course, it is not enough to meet at such similar and parallel points and disregard the differences. Ethical and material conflicts must be resolved. To achieve peace, we have to solve the problems that confront us. Despite all the difficulties, we have to go on researching, organizing conferences like the present one and increasing the discussion. Perhaps the Jewish and Muslim communities will ultimately encounter each other in peace.

2. Attempts should be made to resolve religious differences within each religion, between different groups, sects, and the like. This is, of course, the responsibility of theologians, preachers and other clergy of synagogues and mosques, respectively. Once Jews are at peace with each other, and Muslims too, we can hope for peace between Jews and Muslims. Only then will Jewish and Islamic theologians be able to determine the harmonizing points of two religions by studying together.

In my opinion, the two religions share two main goals. First, both believe in the Oneness of God. Second, they have religious commandments to prevent quarrels, differences and conflicts. These two goals will bring Jews and Muslims together. As Jewish and Muslim theologians, I think, we have shared points of view and common goals. We can meet in humanity. Even then, though, the differences that do exist in regard to details might engender certain friction. Islam, however, believes in a forgiving God, since His universal commandments are more important than the more specific ones.

The fact that human beings do not believe in idols and paganism but in a single God illustrates their free will. Human beings have

fought over the centuries to achieve liberty, and I should point out here that liberty of men and women is one of the most important principles of modern law. History cannot deny the contribution of Jewish and Islamic Law to modern law in this respect. Both religions forbid the worship of idols and vigorously oppose every kind of idol and idolatry.[22] Judaism and Islam have saved men and women from worshiping idols and established the concept of the Oneness of God.

3. The fact that Jewish Law has influenced Islamic Law may be demonstrated on the basis of the Qur'ân, the *Hadîth* literature and Islamic legal literature in general. This influence surely illustrates the acceptance by the believers of both religions of a legal system that has been revealed by the One God. It represents God's will, and it is incumbent upon us to obey God and His commands, solve every kind of problem and struggle to achieve peace. We all, surely, share the intention of attaining peace, but may perhaps be ignorant of the proper action to that end. At any rate, peace is never achieved by fighting. As it has been said, "Everything is achieved by force, but every force is motivated by thought." It is our duty, therefore, to seek that thought, the thought that will provide the basis for peace in the world and, in particular, in Jerusalem. If peace is not achieved in Jerusalem, it will not be achieved in the world in general. Our God has created solutions to these problems, but we do not know them and must engage in further research to discover them. Therefore we have to research solutions for these problems.

Paraphrasing a statement by Nahum Rakover,[23] I would like to conclude this paper with the sincere hope that it will assist not only theologians, preachers, lawyers, legislators and jurists, but also social scientists, politicians, peacemakers and anyone interested in questions of justice, morality, the application of Jewish law or Islamic law in our time and the comparison of Jewish law and Islamic law.

[22] Ibn al-Kalbi, *Kitâb al-Asnâm* (Ankara, 1969), 23-54.
[23] Nahum Rakover, *A Guide to the Sources of Jewish Law* (Jerusalem, 1994), 11.

THE INFLUENCE OF JEWISH LAW ON BRAZILIAN LAW – MARRIAGE AND DIVORCE

*Sinaida De Gregorio Leão**

The study of comparative law is very important for the jurist, since it reveals the social and judicial reality of a particular time and society and thus shows how law has evolved. We must not forget that contemporary law has its roots in the past and that present-day judicial systems are essentially the creation of great human minds of the past, who formulated the basic concepts in the construction of modern theories. Furthermore, the history of law, one of the branches of contemporary law, contributes to wise evaluation of the law, a *sine qua non* for a satisfactory judicial education.

The first book of comparative law of which we know is the *Mosaicarum et romanarum legum collatio,* a pre-Justinian compilation of *leges et iura*, comparing Jewish and Roman Law, published during the Early Roman Empire. The fact that this book was adopted in Rome as a legal source proves the importance of Jewish Law in Rome and later in Canon Law. Jewish rules have come down to modern occidental judicial systems through Roman and Canon Law, notwithstanding the ignorance of scholars such as Émile Durkheim, who

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found no similarities between Jewish Law and the legal systems of "developed civilizations."[1]

Jewish Law is almost unknown in Brazil. The few Brazilian authors who mention Jewish law generally do so only briefly and superficially. These authors have in fact given their the readers incorrect – in fact, anti-Semitic – information, as they have not researched the historical and sociological sources of Jewish law. Most of their works were written toward the end of the 19th century and in the first part of this century, when anti-Semitic ideas and feelings of cultural and racial superiority were common. Moreover, the State of Israel had not yet been founded and the scholars, unjustifiably, did not consider the study of Jewish law of practical use.

Ignorance about the real sources of Jewish law resulted in many misconceptions. For example, the most famous author of comparative law in Brazil, Lino de Moraes Leme, stated that the "Hebrews" did not have a high level of morality because they permitted polygamy.[2] Such authors, of course, were ignorant of the historical facts and sociological concepts necessary for a comparative study of legal systems. Instead, they used comparative law to judge societies, cultures and juridical systems of different times – an absurd approach according to modern sociology. What is worse, they transmitted – and still do – to readers preconceived ideas that might create anti-Semitic feelings.

It is indeed very difficult to demonstrate the influence of one judicial system upon another, since there are many social and historical factors to be considered. The purpose of such studies is not, as frequently in the past, to preach the superiority of a particular judicial system or civilization, but rather to reveal the true origins of judicial systems and thereby to improve our judicial knowledge.

Jewish Law is not the "unusual" or "old-fashioned" legal system of an ancient society. Jewish Law has survived for more than two thousand years and is now valid in the State of Israel. In other words, it is a traditional system which has been incorporated into a modern judicial system. Jewish Law is in use in Israel, particularly in matters

1 Émile Durkheim, *De la division du travail social* (Paris, 1893).
2 Lino de Morais Leme, *Dirito Civil Comparado* (São Paulo, 1962).

of marriage and divorce, though it is applied only to Jewish citizens and by religious courts.

Historical Development of Jewish Law and its Judicial System

In Antiquity, at the time of Abraham, the Hebrews were a semi-nomadic, pastoral people, living in a tribal organization and united by the faith in a single God. Their behavior was already governed by certain religiously inspired rules. Monotheism was born, although at this stage it should more properly be called monolatry or henotheism, that is, faith in a single God, of a particular people.

Until the Exodus from Egypt, internal problems and disputes among the Children of Israel were solved by the head of the group. After the Exodus, however, that system of justice changed. Upon a suggestion from Jethro, his father-in-law, Moses chose capable and trustworthy men to be chiefs of thousands, hundreds, fifties or tens, to deal with problems among the members of each group. The most difficult questions were to be considered by Moses himself. This was the beginning of a hierarchical organization of justice, based on increasing levels of jurisdiction, similar to the present-day system.

When the Five Books of the Torah were revealed to Moses, the Hebrew people were introduced to the Written Law, which was inspired by religion. The Torah, was, in fact, the heart of the Jewish judicial system. Containing both religious and secular laws, it was in fact a guide to religious faith and to the social needs of Jewish people. Violation of the law constituted an offense to God but could also be punished by society.

As a code of rules addressed to and accepted by the entire Jewish people, either individually or as a group, the Torah had an egalitarian and human character unprecedented among ancient peoples. This special character was responsible for the development of a democratic society which the historian Paul Johnson has called a "democratic theocracy,"[3] whose rules inspired several ancient laws.

The religious, God-given character of Jewish law did not affect its social character, as the Torah addressed itself in particular to real problems. Jewish Law, in spite of its religious source, met the real

[3] Paul Johnson, *A History of the Jews* (London, 1988).

needs of the people, and by dint of its application to the day-to-day life of the nation it became a source for the development of subsequent laws.

Subsequently, an Oral Law was developed on the basis of the Written Law, built up from interpretations of the latter by generation upon generation of sages and priests. These interpretations evolved from the real problems of Jewish people, for which there were no legal rules. The teachings of the Oral Law comprised a system of traditions, which it was forbidden to write down, as the sages believed that codification of the law might hinder its evolution.

On the way to the Promised Land a new judicial system was established – a council of seventy elders, traditionally chosen by Moses from among the heads of the most important families and priests to solve disputes and internal problems. This system, in turn, changed around the 3rd or 2nd century BCE, when a new judicial hierarchy was established. The highest authority was *Sanhedrin Gedolah*, composed of seventy elders elected from among the wisest men of several towns. No social, economic or political distinctions were made; according to some authorities, it was presided over by the High Priest. The Sanhedrin was initially composed of twenty-three sages; if the necessary majority for adjudication of some case was not available, another twenty-three sages were summoned, and so on, successively, until the number of members of the tribunal reached seventy.

The Sanhedrin had an interpretative function in religious, civil and criminal law, and enjoyed full legislative and administrative authority. It also solved conflicts among lower tribunals and dealt with infractions of their original competence.

The first level of jurisdiction, however, was an ordinary tribunal of three judges, two chosen by the litigants (one by each party) and the third by both parties in agreement. Decisions were taken by majority. Such ordinary tribunals, charged with adjudicating the simplest problems, sat at the gates of towns or on the most frequently used roads.

The second level of jurisdiction was the Small Council of Elders (*Sanhedrin Ketanah*), which had the authority to deal with more difficult questions and to hear appeals against decisions of what we have

called ordinary tribunals. It consisted of twenty-three judges, and could be convened in towns or villages with more than a hundred and twenty inhabitants. By way of comparison, it is interesting that in Rome, where single judges occupied the bench, the possibility of appeal against decision on a lower level was introduced only in the 1st century CE.

When the Second Temple was destroyed in the 1st century CE and the Jews were sent into Exile, the sages felt the need to commit the Oral Law, which had evolved over the centuries and represented the various interpretations of the Torah, to writing. The codification of the Oral Law was considered essential to preserve oral tradition, as the people were now dispersed in exile around the world and the numerous interpretations were difficult to recall. Thus, the compilation of the Oral Law, called the Mishnah, was initiated by Rabbi Meir and Rabbi Akiva, and completed by Rabbi Judah the Prince around the year 200 CE. The Mishnah, succinctly summarizing the views of sages at various times, including divergent views, preserved the continuity of the Oral Law. This made it possible to engage in comparative study of the law and to analyze oral teachings over the centuries. The Mishnah is divided into six divisions known as "orders": *Zera'im* (Seeds), concerning agricultural laws; *Mo'ed* (Festivals), about the holy calendar; *Nashim* (Women), about family law; *Nezikin* (Damages), on civil and criminal law; *Kodashim* (Holy Things), about the sacrificial cult in the Temple; and *Taharot* (Purity), on laws of purity and impurity.

After the compilation of the Mishnah, the sages continued to reinterpret the Mishnah and the Torah. Those new commentaries comprised the *Gemara* ("complement" or "tradition") which, together with the Mishnah, comprised the Jerusalem (or Palestinian) Talmud and the Babylonian Talmud, the first elaborated by the sages of Jerusalem, the second by the sages of Babylonia, the great new Jewish center.

Later, in the Middle Ages, new codes were composed, summarizing the legal rulings of the Talmud, as the latter was difficult for the general public to read and understand. The best known of these codes were Maimonides' *Mishneh Torah* and Rabbi Joseph Caro's *Shulhan*

Arukh, the latter together with the glosses by Rabbi Moses Isserles, known as the *Mappah*, which made it possible for Ashkenazic Jews to use Caro's code. Problems arising in daily life for which there were no set rulings were extensively treated in the *responsa* literature, namely, the answers of the greatest rabbinical authorities of the time to questions addressed to them by rabbis, communities or individuals.

The Jewish judicial system in the Diaspora underwent many changes, as not all countries granted the Jews judicial autonomy. Since the emancipation of the Jews in the 18th century and later, among other things as a result of the French Revolution, Jews acquired civil and political rights, and Jewish judicial autonomy was generally discontinued. Recourse could still be had to rabbinical courts, which acted *inter alia* as courts of arbitration, but this was only on a purely voluntary basis; naturally, rabbinical courts continued to deal with religious problems.

Influence of Jewish Law on Roman Civil Law

The Jewish community of Rome was the oldest in Europe, dating back to the 2nd century BCE. There was considerable migration of Jews to Rome, largely for economic reasons. Questions about trade relations between Jews and Romans were often submitted to Roman tribunals, which had the authority to solve these questions. However, to judge such questions, the Roman tribunal had to analyze the rulings of both Roman Law and Jewish Law. Since the year 63 BCE, when the Romans occupied Judea, many Jews were brought to Rome as war prisoners. Jewish law imposed a religious obligation on the Jewish community to rescue Jewish prisoners from slavery, and these freed slaves ultimately became part of the local Jewish community. Thus, by 66 CE there were about 50,000 Jews in Rome, with twelve synagogues.

In view of the high cultural level of the Jews and in the tolerance displayed by many of the Roman emperors, the Jews were full participants in Roman political and cultural life. They enjoyed considerable autonomy, with their own rabbinical courts. The Romans, who were pagans, felt increasingly attracted to Judaism, and there were numerous conversions. Conversion to Judaism even affected the

Roman aristocracy, as in the cases of Helena, the queen of Adiabene and her sons; Fulvia, a lady of the Roman nobility; and Nero's wife Poppeia. According to historical research, the population of the Roman Empire was about six or eight million people, of whom one in ten was Jewish. The historian Josephus Flavius wrote:

> The masses have long since shown a keen desire to adopt our religious observances, and there is not one city, Greek or barbarian, nor a single nation, to which our custom of abstaining from work on the seventh day has not spread, and where the fasts and the lighting of lamps and many of our prohibitions in the matter of food are not observed.[4]

Many Roman citizens, though not actually converted to Judaism, observed the religious precepts of Judaism. In addition, there were many mixed marriages, which nearly always resulted in conversion of the Roman partner to Judaism.

With the advent of Christianity, conversion to Judaism declined, although some historians hold that the rapid spread of Christianity was due, above all, to the legacy of Jewish proselytism. In fact, many Jewish concepts were incorporated into Christian teachings, which transmitted them to other societies.

As law is a social phenomenon, reflecting the way of life and values of a certain society, it could not escape the Jewish influence which, as we have just shown, was common in Roman society. This can be demonstrated by an analysis of classical and post-classical Roman judicial institutions.

We have already mentioned *Mosaicarum et Romanarum legum collatio*, a pre-Justinian compilation of *leges et iura* of the *Dominato* period which compares Roman and Jewish Law. It is well known that the development of a judicial reality is more rapid than the codification of any law applied in that reality. Hence, the fact that a book about Jewish law was accepted as a source for Roman Law in the 4th century indicates the prominence and influence of Jewish law in the preceding period.

The idea that Roman law was influenced by many features of

[4] *Contra Apionem* II, 282 (Loeb ed., pp. 405-407).

Christianity, commonly expressed in several books on Roman Law, is in fact superficial and not based on the true, factual reality. In a more profound sense, such Christian influence reflects Jewish influence. The first Christians were Jews, who believed in Jewish Law and precepts as taught by the rabbinical schools of the time. They applied new philosophical concepts to Jewish law, generally concepts originating in stoicism.

The distinguished scholar Mateo Goldstein, writing about Roman Civil Law, in particular in regard to the laws of property and acquisition, offers the following comment:

> In general, the Hebrew people admitted several modes of acquisition similar to those established by Roman Law, which can be proved from the jurisprudence of both judicial systems. Sovereignty over sea and river water, occupation, laws of ownerless and lost property, public and private domains, transfer of real assets, the exercise of certain actions to protect the property and possession rights... were similarly... inspired directly or by intermediary sources in Jewish Law. The dissemination of Jewish Law over the western world, via Roman Law, explains why the judicial systems of many modern nations incorporate elements of Jewish Law.[5]

Such influence of Jewish Law on Roman Law and on the judicial systems of the western world, as discussed by Grosso, was particularly strong in the area of marriage and divorce. One should note that, until the Council of Trent in the 16th century, Christianity had no laws of matrimony. The suggestion, say, that Greek Law influenced Roman Law in this area must be rejected, in view of the intellectual crisis in Greece in Antiquity, when the new concepts of Hellenic philosophy clashed with the old traditions of Greek religion. The resulting social crisis in Rome and Greece has been described by Fustel de Coulanges, who attributes it to the crumbling of the Ancient Polis system.[6] As that system was disintegrating, the laws had to be refor-

[5] Mateo Goldstein, *Derecho Hebreo a través de la Biblia y el Talmud* (Buenos Aires, n.d.).

[6] Numa Denis Fustel de Coulanges, *La cité antique. Étude sur le culte, le droit, les institutions de la Grèce et de Rome* (Paris, 1864).

mulated in order to deal with marriage and divorce. Some Brazilian authors have traced the seeds of that judicial and social change in Christianity.[7] However, the historical sources seem to imply that the real roots of these changes lay in the legacy of Jewish proselytism, which had in general facilitated the rapid spread of Christianity.

During the imperial age, a high rate of divorce was recorded among the Romans in Rome, who lived in an atmosphere of domestic and social immorality. As there were no prescribed formal rules for the celebration of matrimony, marriages were contracted and dissolved according to the will of the parties exclusively, that is, depending on the existence of *affectio maritalis*. Throughout that period, and later too, Roman emperors used all means to restore morality by promulgating laws that discouraged divorce and made the institution of marriage more stable. The Romans clearly could not have taken such laws from Hellenic law, which then exhibited the same judicial and social disorder, but from a system that put a proper value on marriage and family.

Jewish Law, since the 5th century BCE, had prescribed a written marriage contract which furnished evidence of the act of marriage; marriage was conceived essentially as a civil and private act. The marriage contract was improved in the 2nd century BCE by Simeon ben Shetah. It became a complex document securing the rights of the wife, particularly in cases of divorce or widowhood, based on the dowry system. The sages thus introduced safeguards against impulsive divorces and, consequently, enhanced the moral stature of their society.

In Rome, women's rights obtained increased protection through dotal legislation, which prescribed exactly the same measures as had been applied in Jewish Law for centuries. This influence was noted by San Nicolo and Volterra.[8] Furthermore, various essential elements that Roman Law introduced in relation to matrimony, such as marriage impediments, were inspired by Jewish Law.

[7] See, e.g., Orlando Gomes, *Direito de familia*, 1a. ed. (Rio de Janeiro, 1968); Washington de Barros Monteiro, *Curso de Direito Civil*, 27a. ed. atual. (São Paulo, 1989), vols. 1, 2.

[8] As cited by Mario Curtis Giordani, *Iniciação ao Direito Romano* (Rio de Janeiro, 1986).

In the case of divorce, Jewish Law was the source of provisions that made the dissolution of marriage a more formal affair, thus preventing various immoral practices in society. The necessity of legal reasons to justify divorce, and the patrimonial and personal consequences of divorce, were similar to those obtaining in Jewish law. As Christianity did not recognize divorce, one can conclude that Jewish Law was the true source of Roman Law, which was influenced by the oriental regions of the Empire in the post-classical era and under Justinian, as has been demonstrated by many authors.[9]

Influence of Jewish Law on Canon Law

As mentioned above, the undeniable and immeasurable influence of Jewish religion and law upon Christianity is quite evident. Jesus and Paul were devout Jews, who observed the precepts of the Torah and were disciples of the great Jewish masters Hillel and Rabbi Gamaliel. Paul in fact claimed that, in this sense, the Church was but a branch of an olive tree grafted onto the cultivated tree of the Jewish people.

The influence of Jewish culture on Christianity, shown *inter alia* by the admission of the *Tanach* (which the Christians of course called "The Old Testament") as part of the Christian canon, is still not well known to many scholars. This ignorance may be attributed partly to the need felt by the early Christians clearly to differentiate their faith from Judaism proper.

Many scholars merely compare the *Tanach* and the New Testament, trying to understand the two religions' different modes of thought, mainly in regard to their legal aspects. Of course, differences undeniably exist, but they are frequently exaggerated. Many concepts attributed to Christian moral and doctrine, such as women's dignity and respect for human beings, were in reality the outcome of the influence of Jewish sources. The *Tanach* was canonized in the 3rd century BCE, while the New Testament was written in the 1st century CE; this leaves a chronological gap of four centuries. During that period, Jewish law developed considerably, an increasing body of jurisprudence being produced by the Sages and the Sanhedrin –

[9] See, e.g., Giordani, *op. cit.*; José Carlos Moreira Alves, *Direito Romano* (Rio de Janeiro, 1965).

culminating many centuries later in the composition of the Mishnah and the Talmud. Any study of the relationship between the *Tanach* and the New Testament must therefore devote proper attention to the history of that interim period. Jesus and Paul, as disciples of the great Jewish masters, surely took over many laws that had been developed in the last centuries BCE.

Of course, one should not lose sight of the many differences between Jewish and Christian legal doctrines. As far as the area of matrimony is concerned, however, the influence of Jewish law is undeniable, as the Church had no marriage laws until the Council of Trent. Until then the Church used only the apostolic rules preached at the beginning of Christianity, which resulted directly from Jewish law and customs as applied in the Roman Empire. The influence of Jewish Law on Canon Law in this area can be seen in many aspects, such as the judicial nature of marriage, marriage impediments, the validity elements of marriage and the theory of nullity and annulment of marriage. As far as divorce is concerned, however, there is no such influence, since Canon Law does not recognize divorce at all.

Influence of Jewish Law on Brazilian Law

Brazil received much legal influence from Portugal, the former colonial power. Portuguese marriage rules were in fact influenced by Canon Law and Christian tradition. In spite of the secularization of marriage, which occurred later in Brazil than in Europe, the inspiration of the Bible and the influence of Jewish law are still evident, e.g., in the doctrine of marriage impediments, in the concept and judicial nature of marriage, in laws governing concubinage, in the theory of nullity and annulment of marriage, in the condition of married women and in the safeguarding of women's rights, mainly in the event of divorce or widowhood.

With regard to divorce, the provisions adopted in Brazilian legislation may be ascribed to the influence of Jewish Law through Roman Law. Until the advent of the "Law of Divorce," the Brazilian law still followed Christian traditions as transmitted through Portuguese law, which did not recognize divorce as an act of dissolution of the marriage bond but only as an act of dissolution of marital society as permitted by tolerance in Canon Law (*divortium quoad*

thorum et habitationem). In view of the practical problems created by the nonexistence of divorce in Brazilian Law, such as the increased frequency of concubinage, demands to introduce divorce were finally successful, leading in 1977 to the enactment of the "Law of Divorce."

Although the influence of Jewish Law on the recognition of divorce in Brazilian Law cannot be proved directly, such influence was no doubt exerted by way of Roman Law. Jewish influence is also present in the personal and patrimonial effects of divorce, as well as in procedural rules. Even in instances where Jewish influence is not evident, the similarity of substantive and procedural rules in both legal systems is undeniable. Such similarity between two legal systems, chronologically so distant from each other but so similar in content, may be attributed to the extreme realism, humanity and rationality of Jewish sages and rabbis in face of the situations that they routinely encountered, and to the influence of Jewish and Christian morality on western society.

Conclusion

The above brief comparison of Jewish Law with the Roman, Canon and Brazilian judicial systems should, we hope, improve legal scholars' and jurists' conscious and efficient professional activity. The aim of this article is to increase its readers' judicial culture, and to highlight the essence and contents of Jewish law.

The underestimation of Jewish Law as a source of influence in the western world up until the first half of this century has been attributed to the fact that it was not fully applied in practice, as the State of Israel had not yet been founded. The main reason, however, was the ignorance of most comparative-legal scholars in regard to Jewish Law and in fact Judaism in general. Witness the persecutions perpetrated against the Jewish people toward the end of the nineteenth century and later, up to and including the Second World War – persecutions due, above all, to the ignorance of people who, blinded by anti-Semitism and hatred, totally rejected knowledge and humanity.

APPENDIX

SEMINAR PROGRAM

CHAIRMAN

Professor Nahum Rakover
Deputy Attorney General
Israel

Monday, July 8, 1996

Opening Session at the President's Residence, in the presence of Mr. Ezer Weizman, the President of Israel.

Opening Remarks

Prof. Nahum Rakover
Deputy Attorney General, Israel

Greetings

Mr. Ezer Weizman
President of Israel

Prof. Aharon Barak
President of the Supreme Court, Israel

Prof. Ya'akov Ne'eman
Minister of Justice, Israel

Mr. Dror Hoter-Ishai
President of the Israel Bar

Klaus Eppler, Esq.
President of the New York County Lawyers' Association

Keynote Address

Rabbi Eliyahu Bakshi-Doron
Chief Rabbi of Israel and President of the Supreme Rabbinical Court

"THRONES OF JUDGMENT AT YOUR GATES, O JERUSALEM"

Tuesday, July 9, 1996

Session 1

INDIVIDUAL RIGHTS AND RESPONSIBILITIES

LECTURERS

Jonathan Fisher, Esq. (USA)

SELF-INCRIMINATION AT COMMON LAW – ITS ORIGIN IN JEWISH LAW

Prof. George P. Fletcher (USA)

VIRTUES AND VICES: A JEWISH PERSPECTIVE

Prof. Richard A. Freund (USA)

INTER-GENERATIONAL RESPONSIBILITY

Rabbi Alan J. Yuter (USA)

PERSON AND PROPERTY IN JEWISH LEGAL THOUGHT

Session 2

FAMILY LAW

LECTURERS

Allan S. Cooper, Esq. (Canada)

THE DISPUTE RESOLUTION OFFICER IN FAMILY LAW

Sinaida De Gregorio Leão (Brazil)

THE INFLUENCE OF JEWISH LAW ON BRAZILIAN LAW – MARRIAGE AND DIVORCE

Session 3

AUTHORITY OF SECULAR LAW

LECTURERS

Prof. Yaakov Bazak (Israel)

ISRAELI LAW IN THE VIEW OF HALAKHAH

Prof. Nicholas N. Kittrie (USA)

DUTY TO OBEY THE LAW OF THE LAND

Prof. Shmuel Safrai (Israel)

PROVIDING INFORMATION ON CRIMINALS TO THE AUTHORITIES

Session 4

THE LEGAL STATUS OF JERUSALEM

LECTURERS

Prof. Malvina Halberstam (USA)

THE JERUSALEM EMBASSY ACT:
U.S. RECOGNITION OF JERUSALEM AS THE CAPITAL OF ISRAEL

Prof. Shlomo Slonim (Israel)

CHANGES IN THE ATTITUDE OF THE VATICAN ON THE ISSUE OF JERUSALEM

Prof. David A. Thomas (USA)

A CONCISE LEGAL HISTORY OF JERUSALEM

Wednesday, July 10 1996

Session 5

LAW AND EQUITY

LECTURERS

Rabbi Shear-Yashuv Cohen (Israel)

EQUITY ABOVE AND BEYOND THE LAW

Bernard W. Freedman, Esq. (USA)

THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT...? – COUNSEL'S ETHICAL RESPONSIBILITIES

Naphtali Lipschutz, Esq. (Israel)

LEGISLATION FOR THE PUBLIC GOOD

Session 6

At the Knesset

HUMAN DIGNITY AND FREEDOM OF EXPRESSION

LECTURERS

Prof. Irwin Cotler (Canada)

HATE SPEECH, EQUALITY AND THE LIMITS ON FREEDOM OF EXPRESSION: THE CANADIAN EXPERIENCE AS A CASE-STUDY

Prof. Nahum Rakover (Israel)

THE PROTECTION OF HUMAN DIGNITY

Greetings by *Mr. Dan Tichon,* Speaker of the Knesset

Session Sponsored by Touro College Law Center

Thursday, July 11, 1996

Session 7

THE RELIGIOUS STATUS OF JERUSALEM AND THE TEMPLE MOUNT

LECTURERS

Prof. Yitzchak Englard (Israel)

THE LEGAL STATUS OF THE TEMPLE MOUNT

Judge David Frankel (Israel)

TEMPLE MOUNT – ACCESS AND PRAYER

Prof. Abdul Hadi Palazzi (Italy)

JERUSALEM: THREE-FOLD RELIGIOUS HERITAGE FOR A CONTEMPORARY SINGLE ADMINISTRATION

Session 8

MEDICAL ETHICS

LECTURERS

Rabbi Prof. J. David Bleich (USA)

SURROGATE MOTHERHOOD

Rivka Katz, Adv. (Israel)

MEDICAL ETHICS

Sharon Levy (England)

EUTHANASIA: WITHHOLDING TREATMENT:
A LEGAL AND ETHICAL ANALYSIS

Session 9

CONSCIENCE AND LAW

(in Hebrew)

LECTURERS

Prof. Eliav Shochetman (Israel)

FOLLOWING ORDERS DOES NOT EXCUSE UNLAWFUL ACTS

Rabbi Yaakov Medan (Israel)

THE WAY OF GOD AND THE WAY OF LAW AND RIGHTEOUSNESS

Dr. Leah Bornstein-Makovetsky (Israel)

JEWISH INFORMERS IN THE OTTOMAN EMPIRE IN THE 16th-17th CENTURIES

Session 10

JERUSALEM, SANHEDRIN AND RULE OF LAW

(in Hebrew)

LECTURERS

Rabbi Naftali Bar-Ilan (Israel)

IMMUNITY

Rabbi Menachem Ben-Ya'akov (Israel)

WHY JERUSALEM IS NOT MENTIONED IN THE BIBLE AS A HOLY CITY

Rabbi Dov Lior (Israel)

THE AUTHORITY OF THE SANHEDRIN

Session 11

JEWISH LAW AND CONTEMPORARY LEGAL SYSTEMS

LECTURERS

Prof. Elen Podgor (USA)

WHITE COLLAR CRIME

Prof. Osman Zümrüt (Turkey)

THE INFLUENCE OF JEWISH LAW ON ISLAMIC LEGAL PRACTICE

Session 12

DEMOCRACY AND POLITICAL THEORY

LECTURERS

Prof. Ze'ev Falk (Israel)

HUMAN RIGHTS, DEMOCRACY AND AUTONOMY – A JEWISH PERSPECTIVE

Prof. Asher Ma'oz (Israel)

THE VALUES OF A JEWISH AND DEMOCRATIC STATE

Rabbi Prof. Nahum Eliezer Rabinovitch (Israel)

THE CONCEPT OF PARTNERSHIP AS THE BASIS OF GOVERNMENT

Session 13

THE TEMPLE MOUNT – SANCTITY, RIGHT OF ACCESS AND PRAYER

LECTURERS

Prof. Menashe Har-El (Israel)

JERUSALEM THE HOLY CITY IN JUDAISM, CHRISTIANITY AND ISLAM

Moshe Drori (Israel)

RIGHT OF ACCESS AND PRAYER ON THE TEMPLE MOUNT

Rabbi Yitzhak Shapira (Israel)

ASCENDING THE TEMPLE MOUNT – WHEN IS IT ALLOWED?

Session 14

JUDGES AND JURISDICTION

LECTURERS

Mr. Moshe Nissim (Israel)

APPOINTING JUDGES

Dr. Zerach Warhaftig (Israel)

QUALITY VS. QUANTITY IN MAKING JUDICIAL DECISIONS

Prof. Aaron Kirschenbaum (Israel)

JURISDICTION FOR PROVISIONAL NEEDS: COURT AND KING

Rabbi Yehoshua Ben-Meir (Israel)

CIRCUMSTANTIAL EVIDENCE

Friday, July 12, 1996

Session 15

FREEDOM, EQUALITY, RELIGION AND TOLERANCE

LECTURERS

Prof. Herbert Druks (USA)

RELIGIOUS FREEDOM AND THE JEWS IN EARLY AMERICAN HISTORY

Dr. Moshe Ish-Horowicz (England)

RELIGIOUS TOLERANCE AND DIVERSITY IN JUDAISM

Ed Morgan, Esq. (Canada)

RELIGIOUS EDUCATION AND CONSTITUTIONAL LAW

Prof. Neil H. Cogan (USA)

MOSAIC EQUALITY IN AMERICA

Session 16

JUDAISM AND DEMOCRACY

LECTURERS

Prof. Eliezer Schweid (Israel)

ISRAEL AS A JEWISH-DEMOCRATIC STATE: HISTORICAL AND THEORETICAL ASPECTS

Prof. Avi Ravitzki (Israel)

JUDAISM AND DEMOCRACY

Rabbi Avraham Sherman (Israel)

BASIC HUMAN RIGHTS – LAW AND IDEOLOGY

Rabbi Dr. Ratzon Arusi (Israel)

MAJORITY DECISION IN THE KNESSET AND IN THE ELECTIONS

Session 17

LAW AND MEDICINE

LECTURERS

Dr. Yosef Rivlin (Israel)

ARTIFICIAL INSEMINATION, IVF AND SURROGATE MOTHERHOOD: IMPLICATIONS FOR INHERITANCE LAW

Dr. Itamar Warhaftig (Israel)

AGREEMENT BETWEEN SPOUSES ON IVF

Prof. Avraham Steinberg (Israel)

THE TERMINALLY ILL

Dr. Elimelech Westreich (Israel)

SCIENCE AND MEDICINE IN THE DECISIONS OF THE RABBINICAL COURTS IN ISRAEL