

ABHANDLUNGEN

Can Judaism Serve as a Source of Human Rights?

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A. Judaism

Judaism – *Yahadut* in Hebrew – is first and foremost a religion. The term Judaism – *Judaismes* in the Greek form – is first found in the Jewish-Hellenistic literature of the first century as a synonym for “the religion of the Israelites”.¹ The same sense is found in St Paul’s Epistles to the Galatians – “And profited in the Jews’ religion”.²

This term does not appear in the Bible³ or in rabbinical literature and only occasionally is found in medieval literature. In classical sources the term used for the body of Jewish teachings is *Torah*, which means also the Law of Moses or the Pentateuch. The term Judaism became popular during the Age of Enlightenment.⁴

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¹ Maccabees II, 2:21; 8:1; 14:38. Professor Samuel S. Cohen wrote: “The term Judaism (*Ioudaismos*) appears to have been coined by Greek-speaking Jews to designate their way of religious belief and practice as distinct from Hellenism which was the religion of their neighbors”; *The Universal Jewish Encyclopedia*, 10 vols. (New York 1948) VI, 232.

² 1:14, King James Version. Other versions translate this term as “Judaism”; see e.g. E.J. Goodspeed, *The Parallel New Testament: The American Translation and the King James Version*, Chicago 1943, 432.

³ Save for the verb *mityahadim* [becoming Jewish], in *Esther*, 8:17. The term *yehudim* originally meant “the inhabitants of the kingdom of Yehuda”. Later it gained the meaning “Jews”.

tateuch. The term Judaism became popular during the Age of Enlightenment.⁴ Judaism, as an appellation, means Jewish religion⁵ and as such is equivalent to Christianity or other named religions. However, this is only partially true, for Judaism is also a comprehensive legal system. In their famous work *Major Legal Systems in the World Today – An Introduction to the Comparative Study of Law*,⁶ Rene David and John E.C. Brierly define Judaism as “essentially a religion of the law”.⁷ “[T]he Catholic Church”, on the other hand, “... did ... feel it unnecessary to develop a Christian law to take the place of Roman law ... Canon law was not a complete legal system designed to replace Roman law. It complemented Roman law or other ‘private’ laws, never anything more, and regulated subjects not covered by these laws such as Church organization, the sacraments, and canonical procedure”.⁸ The separation between spiritual and temporal matters, which is at the foundation of Christianity,⁹ is alien to Judaism for Judaism encompasses all aspects of society and of an individual’s life.¹⁰ As Professor Abraham Haim Freiman wrote:

Jewish religion and law are a single entity. The *Torah* makes no dogmatic distinction between religious teachings and legal provisions.¹¹

⁴ Encyclopedia Judaica, 16 vols., 1971, X, 383; *Ha'Encyclopedia H'Ivrit – Clalit, Yehudit ve Artziyisre'elit* (Encyclopedia Hebraica), 32 vols., 1968, XIX, 159 (*Heb.*).

⁵ R.J. Werblowsky/G. Wigoder (eds.), *The Oxford Dictionary of the Jewish Religion*, New York/Oxford 1997, the entry “Judaism” refers to “Jewish Religion”, at 382; in: G. Wigoder (ed.), *The Encyclopedia of Judaism*, Jerusalem 1983, at 397 Wigoder defines Judaism as “The monotheistic faith of the Jews”. *Encyclopedia Britannica*, 15th ed., 1979, defines Judaism as “the religion of the Jews”; *Macropaedia*, 19 vols., vol. 10, 623; *Micropaedia*, 23 vols., vol. 5, 244. The 1971 edition of *Encyclopedia Britannica* defined Judaism as “the Hebrew religion”, vol. 13, 103. Another writer states: “By Judaism we mean the religious beliefs of the Jewish people”; S. Spero, *Morality, Halakha and the Jewish Tradition*, New York 1983, xiii.

⁶ R. David/J. Brierly, *Major Legal Systems in the World Today – An Introduction to the Comparative Study of Law*, 3rd ed., London 1985.

⁷ *Ibid.*, at 456. Professor Rackman wrote: “... it is more accurate to conceive of Judaism as a legal order rather than a religion or faith.”; E. Rackman, *One Man’s Judaism*, New York 1970, at 4. Professor Konvitz, likewise, described Judaism as “a law-centered civilization”; M.R. Konvitz, *Judaism and the American Idea*, Ithaca/London 1978, 53.

⁸ *Supra*, note 6, at 464.

⁹ This distinction was clearly expressed in Matthew’s rule: “*Reddite ergo quae sunt Caesaris, Casari; et quae sunt Dei Deo*”; Matthew, XXII, 21. See generally, A. Maoz, *Ha'Rabbanut u'Vatey Ha'Din – Bein Patish Ha'Hok Lisdan Ha'Ablacha* [The Rabbinate and the Rabbinical Courts Between the Hammer of the Law and the Anvil of Halakha], 16-17, *Shenaton Hamishpat Ha'Ivri: Annual of the Institute for Research in Jewish Law*, The Hebrew University of Jerusalem, 289, 311-312 (*Heb.*), (1991).

¹⁰ A. Maoz, *State and Religion in Israel*, in: M. Mor (ed.), *International Perspectives on Church and State*, Omaha 1993, 239, 242. Cf. A. Kasher, *Minimalistic Judaism*, *The Jerusalem Quarterly*, No. 23, 103, 104 (Fall 1983): “The Jewish religion is a ‘total’ religion. The ideal code of behaviour is a complete one. Whoever attempts to follow the ideal code will find guidance for correct religious behaviour in all the normal areas of human life.”

¹¹ A. H. Freiman, *Diney Yisrael Be'erev Yisrael* [Jewish Law in the Land of Israel], *Ha'arev Calendar*, 1945-46, 110 (*Heb.*); reprinted in: Y. Bazak (ed.), *Ha'mishpat Ha'Ivri u'Medinath Yisrael*:

In the words of Rabbi Isaac Herzog, the first Chief Rabbi of the State of Israel: “In Judaism what would generally be described as civil law is an integral part of the Jewish religion.”¹²

In addition, Judaism is an ethical system, teaching a moral way of life:

Jewish law is a combined system, consisting of law, religion and morality. These three elements are intertwined and interrelated, and form one system, known as *Halakha*, which means a way of life.¹³

After defining Judaism as “[t]he religion of the Jewish people”, Dr. Kohler Kaufmann admits:

A clear and concise definition of Judaism is very difficult to give, for the reason that it is not a religion pure and simple based upon accepted creeds, like Christianity or Buddhism, but is one inseparably connected with the Jewish nation as the depository and guardian of the truths held by it for mankind. Furthermore, it is as a law, or system of laws, given by God on Sinai that Judaism is chiefly represented in Scripture and tradition, the religious doctrines being only implicitly or occasionally stated; wherefore it is frequently asserted that Judaism is a theocracy (*Josephus*, “Contra Ap.” li. 16), a religious legislation for the Jewish people, but not a religion. The fact is that Judaism is a too large and comprehensive force in history to be defined by a single term or encompassed from one point of view.¹⁴

The Hebrew translation of religion is *dat*. The word *dat* originates from the ancient Persian word *data* that means “the given”, referring to law¹⁵. This meaning of

Leket Ma'amarim [The Jewish Law and the State of Israel: Collected Articles], Jerusalem, 1959, 36 (Heb.).

¹² I. Herzog, Moral Rights and Duties in Jewish Law, 41 *Juridical Review*, 60, 61 (1929). In his monograph *Unjust Enrichment: A Study of Private Law and Public Values*, Cambridge 1997, Hanoch Dagan notes: “The term Talmudic civil law refers to the legal – as distinguished from religious – part of the Jewish *Halakha*; but the legal and the religious are inextricably woven together in the *Halakha*”; *ibid.*, at 109. Elon explains: “Religious’ law and ‘legal’ law in the *Halakha* are of one piece”; M. Elon, *Jewish Law – History, Sources, Principles*, 4 vols., B. Auerbach/M. Sykes, (trans.), Philadelphia 1994, I, 111. Professor Elon notes that the distinction between “laws concerning the relationship between people and God” and “laws applicable to relationship in human society”, “are described quite arbitrarily and without any basis in the conceptual framework of the *Halakha*’ as a distinction between ‘religious’ or ‘ritual’ laws and ‘legal’ laws. This is done ‘in a manner reminiscent of the dichotomy in Roman law between *ius divinum* and *ius humanum*, between *Fas* and *Jus*”; *ibid.*, at 93, note 2. See also M. Elon/B. Auerbach/M.J. Sykes, *Jewish Law (Mishpat Ivri): Cases and Materials*, New York 1999, Ch. 2

¹³ Ch. Povarsky, The Enforcement of a Jewish Marriage Contract in a Civil Court: Is Jewish Law a Religious Law?, *Jewish Law Report*, 1, 3 (April 2000).

¹⁴ The Jewish Encyclopedia, I. Singer (managing ed.), New York and London, 1901-1905, 12 vols., VII, 359. However, scholars of Judaic studies criticize Josephus’ observation that Judaism is a religious monarchy, or a theonomy rather than a theocracy; see: A. Kirschbaum, *Theocracy Yehudith* [Jewish Theocracy], 8 *Dinê Israel: Shenaton LeMishpat Ivri u’le’Diney Mishpacha be’Yisrael* [An Annual of Jewish Law And Israeli Family Law], 223, 223-225 (Heb.), (1977). Cf. J. Faur, Some General Observations on the Character of Classical Jewish Literature: A Functional Approach, *XXVIII Journal of Jewish Studies* 37, fn. 44-45, (1977).

¹⁵ *Ha’Encyclopedia Ha’Ivrit*, vol. 13, 238. Cf. O. Yisrael [Treasure of Israel]: An Encyclopedia of all Matters concerning Jews and Judaism, J.D. Eisenstein (ed.), New York 1907-13, 10 vols., vol. 4, 92 (Heb.).

the word *dat* is found in the Bible as well¹⁶. The fact that Judaism is not merely a religious system dealing solely with the relations between man and God may account for the fact that even non-religious people accept its teachings and norms. However, further explanation is needed for the thesis that Judaism has and continues to serve as a valuable source of human rights. The explanation is found in the fact that the civil and ethical tenets of Judaism, no less than its “religious” aspects, stem from divinity. The Ten Commandments include religious norms, such as the forbidding of idolatry; ethical principles, such as the commandment to respect one’s parents; social values, exemplified by the universal day of rest; and moral rules as in the prohibition of adultery and legal provisions, such as the prohibition against false testimony. All these norms were given by God on Mount Sinai and are equally binding. From a religious point of view there is no distinction between the religious and civil norms of *Halakha*.¹⁷

B. Judaism and Human Rights

It might seem surprising that Jewish law, being a religious legal system, incorporates principles of human rights. *Prima facie*, such values and principles contradict a religious normative system in which the ultimate task of the individual is to serve God.¹⁸ This is especially so since Judaism does not propound a concept of rights but adheres to a concept of duties, not only in the relationship between man and God, but also in the relationship between man and man. Indeed, even the term “human rights” is absent in Jewish classic texts,¹⁹ as is the term “rights” in general. Yet, while “Jewish law ... postulates a system of duties rather than a system of

¹⁶ *Ezrah*, 8:30. *Esther*, 2:12; 3:14; 3:15; 4:8.

¹⁷ The interplay between religious and legal norms in *Halakha* may be demonstrated through the controversy as to whether paying a debt is a legal duty or merely a religious one. This controversy is reported in the Babylonian *Talmud* [a collection of commentaries and expositions on the *Mishnah* – a codification of post-Biblical oral law, circa 200 C.E – compiled in Babylon in the sixth century. Reference to the *Talmud*, or to a tractate in general, is always to the Babylonian *Talmud*], Tractate *Ketubboth* [marriage contracts], 86a. One of the Sages expressed the view that a debtor is under a legal obligation to pay his debt, just as a bailee is under an obligation to return the bailed chattel to the bailor. Another Sage rejected this comparison, stating that the bailor’s right to demand the return of the bailed chattel is based on the fact that he retains the title to the chattel. In contrast, a loan is usually spent and does not remain in the hands of the debtor. Therefore, the obligation to pay the debt rests on the debtor’s promise. The obligation to fulfill this promise is based on a religious commandment, as “paying off a debt is a *mitzva* [a religious commandment]”. When asked what the rule is if the debtor abstains from fulfilling this obligation, the Sage answered that just as a rabbinical court may enforce religious obligations, so too the court will compel performance of the religious obligation to pay a debt. See, generally, Elon, *Jewish Law*, *supra*, note 12, vol. I, 117-9.

¹⁸ Y. Leibowitz, *Judaism, Human Values and the Jewish State*, Cambridge 1992, 14. Cf. S.D. Goitein, *Human Rights in Jewish Thought and Life in the Middle Ages*, in: D. Sidorsky, (ed.), *Essays on Human Rights – Contemporary Issues and Jewish Perspectives*, Philadelphia 1979, 247.

¹⁹ M.R. Konvitz, Introduction, in: *ibid.* (ed.), *Judaism and Human Rights*, New York 1972, 13.

rights”,²⁰ the protection of rights might actually be more effective under such a system.²¹ Hence, the suggestion that “[t]he absence of an explicit vocabulary of human rights in the Bible” ought to lead to “the conclusion that the search for this concept in biblical literature is a futile, anachronistic exercise”, has been rejected. Instead, as explained by Professor Herbert Chanan Brich to, “the interpretation of biblical thought requires the translation of concepts rather than of words”.²² Likewise, as David Daube has explained: “There is no rubric human rights in rabbinic literature or in Philo, yet the documentation bearing on the topic constitutes a veritable *embarras de richesses*.”²³

Evidence of this may be found in relation to the right to life. This right is paramount in Western civilization²⁴, nonetheless, an American court stated over a century ago that failing to rescue a two-year old baby seen on a railroad track would not comprise a breach of the law. The bystander “may be styled a ruthless savage and a moral monster”, the learned judge told us, “but he is not liable in damages for the child’s injury, or indictable under the statute for his death”. “With purely moral obligations”, the court noted, “the law does not deal”.²⁵

Similarly, a contemporary writer refers to a person, who while sitting in a lounge chair next to a swimming pool sees a child drowning in the pool. All he has to do in order to save the child “is put down my drink, reach down, grab him by the trunks, and pull him out”, all this “without even getting out of my seat”. Nev-

²⁰ H.H. Cohn, *Human Rights in Jewish Law*, New York 1984, 18. Cf. A. Kirschenbaum, *Equity in Jewish Law – Beyond Equity: Halakhic Aspirationalism in Jewish Civil Law*, Hoboken/New Jersey 1991, 1-8. See also: M. Silber g, *Law and Morals in Jewish Jurisprudence*, 75 Harv. L. Rev. 306, 311-13 (1961), (A revised version of this article is included as chapter 6 in M. Silber g, *Talmudic Law and the Modern State*, B.-Z. Bosker (trans.), M.S. Wiener (ed.), New York 1973; however, references in this essay will be made to the original article); S. Kooly k, *A Comparison of the Underlying Philosophical Assumptions Concerning the Concept of Justice in Kohlberg’s Theory of Moral Development With Those of Jewish Ethical Theory From the Halakhic Perspective* (Boston University School of Education: Doctoral Dissertation), 1978, 71: “Jewish law is duty-oriented. Every legal and moral requirement is a duty ... [A]lthough rights and duties are correlative, the stress is on the duty.”

²¹ Cf. R.M. Cover, *Obligations: A Jewish Jurisprudence of the Social Order*, 5 J. L. & Religion 65 (1987). René Cassin, who was assigned to write the first draft of the Universal Declaration of Human Rights, expressly mentioned the duties of man. This idea met with objections from members of the United Nations Commission on Human Rights, both on liberal and religious grounds; R. Cassin, *From the Ten Commandments to the Rights of Man*, in: S. Shoham (ed.), *Of Law and Man – Essays in Honor of Haim H. Cohn*, New York/Tel Aviv 1971, 13, 14.

²² H.C. Brich to, *The Hebrew Bible on Human Rights*, in: Sidorsky, *supra*, note 18, at 215, 216.

²³ D. Daube, *The Rabbis and Philo on Human Rights*, in: Sidorsky, *ibid.*, at 234.

²⁴ See Y. Dinstein, *The Right to Life, Physical Integrity, and Liberty*, in: L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*, New York 1981, 114: “The right to life is incontestably the most important of all human rights ... The inviolability or sanctity of life is, perhaps, the most basic value of modern civilization.” The Human Rights Committee regarded the right to life, declared in Article 6 of the International Covenant on Civil and Political Rights, the “supreme right of the human being”; Communication No. R. 11/45, submitted on behalf of the husband of *M. F. Suarez de Guerrero v. Columbia* (views adopted on 31 March 1982, GAOR A/37/30, Report HRC, 146, para. 13.1, quoted in A.L. Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, The Hague 1998, 398.

²⁵ *Buch v. Amory Manufacturing Co.*, 69 N.H. 257, 260; 44 A. 809, 810 (1897).

ertheless, “[I]f I do not save him I violate no rights... but would still reveal myself as a piece of moral slime properly to be shunned by all decent people”.²⁶ Possibly, this is not the most extreme formulation of the rule, for several writers share the view that to lend active aid in order to prevent harm from others “confers a mere gratuitous benefit, and therefore cannot have been required by duty, not even by moral duty”.²⁷ It has, moreover, been noted that “[o]fficial sources of American law have done their best to discourage Good Samaritans”.²⁸

No “right to life”, as such, exists in Jewish law, yet the *Torah* commands us: “Neither shalt thou stand against the blood of thy neighbour”.²⁹ This duty takes precedence over almost every other commandment. Maimonides [Moshe ben Maimon, known as the Rambam], the greatest post-Talmudic codifier of Jewish Law, summarized this rule as follows:

If one person is able to save another and does not save him, he transgresses the commandment, neither shalt thou stand idly by the blood of thy neighbour. Similarly, if one person sees another drowning in the sea, or being attacked by bandits, or being attacked by wild animals, and, although able to rescue him alone or by hiring others, does not rescue him; or if one hears heathens or informers plotting evil against another or laying a trap for him and does not call it to the other’s attention and let him know; or if one knows that a heathen or a violent person is going to attack another and, although able to appease him on behalf of the other and make him change his mind, he does not do so; or if one acts in any similar way – he transgresses the commandment, neither shalt thou stand idly by the blood of thy neighbour (*Lev.* 19:19).³⁰

Failure to save human life is tantamount to actively shedding blood. Maimonides goes on to explain that though a breach of this commandment, being an act of nonfeasance, is not punishable in court, “the offence is most serious”.³¹ To emphasize this point he quotes the *Mishna* asserting that “whoever destroys one human life is deemed by Scriptures to have destroyed the whole universe and if a man saves a single soul, Scriptures regard him as having saved the whole world”.³² A

²⁶ J.F. Murphy, *Blackmail: A Preliminary Inquiry*, 63(2) *The Methodist* 168 n. 6 (1980).

²⁷ J. Feinberg, *The Moral Limits of the Criminal Law*, 4 vols., vol. 1: *Harm to Others*, New York 1984, 130.

²⁸ J.P. Dawson, *Rewards for the Rescue of Human Life?*, in: J.M. Ratcliffe (ed.), *The Good Samaritan and the Law*, Garden City 1966, 63.

²⁹ *Leviticus*, 19:16.

³⁰ *The Code of Maimonides [Mishneh Torah]*, *The Book of Torts, Murder and Preservation of Life*, 1:14, Yale Judaica Series, 21 vols., New Haven 1947-1979.

³¹ *Ibid.*, 1:16

³² Tractate *Sanhedrin* [court of justice], 4:5. In several versions reference is made to destroying and saving the life of an Israelite; yet, from ancient manuscripts it seems clear that the original version did not make mention of Israelites and that this was a later addition, possibly as a reaction to Jewish persecution; see: L. Finkelstein, *Mavo le-Masseketot Abot ve-Abot d’Rabbi Natan* (Introduction to the treatises Abot and Abot of Rabbi Natan), New York 1950, 84-87 and note 138 (*Heb.*); S. Goren, *Meshiv Milhama: She’elot u’teshuvot be’inyeney tzava, milhama u’bitahon* [Responsa in Matters of Army, War and Security], 3 vols., Jerusalem 1993, vol. I, 3-6 (*Heb.*). See generally, E.E. Aurbach, ‘*Kol Ha-Meqayyem Nefesh Ahat’ ... Gilgulav shel Nusach, Tahapuchot Ha’tzenzura ve’Iskey Mad-*

rabbinical source of the 15th century even stated: “If one person sees another drowning in the river, or being attacked by a beast of prey or by bandits, and although able to rescue him, does not do so, he is deemed as if he himself killed him.”³³

Professor Aaron Kirschenbaum summarizes the attitude of Jewish law in this matter as follows:

It would be misleading ... to interpret the lack of judicial punishment in Jewish law for the innocent bystander who fails in his duty to come to the rescue of his fellow-man in distress as indicating that the duty is merely moral. Rather, Jewish law views such failure as nonfeasance, a formal offence of inaction (*delictum mere omissivum*) where action is a duty required by law.³⁴

This is so since “in Jewish society ... non-prosecutable injunctions, by their sheer religious weight, were effective in their deterrent power”.³⁵ The Good Sa-

pisim [“whoever saves a single soul” – Development of Version, Vicissitudes of Censorship, and Business Manipulations of Printers, XL *Tarbiz – Riv'on le'Madaey ha'Yahaduth* (A Quarterly for Jewish Studies), 268 (Heb. with English summary, II-III), (1971) (Heb.). See, also, *infra*, text to note 43.

³³ *Sefer Issur Ve'heter* [The Book of Prohibition and Permission], 59:38 (Ferrera, 1555), attributed to Rabbi Jonah Ashkenazi (*Heb.*).

³⁴ A. Kirschenbaum, The Bystander's Duty to Rescue in Jewish Law, 8 *The Journal of Religious Ethics*, 204, 207 (1980). The authorities suggested an alternative, positive, basis for the duty to rescue. The Babylonian *Talmud*, Tractate *Sanhedrin*, 73a states: “Whence do we know [that one must save his neighbor from] the loss of himself? From the verse And thou shalt restore it to him (Deuteronomy 22:2).” As explained by Rabbi Meir Halevi Abulafia, from the 12th and 13th century, “And thou shalt restore him [a person losing his life] to himself.”, *Yad Ramah* [highhand], *Sanhedrin* 73a. See, also *Sifrei Ki Tezei* 22:2. Maimonides did not include, however, this statement in his code. A further alternative for the obligation to preserve life stems from the concept of “You shall live by them (*va-hai ba-hem*)”, Leviticus, 18:5; see A Lichtenstein, “Abortion: A Halakhic Perspective”, 25(4) *Tradition* 3, 5 (1991).

³⁵ Kirschenbaum, *supra*, note 34, at 207. For a comparison of the Jewish and the common law approaches to the duty to rescue and to render aid, see A. Cucchiara Besser/K.J. Kaplan, The Good Samaritan: Jewish and American Legal Perspectives, 10 *J. Law & Religion*, 193 (1993-1994); E. Weinrib, Rescue and Restitution, 1 *S'vara*, 59 (1990); E. Ben Shlomo, *Ha'hova Le'hatzil Ne'fashot* [The Duty to Save Lives], 39 *Hapraklit* [Law Review published by the Israel Bar], 414 (1990) (*Heb.*). For a comprehensive analysis of the legitimacy of bad Samaritan laws, see J. Feinberg, The Moral Limits of the Criminal Law, *supra*, note 27, vol. I, Ch. 4: “Failure To Prevent Harm”, 126-185. See, also, A. Ashworth, The Scope of Criminal Liability for Omissions, 105 *L. Q. Rev.*, 424 (1989); G. Williams, Criminal Omissions – The Conventional View, 107 *L. Q. Rev.* 86 (1991); M.A. Menlowe/A.M. Smith, (eds.), *The Duty to Rescue: The Jurisprudence of Aid*, Aldershot 1993; T. Nagel, *The Possibility of Altruism*, Oxford 1970; M.S. Moore, *Act and Crime: The Philosophy of Action and Its Implication for Criminal Law* (Oxford 1993); M.A. Menlowe, *The Philosophical Foundations of a Duty to Rescue*, in: M.A. Menlowe/A. McCall Smith (eds.), *The Duty to Rescue: The Jurisprudence of Aid*, Aldershot 1993, 5; E.J. Weinrib, The Case for a Duty to Rescue, 90 *Yale L. J.*, 247 (1980); R.J. Lipkin, Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Duty to Rescue, 31 *UCLA L. Rev.* 252 (1983); A.D. Wooley, A Duty to Rescue: Some Thoughts on Criminal Liability, *Va. L. R.* 1273 (1983); S. Freeman, Criminal Liability and the Duty to aid the Distressed, 142 *U. Pen. L. Rev.*, 1455 (1994); S.J. Heyman, Foundations of the Duty to Rescue, 47 *Vand. L. Rev.* 673 (1994). For a survey of common law, see: A. McCall Smith, *The Duty to Rescue and the Common Law*, in: M.A. Menlowe/A. McCall Smith (eds.), *ibid.*, at 55; C.O. Gregory, *The Good Samaritan and the Bad: The Anglo-American Law*, in: M. Ratcliffe (ed.), *supra*, note 28, at 23. Continental law differs from common law in advocating a duty

maritan in the New Testament, on the other hand, while aiding the wounded man on the road to Jericho³⁶, merely performed a moral duty. Referring to this parable, Chief Justice Alonzo P. Carpenter wrote:

The priest and the Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might, and morally ought to have prevented or relieved.³⁷

Analyzing the difference between the Jewish and the Christian attitudes in inspiring a duty to rescue, Judge Neal Hendel wrote:

There is, certainly, a difference between the inspiration of the Good Samaritan and that of "Neither shalt thou stand against the blood of thy neighbour". The Good Samaritan is a notorious important parable with a clear message, which had influence for generations; yet it is no more than a parable. "Neither shalt thou stand against the blood of thy neighbour" is a religious commandment and a law within a legal system.³⁸

It is essential to apprehend the unique interplay of religious commandment and legal duty in Judaism. Relating to this phenomenon Kirschenbaum wrote:

The glory of Jewish religious law resides in the conversion of acts of love and mercy usually left to the individual's kindness and the promptings of his heart into positive legal duties.³⁹

The legal nature of the duty to rescue can be proven, *inter alia*, by the fact that the rescuer has a legal right to recover from the rescued person the losses incurred by him as a result of the rescue operation.⁴⁰ He is, moreover, exempted from indemnifying for damages created because of the rescue operation.⁴¹ Furthermore, being a religious commandment, the duty to save life is subject to physical coercion to compel the fulfillment of the duty.⁴²

Summarizing the attitude of Judaism to the sanctity of life, Rabbi Shlomo Goren, the founding chaplain of the Israeli Defense Forces and a former Chief Rabbi of the State of Israel, wrote:

to rescue; see A.W. Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in: Ratcliffe (ed.), *ibid.*, at 91; A. Tunc, *The Volunteer and the Good Samaritan*, in: Ratcliffe (ed.), *ibid.* at 43; A. Cadoppi, *Failure to Rescue and the Continental Criminal Law*, in: Menlowe/McCall Smith (eds.), *ibid.*, at 93. Cf. *The Failure to Rescue, A Comparative Study*, 52 Col. L. Rev., 631 (1952).

³⁶ Luke, 10:30.

³⁷ *Buch v. Amory Manufacturing Co.*, *supra*, note 25.

³⁸ N. Hendel, *Hok Lo Ta'amod al Dam Re'echa. 5758-1998: Hash'ra'a uMetziuth* [The "Thou Shall not Stand Passive" Law – Inspiration and Reality], 16 *Mechkerey Mishpat* [Bar-Ilan Law Studies], 229, 268 (Heb.), (2001).

³⁹ Kirschenbaum, *supra*, note 20, at 4.

⁴⁰ Kirschenbaum, *supra*, note 34, at 207-209. See, however, tractate *Kiddushin*, 8b indicating that a rescued woman is exempt from recovering her rescuer's expenses since the latter merely executed a legal duty.

⁴¹ *Ibid.*, at 214-16.

⁴² *Ibid.*, at 216. Moreover, one who saves life is exempted from all ethical, civil, religious and ritual duties which interfere with his mission; *ibid.*, at 213.

Undoubtedly, human life is the supreme value in Jewish *Torah* – the *Halakha* – and in the morals of the prophets. The subject is not the life of the Israelite, but the life of all human beings that have been created in the image of God.⁴³

Professor Robert M. Cover provides another illuminating demonstration of the advantages of Jewish jurisprudence of duties over the Western paradigm of rights.⁴⁴ In his essay on obligations Cover refers to the “right of education” in American law and concludes that “[t]aken alone it only speaks to a need”.⁴⁵ This is so since “it is not even an intelligible principle unless we know to whom it is addressed”.⁴⁶ “Jewish legal materials”, on the other hand, “never speak of the right or entitlement of the child to an education”. Yet, Jewish law imposes an “obligation incumbent upon various providers” – the father, the teacher, the wealthy and the community as a whole – “to make the education available”. In such a system, the right to education is not declared, yet it is guaranteed.⁴⁷

What accounts for the fragile status of these rights in Western jurisprudence is that we do not speak of rights in the strict sense, but rather of rights in the generic sense. What we actually have in mind is what Professor Wesley Newcomb Hohfeld called “privileges”,⁴⁸ and Sir John Salmond named as “liberty”.⁴⁹ Privilege or liberty means that the individual is “free or at liberty to conduct himself in a certain matter as he pleases”.⁵⁰ This does not impose on others any duty, but rather what Hohfeld called a “no-right”, meaning a “legal relation of a person in whose behalf society commands nothing of the other”.⁵¹ Therefore the baby’s right to live, in the case of *Buch v. Amory*⁵², did not impose a duty on the bystander to save him from the oncoming train, just as the “right of education” does not impose in itself a duty to provide for education.

In Cover’s words:

⁴³ Goren, *supra*, note 32, at a.

⁴⁴ Cover, *supra*, note 21. This essay followed his celebrated work *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 Harv. L. Rev., 4 (1983).

⁴⁵ *Ibid.*, at 71.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.* cf. H.C. [High Court], 1/67 *Mashi’el v. Minister of Education and Culture*, 21(3) P.D. 384, 387; N. Rakover, *Modern Applications of Jewish Law*, 2 vols., in: *ibid.* (ed.), Jerusalem 1992, I, 228, at 229, *per* Justice Yitzhak Kister: “The Jewish people recognized the duty of parents to educate their children ... as well as the duty of the public to set up schools for children ... among Jews a parent had the right to demand proper education for his young children and the public authorities were under an obligation to make suitable arrangements.”

⁴⁸ See W.N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L. J. 16, 32 et seq. (1913); reprinted with some corrections and alterations in: D. Campbell/P. Thomas (eds.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning by Wesley Newcomb Hohfeld*, Aldershot 2001, 14 et seq.

⁴⁹ See Salmond on *Jurisprudence*, 12th ed., P.J. Fitzgerald (ed.), London 1966, 225, note (m). See also, A.H. Campbell, *Some Footnotes to Salmond’s Jurisprudence*, 7 C.L.J. 206 (1939-1941).

⁵⁰ A.L. Corbin, *Legal Analysis and Terminology*, 29 Yale L. J. 163, 167 (1919-20); reprinted in J. Hall (ed.), *Readings in Jurisprudence*, Indianapolis 1938, 471, 476.

⁵¹ Corbin, *ibid.*, at 168 (477 in Hall’s book).

⁵² *Buch v. Amory Manufacturing Co.*, *supra*, note 25.

The jurisprudence of rights has proved singularly weak in providing for the material guarantees of life and dignity flowing from the community to the individual. While we may talk of the right to medical care, the right to subsistence, the right to an education, we are constantly met by the realization that such rhetorical tropes are empty in a way that the right to freedom of expression or the right to due process are not. When the issue is restraint upon power it is intelligible to simply state the principle of restraint.⁵³

Likewise, in Judaism one cannot speak of rights as correlative to the duties imposed by that system. This is so since “all duties are to God”, and therefore the correlative right “must be said to be in God”. One therefore has no claim “as of right ... for benefits received, or even deserved, or due”.⁵⁴ In a duty-oriented system, “[t]he answer to the question, What are my duties?, is that they are what God has commanded. The answer to the question, Why should I perform my duties?, is that if I do not, I shall be a stranger to God”.⁵⁵ In a jurisprudence of duties the correlation of rights with duties is broken “by abolishing right as an operative category in the jurisprudence”.⁵⁶ In such jurisprudence the concern is not the damage to the complainant resulting from the breach of duty, but rather the duty of the violator. The emphasis is on the violator’s “religious-moral duty”.⁵⁷ In such a system, “[a] complainant goes to court, not because she is enforcing a right to compel another to fulfill her mirror-image duty, but because she has a duty to report the other person’s failure to the court”.⁵⁸ Under this system, “[t]he creditor receives his money almost incidentally, as a secondary result of the performance of this duty”, since “the duty is the primary thing and the right secondary, if not less than that”.⁵⁹ Yet, the crux of the matter is that because of the emphasis put on the performance of a duty, the complainant enjoys a far better chance of her “right” being honored, than in a rights-oriented jurisprudence.⁶⁰

⁵³ Cover, *supra*, note 21, at 71.

⁵⁴ L. Henkin, Judaism and Human Rights, 25 *Judaism* 435, 436 (1976).

⁵⁵ A.J. Jacobson, Hegel’s Legal Plenum, 10 *Cardozo L. Rev.*, 877, 892 (1989).

⁵⁶ A.J. Jacobson, The Idolatry of Rules: Writing Law According to Moses, With Reference to Other Jurisprudences, 11 *Cardozo L. Rev.*, 1079, 1127 (1990).

⁵⁷ Silberberg, *supra*, note 20, at 312.

⁵⁸ Jacobson, *supra*, note 56, at 1127.

⁵⁹ Silberberg, *supra*, note 20, at 312-13 (referring to the duty to pay a debt; see, *supra*, note 17).

⁶⁰ Henkin asserts, moreover, that human rights, in the sense of “legal rights” are “rights against society”, while rights in Judaism are “between individuals within society”, and one has no “valid claims against society”; Henkin, *supra*, note 54, at 436. However, as we have seen, “rights against society” are, in most cases, negative rights: the right of the individual not to be enjoined by society from exercising the “rights”. Moreover, as we have seen, in the case of the duty to provide for education (*supra*, note 47), duties may be imposed on the community at large to provide for the needs of its members and those members may demand the fulfillment of those duties.

C. Judaism, Human Rights and Western Philosophy

Western notions of human rights and democratic values have derived much of their substance from the Old Testament as well as from classic Judaic sources. Thus, as William Lecky wrote in his famous work *History of the Rise and Influence of the Spirit of Rationalism in Europe*:⁶¹

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

The American Bill of Rights is based largely on the constitutions of the colonies which themselves drew extensively from the Old Testament.⁶² The Puritan settlers of the first colonies of Plymouth and Massachusetts Bay chose the ancient laws of the Hebrews as their governing legal system. An American jurist colorfully depicted Jewish law sailing to America “aboard the Mayflower and the Alberta” and striking “deep roots in rocky New England”.⁶³ A writer of that period asserted that “the people of Massachusetts adopted the laws of Moses”.⁶⁴ Moreover, it has been stated that “[t]he legacy of Hebrew laws ... was to remain part of the American heritage”.⁶⁵ A contemporary American jurist states:

The fundamental liberties of man – as they are stated in the Bill of Rights or in the Universal Declaration of Human Rights – find their roots in the narratives and prophets of the Hebrew Scriptures and the teachings they have generated over the centuries.⁶⁶

Another American jurist went so far as to declare that “[t]he Hebrew Bible [serves] as the primary source of American civilization”.⁶⁷

Justice Louis Brandeis of the United States Supreme Court was equally bold in his attribution, stating that “twentieth century ideals of America had been the age-old ideas of the Jew”.⁶⁸

⁶¹ W. Lecky, *History of the Rise and Influence of the Spirit of Rationalism in Europe* (New York: D.A. Appleton, rev. ed., 1871), Vol. II, 168.

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

⁶³ B.J. Meislin, *Jewish Law in American Tribunals*, New York 1976, IX.

⁶⁴ H.St.G. Tucker, *Commentaries on the Laws of Virginia*, Winchester 1831, 1, 6-7.

⁶⁵ Meislin, *supra*, note 63, at 28. See, also, W.C. Ford, *Cotton’s Moses His Judicials*, in: Massachusetts Historical Society, *Proceedings* (Series 2), 1902, vol. xvi, at 184. Cf. R.J. Rushdoony, *The Institutes of Biblical Law*, Phillisburg, N. J., 1973, at 79-91. B.J. Meislin, *The Role of the Ten Commandments in American Judicial Decisions*, in: A.M. Fuss (ed.), *Jewish Law Association Studies III, The Oxford Conference Volume*, Atlanta, Ga. 1987, 187; *ibid.*, *Jewish Law in America*, in: B.S. Jackson (ed.), *Jewish Law in Legal History and the Modern World*, Leiden 1980, 147; E. Rakman, *The Federal Constitution of the United States and the Jewish Heritage*, in: *ibid.*, *Modern Halakha For Our Time*, Hoboken 1995, 144-151; J.S. Auerbach, *Rabbis and Lawyers: The Journey From Torah to Constitution*, Bloomington 1990, 3-25.

⁶⁶ Konvitz, *supra*, note 19, at 17.

⁶⁷ Auerbach, *supra*, note 65, xvii.

⁶⁸ A. Gal, *Brandeis of Boston*, Cambridge, Mass. 1980, 126.

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

... the Jewish legal tradition has come to represent in this scholarship precisely the model of law that many contemporary American theorists propose for American legal society.⁶⁹

Extensive references to Biblical law as well as to classic Jewish sources are found in American judicial decisions.⁷⁰ In an article dealing with “Maimonides and American Case Law”⁷¹, Bernard Meislin noted that “a computerized search of recent American legal decisions retrieves citations of Maimonides as authority for American legal propositions in the fields of criminal law, matrimonial law, bailment, arbitration, real estate, evidence and even corporate litigation”. He concludes: “Despite divergent legal systems, despite a sea change in culture and a different language, *Halakha* as ordered by Maimonides, speaks to American judges of the late twentieth century with a persuasive voice ...”⁷²

The first settlers in America brought the seeds of Biblical law from their English homeland. Jewish law had played a major role in the old world. Jewish rabbinical sources were cited in English courts and consulted by the English legislature as early as in the sixteenth century.⁷³ The theoretical basis for the application of Biblical law was supplied by a book from the sixteenth century, *Examen Legum Angliae: Or the Laws of England Examined by Scripture, Antiquity and Reason*.⁷⁴ In this book the author distinguishes between two sets of laws in the Bible: laws which deal with religious worship and laws which relate to the Kingdom of Israel. The former are designated for Jews only. The latter, consisting of judgments which are “Laws of Common Justice and Equity belonging to the moral law”, have been given to the Jews as human beings and apply to non-Jews as well, and as such were also to be applied in England.⁷⁵ The author refers to a successful experiment con-

⁶⁹ See S. Last Stone, In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory, 106 Harv. L. Rev. 813, at 819 (1992).

⁷⁰ See Meislin, Jewish Law in America, *supra*, note 65; *ibid.*, The Role of the Ten Commandments, *supra*, note 65; *ibid.*, The Ten Commandments in American Law, in: N. Rakover (ed.), Jewish Law and Current Legal Problems, Jerusalem 1984, 109. See also, D.A. Ashburn, Appealing to a Higher Authority? Jewish Law in American Judicial Opinions, 71 U. Detroit Mercy L. Rev. 295 (1994).

⁷¹ In N. Rakover (ed.), Maimonides as Codifier of Jewish Law, Jerusalem 1987, 269.

⁷² *Ibid.*, at 270.

⁷³ See I. Abrahams / C.E. Saylor, The Purchase of Hebrew Books by the English Parliament in 1647, Jewish Historical Society of England: Transactions, 63 (1918). This occurred notwithstanding the fact that the Jews had been expelled from England under a Royal order (*Statutum de Judaismo*) issued by King Edward I in 1275 and repealed only in 1656.

⁷⁴ Published in 1656, attributed to A. Boats. Excerpts from the book were published in: M. De Wolfe, Readings in American Legal History, Cambridge 1949.

⁷⁵ Cf. the division of God’s commandments, as specified in Deuteronomy 6:1: “Now these are the commandments, the statutes, and the judgments, which the Lord your God commanded to teach you.” While commandments and statutes are understood to be ordinances of religious character, “judgments ... comprise the civil and criminal laws which every society must enact to protect its members as individuals, and itself as a whole. These involve rules to avoid anarchy, to avoid theft,

ducted by King Alfred the Great at the end of the ninth century to enforce the laws of Moses throughout his kingdom. The king regarded the judgments specified in chapters 20-23 of *Exodus* “the most apt and compatible for the government of his kingdom”.⁷⁶

Reference to Jewish law may be found in the trial of James Nayler before the second Parliament of Oliver Cromwell, in 1656.⁷⁷ In this case Nayler was found guilty of “horrid blasphemy” and after heated debates Parliament voted against imposing death penalty upon him. Those who were in favour of imposing the death penalty relied on “the law of God”, as reflected in the Biblical story of “the son of an Israelitish woman, whose father was an Egyptian”, who “blasphemed the name of the Lord and cursed”. Whereupon God ordered Moses: “He that blasphemeth the name of the Lord, he shall surely be put to death.”⁷⁸ However, the majority in Parliament preferred the opinion submitted by Lord Commissioner Whitbloee. Whitbloee followed the interpretation of “the Rabbins” with whom “[Hugo] Grotius agrees”. According to this approach, hardly supported by the Biblical text, “every cursing of God was not punishable with Death”, but only “if Jehovah were named ... and so expressly and immediately dishonoured”.⁷⁹ As to the application of the laws of *Torah* to non-Jews in general, the following distinction was suggested:

Very learned divines are of the opinion ... That no part of the law of the Jews doth bind any other nation, but that part of it only which is moral. The Laws of the Israelites were by the wisdom of God, suited to the inclination and disposition of that people; and

bloodshed, and oppression of the weak; rules to promote the welfare of the members of that society so far as is mutually beneficial.”; A.J. Cohen, *An Introduction to Jewish Civil Law*, Jerusalem 1991, at 8. John Selden, the notorious seventeenth century Hebraist, endeavoured “to demonstrate that the laws of the Jews, given in the Pentateuch and interpreted in the *Talmud* and in Maimonides’ *Mishneh Tora*, constitute the historical core of the natural law common to all mankind”; F. Oszalberger, *The Jewish Roots of Western Freedom*, 13 *Azure*, 88, 95 (2002). In his opinion, “[t]he law given by God at Sinai was natural law itself, hence the Israelite laws deriving from it belong not in the realm of canon law but in that of civil law in the most proper sense”; *ibid.*, at 96.

⁷⁶ Professor Ogg wrote that King Alfred drew up his code “on the basis of old customs and the laws of some of the earlier Saxon kings”, F.A. Ogg, (ed.), *A Source Book of Mediaeval History: Documents Illustrative of European Life and Institutions from the German Invasions to the Renaissance*, New York 1907, (reprinted, New York 1972), at 104. Rushdony criticizes Ogg and accuses him of “ignorance of Biblical law”, since the laws Ogg referred to were of Biblical, rather than pagan, origin; Rushdony, *supra*, note 65, at 787. However, as Boots noted in his book, the Laws of Moses were the source of Saxon, Danish and Norman’s laws, which were in effect in England, *supra*, note 74, at 87-88.

⁷⁷ Proceedings in the House of Commons against James Naylar for Blasphemy, and other Misdemeanors: 8 Charles II A.D. 1656, Commons’ Journals, 6 Harleian Miscellany, 399; Hargrave’s Complete Collection of State Trials and Proceedings for High Treason, and Other Crimes and Misdemeanours in Great Britain, London, 4th edition, 1775-81, 11 vols. Bound in 6 [Folio Edition], vol. 11, 265; Cobbett/Howell, Complete Collection of State Trials and Proceedings for High Treason, and Other Crimes and Misdemeanours from the Earlier Period to the Year 1783, 33 vols., London, 1816-28 [Octavo Edition], vol. 5, 801, at 823-24.

⁷⁸ *Leviticus*, 24:10-16.

⁷⁹ Hargrave, *supra*, note 77, at 274; Cobbett/Howell, *supra*, note 77, at 824.

others (as there is great difference between the inclinations of people) must have different laws; and non hath ever yet affirmed, that this or that punishment of any offence is moral, though the offence itself be so.⁸⁰

The reliance on Biblical and other Judaic sources is not unique to American scholars. While stating that “[t]he spirit prevailing during the preparation of the Universal Declaration of Human Rights was completely at variance with any intention of drawing deliberate and direct inspiration from the Ten Commandments”, and while “any relationship between the Universal Declaration ... and the Decalogue as the first formulation of man’s basic duties ... is not a formal one”, René Cassin admits that it “does exist” and “its reality is evident”⁸¹, for “the Decalogue ... is the point of departure, and the present Charter ... is our temporary point of arrival”.⁸² In a Chalcedon study it was stated, that “Biblical law played a central role in the shaping of Western civilization as it entered society from still another source, the Jews of Europe”.⁸³

D. Human Dignity

A major crossroad where Western philosophy intersects with Judaism is human dignity. This is, as Kirschenbaum put it, “the rock upon which all human rights build their foundation”.⁸⁴ Human dignity is at the core of central international instruments including the Charter of the United Nations, 1945, the Universal Declaration of Human Rights, 1948, the United Nations Covenant on Economic, Social and Cultural Rights and the United Nations Covenant on Civil and Political Rights, both from 1966. These documents regard human rights as deriving from the “inherent dignity” of the human being.⁸⁵

Several national constitutions, particularly those of recent origin such as the German *Grundgesetz*, explicitly recognize human dignity. Article 1 of the *Grundgesetz*, entitled “Protection of Human Dignity” provides:

⁸⁰ H a g r a v e, (note 77) at 274; C o b b e t t / H o w e l l, (note 77) at 823.

⁸¹ C a s s i n, *supra*, note 21, at 14.

⁸² *Ibid.*, at 22. When asked about the sources from which he derived the principles of the Universal Declaration of Human Rights, René Cassin is said to have answered that he had just rephrased the Ten Commandments; A. R u b i n s t e i n, *Hamishpat Ha’Konstitutzioni shel Medinat Yisrael* [Constitutional Law of the State of Israel], 2 vols., 5th ed., Jerusalem/Tel-Aviv 1996, 907 (*Heb.*). R u b i n s t e i n makes no reference to any specific source for this anecdote; it is certainly not supported by C a s s i n’s article. For the influence of Jewish legal ideas and practices from ancient times to the late Middle Ages, see J. J. R a b i n o w i t z, *Jewish Law – It’s Influence on the Development of Legal Institutions*, New York 1956.

⁸³ R u s h d o o n y, *supra*, note 65, at 787. Cf. O z - S a l z b e r g e r, *supra*, note 75, at 115: Jewish chromosomes may be found in the genome of Western political thought.

⁸⁴ A. K i r s c h e n b a u m, Book Review: Judaism and Human rights, 2 I.Y.H.R. [Israel Yearbook on Human Rights], 357, 358 (1972).

⁸⁵ See, generally, H. H. C o h n, On the Meaning of Human Dignity, 13 I.Y.H.R. 226 (1983).

(1) The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and justice in the world.

Commenting on this article, Donald P. K o m m e r s wrote:

Article I, appropriately, is the cornerstone of the Basic Law ... The principle of human dignity, as the Constitutional Court has repeatedly emphasized, is the foundation of all guaranteed rights.⁸⁶

Constitutions, which do not expressly refer to human dignity, are not necessarily indifferent to it. An American writer stated firmly:

The basic value in the United States Constitution, broadly conceived, has become a concern for human dignity.⁸⁷

Another writer noted:

Understood abstractly enough, the right to human dignity would gain unanimous adherence in the United States and in many if not all other contemporary societies.⁸⁸

As with human rights, the term “dignity” is absent from Jewish writings and in fact there is no parallel term in Hebrew. While the Hebrew term *kavod* literally means “honor”, it is accurate to translate the term *kevod ha-beriot* (“the honor of human creatures”), as used by the sages, to mean human dignity.⁸⁹ This value, which underlies the teachings of Judaism, is supreme and even supersedes the commandments of God.⁹⁰ It is, moreover, essential to note, that the term “C r e a t u r e” is normally employed “where the condition of man as such, irrespective of nation, rank, or the like, is in question”.⁹¹

Human dignity stems from creation itself. We are told in *Genesis*⁹² that man was created in the very image of God. Thomas P a i n e regarded this Biblical source as proof “that the equality of man, far from being a modern doctrine is the oldest on record” and relied on it to support the principle in the American Declaration of Independence that all men are created equal.⁹³

⁸⁶ D.P. K o m m e r s, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed., Durham 1997, 20. Cf. O. L a g o d n y, *Human Dignity and Its Impact on German Substantive Criminal Law and Criminal Procedure*, 33 *Isr. L. R.* [*Israel Law Review*], 575 (1999): “Human dignity is the article with which our constitution begins. The following guarantees may be seen ... as an emanation of human dignity ...”.

⁸⁷ W.F. M u r p h y, *An Ordering of Constitutional Values*, 53 *South. Cal. L. Rev.* 703, 745 (1980).

⁸⁸ P. B r e s t, *Accommodation of the Majoritarianism and Rights of Human Dignity*, 53 *South. Cal. L. Rev.* 761, 762 (1980).

⁸⁹ C o h n, *supra*, note 85, at 247. See, generally, N. R a k o v e r, *Gadol Kevod Ha'Briyoth: Kevod Ha'adam Ke'Erech Al*, Jerusalem 1998 (*Heb.*). The English title of the book – *Human Dignity in Jewish Law – Hardly Conveys Its Message*. The literal translation of the Hebrew title would be: “Great is the Honor of Human Creatures: Human Dignity as a Super-Value.”

⁹⁰ Babylonian *Talmud*, Tractate *Berakhot* [benedictions], 19b.

⁹¹ D a u b e, *supra*, note 23, at 234.

⁹² *Genesis*, 1:26-27.

⁹³ T. P a i n e, *The Rights of Man*, London/Toronto 1915, 43.

This succinct Biblical statement may well be regarded as the basis of human rights in Judaism. The variety of interpretations accorded to this verse cover most aspects of human dignity and freedom. The full verse reads as follows:

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

The Psalmist described man as not worthy to be within the contemplation of God, yet he asserted:

[T]hou hast made him a little lower than God,⁹⁴ and thou crownest him with glory and majesty.⁹⁵

Ben A z z a i, a fourth century Jewish scholar, inferred from this verse that all descendants of Adam – regardless of religion, race or color – bear the imprint of divine creation and divine likeness and must be treated accordingly.⁹⁶

It is worthwhile mentioning a traditional commentary on why God created a single man, as opposed to a community of people: "Therefore each one ought to say: 'It is for me alone that the world was created.'" This idea is given practical application in the caution administered by the Jewish religious courts to witnesses in criminal cases. The Court must warn the witnesses not to give hearsay or speculative evidence:

Man was created single to teach that whoever destroys one human life is deemed by Scriptures to have destroyed the whole universe and if a man saves a single soul, Scriptures regard him as having saved the whole world.⁹⁷

Another interesting reason given for the creation of a single individual is "that no one may be heard to say to another: 'My father was greater than yours.'" ⁹⁸ This reminds us of another statement in the Bible: "Have we not all one father? Hath not one God created us?" ⁹⁹ Professor Boaz C o h e n blends this verse with Philo Judaeus [Philo of Alexandria]'s philosophy and states: "As for the Republic of humanity, Judaism teaches that all citizens have one father and one God created them all." ¹⁰⁰

⁹⁴ Interestingly, the King James translation could not accept the idea that man is just a little lower than God and replaced God with "the angels". On the other hand, Saadia G a o n, the great rabbinical scholar of the tenth century, regarded man as the goal of creation: "[T]he primacy of man holds away over the entire range of the creation, angels included." This is so since man has a free will, while "the angels ... are not free agents" and are not worthy of being commanded by God; see N. L a m m, *Man's Position in the Universe, Faith and Doubt: Studies in Traditional Jewish Thought*, New York 1971, 83, 89-91, (ch. IV), based on Saadia G a o n, *Emunot ve'Deot – The Book of Beliefs and Opinions*, Yale Judaica Series, vol. 1, S. Rosenblatt (trans.), New Haven 1948, IV: Introduction.

⁹⁵ *Psalms*, 8:5.

⁹⁶ *Sifra* [a collection of interpretations of *Leviticus*, compiled in the fourth century], *Kedoshim* [holy], 4:12.

⁹⁷ *Mishnah*, Tractate *Sanhedrin*, 4:5. Cf. the version in M a i m o n i d e s, *Book of Judges*, 16b.

⁹⁸ *Mishnah*, Tractate *Sanhedrin*, 4:5.

⁹⁹ *Malachi*, 2:10.

¹⁰⁰ B. C o h e n, *Law and Ethics in Light of Jewish Tradition*, in: B. Cohen, (ed.), *Law and Tradition in Judaism*, New York 1969, 182, 234.

The statement has more than philosophical value, as God commanded the Children of Israel:

“One law and one manner shall be for you and for the stranger that sojourneth with you.”¹⁰¹

The idea of equality is expressed in the description of the covenant between God and the Children of Israel. Abba Hillel Silver wrote:

Judaism was essentially a democratic faith, a people’s religion. The covenant was made with “all the men of Israel, from the hewer of your wood to the drawer of your water” (*Deuteronomy*, 29:11). The *Torah* was given to all and in sight of all (*Exodus*, 19). The entire people was summoned to become a “kingdom of priests and a holy nation” (*Exodus*, 19:6) ... On the verse: “You stand this day all of you before the Lord your God, your heads, your tribes, your elders, and your officers, all the men of Israel” (*Deuteronomy*, 29:10), a *Midrash* expounds: God says: “Even though I have appointed over you heads and judges, elders and officers, you are all equal in my sight.” This is the meaning of “all the men of Israel” – all are alike (*Midrash Tanhuma*).¹⁰²

The rule of law and equality before the law are universally applied in Judaism. We find, in Jewish ancient sources, two versions of a story relating to the status of kings in judicial proceedings.

The Babylonian *Talmud* tells of Alexander Yannai, a most powerful king, whose slave stood trial for killing a person. Rabbi Simeon Ben Shetach, President of the *Sanhedrin*, the ancient Jewish Supreme Court, summoned the king to be present at the trial. The king appeared in court yet rejected Ben Shetach’s demand to stand during the trial. Rabbi Ben Shetach reprimanded the king, saying:

Stand up on thy feet, King Jannai, and let the witnesses testify against thee; yet it is not before us that thou standest, but before Him who spoke and the world came into being, as it is written [in the *Torah*], “Then both the men between whom the controversy is, shall stand etc” (*Deuteronomy*, 19:17).¹⁰³

However, the king refused to stand up saying he will not obey Rabbi Simeon Ben Shetach, but will do what the other members of the court will decide. Thereupon, the *Talmud* tells us, Ben Shetach turned his eyes on his colleagues, yet they all looked down at the ground out of fear of the king.¹⁰⁴ Ben Shetach reacted with temper, saying: “Are ye wrapped in thoughts? Let the Master of thoughts [God] come and call you to account.” Instantly, “Gabriel [the angel] came and smote them to the ground, and they died”. Following this episode it was enacted: “A King may neither judge nor be judged.”¹⁰⁵

¹⁰¹ *Numbers*, 15:16. See also, *Exodus*, 12:49.

¹⁰² A.H. Silver, *Where Judaism Differed*, New York 1956, 275-6. Cf., Konvitz, *supra*, note 7, Ch. 3: “Judaism and the Democratic Ideal”, 69-90.

¹⁰³ Tractate *Sanhedrin*, 19a. The translation is from the Soncino edition by J. Shechter, I. Epstein, (ed.), 18 vols. (1935-1952). However, the transliteration of the names is that of Encyclopaedia Judaica.

¹⁰⁴ Another explanation put forward for their behaviour is that most of them “were members of the Sedducean or the king’s party”; Konvitz, *supra*, note 7, at 61.

¹⁰⁵ Tractate *Sanhedrin*, *supra*, note 103.

It is clear why this traumatic occurrence caused the sages to grant immunity to kings. It is less obvious why the kings were enjoined from sitting as judges in trials. In order to understand the reason for that we must look at the beginning of the section. It is stated there that this rule applies to the kings of Israel only, but not to the kings of the House of David. The sages learned this from the words of Jeremiah the prophet: "O House of David, thus saith the Lord, execute justice in the morning and deliver him that is spoiled out of the hand of the oppressor ..." ¹⁰⁶ And how do we know that they may be judged? The *Talmud* explains: "... and if they may not be judged, how could they judge?" This logic is in accordance with Resh Lakish's statement: "Adorn yourself first and then adorn others." ¹⁰⁷

A somewhat different version of this story appears in *Midrash Tanhuma*, a homiletic interpretation of the Scripture, attributed to Rabbi Tanhum Bar Abba, from the second half of the fourth century. According to that source a plaintiff asked Rabbi Simeon Ben Shetach to summon a Hasmonite king for a civil suit. Ben Shetach checked with his colleagues whether they would try the king without fear. Upon their positive answer he summoned the king, who refused to stand and answer the claim. The story about the angel who beat the members of the court to death has here an addendum: "Immediately the king was shocked. Immediately Simeon Ben Shetach said to him: 'Stand up on thy feet, and answer the claim, yet it is not before myself that thou standest, but before Him who spoke and the world came into being, as it is written: 'Then both the men between whom the controversy is, shall stand before the Lord.' Instantly he raised to his feet and was sued.'" ¹⁰⁸

This episode was brought by the *Midrash* as a demonstration of the Biblical warning against discrimination in justice and against preferential treatment. This is expressed in the prohibition of having the poor litigant stand while the rich counterpart remains sitting. The *Midrash* concludes: "The judges must regard as if the Divine Presence sits among them, as it is written: 'He judgeth among the gods.'" ¹⁰⁹

¹⁰⁶ *Jeremiah*, 21:12.

¹⁰⁷ Tractate *Sanhedrin*, *supra*, note 103.

¹⁰⁸ *Midrash Tanhuma*, *Shoftim* [Judges], 7.

¹⁰⁹ *Psalms*, 82:1. A third version of this story appears in Josephus Flavius' book *Jewish Antiquities*. According to Josephus, the episode told in the *Talmud* related to Herod, the ruler of the Galilee, who was summoned by King Hyrcanus to court to stand trial for committing murder. Yet, Sextus, the governor of Syria, pressured the king to acquit Herod of the charge. The governor's letter indeed "gave Hyrcanus a pretext for letting Herod go without suffering any harm from the Synhedrion [Sanhedrin]". Josephus tells that Herod appeared before the Sanhedrin escorted by his troops, and frightened both the witnesses and judges. Samaias, a member of the Sanhedrin arose and said: "Fellow councilors and King, I do not myself know of, nor do I suppose that you can name, anyone who when summoned before you for trial has ever presented such an appearance. For no matter who it was that came before this Synhedrion for trial, he has shown himself humble and has assumed the manner of one who is fearful and seeks mercy from you ... But this fine fellow Herod, who is accused of murder and has been summoned on no less grave a charge than this, stands here ... with his soldiers round him, in order to kill us if we condemn him as the law prescribes, and to save himself by outraging justice. But it is not Herod whom I should blame for this or for putting his own interests above the law, but you and the king, for giving him such great licence. Be assured, however, that God is great, and

God himself is subject to the rule of law. The Jerusalem *Talmud*¹¹⁰ states:

It is universal custom that when an earthly king issues a decree, at his will he observes it himself, and at his will only others are bound to observe it. But it is otherwise with the Holy One Blessed Be He, for He is Himself the first to observe all his decrees. This is deduced from the text “And ye shall observe that which I observe ... I the Lord” (*Leviticus*, 22:9). That is to say, I, the Lord am the first to observe the commandments of the *Torah*.¹¹¹

A vivid demonstration of the idea of the *Torah*'s supremacy over its Giver is to be found in the Babylonian *Talmud*. The *Talmud* tells us of a *Halakhic* dispute that arose between the *Tannaim* (Sages who lived in the first two centuries, C.E.), in which, notwithstanding that all the Sages disagreed with Rabbi Eliezer Ben Horkanos, the latter tried to convince his colleagues that justice lay with him. We are told:

On that day Rabbi Eliezer brought forward every imaginable argument, but they did not accept them. Said he to them: “If the *Halakha* agrees with me, let this carob tree prove it! Thereupon the carob tree was torn a hundred cubits out of its place – others affirm, four hundred cubits”. “No proof can be brought from a carob tree”, they retorted. Again he said to them: “If the *Halakha* agrees with me, let the stream of water prove it!” Whereupon the stream of water flowed backwards. “No proof can be brought from a stream of water”, they rejoined. Again he urged: “If the *Halakha* agrees with me, let the walls of the schoolhouse prove it”, whereupon the walls inclined to fall. But Rabbi Joshua rebuked them, saying: “When scholars are engaged in a *Halakhic* dispute, what have ye to interfere?” Hence they did not fall, in honour of Rabbi Joshua, nor did they resume the upright, in honour of Rabbi Eliezer; and they are still standing thus inclined. Again he said to them: “If the *Halakha* agrees with me, let it be proven from heaven!” Whereupon a Heavenly Voice cried out, “Why do ye dispute with Rabbi Eliezer, seeing that in all matters the *Halakha* agrees with him!” But Rabbi Joshua arose and exclaimed, “It is not in heaven” (*Deuteronomy*, 30:12). What did he mean by this? Said Rabbi Jeremiah: “The *Torah* had already been given at Mount Sinai; we pay no attention to a Heavenly Voice, because Thou hast long since written in the *Torah* at Mount Sinai, ‘After the majority must one incline’.” (*Exodus*, 23:2)¹¹²

this man, whom you now wish to release for Hyrcanus' sake, will one day punish you and the king as well.” Indeed, when Herod assumed royal power, he killed Hyrcanus and all members of the Sanhedrin, save for Samaias; Josephus Flavius' Works, 9 vols., vol. 7, Jewish Antiquities, R. Marcus (trans.), Cambridge 1943, Book 14, Chap. 4, 539-543. Interestingly, based on Josephus' account, the Rashba (Rabbi Solomon Ben Abraham Adret), one of the foremost Jewish scholars in the thirteenth century, in his interpretation of the tractate *Sanhedrin*, regarded the account in the Babylonian *Talmud* as erroneous, and suggested that the person charged before the Sanhedrin was Herod and not King Yannai. This is also the opinion of several researchers; see: Y. Ephron, Simeon Ben Shetah and King Yannai, in: M. Dorman/S. Safrai/M. Stern (eds.), *Sefer Zikaron le'Gdalyahu Alon: Mechkarim Be'toldot Yisrael u'va'Lashon Ha'Ivrit* [Essays In Memory of Gedaliahu Alon: Jewish History and Philology], Tel-Aviv 1970, 69, 94-98 (*Heb.*)

¹¹⁰ Known also as the Palestinian *Talmud*, or the *Talmud* of the West, compiled in the second half of the fourth century C.E.

¹¹¹ Tractate *Rosh Hashana*, [New Year], Chap. 1, 57a.

¹¹² Tractate *Baba Mezia*, 59b.

There is an addendum to this legend:

Rabbi Nathan met Elijah and asked him: "What did the Holy One, Blessed Be He, do in that hour?" – "He laughed [with joy]" – he replied "saying: 'My sons have defeated Me, my sons have defeated Me!'"¹¹³

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

Here we find the Rule of Law in the absolute sense of the term: The law ruling the lawgiver; the inclusion of the legislator himself within the framework of legal and decisional relationships created by the laws given by him. He observes "the precepts of the Law", submits to the authority of the law, and furthermore submits to the authentic interpretation given by the interpreters, i.e., submits himself to the jurisdiction of an authoritative body, the majority, authorized by him to determine in case of doubt, which for him is of course no doubt at all. If the law is "After the majority must one follow", then this rule is to be applied even when the lawgiver himself is an interested party.¹¹⁴

Justice Silberg summarizes:

The idea is too great to be grasped by our ordinary mind, but one conclusion certainly rises from it: that the jurisdiction of Jewish law is not confined within the boundaries of relations between man and man. Matters concerning the relationship between man and God ... are caught by the net of legal relations as well.¹¹⁵

Of special interest is the role of justice in Judaism. George Foot Moore stated:

In no sphere is the influence of the highest conceptions of Judaism more manifestly determinative than in that to which we give the general name of justice, including under it, first, fair dealing between man and man, the distributive justice which gives to each his due; second, public justice, the function of the community in defining and enforcing the duties and rights of individuals and classes; and, third, rectitude, or integrity of personal character. In all parts of the Bible, justice in the broad sense is the fundamental virtue on which human society is based. It is not less fundamental in the idea of God, and in the definition of what God requires of man.¹¹⁶

E. Contemporary Application of Jewish Values in the State of Israel

In 1979, criminal proceedings were instituted against a Jewish husband who had forced himself on his wife.¹¹⁷ In his defense against the charge of rape, the husband

¹¹³ Ibid.

¹¹⁴ Silberg, *supra*, note 20, at 311. See, however, I. Englar d, Majority Decision vs. Individual Truth: The Interpretation of the "Oven of Achnai" Aggadah, 15(1-2) Tradition 137 (1975). For a comprehensive analysis of this episode, see S. Last Stone, *supra*, note 69, at 855-65 and sources cited there.

¹¹⁵ Silberg, *supra*, note 20, at 310-11.

¹¹⁶ G.F. Moore, Judaism in the First Centuries of the Christian Era: The Age of the Tannaim, 3 vols., Cambridge Ma. 1927, I, 180.

¹¹⁷ Cr. F. [Criminal File], (Jerusalem) 163/79, *State of Israel v. Cohen*, 1980 (1) P.M. [*Psakim Mehozi'im* = Law Reports of the District Courts], 245.

relied upon the well-established common law rule that by virtue of the marriage contract a wife is under a duty to cohabit, an essential component of which is to consent to sexual relations. A husband cannot, therefore, be convicted of raping his wife, as this offence is committed only if sexual intercourse takes place without the woman's consent.¹¹⁸ The Court rejected the common law defence, which is based on ecclesiastical law, as inapplicable to Jews in Israel. This decision was upheld on appeal.¹¹⁹ The Court based its decision on Jewish family law, which applies to Jewish couples under Israeli law.¹²⁰ Under this law, although a wife is under a marital obligation to have intercourse with her husband, the common law doctrine of the husband's "domain" over his wife and of the wife's "submission" to him is totally unacceptable, and the husband is prohibited from forcing himself upon her. To use Maimonides' words: "The wife is not a captive taken by sword to please her master's desires".¹²¹ Justice David Bechor of the Supreme Court summarized the decision as follows:

The conclusion ... is consistent with the fundamental principles of protecting a woman as a free person, not as a slave subject to the whims of her husband on such a sensitive matter which, unfortunately, has not been embodied in the legislation or judicial opinions of some of the most enlightened and progressive nations ... The Jewish people should be proud of the progressive and liberal approach of its traditions and *Halakha* on the subject throughout the ages.¹²²

The common law rule, on the other hand, "does not fit human dignity and the dignity of the marriage institute".¹²³

The rationale underlying the *Cohen* decision is questionable. The common law rule became part of the Palestinian Criminal Code of 1936.¹²⁴ This Code became

¹¹⁸ "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto the husband which she cannot retract.", M. Hale, 1 *The History of the Pleas of the Crown*, London 1773, 629.

¹¹⁹ Cr. A. [Criminal Appeal] 91/80, *Cohen v. State of Israel*, 35(3) P.D. [*Piskei Din* = Law Reports of the Supreme Court], 281 (1981), an English translation of the main parts of the decision appears in Rakover, *supra*, note 47, I, 457. The translation here is, however, the author's.

¹²⁰ See Rabbinical Law Jurisdiction (Marriage and Divorce) Law, 1953, 7 LSI [*Laws of the State of Israel* – official translation], 139; A. Maoz, Enforcement of Religious Courts' Judgments Under Israeli Law, 33 *J. Church & State* 473, 473-75 (1991); A. Maoz, Religious Human Rights in the State of Israel, in: J.D. van der Vyver/J. Witte Jr. (ed.), *Religious Human Rights in Global Perspective – Legal Perspectives*, The Hague 1996, 349, 354-57.

¹²¹ Maimonides, *Laws of Marriage*, 14:9. Compare this language with Hume's harsh assertion that "[T]he husband ... cannot ... commit a rape on his own wife, who has surrendered her person to him in this regard", D. Hume, *The Commentaries on the Law of Scotland Respecting the Description and Punishment of Crimes*, Edinburgh 1797, 2 vols., vol. 1, 306. See also N. Rakover, *Coercion of Conjugal Relations*, in: N. Rakover (ed.), *Jewish Law and Current Legal Problems*, Jerusalem 1984, 137.

¹²² *Supra*, note 119, at 291.

¹²³ Quoted from Justice Benjamin Halevi's opinion in Cr. A. 353/62, *El Fakir v. A.G.*, 18(4) P.D. 200, 219 (1964).

¹²⁴ P.G. [Palestine Gazette], First Supp., 1936, 652.

part of Israeli law when, upon its establishment, the State of Israel adopted Mandatory law.¹²⁵ Section 152 of the Code specifically provides that only “unlawful” sexual intercourse with a woman, which takes place “without her consent”, constitutes rape, while under the common law, sexual intercourse with a wife is “always lawful”.¹²⁶ Arguably, religious law, which applies in Israel in matters of marriage and divorce, should have no bearing on this issue. Moreover, concern has been expressed that the *Cohen* decision might discriminate against wives whose religious law permits their husbands to have sexual intercourse without their consent.¹²⁷ Yet, when a further case involving rape within marriage in a Muslim family appeared before the Court, it applied the *Cohen* decision, disregarding the fact that that decision was based on the personal law of the couple involved.¹²⁸

At the time that the *Cohen* decision was delivered, several states in Australia were involved in legislative initiatives to remove the protection accorded to husbands accused of sexual assault within the marriage. The editor of the Australian Law Journal, who became aware of the Israeli judgment, reacted enthusiastically:

It is supremely ironical that the newly contemplated States legislation ... merely echoes after thousands of years the age-old doctrine of rabbinical law that aggressive sexual assaults by a husband on his wife are prohibited.¹²⁹

Over a decade later the House of Lords handed down a decision in line with that of the Israeli court.¹³⁰ Their Lordships were aware of the Israeli judgment as it had been referred to by an English Law Commission shortly before the House of Lords’ decision.¹³¹ Moreover, the House of Lords used a language which resembles that of Maimonides: “[M]arriage is in modern times no longer one in which the wife must be the subservient chattel of the husband.”¹³² It seems, therefore, that Maimonides has influenced the legal approach to rape within marriage both in Australian and English law,¹³³ and indirectly in other legal systems.¹³⁴

¹²⁵ See Section 11a of the Law and Administration Ordinance, 5708 – 1948, I.R. [*Iton Rishmi* – Official Gazette during the tenure of the Provisional Council of State], No. 2 (1948), 1 LSI 7.

¹²⁶ F.H. [Further Hearing] 37/80, *Cohen v. The State of Israel*, 35(1) P.D. 371, 373, per Deputy President Haim Cohn (1980).

¹²⁷ Cf. Y. Shachar, *Anussa al-pi Din* [Lawfully Raped], 8 *Iyunei Mishpat* (Tel-Aviv University Law Review), 649, 689-691 (*Heb.*), (1982).

¹²⁸ Unreported case of the District Court of Beer-Sheba.

¹²⁹ Note, A Wife’s Right to Say “No”, 55 A. L. J. 59, 60 (1981).

¹³⁰ *R. v. R.*, (1991) 4 All E R 481.

¹³¹ Law Commission Working Papers No. 116: Rape Within Marriage 126 (1990).

¹³² *R. v. R.*, *supra*, note 130, at 484, per Lord Keith of Kinkel.

¹³³ Since the publication in the Australian Law Journal, all the Australian states have removed the common law defense.

¹³⁴ For the American approach, which is by far inferior to the *Cohen* formula, see J.E. Hasday, Contest and Consent: A Legal History of Marital Rape, 88 Cal.L Rev., 1373 (2000); see, also, G. Geis, Rape-in-Marriage: Law and Law Reform in England, the United States, and Sweden, 6 Adelaide L. Rev. 303 (1978); K. Burgess-Jackson, Rape: A Philosophical Investigation, Aldershot 1996, 107-112. See, generally, D.E.H. Russell, Rape in Marriage, exp. and rev. ed., Bloomington and Indianapolis 1990.

In 1970, the Israeli Military Court in Gaza convicted a person of committing an act of terror which cost several lives. The Court was asked to impose capital punishment in accordance with its authority under the Defense (Emergency) Regulations of 1945,¹³⁵ promulgated during the British Mandate and maintained in force in Gaza under prevailing Egyptian law.¹³⁶ The Court declined to make this order, declaring:

The Military Court is one of the judicial arms of the State of Israel. Therefore, although it has the authority to impose capital punishment, the moral concepts of the Jewish heritage of the State must serve us as a guideline. In our heritage a *Sanhedrin* that had imposed capital punishment was named “a murderous court”.¹³⁷

Twenty years later the Military Court in the West Bank followed this decision.¹³⁸ Further, the court quoted a *responsa* from the thirteenth century providing that, when handing down a verdict, the judge must be moderate, reconsider the matter and remove all anger from his heart, lest the desire to take revenge divert him from “the good and right path”.¹³⁹

In 1920, a vineyard worker from Rishon Le’Zion, who had been dismissed from his employment, sued his employer before the District Jewish Court of Arbitration (*Mishpat Ha’Shalom Ha’Ivri*) in Jaffa. These Courts were established in 1909 by the Office of the Zionist Organization and resumed operation after the British were granted the Mandate over Palestine. These Courts functioned as arbitration tribunals and purported to revive and renew Jewish law as a national law.¹⁴⁰ The worker, who at the time of his dismissal was 64 years old, sued his employer for “a steady salary which would suffice for his family’s living”. The Court rejected his suit on the ground that only the legislature could introduce compulsory pensions, but nonetheless ordered the employer to pay the employee compensation equivalent to a month’s salary for each year the plaintiff had worked for him. The Court based its decision on “the custom accepted in the country to pay a month’s compensation to a worker who had been dismissed after a year’s work”.¹⁴¹

¹³⁵ P.G. [Palestine Gazette], Supp. 2, 1945, 1055.

¹³⁶ Egyptian law was preserved in Gaza under Israeli military rule by virtue of the Law and Administration Ordinance Proclamation (Gaza Strip and Northern Sinai Region) (No. 2), 1967, Proclamation, Orders and Announcements of the Headquarters of the IDF Forces in the Gaza Strip and Northern Sinai Region, 4. For an English translation, see 1 IYHR, 421 (1971).

¹³⁷ Gaza 652/70, unreported.

¹³⁸ Ramallah 3009/89, *The Military Prosecutor v. Takruro*, unreported, abridged in *HaLishka* [Journal of the Israel Bar], 33 (*Heb.*), (1995).

¹³⁹ *Responsa*, Part 5, 238 [a]. The court cited from Justice Elon’s opinion in Cr.A. 156/80, *Benjamin v. The State*, 35(4) P.D. 744, 746.

¹⁴⁰ For the Jewish Courts of Arbitration, see Elon, *Jewish Law*, *supra*, note 12, IV, 1532-1596; P. Dykan (Dickshtein), *Toldot Mishpat Ha’Shalom Ha’Ivri: Megamotav, Peulotav ve’Hesegav* [History of the Jewish Court of Arbitration: Its Directions, Acts and Achievements], Tel Aviv 1964 (*Heb.*); P. Dykan (Dickshtein), *Mishpat Ha’Shalom Ha’Ivri – She’elotav La’halakha u’le’Ma’ase* [The Jewish Court of Arbitration – Its Theoretical and Practical Problems], Tel Aviv 1925 (*Heb.*).

¹⁴¹ District Court of Jaffa, Case No. 162; approved by the Supreme Court of Arbitration, Case No. 93; see M. Wager/P. Dickshtein, *Pitzuyey Piturin: Perek be’Hitpathut Diney Avoda Bayishuv*

Indeed, in a restatement of Hebrew labour law published in 1942, it was stated that:

It is an accepted and absolute custom among Jewish workers in Palestine that in the case of every worker, employee and permanent official, who is dismissed, the employer is obliged to compensate him with a month's salary for each year that he worked for him, according to his last salary.¹⁴²

The custom referred to by the Court had Biblical foundations. It has its roots in the command not to let a Hebrew released slave go away empty-handed but to "furnish him liberally out of thy flock, and out of thy floor, and out of thy wine-press".¹⁴³ The Jewish Courts of Arbitration consistently applied the duty to pay compensation to a worker upon the termination of work relations. In contrast, British judges dismissed similar claims on the ground that such custom had not been proved "beyond any reasonable doubt" to be "the creation of a long established uniform practice, accepted by the public of its own free will".¹⁴⁴ After the establishment of the State of Israel, the Supreme Court consistently recognized the practice.¹⁴⁵ Finally, the *Knesset* intervened and enacted the Severance Pay Law, 5723-1963,¹⁴⁶ which imposed a duty to give severance pay to a worker who is dismissed after one year of continual employment. Introducing the Bill the Minister of Labor praised this right as "the first social right that the worker in this country has achieved ... in continuation of the ancient Jewish tradition".¹⁴⁷

Regarding the continuing influence of Jewish law on Israeli law, reference should be made to a relatively new statute, the Thou Shalt Not Stand Idly by the Blood of Thy Neighbor Law, 5758-1998.¹⁴⁸ This statute imposes a legal duty to aid a person who, due to a sudden occurrence, faces a severe and immediate danger to his life, corporal integrity or health. The title of the statute quotes verbally the Biblical source for the duty to rescue. The central provision of the statute, imposing a duty to aid and rescue, seems to adopt the wording of the *Shulhan Aruch*, the cen-

Ha'Ivri Bizmanenu [Compensation for Dismissal: A Chapter in the Development of Labour Law in the New Jewish Settlement of Palestine], Jerusalem 1940, 45-48 (*Heb.*).

¹⁴² S.B. Bar-Adon, *Sefer Diney Avoda: Osef Halachot u'Minhagim Beyachasey Ovdim u'Ma'avidim* [Book of Labour Laws: Collection of Laws and Customs in Work and Employer Relations], Haifa 1942, 24 (*Heb.*).

¹⁴³ *Deuteronomy*, 15:14. See Elon, *supra*, note 12, II 924-26, IV 1631-34; and P. Dickshtein, *Pitzuyey Piturin* [Compensation for Dismissal], in: A. Vizer/B. Z. Luria (eds.), *Sefer Korengreen: Ma'a'marim Be'heker Ha'Tanach* [Korengreen Book, Articles in Research of the Bible in memory of Y.P. Korengreen], Tel-Aviv 1964, 275, 276-281 (*Heb.*).

¹⁴⁴ C.A. 5/40 *Cohen v. Copun*, 7 P.L.R. [Palestine Law Reports], 80, 88 (1940), *per Frumkin J.*

¹⁴⁵ See C.A. 25/50 *Wolfson v. Spinneys Ltd.*, 5 P.D. 265 (1951); an English translation of the main parts of the decision appear in Rakover, *supra*, note 47, II, 831.

¹⁴⁶ 5723-1963 S.H. [*Sefer HaHukim* = the official publication of Israel's primary legislation], 136; 17 LSI 161.

¹⁴⁷ D.K. [*Divrey ha'Knesset* = Records of the *Knesset* Proceedings], 33, 1050(1962); see also Elon, *supra*, note 12, vol. III, 1367-1370.

¹⁴⁸ 5758 S. H. 245.

tral codification of Jewish Law.¹⁴⁹ Moreover, the explanatory notes to the Bill¹⁵⁰ expressly state that the statute is meant “to anchor in Israeli legislation the moral and social value whose source is in the *Torah* (*Lev.*, 19:16), according to which an obligation is imposed upon a person to save the life of another person”. The reference to Jewish law was emphasized during the deliberations in the *Knesset*. Thus, M.K. Binyamin Elon stated in the Constitutional, Legislative and Judicial Committee of the *Knesset* that in Israel, being a Jewish State, “there is a meaning to the concept of human dignity, that it is categorical, perhaps even absolute ... It is important to state on the declaratory level, and not merely the declaratory, that just as a human being has basic rights ... he has also basic duties”.¹⁵¹

These four cases serve as instructive examples of the impact of Jewish teachings on the Israeli legal system.¹⁵² These ramifications are natural given that Jewish law

¹⁴⁹ See Shulhan Aruch, *Hoshen Mishpat*, sec. 426; Cf. Hendel, *supra*, note 38, at 259.

¹⁵⁰ 5755-1995 H.H. [*Hatza'ot Hok* = Legislative Bills], 456.

¹⁵¹ Protocol No. 129 of the Constitutional, Legislative and Judicial Committee of the 14th Knesset Sessions, Dec. 10, 1997, 18. The statute goes beyond Jewish law in that it by imposing a fine for violating the duty (The Bill even proposed a sanction of six months imprisonment for violating the statute). This is a result of imposing a provision which originally applied in a religious society to a civil society; Cf., *supra*, text to note 35. On the other hand, a person fulfills the duty to rescue by reporting the case to the appropriate authorities or by calling a person who is capable of rendering the necessary assistance.

Hendel regards this statute as the climax of a series of four statutes which have been inspired by Jewish Law. The three others are: The Restoration of Lost Property Law, 1973 (5733 S.H. 172, 27 LSI 187), imposing the duty to return found property to its owner; The Unjust Enrichment Law, 1979 (5739 S.H. 44, 33 LSI 44) imposing a duty on the beneficiary to make restitution to the benefactor of any benefit obtained from him without legal cause, unless no loss has been inflicted thereby on the benefactor; Penal Law (Amendment No. 37), 1992, 5752 S.H. 142, extending the excuses of self defense, necessity and duress to acts done in order to defend the legitimate interests of any person or property, not necessarily those for whom the defendant is legally responsible; Hendel, *supra*, note 38, at 271-273. Hendel emphasizes that, while in these three statutes the law is brought into action *post facto*, the new statute imposes a duty on the bystander: in this statute “the unfortunate situation of the [other] suffices for the law to impose on the bystander the duty to come to his rescue”; *ibid.*, at 273.

On the *Halakhic* foundations of the Restoration of Lost Property Law, see N. Rakover, *Ha'Mishpat Ha'Ivri Be'hakikat Ha'Knesset: Ha'mekorot Ha'Yehuditim ve'Shilwam Bediyunei Ha'Knesset u've'Hukey Medinat Yisrael* [Jewish Law in the Debates of the Knesset], 2 vols., Jerusalem 1988, II, 835-52 (*Heb.*); N. Rakover, *Ha'Rambam ve'Ha'hok Bemdinat Yisrael* [Maimonides and the Law of the State of Israel], Jerusalem 1985, 505-24 (*Heb.*); N. Rakover, *Hashavat Aveda* [Restoration of Lost Property], A Serial of Researches and Surveys of Jewish Law, Jerusalem 1971, pamp. No. 15. (*Heb.*). On the *Halakhic* foundations of the Unjust Enrichment Law, see: N. Rakover, Jewish Law in the Debates of the Knesset, 853-74; . N. Rakover, Maimonides and the Law of the State of Israel, 525-40; N. Rakover, *Osher ve'lo Be'mishpat: Ha'nehene Mi'nichsey Haveru Bi'zchut ve'she'lo Haveru Bi'zchut* [Unjust Enrichment in Jewish Law], Jerusalem 1987, (*Heb.*); J. Blass/M. Vygodá, *Asiyat Osher ve'lo Be'mishpat Unjust: Ve'nilva lo Bniya u'Netia Be'mekarkaey Ha'zulat* [Unjust Enrichment Including Building and Planting on Another's Property], Jerusalem 1991, (*Heb.*). For *Halakhic* law of unjust enrichment, see Kirschenbaum, *supra*, note 20; Dagan, *supra*, note 12, at 109-129. See also Symposium: Unjust Enrichment 3 JLA [The Jewish Law Annual], (1980). On the *Halakhic* foundations of the amendment to the Penal Law, see 122 D.K., 3823-3824 (1991).

¹⁵² For a general survey of the influence of Jewish law on Israeli law, see M. Elon, Jewish Law in the State of Israel, part IV of Elon, *supra*, note 12. For application of Jewish law by the judiciary, see

is the national legal system of the Jewish people. Moreover, Jewish principles serve as positive sources of Israeli law. Thus, under the provisions of the Foundation of Law, 5740-1980¹⁵³ the courts are referred to “the principles of freedom, justice, equity and peace of Israel’s heritage” whenever a legal question arises to which the court finds no answer in statute law, case-law or by analogy. The referral to Jewish principles was re-emphasized in 1992, with the enactment of Basic Law: Human Dignity and Freedom¹⁵⁴ and Basic Law: Freedom of Occupation.¹⁵⁵ Both Basic Laws include “purpose” clauses. Section 1A of Basic Law: Human Dignity and Freedom provides:

The purpose of this Basic Law is to protect human dignity and freedom in order to anchor in a Basic Law the values of the State of Israel as a Jewish and democratic State.

A similar provision appears in section 2 of Basic Law: Freedom of Occupation. The limitation clause¹⁵⁶ provides:

There shall be no violation of rights under this Basic Law except by a Law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than required

It has been decided by the Supreme Court that “the values of the State of Israel”, in the limitation clause are identical to “the values of the State of Israel as a Jewish and democratic State”, which are specified in the purpose clause.¹⁵⁷

F. Contemporary Application of Jewish Values in Other Jurisdictions

It would be wrong to assume that Jewish principles have significance only for the Jewish people and within the State of Israel, just as it would be wrong to suppose that only Jews follow the teachings of the Bible. We have already seen the indirect influence of the Jewish approach to rape within marriage on the legal systems of Australia and England. The influence of Jewish law is even more direct.

On 17 October 1718, a “congregation”, summoned by the vice-chancellor of the University of Cambridge, decided to strip Dr. Richard Bentley of his academic degrees in accordance with its authority under a custom from “time out of mind”.

Rakover, *supra*, note 47. For references to Jewish law in *Knesset* debates, see Rakover, Jewish Law in the Debates of the Knesset, *supra*, note 151. See also, A. Maoz, *Mekomo shel Ha'Mishpat Ha'Ivri Be'medinat Yisrael* [The Place of Jewish Law in the State of Israel], 40, 53 (*Heb.*), (1991-1992).

¹⁵³ 5740-1980 *S.H.* 163; 34 *LSI* 181.

¹⁵⁴ 5752-1992 *S.H.*, 150. For an unofficial translation, see 26 *Is. L. Rev.* 248 (1992). This translation is not used in this article.

¹⁵⁵ 5752-1992 *S.H.*, 114. For an unofficial translation of the Basic Laws, see 26 *Is. L. Rev.* 247 (1992). This Basic Law was replaced in 1994, 5754-1994 *S.H.*, 90.

¹⁵⁶ Section 8 of Basic Law: Human Dignity and Freedom and Section 4 of Basic Law: Freedom of Occupation.

¹⁵⁷ A. Maoz, *Aracheyha shel Medinah Yehudit ve'Democratit* [The Values of a Jewish and Democratic State], 19 *Iyunei Mishpat* 547, 552 (*Heb.*), (1995).

The congregation's ruling followed a decision by the vice-chancellor to suspend Dr. Bentley upon the latter's refusal to appear before him in connection with a monetary suit which had been brought against Bentley before the vice-chancellor. Dr. Bentley was not summoned to the congregation's hearings and it did not rehear the matter.

In *mandamus* hearings before the King's Bench, the congregation's proceedings were declared illegal for want of a summons on the grounds that "surely he could never be deprived without notice" of his academic degrees.¹⁵⁸ Of interest is Judge Fortescue's reasoning:

The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also.¹⁵⁹

Referring to the *Bentley* case, Justice Silberg, of the Supreme Court of Israel, wrote:

It is not superfluous to recall that the sacred principle of natural justice regarding the need to hear every person before deciding his cause has its sources in the *Torah*. That was explained in the old English judgment in *R. v. University of Cambridge*, where one of the judges observed that, before Adam was expelled from the Garden of Eden for eating from the tree of knowledge, he was asked by God: "Who told thee that thou wast naked? Hast thou eaten from the tree whereof I commanded thee that thou shouldst not eat?" (*Genesis*, 3:11). When Adam put the blame on the woman for giving him of the tree of knowledge to eat, she also was given the opportunity to explain her action. The same thing happened in the incident of Cain and Abel. After Cain killed Abel, God asked Cain: "Where is Abel thy brother?" (*ibid.*, 4:9). God himself who is omniscient was not prepared to condemn Cain and punish him without giving him the opportunity of putting his case.¹⁶⁰

Across the ocean, in the celebrated *Miranda* case,¹⁶¹ Chief Justice Earl Warren relied expressly on Jewish law, as pronounced by Maimonides, in establishing the privilege against self-incrimination. In an effort to prove the antiquity of this privilege, Warren wrote, "We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the

¹⁵⁸ *R. v. The Chancellor, Masters and Scholars of the University of Cambridge*, 1 Strange 557, 566 (1795); 93 E.R. 698, 703 (1909).

¹⁵⁹ *Ibid.*, at 567 (704). Fortescue's opinion was followed by Sir John Walter Huddleston in *Marquis of Abergavenny v. Bishop of Llandaff*, 188, 20 Q.B.D. 460, 472. Judge Huddleston regarded the right of hearing as "natural justice ... having its origin when Adam was not turned out of the Garden of Eden until he had been called upon to shew cause and been heard".

¹⁶⁰ H.C. 295/72 *Bechar v. The Rabbinical Court* 27(1) P.D. 568, 572 (1973); Rakover, *supra*, note 47, I, 311. Cf. H.C. 3, 9/58 *Berman v. Minister of Interior*, 12 P.D. 1493 (1958); Rakover, *supra*, note 47, I, 307, *per* Silberg J.

¹⁶¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

fervour with which it was defended.” “Its roots”, explains Warren, “go back into ancient times.”¹⁶² In a footnote, Chief Justice Warren elaborates:

Thirteenth century commentators found an analogue to the privilege based on the Bible. “To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree.” Maimonides, *Mishneh Torah* (Code of Jewish Law), Book of Judges, Laws of the *Sanhedrin*, c. 18, par. 6, 3 *Yale Judaism Series* 52-53.¹⁶³

The principle of immunity against self-incrimination, Justice Benjamin Halevi, of the Supreme Court of Israel, wrote:

... [is] a principle of the Common law which has been raised to the rank of a constitutional rule of the Fifth Amendment [and] has its source, it appears to me, in Jewish law in the form set by the Sages – “No man can render himself a wrongdoer” (*Sanhedrin*, 9b). This source of the rule is attested to by the Latin maxim *nemo tenetur se ipsum (prodere) accusare*, which is a literal translation of the Hebrew. It is also attested to by the writings of the Church Fathers (see the quotation in: Risenfeld, *Law Making and Legislative Precedent in American Legal History*, 33 *Minn. L. Rev.* (1949) 103, 118, reproduced in: McCormick, *Law of Evidence* (1954), 253 notes 9-10; see also as regards the history of the principle in England, Wigmore, *Evidence, McNaughton Revision* (1961), para. 2250. With the reception of the substance of the Common law in this country, through article 46 of the Palestine Order in Council, and sec. 11 of the Law and administration Ordinance of 1948, the principle returned to its original home.¹⁶⁴

Distinguishing the *Bentley* decision from the *Miranda* case is the fact that the English judges referred to a Biblical source, whereas Chief Justice Warren expressly referred to *Halakhic* law.¹⁶⁵ It is indeed necessary to distinguish between

¹⁶² *Ibid.*, at 458.

¹⁶³ *Ibid.*, note 27. Cf. *In re Worral, Ex parte Cossens* (1820) Buck. 531, 540 (L.C.), where Lord Eldon regards the immunity against self-incrimination “one of the most sacred principles in the law in this country”. Chief Justice Warren also refers to N. Lamm, *The Fifth Amendment and Its Equivalent in Halakha*, 3 *Judaism* 53 (1950); also established in 17 Decalogue, Four (Jan-Feb., 1967) 1, with a revised version published, as chapter X, in N. Lamm, *Faith and Doubt*, New York 1971. References to the *Halakhic* approach to the issue of self-incrimination may also be found in *Garrity v. New Jersey*, 385 U.S. 493, 497-98, n.5, (1967), *per Douglas J.*; *Younie v. Maryland*, 272 Md. 233, 322 A.2d. 211, 215 (1974) *per Digges J.*; *New Jersey v. McCloskey*, 90 N.J. 18; *New York v. Jo-Anne Brown*, 86 M.2d. 339. See also, Cr. A. 532/71 *Bahamotzky v. State of Israel*, 26(1) P.D. 543, 556 = 57 (1972); Rakover, *supra*, note 47, I, 486, *per Kister J.*

¹⁶⁴ Cr. A. 242/63 *Kiryati v. A.G.*, 18(3) P.D. 477, 497 (1972), *per Halevi J.*; Rakover, *supra*, note 47, I, 410.

¹⁶⁵ Though Chief Justice Warren speaks of “an analogue to the privilege grounded in the Bible” (the *Miranda* case, *supra*, note 161, at 458) he refers to Maimonides. Moreover, “the Pentateuch is silent on the role of the criminal confession”, (A. Kirschenbaum, *Self-Incrimination in Jewish Law*, New York 1970, 32), and the exclusionary rule is laid down by “Talmudic or Rabbinic law”, (G. Horowitz, *The Privilege Against Self-Incrimination – How Did it Originate?*, 31 *Temple L. Q.*, 121, 125 [1957-1958]). The Judaic foundations of this privilege in Anglo-American law are controversial. The opponents of such nexus stress the different scope and background of the rule disqualifying confessions in criminal cases in Anglo-American and Jewish law (see e.g. A. Enker, *Self-Incrimination in Jewish Law (An Essay)*, 4 *Dinē Israel*, CVII (1973). See also Kirschenbaum above). Others point to the fact that John Liburn, whose trial served as a landmark in establishing the privilege, raised in his defence “the laws of God”, and the practice of the High Priest in trying Jesus Christ (3 *How. St. Tr.* 1315 [1637]). It was suggested, therefore, that the privilege had its origin in

references to the Old Testament and Jewish law.¹⁶⁶ However, the matter is not as simple as it would appear. While Judge Fortescue referred to the story in *Genesis*, he relied on a Jewish classical interpretation of the Biblical verse, for this is what Don Yitzhak Abarbanel, one of the greatest commentators on the Bible, of the fifteenth century, inferred from the verse from *Genesis*:

And He taught us, Blessed Be He, that it is not appropriate for the judge to try a person, if he does not hear his version. Because God Blessed Be He, while knowing the mysteries of the heart, did not punish him [Adam] till he listened to his arguments.¹⁶⁷

Similarly, one of the leading *Halakhic* authorities, Rabbi Moses Isserles, of the sixteenth century, known by his acronym “Rema”, wrote in his *responsa*¹⁶⁸:

It is obvious that one cannot adjudicate in a matter without hearing the defendant’s argument, since the *Torah* said: “[And I charged your judges at that time] hear the causes between your bretheren [and judge righteously between every man and his brother, and the stranger that is with him].” (*Deuteronomy*, 1:16).

And though this is obvious, we might learn from the paths of God Blessed Be He, whose paths are just and whose ways are pleasant. He approached Adam and asked: “Who told thee that thou wast naked? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the man said ...”

Likewise, the Lord said unto Cain: “Where is Abel thy brother?” And he said: “I know not” ... And [the Lord] said: “What hast thou done?” in order to hear his arguments. The more so, a layman [i.e. a human judge].

The Sages have given a similar interpretation. From what was said [by God following the events of Sodom and Gomorrah]: “I will go down now, and see whether they have done altogether according to the cry of it.” (*Genesis*, 18:21) “He taught the judges not to judge until they have heard and understood.” The conclusion is that even if it is clear to the judge that the defendant is guilty, he must first hear his arguments.

Jewish law (S. Mandelbaum, *The Privilege Against Self-Incrimination in Anglo-American and Jewish Law*, 5 *Am. J. of Comp. L.*, 118, 119 (1956)). Another writer attributes the Jewish foundations of the privilege to the works of the seventeenth century Hebraists of England and to the revolt of the Puritans against compulsory self-incrimination practiced under Canon law (Horowitz, above, 136-143). Another writer points to a development in United States law relating to the privilege against self-incrimination – from exclusion of confessions obtained by coercion likely to produce unreliable confessions to a stage “very close to an absolute law on extra-judicial confessions”, an absolutism which underlines the Judaic attitude M. Halberstam, *The Rationale For Excluding Incriminating Statements: U.S. Law Compared to Ancient Jewish Law*, in: N. Rakover (ed.), *Jewish Law and Current Legal Problems*, Jerusalem 1984, 177, 185.

¹⁶⁶ See Ashburn, *supra*, note 70.

¹⁶⁷ Abarbanel on the *Torah*, *Genesis*, 3:9.

¹⁶⁸ *Responsa Rema*, 108. The translation is from Elon, *supra*, note 12; see, also, H.C. 10/59 *Levi v. The Rabbinical Court*, 13 P.D. 1182, 1188 (1959), per Siberg J.; Rakover, *supra*, note 47, I, 308; H.C. 91/74 *Gabara v. Tel-Aviv District Court*, 28(2) P.D. 518, 526 (1974), per Cohn J.; Rakover, *supra*, note 47, I, 310, per Cohn J.; H.C. 811/75 *The Russian Ecclesiastical Mission in Jerusalem v. A.G.*, 31(1) P.D. 317, 323-24 (1977), per Cohn J.; Rakover, *supra*, note 47, I, 294; C.A. 413/80 *Anonymus v. Anonymus*, 35(3) P.D. 57, 88-89 (1981), per Elon J.; Rakover, *supra*, note 47, I, 170.; Misc. [miscellaneous] (Beer-Sheva) 31/81 *Ben Simon v. The State of Israel*, 1982 (1) P.M. 436, 438-39, per Laron J.; Rakover, *supra*, note 47, I, 310.

Referring to this issue, the Deputy President of the Supreme Court of Israel, Justice Menachem Elon, held that “the right to argue and be heard in Court originates and is based in the heritage of Israel from times immemorial, and the Sages of Israel saw it as the earliest basic right in human culture”. Justice Elon added:

As the right to be heard is a basic right in the legal system in Israel, it is right and proper that this right be implemented in every place where an Israeli authority acts and functions, even if the laws applicable in that place – whether domestic or public international laws – do not require such implementation. Silence on the part of domestic law and public international law regarding this right is not in the nature of a negative arrangement.¹⁶⁹

Indeed, the Supreme Court of Israel applied the right to be heard to the activities of the armed forces in the territories administered by Israel, notwithstanding that no provision was made for this right either in the law applicable to the territories by virtue of which the civil administration operated or in international law.¹⁷⁰ The rationale for this is similar to that of the military courts in the territories in refraining from imposing capital punishment¹⁷¹:

Indeed, the rules of Israeli law have not been made applicable to the region, however, an Israeli official in the area carries with his office the duty to behave in accordance with the additional standards required by the fact that he is an Israeli authority, wherever the place of its activity ... An official, generally, does not meet his obligations if he only acts as required by the norms of international law, because, as an Israeli authority more is required from him, and this is because he should also act in an area under military government in accordance with the rules laying out fair and proper administrative processes.¹⁷²

An interesting point in this context relates to the post-Biblical sources of *Halakha*. These draw their authority from Biblical law itself and see themselves only as interpreters of it. Nonetheless, under the guise of interpretation, the Sages have occasionally modified Biblical law to the extent of even reaching opposite conclusions. Reference was made above to the refusal of the Military Court in Gaza and the West Bank to impose capital punishment. The Court based its decision on “the moral concepts of Jewish heritage”¹⁷³. Yet, a review of the *Torah* reveals that the

¹⁶⁹ H.C. 4112/90, *The Association for Civil Rights in Israel v. Commander of the Southern District*, 44(4) P.D. 626, 637-38 (1990), *per* Elon J.; abridged in 23 IYHR 333 (1993).

¹⁷⁰ Cf. G. von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, Minneapolis 1957, 108. In fact, Israel is the only country in the history of international law that has opened the doors of its courts to petitions of residents of occupied territories against the actions of the occupying military forces; see: Amnesty International Report, 1984, 84; E. Nathan, *The Power of Supervision of the High Court of Justice over Military Government, Military Government in the Occupied Territories Administered by Israel, 1967-1986: The Legal Aspects*, vol. 1; M. Shmgar (ed.), Jerusalem 1982, 450; A. Maoz: *Defending Civil Liberties Without a Constitution – The Israeli Experience*, 16 Melb. U. L. Rev. 815, 824 (1988).

¹⁷¹ See, *supra*, text to note 137.

¹⁷² H.C. 64, 493/81 *Abu Ita v. The Commander of Jerusalem and Samaria Region*, 37(2) P.D. 197, 231(1983), *per* Deputy President Meir Shmgar; abridged in 18 Is. L. Rev. 475 (1983).

¹⁷³ *Supra*, text accompanying note 137.

death penalty was commonly applied in Biblical times. Suffice it to quote just three Biblical sources which have been interpreted as mandating capital punishment. After the flood God blesses Noah and his sons and warns them: "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man."¹⁷⁴ Even more specific is the order given to the Israelites following the revelation on Mt. Sinai: "He that smiteth a man, so that he die, shall be surely put to death."¹⁷⁵ Finally, God explicitly ordered: "And he that killeth any man shall surely be put to death."¹⁷⁶

This is why several Christian churches support capital punishment. Thus, the Lutheran Church--Missouri Synod stated its position "that capital punishment is in accord with the Holy Scriptures and the Lutheran Confessions". Resolution 2-38 of the New York convention of the Synod, of 1967, reads as follows:

Whereas, Various church bodies have condemned capital punishment in recent years; and

Whereas, God's Word supports capital punishment (*Gen.*, 9:6; *Lev.*, 24:17; *Ex.*, 21:12; *Num.*, 35:21; *Deut.*, 19:11; *Rom.*, 13:4; *Acts*, 25:11); and

Whereas, The Lutheran Confessions support capital punishment:

Therefore neither God nor the government is included in this commandment, yet their right to take human life is not abrogated. God has delegated His authority of punishing evil-doers to civil magistrates in place of parents; in early times, as we read in Moses, parents had to bring their own children to judgment and sentence them to death. Therefore what is forbidden here applies to private individuals, not to governments. (Large Catechism I, 180 to 181 [Tappert, p. 389])

Therefore be it Resolved, That The Lutheran Church--Missouri Synod declare that capital punishment is in accord with the Holy Scriptures and the Lutheran Confessions.¹⁷⁷

Referring to this issue, Haim Cohn wrote:¹⁷⁸ "The question whether capital punishment can qualify as a Jewish value is, in view of its many Biblical instances, generally answered in the affirmative." Indeed, Maimonides lists thirty-nine offences for which a court is ordered to impose capital punishment.¹⁷⁹

¹⁷⁴ *Genesis*, 9:6.

¹⁷⁵ *Exodus*, 21:12.

¹⁷⁶ *Leviticus*, 24:17. For an analysis of Biblical homicide law, see M. Sulzberger, The Ancient Hebrew Law of Homicide, 5 *The Jewish Quarterly Review* n.s., 127-161, 289-344, 559-614 (1914-1915).

¹⁷⁷ <<http://www.lcms.org/cic/death.html>>. See also, Lift Every Voice: A Report on Religion in American Public Life 2002, Washington DC 2001, at 24.

¹⁷⁸ H.H. Cohn, *Onesh Ha'mavet – Erech Yebudi?* [Capital Punishment – A Jewish Value?], 1 *Tarbut Democratit* [Democratic Culture], 37 (*Heb.*), (1999). The quotations here are from the English abstract, at 10.

¹⁷⁹ Maimonides, *Hilchot Sanhedrin*, 15:10-13. Goldin notes, however, that the list of crimes punishable by death in the Bible is significantly shorter than their equivalent in the legal systems of "nations of antiquity"; H.E. Goldin, *Hebrew Criminal Law and Procedure*, New York 1952, ch. II.

Nevertheless, adds C o h n, “the true Jewish value now is the abolition of capital punishment”. This is so, as “in talmudic law, ways and means were deliberately sought, and actually found, to render capital punishment nugatory”¹⁸⁰.

Obviously, the Sages could not abolish capital punishment imposed by the *Torah*. However, they achieved this end by laying down several procedural requirements which rendered it impossible to carry out Biblical law, while at the same time basing these requirements on the Bible itself. This technique is described by C o h n as follows:

[F]or capital punishment to be imposed under Biblical law by the courts, it was laid down that no person was to be tried and convicted of a capital crime ... unless it was first established, by the testimony of at least two competent witnesses, that they had, immediately before the commission of the criminal act, given the offender a specific warning to the effect that what he was about to do was a criminal offence, that the capital punishment provided for that offence would be carried out in such and such a fashion, and that he would do better to abstain from carrying his intention into effect. That warning, however, was useless, unless the would-be offender replied that he had understood it, and that he was proceeding to act nevertheless, even if he would have to suffer that particular capital punishment.¹⁸¹

In his conclusions this issue, C o h n writes:

This procedure is shown to be wholly illusory; and it is submitted that it was designed as a well-nigh infallible means to prevent capital punishment from ever being executed. Without abrogating, formally or at all, any Biblical law, the Sages merely put in the way of capital trials such insurmountable obstacles as would suffice to accomplish their purpose.¹⁸²

To use David N o v a k ’s words, “we see some very deliberate steps to make the institution of capital punishment theoretical rather than practically operable”¹⁸³. The Rabbis, opposing capital punishment, “would have interpreted the laws so strictly that, in fact, if not in principle, it would be impossible to ever officially sentence anyone to death”¹⁸⁴. This “would make the mandate for capital punishment a null class, which is a legal fiction”¹⁸⁵. The result is, in fact, that the Biblical mandate

¹⁸⁰ C o h n, *supra*, note 178, at 10.

¹⁸¹ *Ibid.*, at 10-11.

¹⁸² For an analysis of the approach of Judaism to capital punishment, see David D i - S o l a P o o l, *Capital Punishment Among the Jews*, in: M. Reichler/J. Blau/D. Pool, *Jewish Eugenics and Other Essays: Three Papers Read Before the New York Board of Jewish Ministers*, 1915. New York 1916, 51. See also, J.E. P r i e s t, *Governmental and Judicial Ethics in the Bible and Rabbinic Literature*, New York 1980, 134-142, 257-259.

¹⁸³ D. N o v a k, *The image of the Non-Jew in Judaism: An Historical and Constructive Study of the Noahide Laws*, New York/Toronto 1983, at 171. Cf. K. K a n a n a, *The Case For Jewish Civil Law in the Jewish State*, London 1960, 89; G o l d i n, *supra*, note 179, at 26.

¹⁸⁴ D. N o v a k, *A Call for Reckoning: Religion & Death Penalty*, A Conference organized by the Pew Forum on Religion and Public Life and the University of Chicago Divinity School, January 25, 2002; Session One: Faith Tradition and the Death Penalty, Transcript, at 11. Published also at <<http://pewforum.org/deathpenalty/resources/transcript1.php3>>.

¹⁸⁵ *Ibid.* N o v a k gives an interesting explanation why, under the strict rules of procedure, the death penalty became “more symbolic than real”; since no murder crime could be established, unless

to impose capital punishment for murder, turned into “[a] moral instruction about the gravity of the crime of homicide”.¹⁸⁶ Novak connects the rejection of capital punishment in the *Talmud* with the Biblical observation that every human being was created in the image of God: “the murderer, too, is no less made in the image of God. As such even the execution of the murderer, ‘diminishes the divine likeness’.”¹⁸⁷

In the devastating case of a stubborn and rebellious son, the *Torah* commands: “all the men of his city shall stone him with stones, that he die: so shalt thou put evil away from among you”¹⁸⁸. This seemingly cruel rule bothered the sages who made heroic linguistic efforts to turn it obsolete:

“Rabbi Judah [bar Alai] said: if his mother is not like his father in voice, appearance and stature, he does not become a rebellious son. Why so? The Writ saith, he will not obey our voice; and since they must be alike in voice, they must be also in appearance and stature. With whom does the following *Baraita*¹⁸⁹ agree: There never has been a ‘stubborn and rebellious son’, and never will be. Why then was the law written? That you may study and receive reward. This agrees with R. Judah¹⁹⁰.”

Similarly, it is agreed that the legal institution of employee severance pay is rooted in Biblical law. Yet, no specific obligation to provide severance pay is to be found in the Bible. Instead, we find an imposition of granting a gratuity to the Hebrew slave upon his obtaining freedom. Nevertheless, “[t]he *Halakhic* authorities found in this law the concept of giving a certain sum to an employee at the termination of his employment”.¹⁹¹ As explained by Professor Elon, “[t]he inference from the law of the Hebrew slave to the law of an employee was possible because under Jewish law the status of a Hebrew slave is comparable to the status of an employee”.¹⁹² To use Philo’s expression, “[f]or people in this position, though we find them called slaves, are in reality labourers”.¹⁹³

the witnesses warned the would-be assailant, they must have been in proximity to him. Under these circumstances they would “be in a position to save the would-be victim from homicide”, which they are obliged to do under the “*Neither shalt thou stand against the blood of thy neighbour*” rule, “even if that meant killing the would-be assailant”, *ibid.*, at 12.

¹⁸⁶ *Ibid.*, at 11. In the words of Professor Gerald Blidstein, “Jewish law abolished capital punishment in fact not by denying its conceptual moral validity but rather by allowing it only this conceptual validity.”, quoted by R.A. Block, *Capital Punishment*, in: W. Jakob/M. Zemer (ed.), *Crime and Punishment in Jewish Law*, New York/Oxford 1999, at 64, 67.

¹⁸⁷ Novak, *supra*, note 184, at 11.

¹⁸⁸ *Deuteronomy*, 21:21.

¹⁸⁹ Verbally: external. Teachings of the *Tanaim* that were not included in the *Mishna*.

¹⁹⁰ *Sanhedrin*, 71a.

¹⁹¹ Elon, *supra*, note 12, at IV 1631.

¹⁹² *Ibid.*, at 925.

¹⁹³ Philo: With an English translation by F.H. Colson, 11 vols., London 1937, VII, 357.

G. Judaism: Religion and Morality

Yeshayahu Leibowitz, one of the most eminent Jewish thinkers of the present age, emphasized an inherent contradiction between Judaism, as a religion, on the one hand, and humanism and morality as civil phenomena, on the other. In his view:

No social, political or economic program could be derived from Judaism. Judaism does not engage in social or in human problems as such. This is so because man is meaningless ... there is no intrinsic value in man himself but only in his position before God. Judaism is not humanism ... The social constitution of the *Torah* is neither social nor philanthropic: it does not stem from the concept of human rights but rather from man's duty.¹⁹⁴

In England's formula:

Morality as a normative order is necessarily anthropocentric, directed at the fulfillment of human interests. The human being is the end object of all moral rules. In traditional *Halakbic* Judaism, however, the problem clearly requires a theocentric answer. Religion transcends human interest, its ultimate end is not human happiness but service of the Creator.¹⁹⁵

In Leibowitz's opinion:

The attempt to fuse morality and religion is not a happy one ... Judaism did not produce an ethical theory of its own, was never embodied in a moral system, and made no pretence of representing a specific moral point of view.¹⁹⁶

Leibowitz's approach is that of the believer who adheres to the precepts of religion merely because they are God's will. Under this approach the moral basis of religious precepts is totally irrelevant. Leibowitz's approach touches upon fundamental philosophical dilemmas concerning the relationship between religion and morality and between divine supremacy and human autonomy which have engaged theologians and philosophers since the beginning of civilization. This is not the proper place to deal with these dilemmas¹⁹⁷. Suffice it to mention that Leibowitz was sharply criticized from even a religious point of view¹⁹⁸. Lei-

¹⁹⁴ Y. Leibowitz, *Yahadut, Am Yehudi u'Medinath Yisrael* [Judaism, Jewish People and the State of Israel], Jerusalem and Tel-Aviv, 1975, 310 (*Heb.*).

¹⁹⁵ I. England, The Interaction of Morality and Jewish Law, 7 *The Jewish Law Annual* 114, 119 (1988).

¹⁹⁶ Leibowitz, *supra*, note 18, at 6-7.

¹⁹⁷ For a comprehensive discussion of these issues, see D. Statman/A. Sagi (eds.), *Bein Dat Le'Musar* [Between Religion and Ethics], Ramat-Gan 1993, (*Heb.*). See also, Z.W. Falk, *Religious Law and Ethics: Studies in Biblical and Rabbinical Theonomy*, Jerusalem 1991; *ibid.*, *Erkey Mishpat ve'Yahadut: Likrat Filosofya shel Ha'Halakha* [Legal Values and Judaism. Towards a Philosophy of Halakha], Jerusalem 1980 (*Heb.*); S.L. Spero, *Morality, Halakha and the Jewish Tradition*, New York 1983; D. Weiss Halivni, Can a Religious Law be Immoral?, in: A.A. Chiel (ed.), *Perspectives on Jews and Judaism: Essays in Honor of Wolfe Kelman*, New York 1978, 165; A. Lichtenstein, Does Jewish Tradition Recognize an Ethic Independent of Halakha?, in: M. Fox (ed.), *Modern Jewish Ethics*, Columbus OH 1975, 62.

¹⁹⁸ For criticism of Leibowitz, see Ch. Ben-Yerucham/Ch.E. Kolitz (eds.), *Shlila Lishma: Clapey Yeshayahu Leibowitz* [Negation for Negation's Sake: Versus Yeshayahu Leibowitz –

Leibowitz's philosophy is unique in Jewish religious thought and he has been accused of entertaining a superficial and one-dimensional perception of the essence of Judaism¹⁹⁹. Yet, even if sound from a religious point of view, this perception is irrelevant to the thesis advocated in this essay. In the opinion of Leibowitz, "the religious end is the ultimate end" and "is desecrated when it is made to serve as a means to some other end".²⁰⁰ In his view, "a person acting as a moral agent cannot be acting as a religious agent". This is so since "human actions ... can only be identified in terms of the agent's intention". Therefore, "a religious action cannot be simultaneously a moral action".²⁰¹ Leibowitz stresses the idea that "[t]he Bible does not recognize the good and the right as such," but rather, "the good and the right in the eyes of God".²⁰² Yet, the real question is whether that which is good and right in the eyes of God is also good and right from a moral point of view. I have tried to show throughout this essay that fundamentally this is so.²⁰³

Meyer Waxman wrote:

[I]n Judaism God is conceived as an ethical personality par excellence or as the source and fountain of all morality.²⁰⁴

Speaking of "the character of God", Moore wrote:

God's justice is first of all man's assurance that God will not use His almighty power over His creatures without regard to right.²⁰⁵

Abraham A. Abarbanel wrote:

... both as a general matter and in any particular case we cannot believe that evil will result from divine commandments ... For the *Torah* of God embodies the pursuit of absolute justice, and the Lord is true and His *Torah* is true.²⁰⁶

Essays and Comments], Jerusalem 1983 (*Heb.*); M. Granot, *Emunah Mi'shelo: Ha'Yehudi Ha'biloni ve'Mishnato shel Yeshayahu Leibowitz* [A Singular Faith], Tel Aviv 1993 (*Heb.*); M. Gilboa, Y. Leibowitz: *Dvarim ve'Hipucham* [Y. Leibowitz: Ideas and Contradictions, Be'er-Sheba, 1994 (*Heb.*)].

¹⁹⁹ See A. Sagi, *Onsho shel Amaleck: Darkey Ha'hitmodedut shel Ha'masoret Ha'Yehudith im Ha'be'aya Ha'musarit u'Ma'a'mada shel Ha'musariyut Ba'masoret Ha'Yehudith* [The Punishment of Amaleck: The Ways Jewish Tradition Competes With the Moral Issue and the Status of Morality in the Jewish Tradition], in: M. Mautner/A. Sagi/R. Shamir (eds.), *Rav-Tarbutiyut Bi'Medinah Demokratit ve'Yehudith: Sefer Ha'zikaron le'Ariel Rozen-Zvi z"l* [Multiculturalism in a Democratic and Jewish State], Tel-Aviv 1998, 477, 509 (*Heb.*); L. Jacobs, *The Relationship Between Religion and Ethics in Jewish Thought*, in: M.M. Kellner (ed.), *Contemporary Jewish Ethics*, New York 1978, 41. Rabbi Lichtenstein wrote that the challenge presented by Leibowitz could not be regarded seriously, *supra*, note 197, at 66.

²⁰⁰ E. Goldman in his Introduction to Y. Leibowitz, *supra*, note 18, at xvi.

²⁰¹ Ibid. See also Stettin/Sagi, *supra*, note 197, Ch. 7.

²⁰² *Supra*, note 18, at 7, quoting from *Deuteronomy*, 12:28.

²⁰³ Cf. A. Sagi, *Techumotav Ha'musariyot shel Ha'El Basifrut Ha'hilchatit u'Ma'amado shel Hamusar Ba'Halakha* [The Ethical Qualities of God in Halakhic Literature and the Status of the Ethical Factor in HalachaHalakha], in: M. Beer (ed.), *Mechkarim Ba'Halakha u've'Mahshevet Yisrael: Mugashim Lichvod Ha'rav Professor Menachem Emanuel Rackman Be'bagio Le'gvuroth* [Studies in HalachaHalakha and Jewish Thought], Ramat-Gan 1994, 261 (*Heb.*).

²⁰⁴ M. Waxman, *Judaism – Religion and Ethics*, New York 1953, 141.

²⁰⁵ *Supra*, note 116, vol. I, at 387-388.

²⁰⁶ Abarbanel, *Commentary on Deuteronomy*, 17:8 et seq.

Indeed, God himself is said to have described his attributes in the following words:

Thus saith the Lord, Let not the wise man glory in his wisdom, neither let the mighty man glory in his might, let not the rich man glory in his riches: But let him that glorieth glory in this, that he understandeth and knoweth me, that I am the Lord which exercise lovingkindness, judgment, and righteousness, in the earth: for in these things I delight, saith the Lord.²⁰⁷

Commenting on this verse, Rabbi Aharon Lichtenstein wrote:

The ethical element is presented as the reason for seeking knowledge of God, or, at the very least ... as its content. In either case, the religious and the ethical are here inextricably interwoven: and what holds true of religious knowledge holds equally true of religious, that is, *Halakhic*, action. This fusion is central to the whole rabbinic tradition. From its perspective, the divorce of *Halakha* from morality not only eviscerates but falsifies it.²⁰⁸

It is, moreover, disputable whether what is “good and right in the eyes of God” is the ultimate good even according to of the Bible. In this regard it is worthwhile mentioning the traditional interpretation of God’s commandment to the Children of Israel to do “that which is good and right in the sight of the Lord thy God”. *Rasbi* (Rabbi Shlomo Yitzhaki), the great Bible commentator from the eleventh century, explained that this is a commandment to do “what is good in the eyes of Heaven and what is right in the eyes of men”.²⁰⁹ The book of *Deuteronomy*, called *Sefer Hayashar* – the book of righteousness, is based on a similar commandment:²¹⁰ “thou shalt do that which is right and good in the sight of the Lord”²¹¹. Nahmanides (Rabbi Moshe ben Nahman), the great *Halakhic* authority from the thirteenth century, explains this commandment as an all-inclusive provision. Since the Bible can not offer a commandment regarding every interaction one man has with another or provides for every possible State law, the Bible set the way with some basic commandments such as “Thou shalt not go up and down as a talebearer among thy people: neither shalt thou stand against the blood of thy neighbour” and others like them. Thus, the Bible goes on to set a general rule that a man shall be considered “perfect and upright”.

Moreover, the Bible records several episodes where acts of God had been challenged from a moral point of view. Thus, when God informed Abraham of his decision to destroy Sodom and Gomorrah, as an act of retaliation for the sins of the inhabitants of these cities, Abraham reprimanded “the Judge of all the earth” for

²⁰⁷ *Jermeiah*, 9:22-23. Note, moreover, God’s prayer: “May My Attribute of Mercy Overcome My Attribute of Anger” Babylonian *Talmud*, Tractate *Berakhot*, 7a.

²⁰⁸ Lichtenstein, *supra*, note 197, at 67.

²⁰⁹ Interpretation to *Deuteronomy*, 12:28.

²¹⁰ Babylonian *Talmud*, Tractate *Avodah Zarah*, [idolatrous worship], 25a. For a comprehensive discussion of the commandment to do “that which is right and good in the eyes of God”, see Kirshenbaum, *supra*, note 20, 253-285.

²¹¹ *Deuteronomy*, 6:18

failing to do justice.²¹² Professor Emanuel Rackman regards this report as “Biblical authority for the proposition that God respects natural law”, which is “part of the Covenant”.²¹³ Furthermore, it has been suggested that Judaism recognizes the autonomy of morality and accords it religious value.²¹⁴ Yet, even if we disregard these well-reasoned models, it is hard to accept Leibowitz’s attempt to divorce Judaism from morality and deny it any social mission.

We have encountered an episode where God’s ruling was overruled by the Sages and he was defeated.²¹⁵ This does not derogate from God’s supremacy, as it was God who laid down the rule that “after the majority must one incline”.²¹⁶ Yet, as explained by Justice Silber, ²¹⁷ this episode does subject God to the rule of law, just like human beings. Moreover, the fact that God instituted the majority rule may indicate that God does not act arbitrarily, but rather is led by moral considerations. The morality of God and its direct impact on human behavior is vividly demonstrated in a *midrash* included in the Babylonian *Talmud*. The Biblical verse: “Ye shall walk after the Lord your God”²¹⁸ is interpreted in the *Talmud* as follows:

What means the text?. Is it then possible for a human being to walk after the *Shechinah* [the Divine Presence]; for has it not been said “For the Lord thy God is a consuming fire?” (*Deuteronomy*, 4:24) But [the meaning is] to walk after the attributes of the Holy One, Blessed Be He. As He clothed the naked ..., so do thou also clothe the naked. The Holy One, Blessed Be He, visited the sick ..., so do thou also visit the sick. The Holy One, Blessed Be He, comforted mourners ..., so do thou also comfort mourners. The Holy One, Blessed Be He, buried the dead ..., so do thou also bury the dead.²¹⁹

A similar idea may be found in an ancient *Halakhic* interpretation of the Scriptures. Regarding the verse “To walk in all his ways”, the *Sifrei* says:

... [T]hat is, the characteristics of the Holy One, blessed Be He; as it is said: “The Lord, the Lord, a God full of compassion and gracious, slow to anger and plenteous in mercy and truth.” ... As the All-Present is called compassionate and gracious, so be you also compassionate and gracious; ... as the Holy One is called righteous, be you also righteous; as he is called loving, be you also loving.²²⁰

Finally, about the verse “This is my God and I will adorn Him”,²²¹ it was said:

²¹² *Genesis*, 18:25.

²¹³ E. Rackman, *Secular Jurisprudence and Halakha*, 6 *The Jewish Law Annual* 45, 46 (1987). Reproduced, with some changes in Rackman, *Modern Halakha*, *supra*, note 65, at 104- 122.

²¹⁴ See A. Sagi, *Yabaduth: Beyn Dat u’Musar* [Judaism: Between Religion and Morality], Tel-Aviv 1998 (*Heb.*); L. Jacobs, *The Relationship Between Religion and Ethics in Jewish Thought*, in: G. Outka/J.P. Reeder (eds.), *Religion and Morality*, 1973.

²¹⁵ *Supra*, text accompanying note 112.

²¹⁶ *Ibid.* at the end of the text.

²¹⁷ *Supra*, text accompanying note 114.

²¹⁸ *Deuteronomy*, 13:4.

²¹⁹ Tractate *Sotah* [errant wife], 14a.

²²⁰ *Sifrei* [a homiletic interpretation to Numbers and Deuteronomy], *Deuteronomy*, 49:85a.

²²¹ *Exodus*, 15:2.

Is it then possible to adorn God? Yes by resembling Him, I will make myself like unto Him. As He is compassionate and gracious, be also compassionate and gracious.²²²

Setting God's attributes as a model is central in Jewish teachings. Professor Kirschenbaum summarized this observation as follows:

Imitatio Dei is a constant theme of Judaism – in the Bible, in talmudic literature, and among the medieval Jewish philosophers, halachists and mystics – teaching man loving kindness and mercy, encouraging him to ethical living and beneficence and exhorting him to eschew hardness of heart and cruelty, strictness and inflexibility.²²³

Professor Last Stone concludes:

The Jewish legal system ... extrapolat[es] a theory of justice from the attributes of God and the words of Scripture ... [T]he ultimate measure of the Jewish standard of perfection and concept of justice is God's perfection as recorded in a revealed text.²²⁴

H. The Unique Character of *Halakbic* Texts

Professor Julius Kravetz, of the Hebrew Union College in New York City, saw fit “to address some words of academic caution in the direction of those who find that every movement proclaimed in the twentieth century as humane, progressive, and forward-looking has already been anticipated in the Jewish tradition and finds congenial reception there”.²²⁵

Kravetz' caution brings to mind a warning expressed, two decades later, by Suzanne Last Stone. She tells us of “a new genre of Jewish-American legal scholarship”, under which “Jewish law is invoked as a ‘contrast case’. It is described ... as anti-hierarchical, egalitarian, and communitarian, as a jurisprudence written in a feminist voice ..., based on reciprocal obligations rather than rights, and free of the counter-majoritarian difficulty, and as a case study in the redemptive possibilities of legal interpretation”.²²⁶ Last Stone argues that “[t]he Jewish legal tradition is

²²² *Mekhilta* [a homiletic interpretation to Exodus], 37a; Tractate *Shabbat*, 133b. There is a play of words in this interpretation: The Hebrew expression for “I will adorn Him” – *anvehu* – is read as *ani vehu*: me and him.

²²³ Kirschenbaum, *supra*, note 20, at 48. Kirschenbaum refers, *inter alia*, to Maimonides, *Guide of the Perplexed*, 3:54 and to his *Mishneh Torah* [Review of *The Torah*], *Laws Relating to Moral Dispositions and to Ethical Conduct*, 1:5-6.

²²⁴ Last Stone, *supra*, note 69, at 869. See, generally, M. Weinfeld, *Social Justice in Ancient Israel and in the Ancient Near East*, Jerusalem 1995. Cf. N. Lamm, *Notes on the Concept of Imitatio Dei*, in: L. Landman (ed.), *Rabbi Joseph H. Lookstein Memorial Volume*, New York 1980, 217; S. Siegel, *Imitation of God*, *Encyclopedia Judaica*, Vol. 8, 1292; M. Kellner, *Maimonides on Human Perfection*, Atlanta 1990; *ibid.*, *Maimonides and Samuel Ibn Tibbon on Jeremiah 9:22-23 and Human Perfection*, in: M. Beer (ed.), *Studies in Halakha and Jewish Thought*, Ramat-Gan 1994, 49 (*Heb.*); A. Melamed, “Let not ... Glory” – Philosophical Explanations of Jeremiah 9: 22-23, *Medieval and Renaissance Jewish Thought*, 4 *Mechkerei Yerushalayim Be'machshevet Yisrael* [Jerusalem Studies in Jewish Thought], 31 (*Heb.*), (1985); Sagi, *supra*, note 199.

²²⁵ J. Kravetz, *Some Cautionary Remarks*, in: D.J. Silver (ed.), *Judaism and Ethics*, New York 1970, 273. This essay was originally published in 15 *CCAR Journal*, 1 (January, 1968).

²²⁶ Last Stone, *supra*, note 69, at 818-19.

being subtly reinterpreted to yield a legal counter-model embodying precisely the qualities many contemporary theorists wish to inject into American law".²²⁷ She argues "that the counter-model presented so far is often more wishful than accurate and, even when accurate, has limited applicability in a secular society".²²⁸ She warns the "theorists", "not to derive too many lessons from the counter-text of Jewish law. For, in the final analysis, Jewish law is not only a legal system; it is the life work of a religious community".²²⁹

Kravetz and Last Stone are right in warning against over-pushing the Jewish counter-text and against ascribing all advanced social theories to Jewish origin. It is certainly not accurate and even counter-productive to forward Jewish teachings for each and every progressive idea. However, their specific demonstrations and conclusions may be challenged. It would be wrong to evaluate a *Halakhic* text on its face-value. Rather, one should endeavor to reveal the thesis that underlines the text against the background its historical context and apply it to contemporary issues.

Of relevance is also a unique characteristic of Judaic classic texts. The *Halakhic* sources, starting with the *Mishna*, are not satisfied with recording the prevailing rules. They rather record the various opinions expressed during the deliberations in the *Yeshiva*, the Jewish academy of learning. This phenomenon should be regarded a blessing. Justice Elon referred to this phenomenon and wrote:

It is well-known that Jewish thought over the ages – including the Halakhic system ... – is full of varying perceptions and conflicting approaches. No litigant finds it difficult to extract from the recesses of the sources some support for his own arguments and views. This applies to each and every issue ... Certainly it goes without saying that these approaches and perceptions taken together have contributed to the deepening and enriching of Jewish thought. Those, however, who seek understanding must distinguish between that which is of temporary significance and that which is of continuing importance, between the expression of the generally accepted opinion as against something exceptional ... From this vast and abundant storehouse, the inquirer must draw liberally that which his time and place require, and which they themselves join in the treasury of Jewish philosophy and Jewish heritage.

.....

Pluralism is not a negative phenomenon or a defect: it is of the essence the *Halakha*. "It is not a question of inconstancy or deficiency to say, Heaven forbid, that the *Torah* was thereby made into two *Toroth*. On the contrary, that is the way of the *Torah*, the utterance of both are the words of the living God" (Hayim Ben Betzalel, *Mayim Hayim*, Introduction). A multiplicity of views and approaches tend, moreover, to create harmony and uniformity through diversity. In the fine words of the latest of the codifiers, R. Y.M. Epstein (*Arukh haShulhan, Hoshen Mishpat*, Introduction) at the beginning of the century:

²²⁷ Ibid., at 814.

²²⁸ Ibid.

²²⁹ Ibid., at 893-894.

“Every dispute among the *Tanaim* [Sages of the *Mishna*], the *Amoraim* [Sages of the *Talmud*], the *Geonim* [Sages that operated from the end of the sixth century until the middle of the 11th century] and the *Poskim* [codifiers of *Halakha*] in pursuit of true understanding constitutes the word of the living God and each has a place in the *Halakha*. That is indeed the glory of our holy and immaculate *Torah*. The whole *Torah* is called a song and it is the glory of song that its different sounds are various but harmonious.”²³⁰

Commenting on Rabbi Epstein’s view, Elon wrote:

The *Halakha* is a mighty symphony made up of many different notes; therein lies its greatness and beauty. In every generation, it needs a great conductor, blessed with inspiration and vision, who can find the interpretation of its many individual notes that will please the ear and respond to the needs of the contemporary audience.²³¹

Professor Rackman noted: “In halakhic literature one can find support for virtually every theory of legal philosophy known to secular jurisprudence. No one theory by itself dominates the scene.”²³²

The question why minority views were recorded in the *Talmud*, despite the rule is that the majority opinion prevails,²³³ puzzled the sages. One explanation forwarded for this phenomenon is that a minority opinion may become the prevailing rule:

[I]t was always contemplated that the minority view in any dispute could ultimately prevail and govern actual practice. R. Yudah said: “The minority view is recorded [in the *Mishnah*] along with the majority view so that is available to become the applicable law whenever the circumstances are appropriate” (*Tosefta, Eduyyot*, 1:4)... [As an important commentator explained]: “Although the minority opinion was not initially accepted, and had only few adherents, yet if another generation’s majority will agree with its reasoning, it will become the law.” (Commentary of Rabbi Samson of Sens to *Mishnah, Eduyyot*, 1:5).²³⁴

Halakha is unique in its approach to minority opinions. *Halakha* views both majority and minority opinions as “words of the living God”.²³⁵ There is an instructive tale behind this statement:

Rabbi Yannai declared: Had the *Torah* been given in the form of clear decisions, our condition would have been intolerable. How so? When the Lord spake unto Moses, Moses had said to Him, “Lord of the universe, define the law precisely [leaving no ambiguity, no doubt, no flexibility as to its exact contents]”. The Lord, however, answered, Follow the Majority (*Exodus*, 23:2) – if the majority acquits, acquit; if the

²³⁰ Election Appeal 2/84 *Neiman v. The Chairman of the Central Elections Committee to the Eleventh Knesset*, 39(2) P.D. 225, 293 = 95 (1985), Rakover, *supra*, note 47, I, 209, 210-212.

²³¹ Elon, *supra*, note 12, at III, 1452.

²³² E. Rackman, *Secular Jurisprudence and Halakha*, *supra*, note 213, at 45.

²³³ “Where there is a controversy between an individual and a group, the *Halakha* follows the group”, Tractate *Berakhot*, 9a.

²³⁴ *Neiman v. The Chairman of the Central Elections Committee to the Eleventh Knesset*, *supra*, note 230, at 294. The translation is from Elon, *supra*, note 12, at IV, 1848.

²³⁵ Babylonian *Talmud*, Tractate *Erubin*, 13b; Gittin [divorces], 6b; Jerusalem *Talmud*, Tractate *Berakhot*, 1:4; *Yevamoth* [levirate marriages], 1:6. Cf. Tractate *Hagigah*, 3b, concerning “scholars who sit and occupy themselves with *Torah*”.

majority condemn, condemns. The *Torah* is to be interpreted in forty-nine ways leading to a negative decision and in forty-nine ways leading to a positive decision.²³⁶

Rabbi Yomtov Ishbili, of the end of 13th century, known as the *Ritba*, dealt with an interesting dilemma:

“Both are the words of the living God.” The Rabbis of France, of blessed memory, asked: How could both be the words of the living God, since one forbids and one approves?! And they explained: When Moses went to Heaven to receive the *Torah*, he was shown, on each issue, forty-nine ways to forbid and forty-nine ways to approve. [Moses] asked the Holy One, blessed be He, about that, and [the Lord] said that it will be allocated to the sages of each generation, and the rule will be in accordance with their decision.²³⁷

The message of what has been said so far is the freedom of opinion in *Halakha*. Though, on the normative level, a controversy might be resolved according to a certain opinion, the other view nevertheless constitutes a legitimate and cogent opinion.²³⁸ Though freedom of opinion in *Halakha* extends to views only and not to practice,²³⁹ it is submitted that this deficiency has no bearing on our issue. Research into Judaic sources of human rights, in the context of a non-religious jurisprudence, should not be constrained their *halakhic* practical manifestation. The unique *halakhic* approach to minority opinions makes them no less worthy of application than the opinions that have gained majority support.²⁴⁰

Two further statements have a bearing on this matter. The first statement, by Maimonides, refers to the persons authorized to state the law:

God did not permit us to learn [the law] from the prophets but from the *halakhic* authorities, men of reason and knowledge. The *Torah* does not state “you shall go to the

²³⁶ Jerusalem *Talmud*, Tractate *Sanhedrin*, 4:2. The translation is from Kirschbaum, *Equity in Jewish Law*, *supra*, note 20, at 199, following the *Penei Moshe* commentary by Moses Margoliot, of the 18th century.

²³⁷ *Hiddushei ha-Ritba* [Novellae of the Ritba], Tractate *Eruvin*, 13b.

²³⁸ *Neiman v. The Chairman of the Central Elections Committee to the Eleventh Knesset*, *supra*, note 230, at 294. See, generally, Marc Angel, *Authority and Dissent: A Discussion of Boundaries*, 25 *Tradition* no. 2, at 18 (1990). Rabbi Angel, a prominent Orthodox Rabbi, cites an abundant Hebrew literature on intellectual freedom in the Jewish tradition, and argues that dissent within the boundaries of normative Judaism is respected and even encouraged: “Differences of opinion among our sages constitute the glory of the *Torah*.” See also Jeffrey I. Roth, *The Justification for Controversy under Jewish Law*, 76 *Cal. L. Rev.* 338 (1988).

²³⁹ See Elon, *supra*, note 12, at III, 1067; see, generally, H. Ben-Menahem/N. Hecht/S. Wosner (eds.), *Controversy and Dialogue in Halakhic Sources*, 3 vols., Boston/Jerusalem 1991-1993.

²⁴⁰ An example of such application may be found in Block’s article, *supra*, note 186. At the end of his analysis, Block concludes, that “Jewish tradition is ambivalent about capital punishment and the claim that there is only one coherent, Jewish authentic position on the subject strikes ... one as intellectually dishonest and morally flawed.” *ibid.*, at 70. Nevertheless, as he stated in an earlier article, “[s]uch a position can emerge from a personal confrontation with Jewish traditions, as one draws upon the part of the tradition that resonates most intensely within oneself.” R.A. Block, *Death, Thou Shalt Die: Reform Judaism and Capital Punishment*, *Journal of Reform Judaism*, 1 (1983).

prophet who will be in those days”, but “you shall ... appear before the priest, the Levites and the judge ...” [*Deuteronomy*, 17:9]²⁴¹

The other statement refers to the authority of contemporary *Halakhic* authorities:

The generation of your day and the *halakhic* authority of your day should be in your eyes equal of the past generation and of the earlier Sages who lived before you ... Scripture considered three judges of insubstantial quality to be equal to three who were the greatest authorities ... even if the most insignificant person is chosen as a leader of the community, he should be considered the equal of the mightiest of the ancient masters, for it is stated: “You shall ... appear before the priests, the Levites, and the judge of that time.” [*Deuteronomy*, 17:9] This teaches that the judge of your generation is in his time the equal of a judge who lived in the very earliest times.²⁴²

I. Epilogue

Are we to rely on religious argumentation in public debates? Should religious-based justifications be raised to resolve moral and legal disagreements?

I do not wish to join here the extended and heated controversy among philosophers and jurists on whether religious teachings that cannot be justified on secular grounds may be raised in defense of state norms.²⁴³ I do not believe that such a suggestion is morally justifiable, let alone practically feasible. However, my argument is rather a modest one: Religious based morals should not be excluded from public debate. I agree with Professor Schwarzschild:

In the last analysis, perhaps the best justification for liberalism is value pluralism: the idea that there are many conflicting Goods in the world, genuinely Good and genuinely conflicting, not reconcilable in any rational synthesis embodying the Greater Good. Liberal tolerance allows for rough and shifting compromises among the various and conflicting Goods. A liberal society ought to embrace as many of the world’s contradictory Goods as it can possibly carry. And religious values are surely among these Goods. Today’s religious groups, at least those with a calling to social action, offer views which are in some measure a counterweight to the values of secular modernity. The presence of such counterweights strengthens pluralism, and hence stands to strengthen liberal society itself.²⁴⁴

I agree, moreover, with Samuel Levine’s argument:

[E]xclusion of religious thought might unnecessarily lessen the intellectual vitality of public discourse. Of course, it is possible to maintain that any or all of these ideas evolved in American society independent of religious thought. Such an objection, how-

²⁴¹ Maimonides, Introduction to the Commentary on the Mishna. Cf. Jerusalem *Talmud*, Tractate *Berakhot*, 1:4, 3b.

²⁴² *Kobelet Rabbah* [Collection of exegesis on Ecclesiastes], 1:4.

²⁴³ An extensive literature has been written on this issue. See, generally, M.J. Perry, *Love and Power: The Role of Religion and Morality In American Politics*, 1991.

²⁴⁴ M. Schwarzschild, *Religion and Public Debate in a Liberal Society: Always Oil and Water or Sometimes More Like Rum and Coca-Cola?* 30 San Diego L. Rev. 903, 915 (1993).

ever, seems largely irrelevant. To the extent that religion offers insights that, at the very least, enrich the level of discussion, ignoring these insights would seem to prove counterproductive and unfortunate.²⁴⁵

My argument goes further than that and responds to the question: How does Judaism fare with these presuppositions?

As I have tried to show, at the outset of this essay, Judaism does not limit itself to religion only. It does not confine itself within the walls of synagogues.²⁴⁶ It rather extends to all human activities. Some view this an impediment to human rights.²⁴⁷ I regard it a blessing. I find support to my view in Schwarzcchild's analysis of the tension between liberalism and religion.²⁴⁸ Schwarzcchild relates this tension to the legacy of the European Enlightenment. In his words, "[I]n the eyes of the Enlightenment, religion represented everything unenlightened"²⁴⁹; "a threat to freedom, to pluralism, and to reason"²⁵⁰; "an obstacle to progress, science, free choice, the society of contract, and material civilization".²⁵¹ Schwarzcchild notes that the Enlightenment thinkers were confronted with established Christian Churches. Ironically, by segregating between the temporal and the sacred, thus excluding many human preoccupations from its domain, the Church was able to achieve a greater uniformity in belief, "allowing for no religious pluralism in principle, and in practice often affording little tolerance, or none at all, to religious dissenters".²⁵²

Judaism and Classical Islam, on the other hand, are integrated civilizations, rather than mere religions. They embrace all aspects of human life. They were, thus, compelled to a degree of pluralism, tolerance and rationalism that did not present a threat to renaissance.²⁵³

It is appropriate to conclude the analysis of the Jewish contribution to human rights with the story of Shamai and Hillel. Shamai the Elder and Hillel the Elder were two of the greatest sages during the period of the Second Temple. They headed rival schools which clashed over more than three hundred *Halakhic* issues. The conflict was so heated that "the *Torah* became like two *Toroth*".²⁵⁴ The authorities tell us that the school of Shamai adopted a stricter view, while the school of Hillel was more lenient. Hillel himself was gentle and kind, while Shamai was stern and short-tempered. Hillel and his followers came from a lower strata of so-

²⁴⁵ S.J. Levine, Capital Punishment and Religious Arguments: An Intermediate Approach, 9 Wm. & Mary Bill of Rts. J. 179, 188 (2000).

²⁴⁶ See Maoz, *supra*, note 152, at 54.

²⁴⁷ See A. Levontine, "Yehudith ve'Democratit" – *Hirhurim Ishiyim* ["Jewish and Democratic" – Personal Reflections], 19 *Iyunei Mishpat* 521 (1995).

²⁴⁸ Schwarzcchild, *supra*, note 244.

²⁴⁹ *Ibid.*, at 904.

²⁵⁰ *Ibid.*, at 911.

²⁵¹ *Ibid.*, at 914.

²⁵² *Ibid.*, at 905.

²⁵³ *Ibid.*, at 910.

²⁵⁴ Babylonian *Talmud*, Tractate *Sanhedrin*, 88b.

ciety, while Shamaï and his adherers belonged to the upper class.²⁵⁵ According to *kabala*, the school of Shamaï had its origin in might [*gevurah*], while the school of Hillel had its origin in mercy [*hesed*].²⁵⁶ The school of Shamaï was sharper. We are, moreover, told that “in the world to come, the *Halakha* will be according to the School of Shamaï”.²⁵⁷ Nevertheless, a *talmudic* tale reports that, following three years of controversy, a heavenly voice emerged and declared that “the law is in accordance with the School of Hillel”.²⁵⁸ Of interest is the justification put forward for this ruling: “Because they [the School of Hillel] were pleasant and tolerant.”²⁵⁹

A notorious episode, reported in the *Talmud*, demonstrates the difference between Hillel and Shamaï. A heathen came to Shamaï and asked to be converted “on condition that” [he] teach[es] him the entire *Torah* “while standing on one foot”. Shamaï, so are we told, pushed him away with the builder’s cubit. Then he came to Hillel, who told him: “What is hateful to you, do not do to your neighbor; that is the whole *Torah*, while the rest is the commentary.”²⁶⁰

Interestingly, a gentile seeking to convert to Judaism, Hillel makes no mention of God nor of religious precepts. Instead, he teaches the gentile a social message which is supposed to condense the entire *Torah* into a single statement.²⁶¹

At the end of this brief survey of Judaic teachings, it is submitted that Judaism indeed played a central role in advancing human rights. One may ask why it should matter whether Judaism propounds the preservation of human rights. The answer is that the doctrine of human rights is still fragile. It cannot exist in the abstract divested of social concepts. Religion plays a major role in society. Jewish ideas and values have infused Western culture directly and have had an indirect impact through Christianity, enriching Western humanistic and liberal thinking. Jewish ideas and values are capable of enriching it still further.²⁶²

²⁵⁵ Sh. Safr a i, Bet Hillel and Bet Shamaï, *Encyclopedia Judaica*, vol. 4, 737.

²⁵⁶ *Zohar* [the central work of kabalistic literature, attributed to Rabbi Shimon bar Yohai], Ra’aya Meheimna [The faithful Shepard], 3:254a.

²⁵⁷ *Ibid.*

²⁵⁸ *Jerusalem Talmud*, Tractate *Berakhot*, 1:4, 9a; *Babylonian Talmud*, Tractate *Erubin*, 13b.

²⁵⁹ *Ibid.*, The *Tosafot* [Glosses to the *Babylonian Talmud* by 11th and 12th century scholars] wonder why a heavenly voice resolved a *Halakhic* dispute, since “we pay no attention to a Heavenly Voice”, *Babylonian Talmud*, Tractate *Baba Mezia*, 59b. See, *supra*, text to note 112. The explanation put forward was that the School of Hillel was in the majority, yet a Heavenly Voice was needed “since the School of Shamaï were sharper [than the School of Hillel]”, and therefore they relied on the heavenly ruling; *Tosafot*, *Erubin* 6b.

²⁶⁰ *Babylonian Talmud*, Tractate *Shabbat*, 31a.

²⁶¹ Hillel’s statement might remind one of Jesus, the contemporary of Hillel, who preached in the Sermon on the Mount: “Therefore all things whatsoever ye would that men should do to you, do ye even so to them, for this is the law and the prophets.” *Matthews*, 7:12. While Jesus’ formula is positive, Hillel’s is negative. This variance was interpreted adversely by Christianity and favorably in Judaism; see, Hillel (the Elder), *Encyclopedia Judaica*, vol. 8, 482, 484.

²⁶² Judge H e n d e l examines three models advanced in American law to justify the introduction of a duty to rescue in the law of torts (the communal theory; the economic theory; and the feminist theory) and rejects them as being unfeasible and unjustifiable. The law of torts, explains H e n d e l, is basically concerned with the past, trying to establish the fault for damages that have occurred. The duty

In his foreword to Priest's book *Governmental and Judicial Ethics in the Bible and Rabbinic Literature*²⁶³, Professor Wayne Estes wrote:

The impact of the ethical implications of Judaism has an influence that far exceeds the formal acceptance of that religion. Based on both pragmatic and moral needs of mankind, these ethical principles continue to influence standards of human and governmental conduct even when there is absent a realization of their origin.²⁶⁴

to rescue, on the other hand, is foreseeing the future, trying to avoid a catastrophe. Unlike the law of torts, this duty concentrates on the needs of the victim, rather than the activities of the rescuer: "In order to create a duty to rescue, the law needs an external source, an inspiring source, which enjoys a status and recognition, that is capable of creating a duty to rescue per se, beyond the framework of the law of torts ... The source for such duty must enjoy a wide social consensus. Religious law is an outstanding source for fulfilling such conditions. It enjoys a status which enables it to serve as kind of a bridge between law and morality, between *lex lata* and *lex ferenda*. It is of a firm standing enough to overcome the system's objection to adopt a duty to rescue, due to its legal heritage. There are possibly other sources that are able to found the duty to rescue and enable its acceptance by a legal system which rejected it in the past. However, this did not happen. An independent cover of the duty to rescue, even though by merely a title that reflects a religious origin, like the Good Samaritan in the United States and the Thou Shalt Not Stand Idly by the Blood of Thy Neighbour Law in Israel, will add moral and historical legitimacy for adopting a duty to rescue by the legal system.;" H e n d e l, *supra*, note 38, at 268.

²⁶³ P r i e s t, *supra*, note 182.

²⁶⁴ *Ibid.*, at xvii. See, in the same view, O z - S a l z b e r g e r, *supra*, note 74, at 114: "[B]iblical influence fed the modern longing for social justice ... [E]arly modern Europe had invested great efforts that might have built a bridge connecting ancient Israel to modern Israel, and linking new ideas of liberty and justice with their Hebrew origins. Now that modern Israel seems to have lost interest in its own social vision, the need to rediscover that link has become all the more urgent.

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