A Dynamic Halakhah: Principles and Procedures of Jewish Law

ROBERT GORDIS

NO SERIOUS DISCUSSION ON THE NATURE of Judaism or of its experience in the past, its condition in the present, or its prospects for the future can proceed very far without the introduction of the term Halakhah The word, derived from the Hebrew root *halakh*, "go, walk," means "the Way" and refers to the body of Jewish law and practice by which the Jewish people has been governed during its long pilgrimage through time

Tradition found the origin of Halakhah in the written Torah of Moses, which required oral elucidation and interpretation Halakhah became the central intellectual and spiritual enterprise of the Jewish people after the Babylonian Exile, with the arrival of Ezra the Sopher, "master of the book," in Palestine in the middle of the fifth century B C E It continued to be cultivated by the Sopherim (fifth to the second centuries B C E) and by their successors, the Pharisees (second century B C E –70 C E) It assumed literary form in the Mishnah and the early Midrashim at the beginning of the third century C E The Mishnah, in turn, became the subject of detailed analysis and extensive interpretation in the Gemara, carried on by the Amoraim, "expounders," in Palestine and in Babylonia

After the sixth century, the Mishnah and the Gemara, now constituting the Talmud, served as the basis for the activities of the Saboraim (6th–7th centuries C E) and the Geonim, the heads of the great Babylonian academies (7th–11th centuries C E) After the decline of the Babylonian center, a multiplicity of Jewish centers of settlement arose in North Africa, Spain, Provence, Italy, Germany and Poland They created new forms in which the Halakhah continued to grow — legal treatises, commentaries, all-inclusive codes and Responsa by individual scholars The latter have continued to augment the Halakhah until the present day

A true understanding of the nature of the Halakhah and of the principles and procedures by which it grew is fundamental for comprehending the past history of Judaism, as well as its present and future

Fundamental Principles

A basic concept in traditional Judaism is the *authority of the Halakhah* For several reasons this formulation is much to be preferred to the term "the supremacy of the Halakhah," which has the triumphalist ring of a battle waged against enemies A less pragmatic difficulty with the latter

phrase, but one of ultimately deeper significance, is that it connotes a confrontation between the Halakhah and the world. This approach, as will be spelled out below, rests on a basic misunderstanding of the nature of Halakhah itself.

The past two centuries of brilliant and dedicated research in Jewish law, literature and life have demonstrated that the *Halakhah has a history* that reveals the dialectic of continuity and change at every given point. The researches in history and literature of Leopold Zunz, Nachman Krochmal, Solomon Judah Lob Rapoport, Samuel David Luzzatto, Heinrich Graetz and Harry A. Wolfson, as well as the studies in law and institutions of Zacharias Frankel, Abraham Geiger, Isaac Hirsch Weiss, Jacob Lauterbach, Solomon Schechter, Louis Ginzberg, Chaim Tchernowitz and Solomon Zeitlin, together with their fellows and successors in our own day, have supplied abundant evidence that the law of growth and development, which is universal throughout nature and society, applies to Judaism as well. The record is clear that Jewish law was never monolithic and unchanged in the past. There are, therefore, no grounds for decreeing that it must be motionless in the present and immovable in the future.

Jewish tradition is best compared to a flowing river which possesses a mainstream, but also side-currents and even cross-currents that affect its flow significantly. To be sure, it is not always easy to determine at every point which is the dominant and which is the secondary current. At the time that the issues were being debated, the Rabbinic sages were sure that the Sadducees were not in the mainstream of the tradition. But they had no such certainty at the time with regard to the controversies of Hillel and Shammai, Rabbi Akiba and Rabbi Ishmael, Rab and Samuel, Raba and Abaya. Even in retrospect, when we have the benefit of hindsight, it requires a high level of knowledge, insight and intellectual integrity to recognize the difference between the normative tradition and aberrant groups in Judaism, *and to do justice to the contributions of both*.

The dynamic of tradition, the method by which the Halakhah grows in the process of transmission, has been illumined and delineated by modern Jewish scholarship. When the tradition is alive and well, a process of interaction sets in. Each age receives a body of doctrine and law from the period preceding. This body of tradition from the past comes into contact with the conditions, problems and insights of the present. A complex interaction between past tradition and contemporary life now takes place. The spiritual and intellectual leadership in Judaism is called upon to evaluate these new elements, struggling to be admitted into the sanctuary of the tradition. Some aspects it will recognize as dangerous and ill-advised and will reject in toto. Others it will judge to be ethically sound, religiously true and pragmatically valuable, and these will be incorporated into the content of tradition. Many new phenomena, if not most, will be judged to contain both positive and negative elements. The former will be accepted in greater or lesser degree, often after being modified so as to

bring them into greater conformity with the spirit and the form of the tradition To utilize the familiar but useful terminology of Hegel, past tradition constitutes the thesis, contemporary life is the antithesis, and the resultant of these two factors becomes the new synthesis The synthesis of one age then becomes the thesis of the next, the newly formulated content of tradition becomes the point of departure for the next stage

This is not to suggest even remotely that tradition is bound to surrender to "the spirit of the age" It is always free, indeed commanded, to examine the demands and insights of each generation and to accept, modify or reject them as it sees fit But when the tradition is healthy or, more concretely, when its exemplars are true to their function, they will be sensitive to the age and respond to it Often, if not generally, there will be sharp divergences of views as to the validity of these new factors and how the tradition should respond to them Indeed, the issue may remain *in suspenso* for some time Ultimately, however, life is the determining factor and from its decision there is no appeal

This dialectic process, that has operated throughout the history of Judaism and is the secret of its capacity to survive, can be documented in all areas — ritual, civil and criminal law, marriage and divorce It is most evident in the great creative eras of Rabbinic Judaism — the Tannaitic and the Amoraic periods, that saw the creation of the Mishnah and the Talmud With the advent of the Middle Ages came an increasing incidence of persecution, spoliation and harassment, not to speak of frequent expulsion and massacre Inevitably, these mounting tragedies brought about a decline of creative vitality and a narrowing of perspective in all aspects of Judaism, Halakhah included The Expulsion from Spain and Portugal, the Thirty Years War in Germany, the Chmielnicki massacres in Poland and the debacle of Shabbetai Zevi, the "false Messiah," that all but destroyed Jewish morale, brought about an ever increasing ghettoization of the spirit of the Jewish community Medieval Jewish leadership necessarily made Jewish group survival, rather than the needs, interests and desires of the individual, their basic concern The strength of their influence on the present state of the Halakhah can scarcely be exaggerated, since, for the bulk of East-European Jewry, the Middle Ages continued until the twentieth century

From this paradigm of the dynamic of the Halakhah, an important theoretical and pragmatic conclusion emerges *The Halakhah is not to be conceived of as being locked in mortal combat with the contemporary age, the demands of which are, therefore, to be resisted with every means at its disposal* The Halakhah itself comprises both elements in the dialectic continuity with the past and growth induced by the present The evidence for the operation of this principle in the past and its significance for the future will be discussed below

Methods of the Halakhah

The techniques of the Halakhah are significant not only for their own sake. They reveal the openness of the tradition and the interplay of law and life, and thus illumine the creative resolution of the tension between them. This characteristic enabled the Halakhah to survive and function successfully under such radically changing social, economic, and political conditions as the Hellenistic-Roman world, the Christian church-state, Islamic polity, the feudal system, the early laissez-faire capitalist order, the emergence of democracy and the welfare state, and, we profoundly believe, the as yet unknown social orders of the future.

The origins of the Oral Law are to be found in the Biblical period — for, indeed, no written law can be functional without an oral law at its side. However, the Halakhah became the basic spiritual enterprise in Judaism with Ezra, of whom the Sages justly remark, "Ezra was worthy of having the Torah given through him had not Moses preceded him."[1] With his successors, the Sopherim, the two basic techniques of the Halakhah emerge.[2]

One method, that of *Midrash*, is deductive, the other, *Mishnah* or *Halakhah*, is inductive. The Midrash method takes its point of departure from a minute study of the Biblical text, which it searches out and analyzes, in order to deduce implications for contemporary life. The Mishnah method, on the other hand, has its origin in a life-situation. When a problem or a legal case arises, the decision is reached by the accepted authorities on the basis of their religious and ethical perceptions. They then seek to relate to a Biblical text which becomes its formal source and validation.

While there is no iron curtain separating the two procedures and the same authorities, Sopheric and Tannaitic, participated in both methods, two distinct types of literature emerged. The deductive method is embodied principally in the Halakhic Midrashim, *Mekhilta*, *Sifra* and *Sifre*, which reached their present form early in the third century C.E. The inductive method is embodied in the Mishnah, compiled by Rabbi Judah Hanasi at about the same time.

Thereafter, the fortunes of the two techniques diverged radically. The method of Halakhic Midrash was virtually exhausted in the Tannaitic age and no significant Halakhic Midrashim emerged thereafter. The reason is not far to seek. While the Torah is, indeed, "longer than the earth in measure and broader than the sea,"[3] the legal passages in the Torah total only a few hundred verses in all. No matter how fruitful the text and ingenious the method of interpretation, there are limits which

1 B. *Sanhedrin* 21b.

2 Cf. *inter alios* J. Z. Lauterbach, *Midrash and Mishnah* (New York, 1916), pp. 61-64; J. N. Epstein, *Mebho'ot Lesifrut Hatannaim* (Jerusalem, 1957); L. Ginzberg, *Jewish Law and Lore* (Philadelphia, 1955), chap. 1.

3 Job 11:9.

changing conditions and new insights ultimately reached The possibilities of Midrash are, therefore, inevitably limited by the parameters of the text

The inductive method of Mishnah, on the other hand, which has its starting point in life-situations, is as unlimited as life itself, with each day creating configurations of men and circumstances Hence, the Mishnah of Rabbi Judah Hanasi included only a portion, albeit the most significant one, of the material available to the redactor Even the second compilation of Tannaitic material, the Tosefta, attributed to his contemporary, Rabbi Hiyya, did not exhaust this material Hundreds of *Baraitot*, "external traditions," survived outside both collections as *disjecta membra* and have been preserved only because they were later cited in the Gemara [4]

The entire later development of Halakhah followed the method of Mishnah rather than Midrash Predominantly, the Halakhah began with life, which it sought to relate to the body of accumulated tradition This is true of the Gemara both of Palestine and Babylonia It is, of course, the method par excellence of the Rabbinic *Responsa* which have become a mighty stream, showing no signs of diminution even today after a millenium and a half

The availability of this technique of Mishnah deriving its impetus from life, created the potential for a Halakhah that would be appropriate to all times and conditions This potential was actualized because in each generation there were scholars possessing the insight, compassion and courage to apply the Halakhah of the past to the problems of the present

Basic Factors in the Growth of Halakhah

In essence, there were two factors making for growth in the Halakhah — one *external* and the second *internal* The first was *the necessity to respond to new external conditions — social, economic, political, or cultural —* that posed a challenge or even a threat to accepted religious and ethical values The second was the need to give recognition to *new ethical insights and attitudes* and to embody them in the life of the people, even if there was no change in objective conditions The operation of both factors may be illustrated in all areas of life Moreover, these factors functioned actively in every period of Jewish history — ancient, medieval and modern

Responsiveness to New Conditions

The impact of *new social conditions* on the Halakhah is clearly evident in the pages of the Mishnah Observers of the contemporary scene in our day are wont to lament the erosion of ethical standards and the corruption of human behavior in the life of society as a whole and of its individual

4 They were collected and arranged in a series of ten volumes by M Higger, *Ozar Habaraitot* (New York, 1938–1948)

members The Rabbis of the Greco-Roman Era were confronted by a similar breakdown of accepted norms of behavior In several striking cases, they responded to the challenge by abrogating ancient laws laid down in the Torah which no longer served their original purpose

One such practice was the ritual of the public expiation of an unsolved murder through the breaking of the neck of a calf accompanied by a litany of atonement pronounced by the elders of the nearest city (*ʿeglah ʿaruphah*) (Deuteronomy 21 1-7) Another was an ordeal in which a woman suspected by her husband of infidelity (*Sotah*) had to drink "bitter waters" (Numbers 5 11-31) These antique rites, Biblical in origin were no longer adequate in Rabbinic times, because of new social conditions These were explicitly recognized in the Mishnah, *Sotah* 9 9

> When the murderers increased, the rite of the *ʿeglah ʿaruphah* was given up (*batlah*)
>
> When adulterers increased the bitter waters ceased to be employed (*pasku*) It was Rabbi Johanan ben Zakkai who abrogated the practice, for it is said
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> "I will not punish their daughters for playing the harlot
> nor their daughters-in-law for committing adultery,
> For the men indulge their lust with harlots
> and sacrifice with prostitutes" (Hosea 4 14)

It is noteworthy that the prophet Hosea's words constitute the oldest extant protest against the double standard of sexual morality that has prevailed for millennia, and down to our own day It is equally significant that Rabbi Johanan ben Zakkai finds a warrant in the prophet's words for dispensing with a Biblical ordinance

There are also many examples of the Halakhah responding to *new economic conditions* A classic one is Hillel's *taqqanah* of the Prosbul Out of its deep solicitude for the well-being of those in need, the Torah lays down the principle that a debt which has remained unpaid for six years is to be cancelled on the seventh "the year of release "[5] This norm operated to the advantage of the under-privileged in the primitive economy of the First Temple In a simple, rural-urban society, a farmer would borrow money only when some disaster, such as sickness or drought, had left him and his family destitute Hence, virtually all lending of money was a form of charity However, in the more advanced agri-urban economy of the Greco-Roman world, the cancellation of unpaid debts in the seventh year proved to be a major obstacle to the securing of credit The prospect of having debts wiped out at the end of six years served "to shut the door against borrowers," as the Talmud observes [6] Accordingly, Hillel established a far-reaching *taqqanah* Falling back upon the words of the Biblical text, "The creditor shall release his hand on the seventh year from the debt he sought to collect from the borrower," he ruled that the Torah

5 Deut 16 1-6

6 For this formulation, see Rashi, *Gittin* 37a top The Mishnah generalizes the reason as *mipnei taqqun haʾolam* "for the improvement of society

forbade *the creditor*, but not the courts, to collect the debt in the seventh year, so that if a man transferred the debt to the court, it would be collectable after "the year of release"[7]

Superficially viewed, Hillel's *taqqanah* would seem to represent a total abrogation of the law Actually, the objective of both the Torah and of Hillel was identical — to make economic help available to those in need New conditions required radically different, even apparently contrary, procedures for achieving the same goal

The Halakhah exhibits another related instance of its responsiveness to changed economic conditions As the relatively simple economy of the First Temple days was transformed into the more complex socio-economic order of the Roman and the Parthian Empires, the Biblical prohibition against taking interest from Jews[8] posed a major obstacle to the free-flow of credit The Talmud was clearly aware of the problem and permitted a variety of practices bordering on the direct taking of interest (*ʾabhak ribbit*, "dust of usury")[9] As the economic order became increasingly complex, interest became the life blood of commerce and industry In the Middle Ages, the use of a legal fiction became widespread A document "permitting a business transaction" (*shʾtar heter ʿisqa*) was signed, in which the lender became a partner *pro forma* in the business enterprise of the borrower, thereby protecting the lender against any loss and guaranteeing him a minimum fixed "profit"

In the case of the *Prosbul* and the taking of the interest, the new stage in economic development was permanent In other instances, *the changed conditions were of limited scope, either in time or space* Even here, the Rabbis did not hesitate to make the Halakhah responsive to felt needs by drastic modifications in the law Two instances *in the area of ritual* may be cited According to Biblical law, a woman was obligated to bring an offering of two doves or pigeons to the sanctuary for each birth[10] Since a family did not make the pilgrimage to Jerusalem each year, a woman who had borne several children since her last visit might require four, six or eight birds for the offering

One year, the merchants took advantage of the heavy demand for the fowl and drastically raised the price Rabban Simeon ben Gamaliel thereupon ordained that a woman was required to bring only one pair of birds to the Temple even after several childbirths As a result the price quickly reverted to normal[11]

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7 M *Shevit* 10 3 This is the text of the Prosbul, 'I declare (*mosrani*) to you, judges in this place, that, any debt owing to me, I may collect whenever I choose' The judges or the witnesses sign below" See also B *Sanhedrin* 32a, B *Arakhin* 28b

8 Cf Deut 23 20f

9 For a conspectus of the history of interest ("usury" in its older meaning) see *Jewish Encyclopedia*, s v 'Usury," vol XII, pp 388–92, and *Encyclopedia Judaica*, s v 'Usury," vol 16, pp 27–32

10 Lev 12 8

11 M *Keritot*, chap 1 end

The second instance occurred in the Amoraic period in Babylonia, where people were accustomed to discard their ordinary earthen pots before Pesah, thus creating a high demand for new crockery after the holiday. The hardware merchants took advantage of the increased demand and raised their prices exorbitantly. The Amora Samuel threatened to accept and proclaim Rabbi Simeon's view that the *hamez* pots did not need to be broken before Pesah, but could be used after the festival. The threat was sufficient to bring down the price.[12]

These two instances are highly interesting, for they reveal the ethical sensitivity of the Sages and their responsiveness to contemporary conditions. They did not hesitate to set aside what they understood to be the law in the Torah. But, in each case, the situation that they sought to meet was of limited scope in time and space, affecting one locality at one specific period. Their morally courageous actions did not spring from any change in accepted ethical attitudes. Fleecing the poor for personal gain is as old as human society, and denunciations of this evil fill the pages of the Prophets.[13]

New Ethical Insights and Attitudes

Even more significant is the clear evidence of growth and development in the Halakhah because of *new ethical insights and attitudes that represent movement beyond earlier positions*. In these instances the Halakhah did not hesitate to establish new legal norms, not local or temporary in character, but universally and permanently binding. We shall adduce two instances that testify to the dynamic character of the ethical consciousness of the Sages and to their unremitting effort to interpret the Torah in the light of their ethical insights. Both cases are derived from the same Biblical passage, Deut. 21:15-21.

The Lawgiver sets down side by side two provisions of family law.[14] The first is concerned with the law of inheritance, the second with the law of "the stubborn and rebellious son." Both paragraphs are expressed in the identical casuistic style, 'If a man has two wives" and "If a man has a stubborn and rebellious son." Both were equally meant to be regarded as operative law.[15] Yet it is noteworthy that the two similarly formulated provisions sustained radically different treatment in Rabbinic Judaism, neither being treated literally.

In the first passage, the Torah ordains that the eldest son in the family must receive as his inheritance *pi sh³nayim bekol asher yimaze lo*. This

12 B. *Pesahim* 30a.

13 Amos 2:6-8, Isa. 3:13-15, Mic. 3:1-4 may be cited among many.

14 Deut. 21:15-17 and 21:18-21.

15 For the two major modes in the formulation of Biblical law, casuistic and apodictic, see A. Alt, *Der Ursprung des israelitischen Rechts*, translated into English as "The Origins of Israelite Law," in A. Alt, *Essays on Old Testament History and Religion*, trans. by R. A. Wilson (New York, 1967), pp. 161–71.

can have only one meaning, "two parts (out of three)," that is, two-thirds of the entire estate The meaning of the idiom is not subject to doubt in the least Thus, when at the translation of Elijah to heaven the young Elisha asks *yiyehi na' pi sh'nayim beruhakha 'eylai* (II Kings 2 9), he is obviously not demanding that he receive double the Divine Spirit granted to his master, but, more properly, only two-thirds The meaning is even more explicit in Zechariah 13 8 "In the whole land, says the Lord, two thirds (*pi sh'nayim*) shall be cut off and perish, and one third (*hashlishit*) shall be left alive "

The Rabbis had an incomparable knowledge of the Biblical text in minutest detail They were adept in invoking a *gezerah shavah*, comparing two similar or identical usages in language, however remote from one another in location or in theme Now the text in Deuteronomy (21 15-17) is clear, and the passages in Kings and Zechariah remove any possible doubt about the meaning of the idiom Yet, the Rabbis do not invoke these parallel usages Instead, they engage in a casuistic discussion which reveals that they were aware of the original meaning

> Does the Torah mean double any other brother's share, or two parts (out of three) of all his possessions? You may argue it as follows Since the eldest son inherits at times with one other brother and at times with five, just as he receives double when there is one other brother, so he receives double any other portion if there are five Or follow another line of reasoning — since he receives two parts of the estate when there is one other brother, he should receive two parts of the entire estate when there are five! The verse instructs us, "In the day that he gives an inheritance to his sons " The verse has added *to his sons* (and made the sons the measure of the inheritance) [16]

Other Biblical verses that are unclear are then adduced[17] to support the conclusion that the first-born receives twice the share of any other brother and not two-thirds To reach the desired conclusion, the clear-cut passages in Kings and Zechariah where the identical phrase is used are passed over in silence The reason is clear The Rabbis sought to limit the prerogatives of the first-born, so that in a family of five sons, for example, he would receive two-sixths and not two-thirds of the patrimony In this moderate form, the Rabbis found the verse in conformity with their standards of equity, or at least not in violent conflict with them They never doubted that the Torah, being the word of God, embodied the highest level of justice, anything else would have been unthinkable

Quite different was the fate of the adjoining provision in the Torah dealing with "the stubborn and rebellious son " To be sure, the law in Deuteronomy requires a trial for the son before the elders of the city at the gate, thus representing a great step forward in the protection of the young In other cultures, the *patria potestas* was virtually unlimited, so that

16 *Sifrei, Devarim* (ed L Finkelstein), sec 117, p 250 In B *Baba Batra* 122b, 123a, the same reasoning is presented in slightly different form
17 Gen 49 22 and I Chron 5 1 f

a father could beat or even kill his child without being answerable for the act. The Torah denies to the father the right to take the law into his own hands and insists upon a trial of the alleged culprit. However, in Talmudic times, even the literal meaning of the text, while more moderate, was no longer in harmony with the moral sensitivity of the Rabbis. Obviously, the Law of God could not be inferior to the conscience of men.

The Halakhah, therefore, proceeded to apply a series of casuistic limitations to the text in Deuteronomy which made the law totally inoperative in practice. Thus, to cite only one set of restrictions out of many, if either parent was deaf, mute or blind, crippled or a dwarf, the law did not apply. Perhaps the most remarkable statement is the *Baraita*: "Rabbi Judah says, If his father and his mother are not identical *in voice, appearance and height*, he cannot be treated as a stubborn and rebellious son!"[18] As a result, the Rabbis declared that the Biblical ordinance regarding "the stubborn and rebellious son," like that ordaining the total destruction of "the idolatrous city,"[19] "never was and never was destined to be."[20] They explained that the law was placed in the Torah merely to stimulate the hermeneutical skill of the Sages and to serve as a warning to possible youthful offenders.[21]

Here we can see the genius of Rabbinic Judaism at work. In one case, the law was modified to meet the demands of justice as the Sages understood it. In the other, the law was completely set aside because the Rabbis could not reconcile it with their ethical stance and their fundamental faith that the Torah was designed to teach men to practice justice and mercy. In both instances, as in many other provisions in the Mishnah and the Talmud, the dynamic of the Halakhah is clearly evident. What remains constant from the Bible to the Talmud and beyond is the ethical goal of "righteousness and justice, lovingkindness and mercy."[22]

Criminal Law

In the area of *criminal law*, the best known instance of the Halakhah responding to deepening ethical insights is to be found in the Rabbis' attitude towards *capital punishment*. While Biblical legislation prescribed the death penalty for many crimes, the Halakhah interposed a large variety of safeguards before such a sentence could be carried out. The most notable was *hatra'ah*, "warning," the requirement that there must be two adult male witnesses who have expressly informed the sinner of the gravity of his contemplated crime and the specific penalty that it entails.

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18 For the plethora of limitations introduced by the Rabbis, see M. *Sanhedrin* 8:1-4 and the Gemara, *Sanhedrin* 71a.
19 Cf. Deut. 13:13 ff.
20 B. *Sanhedrin* 71a.
21 Ibid.
22 Hos. 2:21.

followed by his explicit admission that he is aware of both the crime and the penalty [23]

Undoubtedly, a good deal of Halakhah in the area of criminal jurisprudence is utopian in character, deriving from the period of Roman hegemony, when the Jewish courts no longer had jurisdiction in capital cases Nevertheless, the spirit of Jewish law is clear from the famous statement that a Sanhedrin that had convicted a criminal once in seven (or seventy) years was called a "murderous Sanhedrin "[24] Equally eloquent is the appended statement of Rabbis Tarphon and Akiba that, had they been members of that court, even the single execution would not have taken place

Here, too, viewed externally, these provisions of the Halakhah would seem to make Biblical law inoperative in practice In a deeper sense, however, the Rabbis were fulfilling the implications of the Biblical worldview One of its pillars is the concept of the sanctity of human life which goes back to the covenant with Noah [25] There the eating of the life blood is forbidden and is linked to the prohibition of murder, which is a desecration of the image of God in which man is created The Rabbis felt that, before a human agency could take a life, there must be not the slightest doubt regarding the full culpability of the criminal Since the imposition of a death penalty by the court would be a fully conscious and completely premeditated act, it would be exceeding the guilt of the criminal if any uncertainty prevailed regarding the conscious and willful character of the crime A death sentence would, therefore, be a violation of the principle of equity implied in the doctrine of *middah keneged middah*, "measure for measure "[26]

Another striking, though less familiar, instance from the area of criminal law may be cited to illustrate how drastically the Halakhah limited the application of the death penalty The book of Deuteronomy deals with the all-too-common phenomenon of a perjured witness falsely charging the accused with guilt

> If a man appears against another to testify maliciously and give false testimony against him the magistrate shall make a thorough investigation If the man who testified is a false witness, if he has testified falsely against his fellow man, you shall do to him as he schemed to do to his fellow Thus you will sweep out evil from your midst Nor must you show pity life for life, eye for eye, tooth for tooth, hand for hand foot for foot [27]

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23 *Sifre, Shofetim* sec 173, B *Sanhedrin* 8b, "Warning was established to distinguish between wilful and accidental murder "

24 M *Makkot* 1 10 — *havlanu*

25 Gen 9 17, esp vv 4-6

26 That the punishment must not exceed the crime is the meaning of the famous injunction, "An eye for an eye, a tooth for a tooth" (Ex 21 23) While Rabbi Eliezer interpreted the verse literally all of his colleagues overrode his view and interpreted it to mean *mammon*, "financial compensation for the injury" (B *Baba Kamma* 84a), as the only way to make sure of fair retribution Cf the explanation in B *Ketubbot* 38a "An eye for an eye and not an eye and a life for an eye "

27 Deut 19 16-21

The Sadducees interpreted the passage literally to mean that if the false testimony had led to the actual execution of the innocent party, the false witness would suffer the same fate On the other hand, the Pharisees, followed by the Tannaim, restricted the provisions of the law to one rare situation They referred it only to the case where two witnesses (not one) had charged the accused with a crime and then two other witnesses had accused the original witnesses of lying by declaring "You were with us at that time at another place, so that your testimony is false "[28] If the secondary witnesses were then discovered to be false, the Rabbis ruled, they fell under the provisions of the Biblical law This was not all The death penalty was to be meted out to the lying witnesses only if the execution of the original group of innocent witnesses had *not* been carried out Had the primary witnesses already been executed, the lying secondary witnesses would not be killed This latter ruling, which ran counter to the Sadducean practice, was derived by the Rabbis from the Biblical phrase, "You shall do to him as he had plotted to do to his neighbor" which they interpreted "as he had *schemed* to do, not as he had actually *done* "[29] Undoubtedly, false testimony in civil law suits and in criminal proceedings was rife in ancient times, though, one ventures to hope, less frequent than in our own day Nevertheless, the Halakhah drastically limited the practice of judicial execution by imposing these two limitations

The intent and the content of the Halakhah here should be clearly understood We have discussed above the establishment by the Halakhah of the general principle of *hatra'ah*, "warning,' as a prerequisite for conviction in capital cases In these instances, the goal of the Halakhah may be construed as the desire to fulfill the inner intent of the Torah by proving the willful character of the crime beyond the shadow of a doubt In the case of the Biblical provision regarding a perjured witness, the Halakhah goes beyond this purpose and radically restricts its application to a set of circumstances so rare and complicated as to be virtually nonexistent It is interpretation carried so far as to become legislation to all intents and purposes

Family Law and Personal Morality

It is in the field of *family law* that the Halakhic process is more significant, and for two reasons First, while much in ritual, civil and criminal law became inoperative after the destruction of the Temple, the Dispersion and the loss of Jewish autonomy, the Halakhah on marriage and the family has remained in force to our own day Second, the thrust of Rabbinic law in this area sheds substantial light on the direction of the Halakhah with regard to the status of women

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28 *Atem heyitem immanu otto hayom himekom pelom* (M *Mak* 1 4)

29 B *Hullin* 11b, Rashi *ad loc* The reasons advanced for this limitation are discussed by Barukh Halevi Epstein *Torah Temimah*, on Deut 19 19 note 73 who concludes, 'The greatest of the Sages tried greatly to reduce the number of people executed by the court

One of the most striking illustrations of the dynamic of Halakhah is to be observed in the institution of *yibbum*, "the levirate," which is one of the most widespread institutions in primitive and ancient societies the world over.[30] Originally, the duty to marry the childless widow of a dead brother (or another close relative) in order "to set up the name of the dead man upon his inheritance," was felt to be a solemn and inescapable obligation. Thus, in Genesis, when Judah refrains from giving his third son, Shelah, in marriage to Tamar in order to fulfill the levirate duty because his two older brothers, Er and Onan, had died, Tamar then takes the desperate step of dressing as a harlot and seducing Judah himself, in order to ensure her having progeny from her husband's family. Nevertheless, Judah's judgment upon her extreme action is that "she is more righteous than I."[31] In fact, her cohabitation with Judah is the starting point for the family line from which King David ultimately descends. Clearly the levirate is felt to be a solemn, fundamental obligation.

The law of the levirate is laid down in Deuteronomy, where the duty to marry a childless widow is still felt to be paramount. However, if the living brother is unwilling to do his duty, the law provides an "escape clause." The recalcitrant brother may avoid it by the rite of *halizah*, though a stigma attaches to him for his dereliction and his family thereafter is called "the family of the unsandaled one."[32]

In Rabbinic times, new factors entered the situation, so that *halizah* took precedence over *yibbum*. All the resources of Rabbinic hermeneutics were utilized to limit and, where possible, to prevent the consummation of the levirate,[33] and in post-Talmudic times, the practice shifted 180 degrees so that only *halizah* was permitted in Ashkenazi communities. *Yibbum* remained an option only in Muslim countries, where polygamy was not forbidden by Rabbi Gershom's *taqqanah*, to be discussed below. Thus, changes in social and cultural conditions, and probably also a higher degree of sensitivity to personal likes and dislikes,[34] led to a radical change in a basic marriage law in the Bible and the Talmud.

The dynamism of the Halakhah continued to function even in the Middle Ages. Most notable are the famous *taqqanot* of Rabbenu Gershom, "the Light of the Exile" and his Synod (adopted about the year 1000 C.E.). One *taqqanah* made it obligatory for a husband to obtain his wife's consent

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30 Cf. *inter alios*, E. Westermarck, *The History of Human Marriage* (New York, 1923), Vol. 3, pp. 207-20, L. M. Epstein, *Marriage Laws in the Bible and the Talmud* (Cambridge, 1942), R. Gordis, "Love, Marriage and Business in the Book of Ruth: A Chapter in Hebrew Customary Law," reprinted in Gordis, *The Word and The Book* (New York, 1976), pp. 89-95.

31 Gen. 38:26.

32 Deut. 25:5-9.

33 For a conspectus, cf. Epstein, *Op. cit.*, vol. 5, pp. 384–404.

34 M. *Bekhorot* 1:7, 'Yibbum took precedence over *halizah* in the past when men's intention was to fulfill the commandment. But now that they do not have the intention to fulfill the commandment (but are motivated by the woman's beauty or money), the Sages said that *halizah* takes precedence over *yibbum*." See the discussion in *Tosefta, Yebamot*, chap. 6, B. *Yebamot* 39b, P. *Yebamot* 13, 2.

for a divorce, a marked extension of women's rights beyond Talmudic practice

The other ordinance of Rabbenu Gershom was the prohibition of polygamy [35] This radical departure from both Biblical prototypes and Talmudic law needs additional analysis It should be remembered that the *taqqanah* did not introduce a totally new practice into the Jewish community Monogamy had been the prevailing practice in the Jewish people from its inception, if only because the biological ratio of the sexes, as well as economic considerations, made polygamy impossible for anyone except the royal dynasty and the aristocracy [36] The Adam and Eve narrative in Genesis obviously pictures a monogamous family, as does the 128th Psalm, and other Biblical evidence is plentiful No instance of polygamy is recorded among the 3000 Sages whose names occur in the pages of the Talmud Nevertheless, the *taqqanah* of Rabbenu Gershom forbidding polygamy was valid only for Jews living in Christian countries [37] In Islamic lands, polygamy was both lawful and operative until very recently [38]

What explains the divergence? It would be fatuous to deny the impact of the Christian environment upon Rabbenu Gershom and his colleagues They found it intolerable for Jews to maintain an attitude toward marriage — in theory, if not in practice — that set womankind on a lower ethical plane than that of their monogamous Christian neighbors [39] For polygamy, it need hardly be pointed out, is clearly based on the inferiority of women, with the male being dominant and free to have more than one wife, but not the reverse Today, of course, the original limitations of the *taqqanah* with regard to time and country have fallen away and monogamy is universally observed in Jewry But the impact of cultural influences from without is clear both in Rabbi Gershom's *taqqanah* and in the limits of its operation

Another situation reveals the responsiveness of the Halakhah even to conditions which it did not find to its liking because they stood on a far lower ethical level In medieval Spain, as Jews acculturated to the dominant groups in society, some members of the upper classes imitated their Muslim prototypes by establishing liaisons with women outside of marriage [40] We may be certain that none of the accredited Rabbinic lead-

35 See Rama on *Shulhan Arukh, Even Ha'ezer* 119 6

36 The newly published Temple Scroll from the Qumranite sectaries forbids polygamy even to kings

37 See *Shulhan Arukh, Even Ha'ezer* 1 10, Asheri, *Responsum* 42 1, *Tashbetz Responsum* 94

38 The State of Israel formally banned new polygamous marriages in the 1951 Knesset Law on Equal Rights for Women "

39 As Rabbi David Aronson has acutely noted this ruling is a clear application to contemporary conditions of the Talmudic dictum enunciated (*B Sanh* 58b) by *Raba Mi ikka middei veyisra'el lo mehayyab venokhri mehayyab*, "Is there any act for which a Jew is free from guilt and a non-Jew guilty?" (David Aronson The Authority of the Halakhah and the Halakhah of Our Authority," *Proceedings of the Rabbinical Assembly*, vol XL 1979 pp 42–56) [The quotation on p 51 is not cited exactly]

40 The subject and its relevance for an approach to contemporary sexual mores is discussed in R Gordis, *Love and Sex A Modern Jewish Perspective* (New York 1978), pp 167 68

ership of Spain favored these extramarital arrangements and many of them translated their opposition into stringent prohibitions and anathemas pronounced against the practice But the liaisons did not abate, even in the face of Rabbinic opposition, and a well-known authority on the history of sexual mores remarks

> In vain did the great Maimonides try to prohibit concubinage, not only did the practice continue, but most contemporary and later rabbinical authorities accepted it Acceptance of course, did not mean approval [41]

In the light of their inability to eliminate the practice through social and religious pressures, religious leaders sought to meet the situation by reviving the Biblical concept of the *pillegesh*, the "concubine" They were thereby conferring upon this status a measure of legitimacy Thus, Nahmanides (1194-1270) declared that if the relationship with an unmarried woman was not temporary or promiscuous but, on the contrary, permanent and exclusive, it was permissible Such leniency was, naturally, not accepted universally Rabbi Isaac bar Sheshet Perfet (1326–1408), for instance, was far stricter [42] He decried the popular saying, "An unmarried woman is not forbidden,"[43] but saw other and greater threats to traditional standards of personal morality in his time [44] Apparently the practice was not prevalent in Ashkenazi Jewry, yet the great German authority, Rabbi Jacob Emden, adopted a very lenient view [45]

Liaisons of the kind we have described ended with the tragic destruction of Spanish Jewry as a result of the Expulsion from Spain in 1492 and from Portugal in 1497 Thereafter, the earlier and stricter traditional standards became all but universal again, and there no longer was a need to find even quasi-legal basis for extra-marital relations

The Ongoing Problem of the "Agunah"

We may cite one more highly important instance in family law with direct relevance to modern life, the problem of the *agunah*, "the chained

41 Raphael Patai and Jennifer P Wing, *The Myth of the Jewish Race* (New York, 1976), p 131
42 He cites Nahmanides' view in his *Responsa*, No 6, 398 Nahmanides, in his correspondence with R Jonah Gerondi, permits it (cited in *Zedah Laderekh*, III, 1, 2, 122b, "because there are many in this country who take concubines," cf also S Halberstam, *K'vuzat Mikhtavim Be-inyanei Hamahloket al Dvar Sepher Hamoreh Vehamada*, (Bamberg, 1875, Haifa, 1969) See L M Epstein, *The Jewish Marriage Contract* (New York, 1927) On the etymology of *pillegesh* and the categories of concubinage in ancient times, see F Neufeld, *Ancient Hebrew Marriage Laws* (London, 1944), pp 123 ff
43 The Hebrew phrase is *pelonit penuyah muteret*
44 *Responsum* 425, see also No 6 and No 398 on concubinage Cf A M Hershman, *Rabbi Isaac bar Sheshet Perfet and His Times* (New York, 1942), esp pp 143-5, and Yitzhak Baer, *A History of the Jews in Christian Spain* (Philadelphia, 1966), Vol II, pp 465–6, L M Epstein, "The Institution of Concubinage Among the Jews," *PAAJR*, 6, (1934-5) 153-88
45 Cf *She'elot Yavez* Part II, Responsum 15 He declares that it is his own view that "it is a *mizvah* to proclaim publicly the permissibility of concubinage " But he does not wish to have any one rely on his own individual opinion The motive for his eccentric opinion is the desire to increase the population of God's holy people On this objective in the Halakhah generally, see sec 4b-c

wife." This tragedy, repeated times without number, was an inevitable consequence of the fact that the initiative for the issuance of a *get* was, according to the Rabbinic interpretation of Deuteronomy 24:1 ff., vested in the husband alone. Keenly aware of the inequality involved, the Halakhah took steps to reduce the power of the husband on the one hand and to extend the rights of the woman on the other. Two such instances may be mentioned. The principle, *kofin oto ad sheyomar rozeh ani*, "The court uses pressure upon the husband to issue a divorce until he says, 'I am willing,'" was invoked by the Rabbis in special cases. In the post-Talmudic period, a woman's consent was required for the husband's issuance of a divorce. Other modifications designed to bring relief to the *agunah* will be noted below.

The disparity of rights between the sexes was never eliminated, but some of the worst inequities could be mitigated. So long as the judicial system of the Rabbis operated under the aegis of the state, as in Babylonia and its authority was universally recognized, the Halakhah was not helpless. It was possible to utilize various instruments, including the threat of imprisonment and excommunication, to bring a recalcitrant husband into line and have him issue a *get* when the marriage was dissolved.

The breakdown of the Babylonian center and its replacement by a multiplicity of independent communities led to a general fragmentation into many areas of local jurisdiction. The coercive power of Rabbinic law was now correspondingly reduced. The frequent uprooting of Jewish communities, the migrations and transplantations of individuals, accompanied by the deaths of countless individuals through natural disaster, famine or massacre, substantially increased the number of *agunot*. The medieval Rabbis partially met the challenge by a variety of changes in the law designed to free as many *agunot* as possible from the chain of perpetual widowhood.

Then came the modern period, marked by the Enlightenment and the Emancipation, which wrought havoc with the traditional pattern of Jewish life. The admission of Jews into political citizenship, civic equality and economic opportunity was directly and explicitly linked to the erosion of the authority of Jewish law and to the breakdown of the traditional Jewish communities in Central and Eastern Europe. The rapid growth of secularism was accompanied by the migration of millions of individuals from one country to another. The establishment of civil marriage and divorce in nearly all Western countries gave rise to a tremendous increase in the number of *agunot*. Women loyal to the Halakhah were at the mercy of unscrupulous, greedy or vindictive husbands, who had secured a civil divorce and now refused to grant a *get* or had disappeared, leaving their wives perpetual widows. By and large, the Orthodox rabbinate declared itself powerless to deal with the problems.

At the outbreak of the Russo-Japanese War (1903), when many Jewish young men in Russia were called to fight in the Czar's army and

there loomed the tragic possibility of their being lost and missing in action, Rabbi Isaac Elhanan of Kovno visited the troops before they left for the front and urged Jewish soldiers to issue a *get ʿal tnai*, a conditional divorce, so as to free their wives from the status of *agunah* should the husbands not return

This procedure was clearly helpful in individual cases, but it did not meet the problem of the husband who deserted his wife in peace-time or received a civil divorce and refused to issue a *get* Rabbi Louis M Epstein, of Boston, after years of study of the entire question, proposed a plan whereby a groom, before his marriage, would designate specified individuals to serve as his agents for the issuance of a *get (minnui shelihut)* if, at some future date (a) a civil divorce were to be issued, (b) the husband were to disappear, or (c) he were to be lost in an accident or in military action

Subjected to a barrage of misrepresentation and proving unwieldy in operation, the Epstein plan, after being put into practice in many cases by the Rabbinical Assembly, fell into disuse But the principle of an active concern for the *agunah* and a determination to act on her behalf persisted, and a new procedure was worked out by the eminent Rabbinic authority, Professor Saul Lieberman It consists of a codicil added to the traditional marriage contract in which husband and wife solemnly agree to abide by the provisions of Jewish law The theory is that this commitment includes the issuance of a *get*, should that become necessary in the future If the husband then fails to honor his promise, the civil court could be asked to enforce performance of the contract There has thus far been no test of the Lieberman *ketubah* in the secular courts

The Rabbinical Assembly has since decided to utilize another resource of the traditional Halakhah for dealing with the problem, by putting into practice provisions for conditional marriage and divorce already existing in the Talmud "Whoever contracts a Jewish marriage does so under the authority of the Rabbis,"[46] is not merely an abstract principle It is applied by the Talmudic and post-Talmudic authorities to annul a marriage when circumstances require it In the words of the Talmud "The Rabbis retroactively break the husband's marital contract"[47] Even the presence of children born to the couple does not prevent the application of this principle, since their legitimate status in Judaism is not impugned by the annulment

The instances we have adduced from the areas of ritual enactment, civil and criminal law, marriage, family morality and divorce are by no means exhaustive, but they should suffice to demonstrate the validity of the principles governing the Halakhah set forth in the first section of this paper They also perform a second, equally significant, highly relevant function *In all aspects of Jewish law, the Halakhah reveals a deep concern for*

46 B *Ketubbot* 3a, *Kol hammekaddesh ʿada'ata derabbanan mekaddesh*
47 Ibid , *Afke ʿinho rabbanan lekiddushei minneh*

basic ethical considerations, whether age-old or newly arrived at. In all periods, the Halakhah manifests its lively awareness of social, economic, political and cultural factors in the life of the Jewish community.

Strengthening Jewish Survival

Another powerful motive in the dynamic of the Halakhah, closely related to the Rabbis' ethical concerns, is *the survival of the Jewish people*. During the period of the Mishnah and the Gemara, they wrestled with the need to preserve the integrity and the viability of the Jewish community in Palestine. It was by no means an easy task, in view of the heavy taxation and other forms of oppression practiced by the Roman power. As a result, Jews were increasingly tempted to leave the land of Israel for more favorable centers of settlement elsewhere, — Babylonia, Egypt and the Mediterranean littoral. The Pharisees, and the Rabbis after them, sought time and again to stem this flight by enacting a *gezerah*, "a restrictive decree," declaring territory outside the land of Israel "unclean" and by the adoption of other regulations.[48] However, their efficacy was probably limited in duration.

It was not easy for the Jewish farmer to maintain his precarious foothold in the Holy Land. In addition to the various "gifts due to the priesthood," he was obligated to let his land lie fallow each seventh year. This problem the Rabbis sought to meet by establishing the principle which, they declared, emanated from the Men of the Great Assembly, that "the land conquered by Joshua after the Exodus (*kedushah rishonah*) became holy only temporarily (while Jews lived on it), but not for the future. Only the land acquired after the Return from the Babylonian Exile (*kedushah sheniyah*) acquired a permanent sanctity."[49] Since the second Jewish settlement was much smaller in extent than the first, it meant that considerable portions of the country were freed from these special burdens. Measures such as these undoubtedly helped to prolong the existence of a Jewish presence in Palestine.

Ultimately, however, the bulk of world Jewry was to be found outside the land of Israel, in Asia, North Africa and Europe. Now Jewish survival became a desperate battle against heavy odds. Persecution, spoliation, expulsion and massacre made great inroads into the Jewish population. The perennial physical hazards of disease and malnutrition also decimated the ranks of the children, as well as their elders.

Faced by these perils, medieval Jewry saw its preservation dependent on a *high birth rate*, without restriction or qualification. The imperious demand for group survival made no allowance for individual desires or family welfare. Only through children and more children could the Jews hope to overcome the tragically high mortality rate. Thus, the instinctive

48 See B. *Shabbat* 14b and parallels, and see the detailed studies of Solomon Zeitlin.
49 B. *Hag.* 3b, see also B. *Yeb.* 82b on three inheritances, and Rashi *ad loc.*

wish for progeny was intensified by overpowering religio-national motives Hence, the view of the Halakhah that the birth of two children fulfills the requirements of the law[50] was ignored and parents were encouraged to bring as many children into the world as possible

A classical passage in the Talmud, repeated six times, permitted (or commanded) three categories of women — a minor a pregnant woman and a nursing mother — to use an absorbent to prevent a new conception [51] The passage was now interpreted narrowly, in defiance of linguistic usage, to mean that only one Sage, Rabbi Meir, permitted the practice and only for a child wife, while all his colleagues prohibited it for all three categories [52]

Moreover, this basic Talmudic passage permitting (or prescribing) birth control was totally ignored and passed over in silence in the medieval codes It is not referred to in the *Mishneh Torah* of Maimonides or in the authoritative *Shulhan Arukh* of Rabbi Joseph Karo A distinguished modern Orthodox scholar writes that "the codes, *rather surprisingly*, omit any direct reference to contraception altogether "[53]

The same motivation came into play on a related subject The Talmud frequently voices strong objections to the *marriage of young children* [54] The medieval authorities ignored these objections and urged that marriage engagements be entered into whenever practicable at any age They justified their action by calling attention to the rigors of the exile, which included the perpetual threat of physical attack and economic insecurity [55]

The ongoing threat to Jewish spiritual integrity, stemming from close contacts with pagans, was also a source of perpetual concern Among the eighteen *gezerot* which the school of Shammai succeeded in adopting over the objections of the school of Hillel, before the destruction of the Second Temple, was a prohibition forbidding the bread, the oil, the wine and the daughters of pagans to Jews [56]

The Role of the Popular Will

Another factor closely related to the preceding motive of advancing Jewish survival is *the responsiveness of the Halakhah to the popular will*, meeting the desires of the common people Whenever a particular practice did

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50 Mishnah *Yeb* 6 6, *Shulhan Arukh, Yoreh Deah* 1 5

51 See B *Yeb* 12b, 100b, *Ketubbot* 39a, B *Nedarim* 35a, B *Niddah* 45a, *Tos Yeb* 2 6

52 See the analysis of the text in R Gordis, *Love and Sex A Modern Jewish Perspective* (New York, 1978), pp 266 f , note 12

53 I Jakobovitz, *Jewish Medical Ethics* (New York, 1959), p 169 (italics ours)

54 Cf B *Kiddushin* 41a, B *Niddah* 13a

55 On the difficulties involved in harmonizing the Talmudic objections to child marriages and the medieval practice see D M Feldman, *Birth Control in Jewish Law* (New York, 1968), pp 176-80

56 On the Eighteen Decrees" designed to restrict intercourse between Jews and pagans, see P *Shabbat* 1, 7, 3c, B *Shabbat* 13b, 17b

not contravene an important religious or ethical norm and enjoyed wide support, the exemplars of Halakhah yielded to the general will with greater or lesser grace, as the case might be

When the people followed a practice on *Pesah* that seemed to contradict the law, Rabbi Johanan declared "Do not interfere with Israel If they are not prophets, they are the descendants of prophets "[57] He proceeded to explain that the populace was really following a law which he had forgotten Again and again Rabbis seeking to establish the proper practice invoked the principle, "Go out and see how the people conduct themselves "[58]

The Middle Ages offer a striking instance of how the popular will overrode the accepted Halakhah of the past Not only did the people create the festival of *Simhat Torah* without the support, and often in the face of opposition, from the recognized Halakhic authorities, they insisted upon introducing into the observance of the festival, both in the synagogue and without, practices at variance with the Halakhah [59]

In modern America, the introduction of family pews, not merely in Reform congregations but also in Conservative ones, is an illustration of the triumph of the popular will With the exception of ultra-right wing Orthodox and Hasidic synagogues, Orthodoxy in American has also yielded on this point, with such devices as separate sections for men and women, token *mehizot*, or raising the women's section three or four inches Conservative leadership has never "sanctioned" mixed pews, they are an expression of the popular will which has been allowed to prevail because the leadership recognized important social and ethical values in the practice and no contravention of any vital religious principle

The far-flung evidence of the responsiveness of the Halakhah to the world, a fraction of which has been adduced above, leads inescapably to one conclusion *The notion that the Halakhah and "sociology" are antagonists that are in perpetual confrontation with each other and must be kept at arm's length from each other is a major error "Sociology" is not extraneous to Halakhah – it is an integral element in it*

To be sure, at any particular moment, the law, which embodies the received tradition and practice of the past, will be in tension with conditions and insights of the present But it is their interaction that produces the body of tradition to be transmitted to the future This process has created the dialectic of Halakhah in the past and is the secret of its vitality for the present and the future *

57 B *Pesahim* 66b

58 B *Ber* 45a, B *Yrub* 14b and often

59 See 'Simhat Torah — The Triumph of the Democratic Spirit' in R Gordis, *Judaism For the Modern Age* (New York, 1955), pp 195-203 for the original Halakhah, for the final day of the Festival for the objections of the Rabbinate to the newly introduced practices on Simhat Torah, and their ultimate yielding to the popular will

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