

# HALAKHAH — THE GOVERNING NORM

Gerald J. Blidstein

*This article describes how halakhah functions as the normative component of Jewish life. It presents the modalities — intellectual as well as social — through which halakhah operates as well as sketching its general approach to the different topics it regulates. The method is phenomenological, though changes in historical reality are integrated into the presentation.*

## I. The Scope and Structure of *Halakhah*

1. *Halakhah* (literally, the walking)<sup>1</sup> is the normative structure undergirding Jewish life in both its private and public dimensions. True to the biblical ethos which sees a person's social and religious existence as part of a single organic whole, *halakhah* provides normative prescription (or at least discussion) in all areas of experience. No area is beyond *halakhah*, which does not distinguish between that which is rendered to God and that which is rendered to Caesar; all of life is subject to ethical rationalization in Weberian terms. Different rubrics of decision-making and interpretation will sometimes apply to questions of law as distinct from questions of ritual observance, with greater flexibility built into civil law, but all topics (whether matters "between man and his fellow" or those "between man and God," a terminological distinction that was not always of the greatest significance)<sup>2</sup> could expect normative guidance. In these

*Jewish Political Studies Review* 8:1-2 (Spring 1996)

senses, the distinction between private and public spaces finds no resonance within the *halakhic* consciousness. Convinced that their lives were molded by a divinely revealed set of norms, and assured that their institutions were either guided by God's spirit or authorized by His law, Jews felt that all aspects of their existence were penetrated by *halakhah* and held in its web.

Similarly, all Jews were subject to the norms, and indeed subject to identical norms. Rabbis and laymen are bound by the same standards of behavior, and so one cannot speak of a clerical status *per se*, nor of a norm to which clergy — but not laity — were subject. The status of the priesthood (*kohanim*) implies rather little since the destruction of the Temple of Jerusalem in 70 C.E. — some ritual honors and requirements, and a ban (not always trivial) on marriage to divorcees and converts. The major distinction as to persons in *halakhah* is that between women and men, which manifests itself largely (though with no consistent pattern) in the area of ritual law, as women are released from some requirements of religious observance and cannot be counted towards the communal quorum for prayer. This distinction does not hold in the areas of civil and criminal law, and anything forbidden to men in the spheres of ritual law is forbidden to women as well. Women's legal status is quite different from that of men's in areas related to marriage.

*Halakhah* intends, therefore, to provide the norm of Jewish life — that of the individual, the community, the society, and the state. In theory, at least, the responsibility of providing the norms of Jewish life falls to the *halakhah*, and not to the polity; this is inherent in the belief that Torah is given to man rather than produced by him. Indeed, given the variety of life-styles that communities have developed in the reaches of dispersion and in the stretches of historic times, it is in fact likely that *halakhah*, its substance, methods, and institutions, has been the major integrating factor of the Jewish people. Such integration can also be appreciated against the background of other possibilities. Thus, the loyalty to community and people did not compete with the loyalty to *halakhah*, for *halakhah* was of and in the people. And if Thomas Luchmann is right in claiming that the very existence of the church implied the opposing existence of the secular realm, no such institutional dichotomy exists in Judaism, where no "church" *per se* exists.

2. It is customary to refer to *halakhah* as "Jewish law," which I have consciously refrained from doing. *Halakhah* is, in part, "law" in the sense in which that term is used in the contemporary West. It deals with matters civil and criminal, is endowed with sanctions, is elaborated by methods and authorities which resemble legal thinking and institutions, and is often formalistic. Yet a good deal sets it

apart from “law” as that term is generally understood today. This is true even if the contrast of the ostensible divine origins of *halakhah* with the presumed origins of modern law in political sovereignty or the popular will, is of theoretical concern alone.

The scope of *halakhah*, to begin with, is far more extensive than is the scope of a modern legal system, as my earlier discussion indicates. But this is true not merely in the sense that it ranges over more topics and includes religio-ritual norms as well as social, civil, and criminal matters in its bailiwick. Law in modern societies is usually set over against “morals” and “ethics,” both in the sense that sanctions do not apply in these areas, and because their discussion and elaboration are not assigned to legists, but are rather pursued by moralists and philosophers. This is not the case for *halakhah*. Just as it does not attach great significance to the distinction between matters religious and secular, so does it not recognize a firm dichotomy between earthly (i.e., human) and heavenly sanctions. Consequently, it occupies itself with issues that span the legal and the ethical, or, put another way, pursues an issue whether its ultimate resolution will be in the sphere of the legal or the ethical and moral.

Now, it is quite true that the treatment of a topic increases in specificity as the matter is more highly “legal,” i.e., falls within the jurisdiction of human institutions; so too, obviously, will these institutions adopt a more insistent posture in matters “legal.” Judgments of the “ethical” or “moral,” on the other hand, are usually more general, and are frequently left for the individual to flesh out himself; they are usually voluntary in the sense that no institutional compulsion is attached to them, and the intensity of their imperative is a function of the individual’s personal level. Yet granting all this, it is nonetheless the fact that the “legal” and the “ethical” are merely different poles of a single spectrum, which is treated in its entirety by one body of literature representing, fundamentally, a single discipline. Precedent, textual authority, Scriptural verses, the search for consistency and internal logic — all these remain the major modes of discussion irrespective of whether the ultimate conclusion is to be *hayyav* (liable for penalty) or *assur* (forbidden), a distinction which is roughly equivalent to that between laws and morals. Indeed, either conclusion entails obligation, as might be expected when the ultimate authority is God, though certain categories (such as *middat hassidut* [the way of the pious]) more appropriately oblige the heroic figure. These distinctions are relevant when priorities must be established between competing norms, rather than as indicators of different levels of commitment.<sup>3</sup>

Attempts to locate the basis for the authority of *halakhah* in a Kelsian *grundnorm* seem, then (irrespective of their accuracy), to focus too exclusively on the "legal" character of *halakhah*, rather than on the existential consciousness of the Jew, who appropriated *halakhah* as a way of life in which one served God and felt His constant presence, and by which he was coherently rooted in a chosen people. The liturgical formula which precedes the performance of a *mitzvah* says it all: "Blessed is God who has sanctified us by His commandments...." It is through the *halakhic* commandment that the Jew strives for holiness, and he does this as part of his people.

A number of theories do attempt to account for the authority of the *halakhah*, an enterprise in which medieval thinkers led the way. Scripture was, of course, the revealed word of God, sacred and commanding. As for the Oral Law, that is, the rabbinic tradition as ultimately written down in the Talmud and its derivative literature, different stresses are found. The Talmud asserts that Oral Law was given to Moses along with Scripture, though the extent, meaning, and history of this claim require elaboration and cannot be taken at face value. For Yehuda HaLevi (twelfth century) and possibly Nahmanides (thirteenth century), the entire rabbinic tradition is rooted in revelation or at least in grace; thus its essential authoritative formation will have been in Palestine and before the destruction of the Jerusalem Temple by the Romans — in place and time still visited by the divine presence. For Maimonides (twelfth century) much Oral Law will have been devised by the rabbis, but its institutional authority is constituted by a divine imperative to obey the directives of the Great Court.<sup>4</sup>

These theories are organically related to the overall intellectual thrust of their protagonists, to their view of law, authority, the relationship of God and Israel, the nature of the Jewish community and its cohesion and solidarity. Yet it seems clear that for those manifold centuries in which the authority of *halakhah* was an unquestioned fact of life, it held the people's allegiance in a much more direct fashion. *Halakhah* was simply God's Torah, his teaching for His people. Given by a good though demanding Father, it was a token of love and its contents were experienced as such. Phrases from the classic liturgy are clear:

Thou has loved the house of Israel thy people with everlasting love; thou hast taught us Torah and precepts, laws and judgments. Therefore, Lord our God, when we lie down and when we rise up we will speak of thy laws, and rejoice in the words of thy Torah and in thy precepts for evermore. Indeed, they are our life and the length of our days; we will meditate on them day and

night. Mayest thou never take away thy love from us. Blessed art thou, O Lord, who lovest thy people Israel.

From geonic times on (at least) the Jew congratulated himself on his lucky history (!) and his bountiful law: "Blessed are we — how good is our share in life, how pleasant our fortune, how beautiful our inheritance." Perhaps as answer to Paul, or to the vicissitudes and trials of historic experience, all this reflected and created the Jew's attitude towards his way of life. This view of Torah as God's gift to His people and as the ground of its identity, goes a long way to explain why Jewish society so emphatically internalized *halakhah's* imperatives. For if political and legal obedience must ultimately be internalized in all societies, this is doubly the case for Jewry, which so frequently lacked direct access to physical power.

## II. Modes of Internalization and Communication

1. *Halakhah* is not created by the state but by scholars and jurists, and it is rabbinic literature in its varied forms which both sets and communicates the norms that govern Jewish society.<sup>5</sup>

From a formal point of view (and substantively, too, in large measure), rabbinic literature is thoroughly engrossed in its past, turning on itself over and over again so as to spin out the web of its future. The standard forms of *halakhic* creativity, whether commentary, responsum, or code, all claim to be no more than correct (or more precisely, conscientious) applications of the wisdom and standards of the forebears. This of course is not to deny the distinct character and career of these different modes of literature, or to accept the claim in its simplest sense.

The *Commentary* explicitly addresses the classic text, explicating and not infrequently rendering decision as to the preferred opinion or tradition. The Talmud is, though perhaps only in part, commentary to Mishnah: Rashi is commentary to Talmud, as are the synthesizing-conceptualizing *tosafists*; Maimonides has his legion of commentaries; and the authority of *Shulhan Arukh* (the last major code) derived from the quality and assent of its commentaries. The *Code* — and many of this genre's characteristics are already found in Mishnah: terseness, elimination of rationales, lack of complete decisiveness — presents itself as the distillation of the discussions of the past masters. And *Responsa* — rabbinic answers to specific queries, a form pioneered in the geonic period but continued with unflagging relevance in all centuries and once again in our own time, when

codes and commentaries are more rarely attempted — are argued as applications of tradition's norms to a new situation. Each form, needless to say, will draw upon the relevant material found in any of the others and utilize it in terms of its own function.

To the degree that *halakhah* is created in these modes, it communicates largely through literary devices. *Halakhic* issues — such as matters of civil law and personal status (marriage and divorce) — have often come before rabbinic courts, and their decisions would be communicated and sanctioned in more direct ways. But it has been the individual scholar, unavailed by formal authority, who has been the dominant vehicle of *halakhic* development and creativity as he glossed, analyzed, sifted, evaluated, and applied the texts of previous generations. The *halakhic* network was (and is) well-nigh international, though the different schools naturally paid more attention to their own products, and classic fissures have always existed — Palestinian/Babylonian, Ashkenazic/Sephardic. This network of peers was literary, as new work was read and absorbed.

There is, however, one *halakhic* form to which most of the considerations described thus far are quite alien. This is the *takkanah*, or enactment, a creative form in which *halakhah* approximates the idea of formal legislation. Such legislation is already found in early talmudic times where it either augments biblical law (as where it expands the list of forbidden incestuous relationships) or limits it (as in the *prosbol*, which provided a means of avoiding the Sabbatical-year cancellation of debts). Some talmudic theory explains this activity as protecting the biblical norm by adding a rabbinic “hedge”; it may also be possible to see many of these norms as simply extensions of the biblical norm itself. Be this as it may, we have here — especially if the *takkanah* is seen as a rabbinic “hedge” to the biblical law — a legislative act: it is not the product of literary interpretation, is not derivative of precedent or traditional norms, and is largely generated by an authoritative group rather than by an individual.

In talmudic and geonic time, this group was rabbinic and its *takkanot* were intended to be of universal provenance. In medieval Europe, however, the community itself authors *takkanot*, often with rabbinic guidance or collaboration. Though usually concentrating on matters of public interest — taxes or the right of settlement, for example — *takkanot* will occasionally regulate religious matters or relate to issues of personal status. These *takkanot* do not presume to be of more than local provenance, though some did in fact win broad acceptance, spreading beyond the communities in which they originated. Good examples would be the bans on polygamy and divorce compelled by the husband. These enactments are identified with the



tenth century R. Gershom, but may well have originated as communal enactments; they quickly spread beyond their original confines to become standard in all Ashkenazic Europe and, eventually, in the entire Jewish world. More than the other forms mentioned, the communal *takkanah* (*takkanat hakahal*) reflects the direct authority of the people itself.

It is not surprising, therefore, that the extent of this sovereign power would be the subject of disputes between rabbis and communal leaders, much as one finds similar tussles concerning the operation of non-rabbinic merchants' courts. Indeed, despite the overall impression of a meshing of rabbinic and lay leadership and an absence of systematic, ideologically-fuelled struggle over authority in the community — a phenomenon attributable to both the historical situation of a vulnerable society and the systemic features of Jewish political tradition — evidence for such conflict does surface now and then, and more will doubtless be discovered in the future.<sup>6</sup>

The normative force assigned to *minhag* (custom), the final mode of *halakhic* creativity, leads directly to the role of the people as a whole. Custom is ostensibly more authoritative in civil law, inasmuch as financial rights can always be waived by their possessors, but actually it functions in all areas of *halakhah*, its real extent often the refraction of a community's self-image. Frequently, of course, custom enlarges upon the *halakhic* tradition, as in liturgical activity; but there are even instances of its challenging Torah-law — a phenomenon which *halakhists* generally deny, or at least resent. Some medieval *halakhists* claim that popular custom collectively recalls rulings made by *halakhic* scholars of yore, that it is a kind of collective memory; but while some communities may have assumed that their forebears were all men of great stature, this theory is a systemic luxury. More ancient teachings simply derive the force of custom from verses such as Prov. 22:28: "Remove not the ancient landmark which thy fathers have set," and it would seem that the tradition assumed that loyalty to "The custom of your forefathers in your hands" is a corporate form of filial piety, or that it reflects the authority of the people itself, a kind of corporate vow. Does *minhag* reflect a belief in the community's charisma, its access to divine guidance, similar to the Islamic "Allah will not allow my community to err?" This view is usually based on Hillel's dramatic assertion that "If Israel are not prophets they are at least the sons of prophets." There is little evidence for this belief among *halakhists*, though it may have informed the popular consciousness; in the case of Hillel, the people had not created a norm or even decided between conflicting norms, but had rather intuited the solution to a perplexing *halakhic* problem. The more rationalistically oriented theorists could, of

course, have nothing to do with this belief; but it may nonetheless echo even in the phrase — found in *halakhic* writing — that “the custom of Israel is Torah.” Custom, too, is one of the modes by which local variation enters the *halakhic* scheme (along with communal *takkanot*); the thrust of *halakhic* decision-making proper is towards universal acceptance.<sup>7</sup>

2. A distinctive feature of *halakhic* internalization was the imperative of study. “Let not this book of the Torah depart from your lips, but recite it (or: think on it) day and night...” (Joshua 1:8): this verse was appropriated by the rabbis and it generated an imperative for each Jew (male, at least). Biblical verses such as Deut. 6:7 function similarly: “Impress them upon (or recite them to) your children. Speak them when you stay at home and when you are away, when you lie down and when you get up.” Though study does not seem to have held a dominant role in biblical culture itself, it becomes a pivotal virtue, a divine command second to none, for the rabbis. This, perhaps, is an aspect of rabbinic Hellenization, much as is the status of the rabbinic sage himself; it may reflect older Near Eastern traditions; or it may originate as an imminent aspect of Judaic culture. For integrated into a religious culture in which all Jews are subject to all norms, study as a necessary preparation for right action will be a universal norm. Needless to say, Jewish society never succeeded in making all men equally devoted to study or equally knowledgeable (indeed, some talmudic rabbis urged that support of scholars was a good way to compensate for this disparity, bringing beneficial results to both supported scholars and supporting patrons), but the thrust was there, powerfully so.

If the Book of Joshua stressed the religious utility of knowledge (“...so that you may observe faithfully all that is written in it”), rabbinic culture also considered the study of Torah a veritable act of worship, more significant than prayer. This is quite appropriate when revelation is itself encoded in a book. Mentioned in occasional homilies in Tannaitic literature (as when “you shall serve the Lord with all your heart” is glossed: “this means the study of Torah”), this aspect of religion gained momentum through the centuries, reaching its apogee in the thought of the eighteenth century Rabbi Hayyim of Volozhin. Study as worship dovetails with two other aspects of *halakhic* study which are not directly focused on normative performance. First, topics no longer actually practiced (i.e., sacrifices) remain objects of study. Second, *halakhic* study extends far beyond learning what is necessary for practical purposes, stressing intellectual creativity and producing systematic discussions which continue to fascinate probing minds.



This persistent devotion to study was a powerful and ubiquitous vehicle for the internalization of *halakhic* norms and attitudes. The Talmud, its commentaries and codes (but not the responsa, which remained a more specialized form of literature), were the staple of spiritual and intellectual nourishment, constantly studied and repeatedly heard — a fact often bemoaned by devotees of Bible and philosophy, which could not compete successfully with their *halakhic* rival. Indeed, it has been claimed that such internationalization was abetted by the very form of *halakhic* norms. Heavily concrete and quantified, abjuring categories such as fairness, justice, and truth (though undergirded by abstract legal and religious concepts), *halakhic* norms are easily accessible to, and readily applied by, the individual in his daily routine.<sup>8</sup> Obviously, though, many situations are left with no specific normative prescriptions; ethical and religious maturity must operate within the diversity of each situation and from an attentive responsibility to the values of the tradition.

The study of Torah had its rewards, of course, as Bialik's *matmid* recalled. Put less cynically, we would simply say that Jewish society rewarded learning with economic privileges (which varied greatly historically), matrimonial priority, and leadership roles. Indeed, families which fused scholarship and wealth played a dominant role in Jewish societies for long stretches of time.<sup>9</sup>

The centrality assigned to the study of Torah virtually assured that the *teaching* of Torah would be central as well. "Impress them upon your children" is expanded by the rabbis — perhaps true to the verbal ethos already present in *Proverbs* — who understand *children* to mean *pupils*; and Maimonides pairs "to teach Torah" with "to study Torah" in his list of norms. For the mishnaic rabbis, again, spiritual paternity takes priority over biological fatherhood, so that if one must choose, say, between ransoming one's father and one's master, one will choose to free one's master "for the one brought you into This World, but the other brings you into the World-To-Come".<sup>10</sup> Such teachings function, of course, to strengthen the status of the sages as well as to inculcate the value of study. But it is noteworthy that the priority of master to parent, and the concomitant requirement to disvalue the parental bond, is raised in an instance of direct, irreconcilable (and, perhaps, rare) conflict; normally the rabbis assume the continued validity of the familial ethos of the Bible.

This focus on the teaching of Torah had, as one might expect, institutional results. Not only are the Sages in large measure teachers, but Jewish society undertakes to establish the institutions necessary so that its children will study Torah from an early age. Rabbinic tradition assigns the founding of country-wide communally-supported schools to the latter part of the Second Common-

wealth, and Josephus explains that if a Jew is “asked about our laws [he] will more readily tell them than he will tell them his own name, and this in consequence of our having learned them immediately as soon as we became sensible of anything....”<sup>11</sup> The Mishnah presents its schematic idea as to the child’s progress: “Bible at five; Mishnah at ten; *talmud* at fifteen,” where “Mishnah” meant memorization of the text and “*talmud*,” its deeper understanding. Topics of syllabus and children’s education continued to exercise Jewish society through the centuries, with devotees of different realms of learning arguing their priorities. Indeed, discussion of this issue often expressed profound ideological cleavages, and even — as in the case of R. Loew of Prague (*Maharal*) and others — caustic social critique. The Talmud also discusses more mundane issues: how many pupils to a schoolmaster? When is a child old enough to be sent out of town for study? How are schoolmasters to be hired — and fired?<sup>12</sup> But the teacher of children, incidentally, never rose very high in either the social or economic ladder, despite the rank reserved for the Sage.

### III. Courts and Sanctions<sup>13</sup>

#### 1. Courts

*Halakhah* did not function as the norm of Jewish public and private space by virtue of its internalized authority alone. Alongside teaching and study, there exist courts and sanctions. In theory, at least, a fully functioning Jewish society can enlist the power of a court in cases of civil-law disputes, criminal activity, questions of personal status, and infractions of religious regulations. Actually, though, the degree to which courts and sanctions have penetrated these various areas (in theory and practice alike) has fluctuated greatly through the ages. Biblical law, for example, does not provide for sanctions and judicial procedures in many instances of religious regulations (such as rules of kosher and non-kosher foods), while rabbinic law extends the biblical sanction of flogging (and its concomitant judicial procedure) to such areas. Paradoxically, though, such expansion does not indicate rabbinic severity, but quite the opposite: by suffering the punishment of men, the miscreant escapes the more rigorous divine judgment. And due to historical factors, matters which biblical (and rabbinic!) law place squarely in the hands of Jewish courts, such as the consideration of capital and certain criminal cases, have long been removed from them. The reasons for this development have ranged from Roman (and later,

Christian) clipping of Jewish autonomy, to the absence of a Temple in Jerusalem and other considerations internal to *halakhah* itself.

Discussion of the role of the courts labors under great difficulties, on both the empirical and theoretical levels. As is the case with other topics, the Bible barely prescribes — but does describe. It is difficult to ascertain from all these materials how centralized a system is envisaged (what is the relationship, say, between the frequently appearing “elders at the gate” and the court described in Deut. 17; what is the relationship between the courts and king’s justice, and how judges were appointed and by whom?). Many of these puzzles persist in rabbinic theory, though here it is much clearer that (ideally, at least) the judiciary is a self-perpetuating system that does not derive its authority from the monarchy or its substitutes, even if the political sphere will be able to extend certain protections and privileges to the judiciary. Rabbinic theory also insists that the king not be a member of the Sanhedrin, or of other courts. The actual content of these rulings is none too clear, and by serving as the chief officer of the Sanhedrin, the Patriarch of talmudic times in fact united political and legal/scholarly roles. But the basic autonomy of the legislative institutions was well understood. While certain individuals may have fused both roles, it was assumed that this was by virtue of their multifaceted talents or roles, rather than because political power automatically implied rabbinic office.

Further problems arise if one tries to reach a working description of the law actually used and imposed. Talmudic law, for example, leans toward compromise (*pesharah*) as a judicial resolution of conflict — a fact which integrated well with the limitations imposed on the Jewish judiciary by imperial policy and the immanent constraints of Jewish law itself. Certain sanctions were allowed to atrophy; capital punishment, for example, was abolished with the destruction of the Temple and was, in any case, the subject of significant rabbinic disdain. More significantly, the basic structure of judicial authority was shaken when *semikhah*, the personal transmission of legal authority, ended with the demise of the Patriarchate in the mid-fifth century — or at least so many medievals believed. Babylonian scholars had, in any case, labored under similar disadvantages for centuries, as full *semikhah* could be given in the Land of Israel alone and only a court of fully ordained scholars could enforce the full range of sanctions allowed in the law. Surprisingly, though, these diminutions of status were apparently considered to be of formal significance alone, and one cannot detect any lack of confidence in the people, or any attempt to question the authority of judges based on their presumed shaky status.<sup>14</sup>

Yet one should not assume that this judiciary was a smoothly functioning and stable system. Often, and this was true from talmudic times on, courts were not permanent institutions but were convened when necessary. A popular forum was the court of *zabla*, a term formed acronymically from the terms for "this one chooses one judge, and that one chooses one judge, and the two judges then choose a third." Talmudic law allowed the parties to a dispute to waive many of the substantive qualifications required of judges, and Jews turned to other Jews to adjudicate their quarrels rather than to rabbis. Merchants' courts sprang up in the late Middle Ages, subsisting on the fringes of rabbinic legality, but popular with their clientele due to their expertise. A more serious systemic challenge to rabbinic authority was Jewish recourse to gentile tribunals. Such behavior was severely regarded by Jewish society and was perceived as a frontal rejection of Jewish autonomy and social integrity; it was a device employed, most frequently, by powerful Jews with patrons in the gentile world. But even Jewish law allowed an aggrieved party such recourse when confronting individuals who were too powerful for the Jewish court to control; and the community *per se* was also allowed to utilize the gentile court to enforce its will on recalcitrants.<sup>15</sup>

The judges of a community were frequently its rabbis, or at least men recognized as experts in the Torah. They were not merely legal professionals, then, but exemplars of the values held high by the community, personifications of the charisma it recognized. To be summoned before such a tribunal was not only a legal procedure but a spiritual predicament; it was probably a foretaste of the Last Judgement. The verdict — whether it represented strict law or *pesharah* — was an educational and formative experience.

## 2. Sanctions

The *halakhic* system is replete with sanctions, many of them similar to those employed by legal systems, as we shall see. Yet its sanctions are often quite different from legal sanctions, resembling those of religious and/or societal norms. There is, to begin with, the fact that "heavenly sanctions," divine punishments, are a regular feature of the *halakhic* system and buttress some of its central norms. The biblical *karet* ("he shall be cut off from among his people"), though mysterious and somewhat ambiguous, likely refers to divine punishment; it is held above the heads of those who do not circumcise, do not bring the Paschal sacrifice, or who sacrifice to Moloch (and are not apprehended by the community). A good indicator of the power of this sanction is the observance of the ban on sexual

relations and intimacy during menstruation and for some days afterwards, which carries the punishment of *karet*. These restrictions are scriptural, of course, yet it is likely that the seriousness of *karet* contributes to the near-universal acceptance of these rules until modern times, despite their heavy impact on patterns of family life and sexual satisfaction. The rabbis asserted, moreover, that heavenly punishment substitutes for those social sanctions which fall into abeyance for historical reasons: "even if the four modes of execution can no longer be practices, God has other messengers." The obligation to gain divine forgiveness by bringing sacrifices to the Temple, compliments these ideas of heavenly sanctions. Though usually related to cultic offences, sanctions are also mandated for violation of ethical standards that touch on the religious. Indeed, the rabbis keenly feared the human tendency to assuage divine anger while ignoring human hurt, and cautioned that even if the sinner is accepted by God, he does not achieve forgiveness until he makes his peace with the person he harmed. The prophets doubtless concur.<sup>16</sup>

But the non-legal character of these sanctions cuts more deeply: for they relate not only to the individual and his deserts, but to the group, indeed to the people as a whole and its destiny. Deuteronomy, for example, lays it out quite clearly: if the people is loyal to the covenant and observes the Torah, then it will prosper in its land — but if it be "lured away to serve other gods...the Lord's anger will flare up against you, and He will shut up the skies so that there will be no rain, and the ground will not yield its produce, and you will soon perish from the good land that the Lord is assigning you" (Deut. 11:17). This is the biblical "blessing and the curse," and these are the grounds for the prophetic threat of exile. Though the variety of biblical thought allowed the individual and the community to interpret suffering (and prosperity?) in other ways, the threat of communal retribution always hung above the group and its individual components. In brief, *halakhah* is social no less in its ultimate sanctions than in its workings and organization: "All Israel are guarantors (*arevim*) each for the other."<sup>17</sup>

These caveats ought not obscure the fact that *halakhah* legitimates the use of physical and social power by human institutions and by the community. The Bible mandates the death penalty for certain sexual offences, religious violations (in connection with the Sabbath or idolatry, for example), and murder. Rabbinic law makes the actual imposition of capital punishment virtually impossible, though largely by establishing extremely rigorous requirements for the prior warning of an offender to determine intentionality; the offender must not only be made aware of the consequences of his act, but must also indicate his awareness of the penalty which he will suffer — a rather



unlikely sequence of events. Standards of evidence and testimony are also pegged quite high. The likely results of such a policy were not applauded by all. In the case of murder at least, R. Tarfon and R. Akiva asserted that were they to sit in a Sanhedrin “none would ever be executed,” but Rabbi Simeon b. Gamliel (the Patriarch, and hence responsible for public order) commented that these distinguished rabbis would in fact have “multiplied murderers in Israel.” Perhaps, indeed, this is why the Mishnah established the extraordinary penalty of *kippah* — imprisonment until death — for murderers who escaped the death penalty through these liberal loopholes. We hear of little second-guessing as to other offenders deemed worthy of death in biblical law (by the Pharisees and rabbis, at least — they assert that a court which executed once in seven, or even seventy, years, was considered “violent”; we do not know how the Sadducees saw these matters).<sup>18</sup> This sparse use of capital punishment remained the norm of Jewish history, a norm buttressed as well by jurisdictional limitation both self-imposed and insisted upon by some of the empires and polities by which Jews were ruled. A significant exception to all this concerned the treatment of informers who endangered the community: these would be dispatched either by Jews or by gentiles at the direction of Jewish authorities.

Flogging is explicitly prescribed in the Bible for a narrow range of offences: the convicted party to a dispute (Deut. 25:1-3), and the husband who falsely libels his wife (Deut. 22:18; and see also Deut. 21:18) are flogged. If this is indeed the entire case, much of biblical civil and religious *halakhah* is left with no coercive sanctions. Some modern scholars assert, though, that flogging was actually an assumed and common sanction in biblical law. Rabbinic *halakhah* maintains that violation of many of the biblical “negative commands” (the dietary laws, for example) carry the penalty of lashes. Flogging could be administered, the rabbis teach, where the Bible mandates *karet* or its equivalent, thus allowing manageable and defined human punishments to substitute for the much more threatening heavenly sanction. The career of this penalty parallels, in part, that of capital punishment; it, too, fell into disuse due to some of the same standards of evidence and jurisdiction that limited use of the death penalty. But the dynamic in the case of flogging is dialectical, for rabbinic law also expanded its use in actuality: flogging was one of the “discretionary” penalties, it was mandated as a disciplinary measure, and (in theory at least) it could be used to convince a recalcitrant to fulfill his religious duties, and sometimes his social ones as well.

The individual was expected to compensate his fellow for damages caused, and could be fined for a long list of anti-social acts. So



matters appear on the practical surface. The theory was much more complicated, as the demise of a Jewish polity and fully-functioning judiciary undermined the basic structures of Jewish law. Judicial business could seemingly go on as usual, but a variety of legal (but not social) fictions sustained the functioning system. Sometimes courts could not order payment, but “invited” the plaintiff to suggest what he thought was due, forcing him to up the ante by rejecting his proposal, thus introducing an element of give and take into a process that favored compromise anyhow. The biblical fines fell into abeyance, but rabbis and communities felt free to devise new fines for both old and new misdemeanors, ranging from violation of sumptuary laws to the refusal to lend books. And a new provision made its appearance, perhaps symbolizing the role of the community: fines were often to be paid to communal charity. Such insistence may however only have reflected the parallel requirement that substantial fines be delivered to the royal gentile treasury — a reminder of Jewish subservience.

Imprisonment is virtually unknown as a mode of punishment in biblical and talmudic *halakhah*, though a person may be kept in detention while held for judgment (Lev. 24:12; Num. 15:34). The Mishnah also allows lengthy and severe imprisonment for recidivists as well as for murderers who cannot be executed due to procedural reasons. This situation changed radically from the fourteenth century on (according to M. Elon), when imprisonment becomes a standard penalty for both religious and civil offences, as well as for default of debt. European Jews even went so far as to absorb the pillory (called the *kuna*) from their gentile neighbors. Indeed, this entire development represents a shift in *halakhic* practice towards non-Jewish modes of behavior, which doubtless seemed to be a more successful response to lawlessness. But since imprisonment is in fact hardly known in classical *halakhah*, it is absorbed into Jewish practice through *halakhically* peripheral methods: by stipulation of the parties to loans, by communal enactment, or by the discretionary rights held by the court. Yet, peripheral as these may be from the perspective of *halakhic* theory, imprisonment (or the threat of same) had a major impact on communal life.

Perhaps the most significant sanction wielded by the community and its rabbis were the dual *niddui* and *herem* (communal isolation of varying degrees of severity). In contrast to imprisonment, where the offender’s physical mobility is limited and he is withdrawn from the social framework, the sanction of *herem* is completely social and psychological, and it is the community which withdraws itself from the offender. Expelled by his community, the *muhram* is also cursed before God, as the ceremony of excommunication reaches awesome

proportions by Geonic times: the *muhram* is cursed before the scrolls of the Law, a *shofar* is blown, lit candles are extinguished. In some rites the funeral bier covered with a *tallit* is brought, simulating actual death. But the *muhram* also internalizes the communal verdict — he dresses and behaves as would a man in mourning, or a leper.

The terms of the *herem* grew more severe in time, and its use became more frequent, exaggerated. Medieval treatment of the *muhram* exceeded the talmudic provisions; the boycott becomes total (the Talmud had allowed him to maintain a small store, though he was not to be employed), includes his family, and denies him the most fundamental religious and human fellowship: "Do not pray with him, do not circumcise his sons, do not teach his children in the synagogue, do not bury his dead, do not associate with him.... Pour a cup of water after him, and treat him with contempt and as a stranger."<sup>19</sup> Use of the *herem*, available to redress instances of alleged contempt for scholarly authority, multiplied in unhealthy proportions. Some major rabbis declared that they would not participate in its imposition, and communities attempted to restrain its unbridled use.

Yet it is to be recalled that the *herem* also served the community as sanction for its own most important legislation: communal enactments were accompanied by a general *herem* declared against any who should violate them. And the *herem* was decisive in implementing the rule of law: it summoned the recalcitrant to testify, the rapacious to disclose their wealth, and the dishonest to abide by their commitment. *Herem* is the most public of devices; by mustering the moral forces of the community and by manipulating (exploiting?) the individual's need for fellowship and for relationship with Jewish society and its history, it is able to dispense with physical force. In this sense, it is a most apt weapon of a people which did not always have effective physical force at its disposal but which was nonetheless determined to maintain a disciplined identity. It also symbolized the fact that many Jews probably did not see much point in distinguishing between *halakhah* as a command of God and *halakhah* as the web of norms and rules of behavior that defined communal life. Both founts of authority flow powerfully in *herem*.

Jewish reverence for the structured rule of law notwithstanding, it was found necessary to concede much authority to men. This was justified in particularly frank terms by the fourteenth century Spanish R. Solomon ibn Adret — himself a judge and one of the greatest of respondents: "for if you were to rely on the law of the Torah, why society would be destroyed."<sup>20</sup> The law of the Torah and the rabbis is hardly to be denied, of course, but it can only be applied in an ideal society (which will nonetheless continue to have its criminals); the

conditions prevailing in historical times (including the fact of exile, which radically affected the judicial system as much as it disrupted other aspects of Jewish existence) make it necessary to grant discretionary power to judges and perhaps even communal leaders in general. Ibn Adret's immediate context was procedural — rules of evidence, regulations defining who might qualify as witness and judge, and the limits of authority in the exilic diaspora. These, ibn Adret argues, hamstring effective law enforcement. But discretionary power was extended in matters of substance as well as in procedural areas.

Though ostensibly collating biblical and talmudic pronouncements, Maimonides constructed a powerful engine of discretion and it appears that he despaired of running a society without recourse to discretionary use of extraordinary powers: "The court is empowered to flog him who is not liable to flagellation and to mete out the death penalty to him who is not liable to death....The judge may at all times expropriate money from its owner, destroy it, or give it away, disposing of it in any way which...will halt breakdown of religion... or bring to terms the defier of the Law....[T]he judge may lay the ban...he may quarrel with him who deserves to be quarrelled with, curse him, smite him, pluck his hair, and compel him to take an oath that he will desist from committing the offence again....He may fetter the hands and feet of the offender, imprison him, knock him down, and drag him on the ground...discretionary power is vested in the judge." It is no wonder that Maimonides immediately warns the (overzealous?) magistrate: "But whatever the expedient...all his deeds should be done for the sake of Heaven. Let not human dignity be light in his eyes..." and continues to admonish communal leadership against a "domineering and arrogant manner...arousing excessive and unnecessary fear in the people, or treating them with disrespect."<sup>21</sup>

It does in fact appear that few leaders appropriated the Maimonidean prerogative with any great frequency. Whatever the ethical restraints, most realized that power in the Jewish community did not rest on wealth, family, learning, and the appropriate connections with gentile society, alone. It was also, and in a significant sense, granted by the community. Such bestowal may well have been indirect and at times passive; but the community could not be flouted or put upon for long. If leadership was not checked by ethical and religious restraint, social and political realities taught a moral of their own.

## IV. Areas of Impact

### 1. Boundaries: Defining Status

Matters of status are settled neither by the individual's preference nor by the sentiment of the community. "Who is a Jew?" That question is settled, in classical Jewish history, by *halakhic* rules interpreted by *halakhists*. The rules, actually, are simple and straightforward: birth from a Jewish mother or conversion are the two modes by which Jewishness is attained. The *halakhah* left birth pretty much alone, but it did set down the requirements for conversion: immersion, circumcision (for males), and commitment to observe the Torah — all this in the context of entering the Jewish people and sharing in the heights and abysses of its history. *Halakhah*, then, drew the lines defining the Jewish people over and against the gentile world; and though the individual may not have always been conscious of it, it was *halakhah* which would decide if he did or did not belong to his people.

Rules require interpretation, and rules are applied to varied and complex situations: so *halakhists* remain necessary and powerful. The Jewishness of "natural" Jews is rarely a complicated issue, but that of converts can be: were all the procedures effected correctly? Should a particular convert be accepted — are his/her motives pure, or is he/she really converting so as to marry a particular Jew or Jewess? And just how significant is the criterion of motivation, and at which points in the process? These last questions seem particularly acute in modern times. The ubiquity of intermarriage and the rise of secularism have added the issue of dubious religious commitment to that of motivation, placing the *halakhic* regimen under great strain indeed, and individual decisors are hard put to find adequate guidance in rules alone.

But the question of status does not arise in connection with the Jew/gentile divide alone. Matters of personal status — is one accounted married or divorced — fall into the *halakhic* bailiwick. So does the decision as to that most dreaded status, that of *mamzer* — the child of an incestuous or adulterous union who may not marry any other Jew, and who passes his status on to his children, and children's children. Once again, *halakhists* were called upon (though these situations were frequently concealed, often with the tacit agreement of the rabbis) to decide the question. Both the system and its rabbinic representatives tend to leniency, to be sure, but the issue would have to be resolved, and the results could be devastating.

The people was normatively constituted, then, and it was this fact which gave it its sociological self-confidence and buoyancy. For

Jews more than most, the issue of boundaries was crucial, and these were neither geographical, linguistic, nor racial. Methodologically, they were *halakhic*.

## 2. Sexual Relations, Marriage, Divorce

The significance of marriage spans the fact that it is the only approved mode of sexual experience; that it is a *mitzvah* intimately connected to the requirement that Jews bring children and raise families; that it is the context for personal responsibility, mutuality, and love; and that it is a central metaphor for a human and national relationship with God — all this, aside from its obvious social and economic role. (Let us recall, too, that rabbis were expected to marry no less than were ordinary Jews. Here is the sociological matrix of rabbinic integration into other centers of social power, of course; the rabbi, furthermore, is part of his community, a man among men who does not claim his status by ascetic superiority or isolation. This situation also made a clear point as to Judaism's ideological approval of the married state, to say the least.) Both marriage and divorce — but especially the latter — were regulated very strenuously by *halakhic* requirements. Sociological realities aside, this sensitivity has adequate *halakhic* motivation: issues of adultery and *mamzerut* — both devastating in their implications — rode on determination of marital status.

Biblical *halakhah* had already forbid incest and adultery, thus defining the pool of potential mates; it allowed polygamy. Monogamy gradually became the rule, inspired perhaps by the monogamous model of Adam and Eve, or spurred by the example of gentile societies. Rabbinic law expanded the list of relations barred in marriage, and defined the marital procedure, thus ensuring the legal character of the act. Marriage was effected in two stages, and while the first retained the character of a private arrangement between the pair, the second involved the community (or its surrogate, the *minyan* of ten males) in the liturgical and symbolic wedding of the husband and wife. This second stage, often expanded because of communal ordinance or the natural desire to ritualize and celebrate the new reality, allowed for public supervision of marriages and could prevent — especially if the second, public state, absorbed the first, private, act — imprudent unions. More profoundly, though, it asserted the essentially communal character of marriage and the formation of a new family. Thus the liturgical celebration of the act alternates between the vision of husband and wife as Adam and Eve, privately blissful in an Eden of their own making, and the vision of a redeemed Zion communally joyous in its progeny.<sup>22</sup>



While monogamy could sometimes — but not frequently — tolerate concubinage, more casual forms of sex were disallowed in the *halakhic* regimen. The severity of the rubrics under which prostitution and dalliance were banned may have been a matter of debate, but the behavioral norm was clear. Here, too, private behavior is projected onto public space. Even the intimate closeting of men and women is forbidden, thus effectively increasing public scrutiny of relationships (and infinitely complicating the pursuit of innocent business). And the ritual baths were closed to all but married women, thus utilizing this public institution to intensify the *halakhic* price of anything but marital sex. For women who were not wives remained in the state of menstrual impurity, making intercourse a much more terrifying pleasure.<sup>22</sup>

Divorce, too, though essentially a private matter between husband and wife, impacted profoundly on society. Thus, the extremely heavy rabbinic involvement with the act reflects both the desire to insure that the individuals concerned do not run the risk of adultery and its concomitant *mamzerut*, and the awareness that the community must be assured that marriages into which its members would enter were beyond cavil so that the generations of people of Israel remained pure. Divorce law was meticulously regulated and its implementation was closely supervised, resulting in clear-cut definitions of personal status and restraining, by procedural devices at least, the otherwise untrammelled ability of a husband to divorce his wife. For despite the prophetic insistence that divorce could be a “betrayal” and the rabbinic warning that “even the altar sheds tears when a man divorces his wife,” *halakhah* did not read Deut. 24:1-4 as restricting it to instances of adultery or lewd behavior (or to be more accurate, the ancient debate on the question was decided in favor of the Hillelites and R. Akiba and against the Shammaites).

When post-biblical and medieval *halakhic* legislation required the husband to divorce in certain situations, and enjoined him from divorcing in others, divorce became even more a matter for public involvement. A husband could be compelled to divorce his wife for certain forms of abuse, if he adopted a physically objectionable occupation, and — in geonic times — if his wife found him sexually intolerable. And communal enactment prevented her involuntary divorce, from the eleventh century on. This rule did brook of exceptions, but once again, such were allowed by rabbinic decision only. Occasionally, communities insisted that all divorce actions win their approval. Yet even where this was not the case, the complicated regulations governing the act and the fact that an expert was needed to prepare the document, made it necessary for the individual to submit to public scrutiny of some sort. Nonetheless,



*halakhah* in no way insists that incompatible mates remain married, and divorce has always been a viable option, probably more popular than sentimental idealizations of Jewish society suggest.<sup>24</sup>

### 3. Life Cycle

*Halakhah* pays rather little attention to birth, though it does establish criteria for defining its exact time (a fact which is sometimes crucial as, for example, in deciding questions of inheritance). It pays considerably more attention to procreation: bringing children into the world is considered a *mitzvah*, for “Be fruitful and multiply” (Gen. 9:11) is understood as an imperative rather than as a blessing. Indeed, this command obliged all — rabbis no less than laity — to marry, whatever other motives were also acknowledged by the tradition. Interestingly, this imperative defers to the ethical components of marriage: monogamy was established, despite its negative impact on the number of children a man could father; and the mishnaic requirement that a wife who was barren for ten years be divorced, was allowed to lapse. All in all, though, *halakhah* more than underscored the universal thrust to family by homilizing from Ecclesiastes 11:6 (“Sow your seed in the morning, and do not hold back your hand in the evening, since you do not know which is going to succeed...”) that a man ought to father more than the boy and girl required by the Hillelites in human imitation of God’s initial act of creation.<sup>25</sup>

The male child, of course, is circumcised — ideally at the age of eight days. This physical sealing of the covenant has had a wide range of explanations, from sacrificial blood-atonement to a device for curbing lust to a badge of national identity. All of these resonate authentically. Circumcision is originally commanded Father Abraham as a sign of his covenant with God, for him and his children forever. More than *mitzvah* alone, it is a central act in male conversion to Judaism, and was typically eliminated by Paul as a requirement for conversion to Christianity. The idea that a child is not Jewish until he is circumcised is, of course, a gross misconception; but the act does symbolize that identity as nothing else does.

The celebration of a boy’s becoming *bar mitzvah* (one commanded) at thirteen (and a girl’s reaching similar religious maturity at twelve) is a rather recent development. Classical Judaism provides for a *berakhah* (blessing) to God, and barely that. This was often the practice until very recent times and it was not unusual for the boy to first “be called up to the Torah” on a weekday rather than on a Sabbath; though a festive meal in honor of the occasion (but hardly an American catered extravaganza) is found by the sixteenth cen-

ture. Indeed, it is somewhat curious that a tradition which sets so high a value on being commanded does not ritualize this moment more significantly. Perhaps, though, it is too abstract, too exclusively *halakhic* a transition; for what Jewish child does not fulfill *mitzvot* before *bar/bat mitzvah*?

Death carries no sacramental significance.<sup>26</sup> On the contrary, since it ends man's ability to do God's will, the termination of life is a thoroughly bleak and brutal event — despite hope for spiritual bliss in a future life. Yet if not sacramental, death is nonetheless treated most significantly in the *halakhic* scheme. The corpse is handled reverently as the past, physical, abode of the spirit, as the instrument through which many *mitzvot* were fulfilled, and — for some — as image of the divine. Early talmudic legislation insisted that all be buried in simple shrouds and plain coffins so as to discourage the ostentatious funerals which either impoverished a family or led to the abandoning of its deceased. Clearly, though, another value is symbolized by this structured egalitarianism, as death restores the inherent equality of all men. The community sets aside a tract of land as graveyard. The area is treated with deference, but it is not hallowed ground. Indeed, *kohanim* (priests) are not allowed to approach a grave, for the dead defile; nor did Jews ever consider burying their dead in the synagogue courtyard, though corpses of the distinguished were sometimes brought there for eulogizing. Visitation of graves is a *halakhic* phenomenon, but a somewhat peripheral one; and though the ancestors are a marked presence in the Jewish consciousness, it is their teaching and memory, not their physical remains, which are "a blessing." Diasporic existence frequently led, of course, to the simple abandonment of cemeteries, but the ambivalent and restrained attitude towards these grounds is doubtless the result of deeper factors.

Responsibility for burial rests with the family, but the deceased is accompanied to his grave by the entire community in procession. It is at the funeral, virtually at the graveside, that the process of *nihum avelim*, the consolation of the mourners, begins. In one form, the community forms two rows; the mourners walk between and are spoken to. The mourners then return home to begin the *shiv'a*, the seven day period when intense mourning is combined with visits of consolation by the community. It is difficult to avoid the conclusion that these events are not only social in character but even social in significance, that the severing of the link to biological relations is addressed by an intensified integration into the fellowship of the community. Mourning is devoted to the dead, of course, but its focus is the individual who remains in life with his memories of the past and his need to be brought into the future, a task undertaken by the

caring community. The mourning individual, again, is at the center, but his experience is structured in public space, even if his space is located physically in the privacy of the home. The home, rather, becomes an extension of public space.

Mourning itself stretches (for parents, at least) over an entire year, and is structured as a gradually attenuated expression of sorrow and loss. Before burial the mourner is relieved of most religious obligations (an approved act of rebellion against the God who decrees death, as suggested by J.B. Soloveitchik); during the *shiv'a* he or she does not go out to work, is unshod, sits on the ground or low cushions, does not fully bathe, wears unkempt clothing, avoids sexual activity. These restrictions ease off in the thirty day period following, and then the next eleven months, which are marked mostly by the mourner's absence at social celebrations. For the full eleven months, though, he recites the *kaddish* at the thrice-daily prayers. Actually, the *kaddish* does not mention death at all, and its use by mourners is a medieval development, though not an accidental one: its text a declaration of faith in God's eschatological triumph, the *kaddish* militantly implies that death is not ultimate. At the end of the year, mourning is to cease; the Talmud counts it a blessing that the dead are forgotten, and excessive mourning is frowned upon: "'Are you more merciful than I?' says God."<sup>27</sup>

#### 4. Synagogue and Holidays

Synagogue and holidays — that is, the ritual side of Judaism — are central to the *halakhic* structure of life, but not quite so central as moderns may think. The pattern of *halakhah* is imprinted on life as a whole and on society as a whole in classical Judaism: God wants that which is given to Caesar, too. The modern *halakhic* focus on ritual reflects the separation of state and religion — basic developments in the history of the modern Western state, but pretty recent arrivals on the stage of Jewish history. On the other hand, the Judaism of ancient times, practiced when a Temple stood in Jerusalem, pilgrimages were made, sacrifices were offered, and a priesthood held real power, did give scope to the communal ritual.

*Halakhah* prescribes the form and content of Jewish worship, its texts and symbols. The individual is free, of course, to address God in fluid and personal words of his own devising, but these cannot substitute for the communal texts. Holidays, too, are days for communal celebration (or mourning) and their symbols embrace the entire people. Yet though *halakhah* legislates, its rabbinic representatives do not officiate. The synagogue is governed by a lay leadership, and rabbis have no special role in leading the prayers, reading

the Torah, and so on. Anyone competent is qualified; and anyone qualified will not — and should not — allow a rabbi to usurp his privilege.

Synagogue prayer is communal prayer; it is conducted three times a day if a quorum of ten adult (i.e., post-*bar mitzvah* age) males is present. But most of the same prayers are said by the individuals gathered (or in their own homes), if the *minyan* does not gather; and many smaller Jewish communities did not always succeed in always putting the daily *minyan* together. Yet the daily *minyan* assumed a status far beyond what *halakhah* might demand. The ten Jews gathered were not merely an organic cell in the Jewish people; they represented, in miniature, that people. "The presence of God rests wherever the ten Jews gather for prayer," and God was summoned to His people morning and evening. Nor was this piety in the normal sense of the term alone. Twice a day the community formed itself and consciously declared its identity. Men met their fellows at day's break and at fall of night in the context of a common commitment renewed. The tradition taught that even personal petitions were more readily answered when made as part of the communal prayer, so the *minyan* had distinct advantages for an individual. And the mourner's *kaddish*, to which many Jews became obsessively devoted, was said only in the quorum of ten. Naturally, much communal business (and personal affairs, too) could be settled at the gathering for prayer. And on a different level, the hiatus between the two evening prayers could be exploited for teaching of Torah on a popular level. All in all, the term *kehilla kaddisha* (the holy community), which communities applied to themselves for much of Jewish history, seems to draw on the synagogue experience, though it doubtless refers to the community as ethical and historical entity as well.

Holidays, too, were celebrated in the synagogue, from the weekly Sabbath to the less frequent feast-days. The Torah was read every Sabbath, and the Jew was transported in annual cycle from world's creation in Genesis, through the exodus from Egypt, revelation at Sinai, the wandering in the desert, to the very portals of the Promised Land at Moses's death. Though I would not put it in terms of "mythic time," the Jew lived in a different historical time on the Sabbath. In early winter he set out with Abram from his father's house, and in spring he was ready for the release from Egypt; this was not merely a literary experience. (Belief has been diluted by modernity; when Franz Rosenzweig was asked whether he truly believed that Balaam's ass spoke, he replied that he believed it on the Sabbath when it was read in the Torah.)

Yet though holidays found expression in the synagogue, their locus was the home and family. The Sabbath table, consecrated by wine, special loaves, and candles; the Passover seder and the week-long menu of unleavened bread served on special dishes (and the weeks-long cleaning to ensure that no unleavened morsel went undetected); the *sukkah* in which the family ate and some slept (in kindly climes); and Hanukkah lights kindled every evening with the family all present — all these were focused in the home. Ultimately, the strength to maintain the community was not rooted in the communal experience itself; rather, it derived from the lessons dramatized at the hearth and table. The people was constituted by parents and children, much as, in Hirsch's phrase, "the calendar is the catechism."

Yet it ought to be made clear that the holidays do not celebrate the family, but rather — the family celebrates holidays. Holidays are not less than Holy Days; the prime purpose of these times is to communicate and embody the presence of God, and to structure the Jew's integration of this reality into his own life. Each holiday has its own specific mode and observance, of course, related to its specific origins and phenomenology; but a general feature of almost all is the cessation of work, *halakhically* defined. Broadly put, the focus of life shifts from man as manipulator of his physical environment to man as creature of God. All this is rooted in the biblical Sabbath as described in Genesis, and it is the Sabbath which serves as a "sign between men and you that God created the heavens and the earth."

This statement (and others like it) hint at another aspect of the Sabbath experience: it concretized the sense of Jewish historical experience and Jewish peoplehood, as special. Sabbath is a uniquely Jewish day; the Jew knew once a week that he — and no one else — was elected to mark God's creation of the world. A midrash puts it thus: Sabbath is the special day of the days in the week, and Israel is the special people of all the peoples — so Sabbath and Israel are loving mates.<sup>28</sup> To profane the Sabbath, that is to do any of the many forbidden labors, was not only perceived as antinomian, an act for which the Bible ordained the death penalty. It was seen as a violation of the bond between Israel and its Lord, as disavowal and betrayal of Israel's relationship with its loving God.

## 5. Taxation and Social Services

Despite the concrete thrust of the *halakhic* system, it must be admitted that *halakhah* was not really the controlling factor in the areas of taxation and social welfare, if we permit ourselves this rather anachronistic phrase. *Halakhah* is less the commanding force

in these areas for a number of related reasons. The talmudic sources are relatively meager and elementary, especially when compared with a complex reality. But it is talmudic *halakhah* that is relatively unrepresented in these matters. Rulings on tax law and the complementary responsibilities of individuals and communities, say, are major components of the most important collections of responsa from medieval to modern times. And *halakhah* itself allow individuals and groups considerable freedom to regulate their own affairs in civil and property-related areas. These topics, then, are frequently left to communal legislation. R. Me'ir of Rothenburg summed it up: "Tax matters are dependent neither on express talmudic law nor on (legal) analogy, but on the custom of the land."<sup>29</sup> But such legislation and custom is itself part of the *halakhic* system in the broader sense; it is sanctioned by it, accepts guidance from it, and is supervised and interpreted by its representatives — in theory, at least. For as soon as we approach these topics, it becomes clear that considerable gaps have often existed between theory and practice, between the opinions and demands of *halakhic* figures and the actual doings of communities and their political leadership.

Talmudic discussion of both taxation and social welfare does exist, but it tends to be somewhat rudimentary, and one frequently has the feeling that more specification is necessary if a rationalized system (in the Weberian sense) is to be achieved. But the overall thrust is extremely clear and is mounted very powerfully. *Zedakah* (charity) and *Gemillat Hassadim* (acts of loving-kindness) become major virtues, far eclipsing justice as a social value. Indeed, by its philological similarity to *zedek* (righteousness), *zedakah* suggests that charity is a truer form of justice. (Actually, the two terms are barely distinguishable in biblical texts.) And man is taught to imitate God by doing charity and acts of loving-kindness, not by meting out justice. Aside from the theological claim that God is primarily a loving figure, this development dovetails with the reality of the Jewish community: vulnerable, dependent on its own resources, but lacking instruments of power. Sociologically, then, solidarity is the rule.

Taxation develops as a multi-faceted and complex issue in medieval times, when the community must raise funds to maintain both its own social services and to make regular and irregular payments owed gentile rulers. The Talmud had related to only three issues: how is residency to be defined for purposes of taxation; what criteria would be used to determine the tax burden and who — if any — are exempt from which — if any — taxes; which modes of discipline of compulsion could be used to enforce collection of taxes. It is also clear that monies would be collected directly by the gentile ruler and



his officials (indeed the status of Jewish tax-farmers or collectors is also a talmudic topic), and so the pressure on the community to solve these problems was not as intense as it became in post-talmudic times.

The topic exploded furiously in medieval times; indeed much of the *halakhic* discussion of governance grapples, in context, with questions related to taxation. A quick glance at the topics treated in M. Elon's survey will indicate the range and complexity of the question: yardsticks of tax assessment (poll tax, financial means, variation of yardstick according to purpose of tax); taxable property (land, house, vineyards and fields, money loaned on interest, money in deposit or trust, jewelry, books, foodstuffs, consecrated property); place of residence and situation of property (if property is in a different jurisdiction than owner's residence, place of business transaction, double taxation); date of accrual of liability (joining or leaving of community, change in taxpayer's financial situation); tax relief and immunity (persons of limited means, large families, scholars, exemption granted by the ruler to the detriment of the larger community); methods of assessment (self-declaration, assessment by assessors and communal trustees — questions which obviously led to disputes as to selection of communal officials); appeals (relative rights of individuals and communal entities, can communal figures adjudicate such disputes or testify in them, etc.).<sup>30</sup> Needless to say, many of these issues would reflect major socio-economic tensions, as the different classes have their particular stake in the making of these decisions.

Social welfare is most appropriately discussed under the dual rubric: *zedakah* (charity), which refers to monetary aid to the poor; and *gemillat hassadim* (acts of loving-kindness), referring to acts by which one cares for another's need, whether physical or emotional. Both concepts resonate very deeply in the ethos. They are major biblical values: the poor are to be provided for from the landowner's fields and are to be lent money with no interest attached; one's attention is especially directed towards the orphan, the widow and the stranger, all lacking power in ancient patriarchal society and all vulnerable to emotional as well as economic hurt. God himself loves the stranger and is father to the orphan — can man do less? The rabbis elaborate the biblical motif, and God's *aggadic* activity in clothing Adam and Eve, visiting a sick Abraham, and burying Moses, are the model for man's imitation. God's clothing the naked, freeing the captive, and healing the sick, become strategic and familiar aspects of the liturgy, opening the daily benedictions and the standard *amidah* prayer, said by all thrice daily — models with definite intentions on the Jew's consciousness. So *zedakah* and *gemillat*

*hassadim* are normative acts, of course, but they are much more, as through them man becomes godly. In this scheme, then, wealth is a test and poverty constitutes an opportunity for the wealthy — a role which endows the poor with surprising dignity and pride. Oppression of the poor and powerless is a major cause of exile and national defeat, the prophets warn, and it is clear that they speak not of injustice alone but of the denial of compassion and the evasion of responsibility. Here *halakhah* is deeply permeated with and fuelled by a powerful prophetic and *aggadic* thrust.

*Zedakah* is financial: money, clothing or food. *Halakhah* obliges the community to organize daily food kitchens as well as a weekly dole. It defines the level of poverty that qualifies one for aid. I am not sure that the talmudic definition was frequently utilized or even reassessed in later times; the matter seems to have been decided more intuitively. Nor was the definition used stringently — significant periods of Jewish history have seen fully one-quarter of a population on the dole, a proportion which increased in severe crisis. But this responsibility was not questioned. As Goitein put it: "Works of charity operated by the community were one of the most conspicuous constituents of its very existence. Charity was a religious duty. Care for the indigent was the natural preserve of a community based on faith."<sup>31</sup>

Individual giving was of course encouraged; the conscientious are to prefer arrangements where an anonymous gift will reach an equally anonymous recipient (*mattan beseter*, a giving in secret), so as to avoid the mutual embarrassment of a personal encounter. *Halakhic* materials stress, indeed, the psychological components of *zedakah* (as though it is obvious that the financial ones will be undertaken). A famous teaching has it that the poor are to be restored to their former state and not merely supported — this, to prevent emotional depression; legend has it that Hillel once replaced the horse of a once-wealthy man and himself acted the herald, all to restore a feeling of self-worth.<sup>32</sup> Needless to say, limited funds, stretched to provide for the many poor, will be allocated more equitably — but the ethical ideal, the definition of "need," remains vital. *Zedakah* is not an attempt at a radical redistribution of wealth, nor does it even attempt to achieve economic equality (a program more in line with the biblical Sabbatical and Jubilee years); rather, it strives to mitigate the cruellest results of poverty and to provide, perhaps minimally, for the weakest. Yet economic (and human) wisdom also has its say, as the highest level of *zedakah* is said to be aid given — a loan no less than an outright gift, even an offer of work — to prevent the fall into outright poverty.

*Gemillat hassadim* is in some ways broader than *zedakah*, for it obliges the poor as well as the rich — personal caring, the extension of self, is not an economic function. It also touches us at our most vulnerable: death, sickness, marriage, distress, joy; and these are needs of the rich as well as the poor. Though transient, it is at these moments that humankind does not wish to be alone. *Hessed*, then, is the personal bonding that penetrates those dimensions where *zedakah* is sometimes unable to enter. Frequently, it is true, even these caring functions would be routinized, organized so as to meet the need efficiently; the *hevrah kadisha* ("burial society," literally: "the holy society") will be responsible for washing the body, laying it out, and making other funeral arrangements. But this too was often a voluntary society, formed by those in the community who wished to fulfill the *mitzvah* of the "*hessed* of truth," and in a small community it remained an expression of personal caring and relatedness. *Zedakah* and *hessed* sometimes fuse: the poor bride must be given a proper dowry and trousseau, and she must have a respectable wedding — that is charity. But men and women must also sing and dance before her and her husband at the wedding, as they must before any newly-wedded couple — and that is *hessed*.

## 6. Economics

*Halakhah's* role vis-a-vis economic activity is clearly supervisory rather than constitutive. Furthermore, much regulation of economic activity was engineered by communal enactments and voluntary agreements, rather than by *halakhic* legislation and interpretation. This sphere more than any other, finally, was shaped by Jewry's integration into the world. Economic realities were not generated within the Jewish community. And the gentile's "special relationship" with the Jews often took the form of laws and edicts affecting Jewish economic existence. Yet despite the historical and inherent limits to *halakhic* authority, economic topics are addressed by major blocs of *halakhic* texts, which apparently found an audience and governed a considerable reality. Alongside torts and civil and criminal law, the Bible also deals with trade and related matters, as when it forbids overreaching and usury. Obviously, non-commercial topics also encompass much that is of economic significance, for instance, regulation of inheritance and the law of the Sabbatical year and the Jubilee, which include a waiver of debt and the return of alienated land to its owner. Here biblical law attempts to periodically (and temporarily) right economic inequality, apparently acting out of a broad ethical and religious concern. Subsequent *halakhic* materials also devote significant space to economic issues: large

tracts of mishnaic orders (*Nezikin*, dealing with civil and criminal law; and *Nashim*, dealing with family law, which includes financial arrangements), and one of the four parts of the *Shulhan Arukh* ("Set Table"), the major code of Jewish law.

*Halakhah* regulates the formal structures through which economic activity takes place. Laws of sale, rental, loans, surety, partnership, agency: these work out the forms that separate the valid act from the invalid and create the legal stability necessary for the marketplace. Much of this body of law is generated by broad underlying legal doctrine and theory; these topics are considered the nettle for the master *halakhist* to grasp and the stone on which the sharp *halakhic* sensibility is honed.<sup>33</sup> But be all this as it may, *halakhah* recognizes extra-*halakhic* structures in this area. Custom (*minhag*), frequently merchants' custom, has the force of law; indeed "custom abolishes law" in this realm. Modes of conveyance, to cite a classic instance, are ordained talmudically; but they can also be established by common commercial usage. Similarly, standards observed universally in a community will have the force of law; this point is often made in discussions of the conditions of workers' employment. Yet though these extra-*halakhic* standards do gain validity, it is assumed that legitimacy is granted by rabbinic authorities who evaluate a custom's provenance, say, as well as its ethical character.<sup>34</sup>

Yet *halakhah* obviously deals with more than the formalities of economic life. For example, the regulation of sale includes defining the moment at which property is transferred and the modes of conveyance. But expanding on the biblical text (Lev. 25:14), *halakhah* articulated a doctrine of over-reaching and fair price, limiting both profits and the advantage one party to the transaction could take of the other. The aggrieved party could appeal to a rabbinic court; a violation of less than one-sixth of the rightful price would entitle him to retrieve the sum, while if it was over that proportion, he could withdraw from the transaction entirely as well as recover. A most substantive body of *halakhah* dealt with the topic of usurious loans. Historically, of course, it is Jewish usury vis-a-vis gentile which has center stage. *Halakhically*, though, this issue is not all that interesting: the Bible clearly allows such activity (at the least!) and the talmudic ban could easily be swept aside in the light of pressing exigencies. *Halakhic* treatment of intra-Jewish usury was a much more complex and tense matter. Such usury is clearly forbidden by the Bible, and much early talmudic legislation expands the biblical ban by broadly identifying various commercial practices as either usurious or smacking of usury. Subsequently, though, it appears that a more permissive trend gains the upper hand and various devices (though not any and all) enable the Jew to charge his

neighbor interest; the most famous of these converts the holder of the debt into a partner of the borrower, and the interest paid into profit on the joint transaction. It is unclear whether the willingness to approve such extreme measures derives from a sense that biblical law was intended for an agrarian, non-commercial reality only and should not be imposed on a different economic world or simply from the willingness to compromise in the interest of Jewish economic survival in a hostile world.<sup>35</sup>

Economic issues are part and parcel of other *halakhic* topics, too, and were simply considered grist for the *halakhic* mill. Thus, marriage law included the entire realm of the economic relationship established by the marriage, ranging from the financial responsibilities of the husband during the duration of the marriage, the categorization and disposition of the various types of property brought into the marriage by the wife or the monies which she earned or received while married, to the nature and quantity of payments made upon divorce or death. Most of these matters are rooted in the *ketubbah* ("marriage document") which dates in large part to Hasmonean times, and which records the responsibilities — mostly financial — undertaken by the groom at the time of marriage; but various provisions were revised in the light of their economic effect in later times.<sup>36</sup>

Another topic which impinged powerfully on the economic life of the Jew was the prohibitions imposed on commerce with the gentile, or on gentile involvement in certain aspects of Jewish commerce.<sup>37</sup> Jews are forbidden to encourage paganism, and this led to bans on commerce with gentiles during their holiday season, or in objects used in the cult at any time. The Mishnah speaks of a ban on the sale of livestock to gentiles, for example. Obviously, all this had clear social ramifications as well, and was part of a policy designed to distance Jew from gentile. But even Jews who could applaud these social goals found the economic price hard to pay. Medieval times saw a general relaxation of these norms, argued either on the basis of the distinction between contemporary gentiles (and their religion) and ancient pagans, or on the primacy of economic survival. The problems connected with the use of gentile wine, or with gentile participation in the preparation of wine for Jewish use or trade, are also part of this general topic. Full application of these bans would deliver a severe blow to Jews involved in the production of wine and its merchandising; and, in fact, some of these norms were significantly relaxed. But recent research indicates that the economic factor alone does not explain this development, for Jews in precisely those geographic areas most dependent on the wine trade (and hence most



hard-hit by the *halakhic* restrictions) rejected the attempts to relax the norms.<sup>38</sup>

While *halakhah* is not eager to admit the existence of change in social, psychological, or religious contexts, it is more ready to acknowledge that economic reality is not static — and that it is not defined by Jewish behavior alone. Thus, rabbinic enactments would periodically bring various aspects of *halakhah* up to date in this area. For example: in talmudic times, when only land was considered real property, a woman could collect her *ketubbah* payment only from the lands of her deceased husband's estate (the same was true of any creditor); but in geonic times it was necessary to admit (due to the new commercial reality) that the widow's lien extended to all funds in the estate. Other such adjustments were introduced through the dynamic use of merchants' custom as a source of legitimate norms. In this way, for example, the new instruments of credit were integrated into the structures of Jewish commercial law.

## 7. Gentiles

The Jew asserts daily his satisfaction in belonging to the covenantal community: first, in the many liturgical statements celebrating that identity (from "Blessed are you O God who has not made me a gentile," to "How good is our destiny, how pleasant our lot, how beautiful our heritage!"); second — as HaLevi pointed out — by not saying the one word which would make of him a Christian or Muslim rather than a Jew.<sup>39</sup> The obverse of this constant self-awareness is the realization that the gentile does exist, ubiquitously, and that Jews will consequently want to regulate the nature and content of the relationship with him. The gentile world, its princes and armies, may well have defined the political and historical contours of that relationship; but the Jew determined that life within those broad contours would meet the requirements of his normative tradition. Thus, *halakhah* defined what was permissible and what was not within the Jewish-gentile relationship, much as it determined the role to be played by the gentile within the world of the Jew.

*Halakhah* recognizes, of course, the possibility of conversion of a gentile to Judaism, but it does not allow for the conversion of a Jew to any other religious faith.<sup>40</sup> However he may perceive himself, the *meshummad* (perhaps, "destroyed one") is considered a Jew for basic *halakhic* purposes — his wife, for example, still needs a *halakhic* divorce (*get*) if she is to be able to leave him and marry another. It is not merely that such conversion is not recognized; *halakhah* has identified Christianity and Islam with pagan idolatry, teaching that a Jew must prefer death to attaching himself — even under duress —



to either of these faith communities. This is the classic situation of *kiddush hashem* ("sanctification of God's name"), which so permeates Jewish consciousness. Maimonides may have asserted that Jews (under duress) could declare allegiance to Islam, but most rabbis felt that the implied rejection of the Torah made even this verbal act as forbidden as Christian baptism. This primarily religious sensibility dovetails perfectly with the social realization that one could not be a member of the Jewish people and share its covenantal history, while identifying oneself as Christian or Muslim. Indeed, medieval Ashkenazic communities went beyond the *halakhic* requirement (and allowance!), murdering their children and then committing suicide so as to escape forced conversion by Christian crusaders. This intensive normative pattern doubtless reinforced much else in the *halakhic* regimen regulating the relationship of Jew and gentile. Marriage with a gentile, then, is not merely *halakhically* impossible and sociologically dysfunctional; it means entry into the realm where death holds sway.

The most fundamental rule affecting the relationship of Jew and gentile is the ban on sexual liaisons between the two, a ban most effectively worked out in the area of marriage and the formation of a family. Even though the theoretical-exegetical bases of this norm are not fully agreed upon by talmudic *halakhists*, the practical upshot is manifest: the biblical bans on marriage with the peoples of Canaan (Deut. 7:3-4), bans adumbrated perhaps by the patriarchal insistence that their seed should not be joined to Canaanite women, are extended to marriage with any non-Jewish mate. Nor is such marriage merely banned — it simply does not exist from a normative perspective, no matter what human reality it reflects. No Jewish family exists unless both partners are Jewish. And until modern times, society placed a premium on that structure: no Jew could remain part of the community if he (or she) attempted to build a family on a marriage of Jew and gentile. Conversion of the non-Jewish partner so as to facilitate marriage is a talmudic phenomenon (and problem), not a modern one; and the allowance of such conversion after the fact (despite its religious impropriety) is a striking indication of the force of the basic *halakhic* rejection of the mixed marriage.

A second barrier between Jewish and gentile society is erected by the nearly total ban on a Jew's eating at a gentile's table. All meat served by a gentile would be forbidden: it was either of a non-kosher animal or fish, or was not slaughtered according to *halakhic* requirements. Even fruits or vegetables cooked in the gentile's pots would be of dubious status, as those same pots were used for non-kosher meats. It is not likely that the major dietary restrictions were designed to achieve this social pattern (though some of the minor ones

were), but they have clearly functioned in this manner. A gentile could, of course, eat at a Jew's home, but the mutuality assumed in free socialization and friendship has been undermined. The *halakhic* limits on bed and board close Jewish society in on itself except, naturally, for commercial activities with the gentile world (and, for a small group, intellectual ones) — or international relations.

The ethics of Jewish-gentile relations range along an axis which stretches from justice to benevolence. It is fair to say that, by and large, *halakhah* forbids acts of injustice against gentiles; the Jew may not steal from the gentile or assault him, for example. But the Jew will not be required to extend the hand of brotherly love to the gentile, though the talmudic rabbis had decided that the non-Jewish poor ought to be supported out of charity along with the Jewish poor in the interests of social harmony. This summary statement, however, is accurate only with regard to idolaters. *Halakhah* — of the Maimonidean school, at least — requires that Jews behave with “*derekh erets* and *gemilat hassadim* (civility and benevolence) as they do towards Jews,” towards gentiles who are not idolaters and who are committed to the basic morality of the Noahide laws.<sup>41</sup> This position was extended even further by the fourteenth century Provencal rabbi, Menahem haMe’iri, who asserted that the Christians of his day were to be included as a group in this category (or perhaps an even more positive one).<sup>42</sup> It is doubtful whether this posture gained many adherents (at least in its ideological terms, which proclaimed a basic respect for all contemporary religionists). Certainly, phrases such as “the Judaeo-Christian ethic” would not win the assent of most *halakhists*. At the same time, *halakhah* in any case proclaims that the lives and property of gentiles are inviolate; and Jewish theology has generally asserted for some two thousand years that “the righteous among the nations of the world have a share in the world-to-come.” To sum up, then, *halakhah* dovetails with the community's certainty that its own members deserve a special measure of love and commitment from Jews as well as from God. At the same time, it has consistently asserted an ethic which protects the rights of the gentile and has frequently declared that any human being, so long as he is not a pagan, has a significant claim upon his fellow, including his fellow Jew. These latter declarations probably extended beyond the assumption of Jewish folk culture.<sup>43</sup>

One function of the gentile *within* the Jewish community that has attracted considerable attention is his role as *goy shel shabbat*, that is: the gentile who performs tasks for the Jew on the Sabbath day which the Jew is himself forbidden to do.<sup>44</sup> Despite the universal character of the Sabbath in Genesis, the day is also designated as unique to Israel (Ex. 31:15-17), and even commemorates the redemption from

Egyptian slavery. Consequently, *halakhah* sees the Sabbath as obliging Jews, but not the rest of humanity. The point may then be raised whether Jews may have gentiles do for them what they may not do for themselves. Clearly, no denigration is implied here, as the gentile is not bound by Sabbath-law — a ritual, not a moral, category — to begin with. (Though that, indeed, may be seen as evidence of his lower status!) The talmudic decision, that “Telling a gentile to perform a task for on the Sabbath is a violation of Sabbath law,” asserts, then, that *the Jew* remains in violation of the Sabbath by his verbal act, which seemingly makes him the partial author, at least, of what is done.

This talmudic rule is, however, less compelling than it may seem. For one thing, it indicates that this violation is of rabbinic, rather than of biblical, rank, thus inviting exemptions. The first of these is given by the Talmud itself: such instruction to the gentile is permissible if it will bring about a *mitzvah*. Other leniencies crowd in: acute physical discomfort and great financial sacrifice are factors to reckon with, and indeed, the issue was raised not only in domestic circumstances but as a mode of allowing Jewish industry to continue normal operation. Distinctions were also made, for example, between direct requests, hints, and understandings; between what is said on the Sabbath and what is communicated during the week. And, finally, as Jacob Katz has pointed out, the popular consciousness, loyal to *halakhah* as it might be, nonetheless never quite assimilated the idea that what a gentile did on the Sabbath could ever be considered as the forbidden work of the Jew. Thus it is likely that many Jews took liberties with the rules limiting the use of the *goy shel shabbat*, which are indeed more stringent than many a Jewish home might acknowledge. Another consideration may also explain the special flavor of this structure, its *sitz im leben* as it were (though not its *halakhic* development): on the Sabbath day even the lowliest of Jews would not do what a gentile could do for him: a distinction rooted in the very orders to which each belonged.

## V. *Halakhah* and Modern Jewish Society

1. The rise of the Western nation-state coincided, roughly, with the onset of the secularization of Jewry. Both phenomena undermined the hegemony of the *halakhic* pattern of life. For assuming the revelational source of *halakhah*, its religious focus and function, it is obvious that the secularist would find *halakhic* commitment a blunder at best, and a sinister irrationality at worst. The rise of the

nation-state had a doubly deleterious effect: First, many areas of civil law and social governance became the exclusive concern of the state, which displaced religious groupings, guilds, and estates; and, indeed, the Jewish community as a legal entity has withered considerably. This is a fact of life to which even the traditionalist acceded, and *halakhah* became even more a matter of ritual observance. And, secondly, the promise of social assimilation held out by the nation-state eroded — especially in an age given to secularist drift — basic ties to Jewish peoplehood and its *halakhic* standards and identity.

Yet, if *halakhah* seemed destined to irrelevancy as Jewry entered modernity, it is anything but that as the twentieth century nears its end. Coincident, perhaps, with a general disillusion with the promise of Western liberalism, a disillusion fired in the furnaces of the Holocaust, Jewry has sought a return to a more native authenticity, and *halakhah* has played a central role in the process of reaffirmation.

Questions of contemporary moral and spiritual concern are increasingly framed in *halakhic* terms, and issues of seemingly narrow *halakhic* concern have become substantive and relevant: the Jewish agenda has taken on a *halakhic* tone. Yet, while *halakhah* is now central to the quest for Jewish identity, it is not simply a unifying factor in Jewish society. Indeed, disagreements on matters *halakhic* are characteristic of the divisions in Jewry and *halakhic* issues are at the forefront of debate.

*Halakhic* disagreements, broadly put, were central to some ancient schisms too; one need only think of the Karaite-Rabbanite split, or even of the origins of Christianity. This generalization holds true, as well, for the nineteenth century institutional cleavage in Jewry encoded in the terms Orthodox-Conservative-Reform. Clearly, the further one moved along this spectrum, the less were *halakhic* commitment and discipline to be found; indeed the less was Judaism a matter of significance at all. Nonetheless, variations in patterns of *halakhic* observance tended to parallel ideological positions: for the Orthodox, divine revelation is the fount of *halakhah*; for the Conservative, the people of Israel became the author of its norms, and history and historical changes emerge as crucial categories; for classic Reform, both ethics and ritual are broad categories of value to which ancient *halakhic* discussion and decisions have little to contribute. Needless to say, patterns of commitment were most profoundly affected by the dual processes of secularization and the elimination of Jewish institutional controls, both of which allowed the Jew to follow his own inclinations and encouraged a radical individualism. But the ideological position described did in fact dovetail with these patterns.

The mid-twentieth century has seen a return to *halakhah*, in terms of personal life-styles as well in the recognition that *halakhah* is a central component in the Jewish experience. Historical factors are clearly crucial in this development; both the Holocaust and the rise of the State of Israel have reawakened a sense of Jewish identity, and this identity now has a significant communal component. Salvation is not only in assimilation (even of a purely cultural variety), and the limits of individualism, too, are clearly perceived. Even Orthodoxy seems to have been galvanized by the historical experience, as the Holocaust in particular fuelled a more vigorous devotion to *halakhic* Judaism, all of which has spilled over into the general arena.

Obviously, actual *halakhic* observance often falls far short of the standard adopted by the *movement* to which the specific Jew is formally affiliated. Learned *halakhic* discussions, in the Conservative rabbinate, say, are often irrelevant to anything but a small fraction of Conservative Jews. This gap is far smaller within Orthodoxy, but this grouping, too, is far from monolithic: the differences in life-style and world-view between the "modern Orthodox" and the *haredi* ("ultra-Orthodox") communities is striking. Israel Jews, incidentally, do not seem to require the Orthodox-Conservative-Reform terminological or institutional break-down; though their *halakhic* behavior is equally varied, Israelis make do with "religious" and "secular." Inaccurate as these terms may be, most Israelis are willing to answer to one or the other.

Perhaps one can speak, too, of ideological constructs, though we must admit that the link between the concept and sociological reality may be tenuous. Martin Buber would seem remote from the *halakhic* enterprise, yet his insistence on the concrete as the mode in which God served and his teaching of *dialogue*, in which the person stands over against an actual *other*, are fundamentally *halakhic* ideas. More *halakhic* elements are present in Franz Rosenzweig's insistence that the classic patterns of observance are the necessary modes for Jewish service of God; and in "covenantal theology," which stressed the ongoing Jewish commitment to this service as the key to Jewish identity. All these fall short, however, of J.B. Soloveitchik's *Halakhic Man*, which offers a critique of these ultimately subjectivistic models and demands a *halakhah* rooted in objective, *a priori*, categories. We may also note a tendency to present *halakhah* as a *legal* system, both in terms of its structure of authority as well as in its methodology and argumentation. This is a frequent Orthodox thrust, and is developed most forcefully and authentically in the work of I. Breuer;<sup>45</sup> but it can now be found (with different emphases, of course) in Conservative authors as well. Indeed, it seems clear that the prominence given to *halakhah* as a term and as a virtually autonomous



spiritual or intellectual category is itself a modern phenomenon, reflecting its ideological significance as well as its polemical function.

2. Social and spiritual issues are increasingly posed in *halakhic* terms, and the perennial splits in Jewry are frequently presented in *halakhic* garb. All of this does seem to indicate that *halakhah* is now a central aspect of the Jewish agenda.

The classic debate as to the legitimacy of the different movements in Jewry is now formulated through the question "Who is a Jew?," that is, who performs conversions to Judaism and how, and how is Jewish lineage to be defined. While it is clear that there are political and ideological components to this issue (both in Israel and the U.S.), the fact remains that the problematic is fundamentally a *halakhic* one and that a good part of the discussion is carried on in a *halakhic* frame of reference. Women's status is another example of an issue with significant *halakhic* content. While the topic touches on a wide range of problems, from the social (divorce) to the bio-ethical (abortion, birth control) to the ritual (prayer quorum), and while it is clear that the *halakhic* considerations do not exhaust the passion aroused, these problems are primarily *halakhic* ones. Put another way, a significant number of Jews see the *halakhic* arena as an important — indeed, central — aspect of feminist issues in Judaism, and argue this issue accordingly.<sup>46</sup> Interestingly, both extreme right and extreme left would dispute this presentation: for the former, *halakhic* argumentation is perceived as an ingenuous ploy, the sheep's clothing under which crouches the wolf of willful Western modernism; while the latter readily admits that moral and cultural change are the moving forces behind these new concerns.

The intersection of ethics and technology embodied in bio-ethical issues has also called forth significant *halakhic* discussion. The ability to manipulate life and death in matters as diverse as birth control, artificial insemination, organ transplants, and euthanasia, has stimulated a considerable body of rabbinic response, most of it framed in *halakhic* terms. The Orthodox contribution remains exclusively *halakhic*; the Conservative responses vary from the assertion of the primacy of the ethical moment in any decision-making to presentations based on *halakhic* sources; while Reform remains wedded, on the whole, to contemporary liberal thought.<sup>47</sup>

It should not be forgotten that one Jewish society does presently control physical means of legal coercion — the State of Israel. Here, furthermore, matters of personal status are adjudicated according to *halakhic* law; the courts ruling in these cases are rabbinic tribunals acting to implement talmudic-rabbinic law. The achievement of this system is a matter of debate, but it cannot be denied that the *halakhic*



structures are presently the legal regulator of a major Jewish society on the subjects of marriage and divorce (much as they are irrelevant to other areas). This reality highlights the basic debate as to the propriety and wisdom of granting *halakhah* legal power in the state, a fact which carries, of course, basic political implications. But this reality also allows insights into the relationship of classic *halakhah* to a modern — at times secular — society whose cognitive reality and style of life are hardly determined by classic Jewish sources. Finally, it provides a test of the pragmatic force and moral level of the *halakhic* system on a large scale, though any moral judgment obviously reflects the value system brought into play.

Similarly, the fact that the State of Israel contains a fairly large observant population impels the implementation of various *halakhic* norms (especially in areas relating to Sabbath observance and biomedical problems), usually of the sort given to technological manipulation. Another significant sphere of *halakhic* influence is the Israeli army, where *kashrut* is the fundamental dietary norm and a considerable measure of Sabbath restrictions are in force. A significant body of *halakhic* deliberation and rulings has, naturally, been developed both in the course of applying these regulations in an arena new to traditional *halakhists* and in guiding the *halakhically* committed soldier in his/her daily routine. Here, too, the basic problematics are those of the ritual requirements and difficulties faced by the individual. Little attention has been paid to the broader moral issue raised by the uses of lethal power in the service of a state, or to questions of conscience.<sup>48</sup>

These comments suggest the observation that contemporary *halakhic* discussion mainly centers on matters of personal significance, thus continuing the centuries-old pattern. The rise of a Jewish state/society has stimulated little broader *halakhic* work, a phenomenon which may in fact dovetail with basic *halakhic* structures or may, conversely, reflect a basic malaise. Dramatically, the very reality of a Jewish people which rejects, in large measure, its vocation of sanctity as defined in the *halakhic* sources themselves, has occasioned little sustained *halakhic* deliberation, both in Israel and in the diaspora, as *halakhic* masters assume that the classic categories and rules remain relevant, even though they are actually imposed quite selectively. In Israel, there has been little *halakhic* work which attempts to bridge the gap — or even discuss intelligently whether a gap exists — between modern democracy and traditional notions of governance and authority.<sup>49</sup> For the time being, then, *halakhah* does not rock the national boat, even if it occasionally produces fitful squalls.

## Notes

- \* This essay originally appeared in French in Shmuel Trigano, ed., *La société juive à travers l'histoire* (Paris: Fayard, 1992), vol. 2, and appears here for the first time in English by permission.
- 1. The term *halakhah* has been related to the root *h-l-kh* (walk) by the eleventh century lexicographer, R. Nathan of Rome, who advanced two possible explanations: (1) something which "has come down" the generations; (2) the way walked by the Jewish people. See J. Kohut, ed., *Arukh Completum*, III (Vienna, 1926), p. 207. This dual suggestion thus encompasses the belief in the hoary ancestry of *halakhah* as well as its character as a mode of life concretized by the people. A modern suggestion relating the term to the name of a Persian tax, from which developed its sense as "rule," does not seem to have gained many adherents — S. Lieberman, *Hellenism in Jewish Palestine* (New York, 1950), p. 83, n. 3.
- 2. The terms are found only once in the Mishnah (*Yoma*, viii, end), in a non-*halakhic* context; they also crop up a number of times in homiletic midrash. See M. Kadushin, *Worship and Ethics*, (Northwestern U. Press, 1964), p. 55. The parallel concepts *issura* and *mammona* do, however, function broadly in *halakhic* context; see M. Elon, ed., *Principles of Jewish Law* (Jerusalem, 1975), pp. 6-7; *idem*, *Mishpat Ha'Ivri* (Jerusalem, 1973) (Heb.), pp. 158-170.
- 3. L.E. Newman, "Law, Virtue, and Supererogation," *J. of Jewish Studies* 40, 1 (1989), pp. 61-89, includes a good bibliographic sampling of literature on this topic.
- 4. See G.J. Blidstein, "Oral Law as Institution in Maimonides," in I. Robinson, ed., *The Master as Exemplar: Studies in Maimonides* (Montreal, 1990), pp. 167-182, which also provides further bibliography.
- 5. On the literary sources of *halakhah*, see M. Elon, ed., *Principles*, pp. 49-148.
- 6. For some representative materials on such conflicts, see A. Schrieber, *Jewish Law and Decision Making* (Temple U. Press, 1979), pp. 375-426; for sociological discussion, see J. Katz, *Tradition and Crisis* (New York, 1961); H.H. Ben Sasson, *Hagut veHanhagah* (Jerusalem, 1959), pp. 194-228.
- 7. Recent research has probed the broader penumbra of the popular contribution to *halakhah*, a phenomenon that extends beyond the specific concept of *minhag*. Interest has focussed on the communal *takkanah* and the degree to which it did or did not rely on rabbinic authority (see, for example, G. Blidstein, "Individual and Community in the Middle Ages: *Halakhic* Theory," in D. Elazar, ed., *Kinship and Consent* [Ramat Gan, 1981], pp. 215-256); on the degree to which the popular consciousness impacted on *halakhic* decision-making (as in the work of Jacob Katz); and on communal self-image as a factor in *halakhic* creativity (H. Soloveitchik, "Religious Law and Change: The

- Medieval Ashkenazic Example," *AJS Review* XII, 2 (Fall 1987): 205-222.
8. M. Silberg, *Talmudic Law and the Modern State* (New York, 1973), pp. 42-53.
  9. See Ben Sasson, *op. cit.*, pp. 121-129; A. Grossman, "From Father to Son: The Inheritance of Spiritual Leadership in Jewish Communities in the Middle Ages," in D. Kraemer, ed., *The Jewish Family* (Oxford U. Press, 1989), pp. 115-132.
  10. *M. Baba Mezi'ah* ii, 11; G. Blidstein, *Honor Thy Father and Mother* (New York, 1975), pp. 237-257.
  11. *Contra Apion* II, 19.
  12. For a magisterial presentation of the rabbinic teachings in the study of Torah, see Maimonides' "Laws of *Talmud Torah*," found in the first book of his code (*Mishneh Torah*). The Mishnah cited is *Avot* v, 21. Jacob Katz, *Da'at* 7 (1981), p. 37, n. 1, has noted the paucity of historical investigation of this topic, which is so central to any understanding of Judaism or the experience of the Jewish people.
  13. For a discussion of the structure of the *halakhic* judiciary, see M. Elon, ed., *Principles*, pp. 561-639; on sanctions and penology, *ibid.*, pp. 552-554.
  14. Some of these issues are explored in J. Roth, *The Halakhic Process* (New York, 1988), pp. 135-152.
  15. See M. Elon, *op. cit.*, pp. 19-20.
  16. See A. Buechler, *Studies in Sin and Atonement* (repr. N.Y., 1967), pp. 375-461. J. Milgrom studies how the biblical regimen of sacrifices itself reflects spiritual/psychological internalization in his *Cult and Conscience* (Leiden, 1965) and subsequent work.
  17. *b. Shavu'ot*, 39a, and elsewhere. According to the midrash, the Jewish people argued with God — successfully — so to limit the extent of communal responsibility for the acts of individuals — *Mekhilta de-Rabbi Ishma'el* to Exodus 20:2, trans. and ed., J.L. Lauterbach (Philadelphia, 1933) II, pp. 230-231.
  18. *M. Makkot* i, 10.
  19. From a *responsum* of R. Paltoi (ninth century), translated in S. Baron, *A Social and Religious History of the People*, V (Philadelphia, 1957), p. 17.
  20. Cited by R. Joseph Karo, *Bet Yosef* to Tur, *Hoshen Mishpat* chapter II.
  21. Maimonides, "Laws of the Sanhedrin," 24:5-10, A. Hershtman, trans., *The Code of Maimonides, Book XIV* (New Haven, 1949), pp. 73-75. For the legal materials, see A. Schrieber, *op. cit.*, pp. 375-426. I have discussed the underlying issues in my paper, "'Ideal' and 'Real' in Classical Jewish Political Theory." See also A. Ravitzki, "Of Kings and Laws" (Heb.), in the *Memorial Volume for H.H. Ben-Sasson* (Jerusalem, 1989), pp. 469-491.

22. These are the six special benedictions said during the wedding ceremony and at the festive meals during the first week after marriage:
- 1) "Blessed art Thou...who hast created all things to Thy glory.
  - 2) ...Creator of man.
  - 3) ...who hast made man in Thine image, after Thy likeness, and hast prepared unto him, out of his very self, a perpetual fabric. Blessed art Thou, O Lord, Creator of man.
  - 4) May she who was barren (Zion) be exceedingly glad and exult, when her children are gathered within her in joy. Blessed art Thou, O Lord, who makest Zion joyful through her children.
  - 5) O make these loved companions greatly to rejoice, even as of old Thou didst gladden Thy creature in the garden of Eden. Blessed art Thou, O Lord, who makest bridegroom and bride to rejoice.
  - 6) Blessed art Thou...who hast created joy and gladness, bridegroom and bride, mirth and exultation, pleasure and delight, love, brotherhood, peace, and fellowship. Soon O Lord, our God, may there be heard in the cities of Judah, and in the streets of Jerusalem, the voice of joy and gladness, the voice of the bridegroom and the voice of the bride, the jubilant voice of bridegrooms from their canopies, and of youths from their feasts of song. Blessed art thou, O Lord, who makest the bridegroom to rejoice with the bride."
23. In ancient times, of course, the ritual bath was used by all menstruants, as menstrual impurity threatened the purity of utensils and food no less than it impinged on the sexual sphere. With the destruction of the Temple the practice of food and utensil purity declined and the relevance of menstrual impurity was limited to sexual relations, leading to the restricting of the *mikveh* to married women alone. Occasional attempts to change this situation were rejected by *halakhists* (see, e.g., R. Isaac b. Sheshet [*Ribash*], *Responsa*, 425). Of course, any women could immerse herself in a natural body of water that was acceptable as a *mikveh*. Jewish prostitutes (and their clients) were likely to be more wary of the interdictions surrounding menstruants than of the ban on prostitution itself, and this reality probably provides much of the social background to the issue.
24. It is a commonplace of scholarship to compare the Shammaite view that a man may not divorce his wife "unless he discovered in her lewd (or adulterous) behavior" (M. *Gittin* ix, 9) with early Christian prescriptions. (Mt. 5:31-2; 19:1-9 and parallels). But H. Albeck, *Mishnah, Nashim* (Jerusalem, 1959), p. 407, has pointed out that the Shammaites elsewhere accept the reality of divorce in situations that lack these characteristics, leading him to conclude that M. *Gittin* refers to those cases where the wife does not consent to the divorce; it is also possible that the Mishnah stops short of an actual ban and speaks of a recommended level of morality alone. Be this as it may, *halakhah* is decided according to the much more permissive view of the Hillelites. For a detailed summary of divorce law, see M. Elon, ed., *Principles*, pp. 414-

- 424 (B.Z. Sherashevsky). This entire topic has, naturally, come under scrutiny with the development of the feminist movement; see, e.g., R. Biale, *Women and Jewish Law* (New York, 1984), pp. 70-102.
25. These *halakhic* norms are central considerations in issues of birth control. See D. Feldman, *Birth Control in Jewish Law* (New York, 1968), pp. 46-59.
  26. See M. Lamm, *The Jewish Way in Death and Mourning* (New York, 1969).
  27. b. *Mo'ed Katan* 27b; b. *Pesahim* 54b.
  28. *Bereshit Rabbah*, xi, 8 (Theodore Albeck, ed., pp. 95-96).
  29. R. Me'ir of Rothenburg, *Responsa* (Prague, 1608), no. 106, 995.
  30. M. Elon, *Principles*, pp. 662-701.
  31. S.D. Goitein, *A Medieval Society*, V (Berkeley, 1988), pp. 74-75, with further references.
  32. *Tosefta Pe'ah* iv, 10, Lieberman, ed., (New York, 1955), p. 58.
  33. b. *Baba Bathera* 175b.
  34. See n. 7, *infra*; M. Elon, ed. *Principles*, pp. 91-110.
  35. The topic is surveyed in M. Elon, *Principles*, pp. 500-505. H. Soloveitchik, "Pawnbroking: A Study in Usury and of the Halakhah in Exile," *PAAJR* 38-39 (1972): 153-192, is a fascinating (and formidable) exploration of legal issues and economic realities.
  36. Though somewhat dated, L.M. Epstein, *The Jewish Marriage Contract* (New York, 1927), remains a solid treatment of the topic. For modern research, see M. Friedman, *Jewish Marriage in Palestine* (Tel Aviv, 1980).
  37. See J. Katz, *Exclusiveness and Tolerance* (Oxford U. Press, 1961).
  38. H. Soloveitchik, "Can Halakhic Texts Talk History?" *AJS Review* 3 (1978): 152-197.
  39. *Kuzari* 1:114.
  40. G. Blidstein, "Who is Not a Jew?" *Israel Law Review* 11:3 (1976): 369-390.
  41. "Laws of Kings," x, 11, as translated by M. Herschmann, *op. cit.*, p. 238.
  42. See Katz, n. 37 *infra*, Chap. X; Y. Blidstein in *Ziyyon* (Heb.) 51, 2 (1986): 153-166.
  43. The eligibility of gentiles for a "share in the world to come" is debated in Tannaitic times (see *Tosefta Sanhedrin* 13, 2), with the Talmud coming down for the view that gentiles do qualify (b. *Sanhedrin* 105a), in an apparent reversal of what was probably the more common doctrine in Second Commonwealth times. For a history of the discussion in medieval and modern times, see J. Katz's paper (Heb.) in *Ziyyon* (1958), p. 174 ff. See also D. Novack, *The Image of the Non-Jew in Judaism* (Toronto, 1983).

44. For a recent presentation of the subject stressing the impact (and limitations) of sociological-historical considerations on *halakhic* development, see J. Katz, *Goy Shel Shabbat* (Heb.) (Jerusalem, 1984).
45. For a sampling of Breuer's work, see his *Concepts of Judaism*, J. Levinger, ed. (Jerusalem, 1974).
46. See the essays and bibliographic notes in R. Biale, *op. cit.*
47. The literature in these areas is voluminous. For an interesting comparison, see the three comments on the issue of abortion which are given by M. Kellner, *Contemporary Jewish Ethics* (New York, 1978), pp. 257-283. Even within one camp, the Conservative, see the different approaches embodied in the recommendations of S. Siegel, "Ethics of the Halakhah," in S. Siegel, ed., *Conservative Judaism and Jewish Law* (New York, 1977), pp. 123-132, and the argumentation in J. Roth, *The Halakhic Process* (New York, 1988). For Orthodox surveys, see J. David Bleich, *Contemporary Halakhic Problems*, 2 vols. (New York, 1977-1983). Bleich's introductory essay is an interesting attempt to counter ostensible Conservative argument; yet even so he merely denies that "subjective considerations or volitional inclinations *may...be allowed consciously* (emphasis G.J.B.) to influence scholarly opinion" (Vol. I, p. xv).
48. See a *halakhic* handbook on problems which arise during military service: S. Min HaHar, *et al.*, *Dinei Zava U-Milhama* (Jerusalem, 1972).
49. Progress has been made in this front since 1992, when this essay was first published (in French), the tragic assassination of Prime Minister Rabin serving as catalyst.