# Constructing a Theory of Halakhah

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## 1. *Introduction*

In this article,[1] I seek to explore some facets of the roles of legal philosophy on the one hand, theology on the other, in the construction of a theory of *halakhah*. In so doing, we must be aware of the distinction between internal and external approaches. At first sight, we may be inclined to regard legal philosophy as external (associated with *wissenschaftliche* approaches), theology as internal (more associated with *yeshivish* approaches). A moment's reflection, however, shows the weaknesses of this construction. Indeed, in legal philosophy itself, the very distinction between purely internal approaches ('hard positivism', paying exclusive attention to the explicit dogmatics of a legal system), and purely external approaches (some forms of American Legal Realism and Critical Legal Studies, reducing the internal dogmatics to politics and economics), has broken down, one attractive alternative being the "moderate external point of view", which pays full attention and respect to the internal dogmatics (and, in our context, theological presuppositions) of a legal system, while viewing them, where appropriate, with the help of external resources,[2] in order best to communicate the full meaning of the internal point of view.

In what follows, I commence (section 2) with three issues arising primarily from the use of legal philosophy as a model for the construction of a theory of *halakhah*: (A) the authority system, viewed in terms of a theory of sources; (B) the relationship between law and morality; (C) the judicial role. Throughout, I argue, the use of legal philosophy as a model proves inadequate. I draw on the recent work of the Agunah Research Unit at the University of Manchester (U.K.)[3] for some pertinent illustrations. I then turn (section 3) to the theological model, noting from the start the conceptual issue of the nature of 'religious law' as conceived in the Jewish tradition. While Jewish theology provides resources for internal answers to questions A-C above (even if these are not primarily internal questions), it also presents us with further internal questions, notably the relationships between law, salvation and covenant. These latter questions, I would argue, cannot be excluded from a theory of *halakhah*; indeed, I suggest that they may also have implications for the way we view questions A-C.[4] My conclusion (section 4) is not, however, the simple replacement of a legal philosophical by a theological model. While I maintain that the theological model is preferable, in paying greater attention to the internal point of view, my approach to it is not purely internal. Here I outline the additional resources I would bring to bear in line with a "moderate external point of view", which serve both to communicate the full meaning of the internal point of view to outside observers of the world of *halakhah* and to pose some further questions to it.

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1 While the overall structure and argument of this article is new, I draw very substantially on my earlier work cited in the footnotes below, where fuller accounts of most of the issues, including references to further literature, may be found. The principal exception is that indicated in n.4, below.

2 This "moderate external point of view" is particularly associated with the Belgian school pioneered by François Ost and Michel van de Kerchove at Facultés Universitaires Saint-Louis.

3 For its downloadable working papers (including the Draft Final report), see http://www.mucjs.org/publications.htm; the Final Report is now available in book form: Bernard S. Jackson, *Agunah: The Manchester Analysis* (Liverpool: Deborah Charles Publications, 2011): http://www.legaltheory.demon.co.uk/books_ARU.html, for this and other print volumes from the Unit. For an earlier discussion in the context of the theory of *halakhah,* see "*Mishpat Ivri, Halakhah* and Legal Philosophy: *Agunah* and the Theory of "Legal Sources"", *JSIJ - Jewish Studies, an Internet Journal* 1 (2002), 69-107, at http://www.biu.ac.il/JS/JSIJ/jsij1.html.

4 This section of the argument is mainly programmatic, outlining issues I have not personally researched in any depth.

## 2.0 *Legal Philosophy*

### 2.1 The "Sources" Theory of Law

Legal positivism (which has dominated jurisprudential thinking in the English-speaking world from the early 19th century) is often described as a 'Sources Theory of Law':[5] each legal system has a recognised set of sources which (alone) are regarded as capable of creating, modifying repealing and enforcing[6] valid legal rules.[7] In the West, these sources are typically classified as forms of legislation, precedent and doctrine. The legal philosopher H.L.A. Hart identified, as a characteristic of (developed) legal systems, the existence of "secondary rules of recognition" capable of providing a "conclusive affirmative indication" of the presence (and validity) or absence of the primary legal rules of the system.[8] This came to be known as the "demonstrability thesis": primary rules exist only if they can be demonstrated to exist, by the criteria of the secondary rules. It follows from this that these secondary rules must be fashioned in such a way as to be capable of generating (if not, Hart later conceded, guaranteeing) such demonstrable results.

For Hart, this was needed for important ideological reasons. It reflected the values of certainty and predictability inherent in the concept of the "Rule of Law", which itself manifests the values of freedom and autonomy: the citizen is entitled to be able to know in advance the law applicable to him, so that he may freely choose a course of action confident in his knowledge of the legal consequences of such contemplated action. Whereas Hart's positivist predecessors identified law with the command of the sovereign, Hart sought to avoid the likely arbitrariness and subjectivity of such a form of governance: law was essentially a "system of rules" (including rules about rules) which, in the vast majority of instances, could generate certainty for the citizen (albeit through the consultation of lawyers): the Rule of Law rather than the Rule of Man.

Jewish law manifestly falls short of fulfilling any such "demonstrability thesis".[9] In theory, there is no doctrine of precedent in Jewish law, and until recent times there has been no regular system of law reporting. Even today, when the decisions (*pisqei din*) of the Israeli (state-authorised) rabbinical courts are published, their authority is more a function of the reputation of the particular judges than of a hierarchy of courts; more attention will be paid to the publication by a judge, or rabbinical scholar who has been asked to advise on the matter, of a "responsum" (*teshuvah*). Yet even apart from issues of sovereignty and the basis of authority – whether the *halakhah* as applied in Israel derives its authority from the state or from the religion – the secular positivist model of legal systems proves inadequate.

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5 See further my "Jewish Approaches to Law (Religious and Secular)", *Law & Justice. The Christian Law Review* 164 (2010), §2.2, at 63-74.

6 Jewish law has largely lacked enforcement powers in the Diaspora. In places, however, the courts have been able to use a *shaliah bet din* (literally, court agent, functioning somewhat like a bailiff): see further S.M. Passamaneck, "Aspects of Physical Violence against Persons in Karo's *Shulhan Arukh*", *The Jewish Law Annual* Vol. 9 (1991), 54-56; more generally, *idem,* "Halacha, Law Enforcement and the Modern World", in E.A. Goldman, ed., *The Jerusalem 1994 Conference Volume* (Atlanta: Scholars Press, 1996: Jewish Law Association Studies, VIII), 100-128.

7 In this context, "legal sources" are commonly distinguished from the literary and historical sources of the law.

8 H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press: 1994, 2nd ed.), 94. Interestingly, this view is denied by M. Silberg, *Talmudic Law and the Modern State,* trld. B.Z. Bokser (New York: Burning Bush Press, 1973), 51, who claims that Jewish law, being a system of religious law, "does not define norms for deciding the law, but norms of behaviour" – thus apparently reducing Jewish law (in Hartian terms) to a system of primary rules only. He also denies (at 57) that there is any recognised competence to effect change in Jewish law.

9 On the resolution of controversies in Jewish law, see Hanina Ben Menahem, S. Wozner and N.S. Hecht, *Controversy and Dialogue in the Jewish Tradition: An English Reader* (New York and Oxford: Routledge, 2005).

Even the basic rule of majority decision is subject to dispute as to whether it applies to cross-generational disputes, where the participants had no opportunity for dialogue.[10] This has a knock-on effect on the rule that as between post-talmudic authorities "the law is in accordance with the later generations" (*hilkheta kebatra'ei*), provided that the views of the earlier authorities are recorded and well known. But that latter rule is equally subject to substantial uncertainty in the details of its application.[11] Indeed, the persistence of minority opinions is capable of generating "doubts"; the *halakhah* has developed principles for dealing with legal doubts, which often leave considerable discretion in the hands of the rabbinical court, even allowing it, where there is double doubt (*sfeq sfeqa*), to permit behaviour prohibited by Torah law.[12] In the light of all this, recourse is often had to one of two (quite contradictory) solutions: on the one hand, a doctrine of "consensus" — though the status of this, too, is a matter of considerable doubt;[13] on the other, invocation of the authority accorded to the leading halakhic scholar(s) of the generation (the *gadol/gedoley hador*).

It seems, then, that the *halakhah* fails Hart's criteria of a "system of rules". But if it does not manifest the ideals of the "Rule of Law", are we to reduce it to a "Rule of Men"? Neither model would seem to fit. Yet despite all this, the positivist model has proved particularly attractive to *mishpat ivri* scholars in Israel. Menachem Elon has made a valiant attempt to incorporate its theological foundations within a positivist model.[14] He defines the "legal sources" as "the sources of law and means of creating law recognised by the legal system itself as conferring binding force on the norms of that system",[15] his language implying an equation of "binding force" with "validity". But whence do these sources of law, which confer such validity on the substantive norms themselves, derive their validity? Elon follows Salmond (and indirectly Kelsen) in asserting the existence of a "basic norm" which gives authority to the sources of law. This "basic norm", which he refers to as either a *"Grundnorm"* (Kelsen) or "basic rule of recognition" (Hart), is identified by Elon with "the fundamental norm that everything set forth in the Torah, *i.e.* the Written Law, is binding on the Jewish legal system".[16] But for Elon (unlike his positivist models), we can locate also a (theological) basis for the fundamental norm itself: "The source of authority of this basic norm itself is the basic tenet of Judaism that the source of authority of the Torah is divine command."[17] This, for Elon, is the real basis of the *Grundnorm*.[18] This view of Jewish law, in terms of a hierarchy of authority deriving ultimately from God,

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10 See Rabbi Dr. Yehudah Abel, "Halakhah - Majority, Seniority, Finality and Consensus", Section I (Working Papers of the Agunah Research Unit, June 2008, no.7, available at http://www.mucjs.org/publications.htm); see also *Agunah: The Manchester Analysis* (*supra* n.3), pp.49-50 (§2.8).

11 On how well-known the views of the *qamma'ey* must be, and to what extent the *batra'ey* must explicitly engage with the reasoning of their predecessors: see Abel, *supra* n.10, at Section III; *Agunah: The Manchester Analysis* (*supra* n.3), 61-63 (§§2.28-29).

12 Abel, *supra* n.10, at 15-16 (§§IV.12-16); *Agunah: The Manchester Analysis* (*supra* n.3), 55-59 (§§2.17-24).

13 See further B.S. Jackson, "Internal and External Comparisons of Religious Law: Reflections from Jewish Law", *Journal of Comparative Law* 1/1 (2006), 190-91; *idem,* "*Mishpat Ivri …*", *supra* n.3, §4.3 at 97-102.

14 See further B.S. Jackson, "Judaism as a Religious Legal System", in *Religion, Laws and Tradition. Comparative Studies in Religious Law,* ed. A. Huxley (London: RoutledgeCurzon, 2002), 34-48, at 35f.; *idem,* "*Mishpat Ivri …*", *supra* n.3, §2 at 70-75.

15 M. Elon, ed., *The Principles of Jewish Law* (Jerusalem: Keter, 1975), 10; cf. his *Jewish Law, History, Sources, Principles* (Philadelphia: Jewish Publication Society, 1994), I.232.

16 *Jewish Law, supra* n.15, at I.232.

17 *Principles, supra* n.15, at 15; cf. *Jewish Law*, *supra* n.15, at I.233. Cf. H. Kelsen, *General Theory of Law and State,* trld. Wedberg (Cambridge: Harvard University Press, l946), 115: "The basic norm of a religious system says that one ought to behave as God and the authorities instituted by Him command." However, in *The Pure Theory of Law,* trld. M. Knight (Berkeley and Los Angeles: University of California Press, l967), 193f., Kelsen goes to some length to stress, in relation to the Decalogue, that the source of its authority is not the *fact* (real or supposed) of divine command but rather "the tacitly presupposed norm that one ought to obey the commands of God". This distinction is elided by Elon. On the possible application of the Kelsenian model, see further "Judaism as a Religious Legal System", *supra* n.14, at 44f.

18 The classical positivists, however, have been less ready to classify religious law as a legal system. See "*Mishpat Ivri …*", *supra* n.3, §3 at 75-83; Jackson, "Judaism as a Religious Legal System", *supra* n.14, at

may appear natural and unsurprising. But there is a fundamental difference[19] between a hierarchy with God at the apex and one based on human political authority: divine authority, and the constitution it mandates,[20] is permanent and unchangeable, while secular positivists accept that a basic norm may be changed by unilateral, revolutionary action of the subjects of the law. Secular jurisprudence thus accords the current constitution a merely contingent validity, until and unless a revolution occurs and succeeds; but such a possibility can hardly be accepted for Jewish law, wherein the basic law is eternal (even if it itself authorises some forms of legislative change[21]), or at least (even if we think of notions of *berit hadashah* or concepts of *Torah* in the messianic age) is not susceptible to change by unilateral action by its subjects. The covenant may be broken, but it cannot be unilaterally revoked by its subjects.[22]

## 2.2 Judicial Interpretation and the Relation between Law and Morality

Two principal problems for judicial interpretation arise from the attempt by legal positivism to construct a theory of law which manifests the values of the Rule of Law: on the one hand, the question how the legal outcome of any proposed action can be knowable in advance, given the nature of human language;[23] on the other, how to deal with unanticipated situations presenting a clash between law and morality.

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34f.; B.S. Jackson, "Structuralism and the Notion of Religious Law", *Investigaciones Semióticas* 2/3 (1982-3), 1-43, at 3-8, concluding: "For Bentham, the exclusion of religious law indicates that greater significance is being attached, for the purposes of classification, to the role of human political institutions than to either linguistic usage or the nature of the sanctions applied. Austin effected a compromise, designed in part to give greater weight to linguistic usage, while at the same time stressing (with Bentham) the role of human political institutions: religious law might be "law", but was not "positive law". Kelsen, while claiming to give weight to linguistic usage (at least as a starting point), stresses the nature of sanctions and (apparently) the perception of divine origin as the points of differentiation, while conceding that religious law may belong to the wider *genus* of normative systems. In effect, however, Kelsen is at one with Bentham and Austin in adhering to the tenet of the social sources of law. For while the political structure (that complex of relationships which we refer to as the "state") is viewed by him as synonymous with the legal system, the requirement that law involve the use of socially immanent, coercive sanctions virtually restores political institutions to their role as a significant mark of distinction."

19 In addition to the difference based on the nature of the sanctions. Insofar as religious law depends upon transcendental rather than socially immanent sanctions, Kelsen excludes it from his definition of positive law. He understood transcendental sanctions as "those that according to the faith of the individuals subjected to the order originate from a superhuman authority", which he appears to understand (only) in terms of "punishment by a superhuman authority", an example of which is given as "the illness or death of the sinner or punishment in another world". See further "*Mishpat Ivri ...*", *supra* n.3, §3.2.2 at 80, on *Pure Theory*, *supra* n.17, at 28, 33; *General Theory of Law and State*, *supra* n.17, at 20f. This argument, of course, largely evaporates *once* Jewish law has been adopted as the law of a state. It remains fundamental, however, in respect of the *halakhah per se.* We see here the influence of the nationalist agenda of the *mishpat ivri* movement in generating the theoretical model used to describe Jewish law.

20 For Elon, the constitution is the *Torah*; as for the ground of the constitution: "we leave jurisprudence and pass into the sphere of faith": *Jewish Law*, *supra* n.15, at I.233.

21 Stressed by Elon, *Jewish Law*, *supra* n.15, at Vol. II, chs.13-20.

22 See further Jackson, "Judaism as a Religious Legal System", *supra* n.14, at 36.

23 Whether the language of the *torah shebiktav*, written in *lashon hakodesh*, is susceptible to the same analysis in an issue I have not seen debated in the literature. For some preliminary thoughts, prompted by the forms of analogy in the Hebrew Bible and the nature of the rabbinic *middot*, see my "Analogy in Legal Science: Some Comparative Observations", in *Legal Knowledge and Analogy,* ed. P. Nerhot, Dordrecht etc., Kluwer Academic Publishers, 1991, 145-165, at 152f., 157-64; "A Semiotic Perspective on the Comparison of Analogical Reasoning in Secular and Religious Legal Systems", in *Pluralism in Law,* ed. A. Soeteman (Dordrecht: Kluwer Academic Publishers, 2001), 295-325. The issue is addressed further in s.3.2, below.

For Hart, both problems challenged his model. On the one hand, legal language, through its use of general terms, necessarily displayed an area of indeterminacy: there was an inevitable "duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules".[24] Such penumbral cases, he claimed, were marginal, in that the "vast majority" of cases arise within the "core of certainty" of the language of the rule. In penumbral cases, he argued, there was a legal gap, in that no decision had previously been made by a recognized legal source; here, the judge had a discretion to fill that gap, but in so doing he was creating new law (under a power granted to him by the legal system).

Dworkin rejected this analysis: law did not consist only of rules, but rather of a combination of rules and principles. When the judge was faced with the need to interpret the law in penumbral cases, he was not filling a gap,[25] but rather deploying existing legal principles in order to declare (albeit for the first time) what in fact was existing law (specifically, in his view, to declare the existing rights of the litigants). Moreover, "legal principles" did not consist only of explicit statements from authoritative sources, nor were they restricted to the technically legal sphere: they included the moral and even political principles which informed the particular legal culture.[26]

Dworkin's approach thus provided an answer also to the second problem: unanticipated situations presenting a clash between law and morality. Here, the issue might arise even where the language of the relevant legal source was entirely determinate. Dworkin's famous example was the New York case of *Riggs* v. *Palmer*,[27] where the beneficiary of a will had in fact murdered the testator (his grandfather). The relevant New York statute had set out the criteria of a valid will (criteria of form and mental capacity), and its language was entirely clear. The court argued, however, that this was here overridden by the principle that a man should not profit from his wrong, and denied the grandson the estate. This showed, Dworkin argued, both that law was not a system of rules only, and that the principles it incorporated included moral principles. A strict positivist approach would have been to grant the estate to the grandson, and leave it to the legislature to change the law (even retrospectively). Hart, in particular, had originally[28] maintained that law was a system of rules only, and that though a legal system might choose to incorporate criteria of morality, this was the role of the legislature and not the judge.

Dworkin's model has proved attractive to some theorists of Jewish law, for the discretion it gives the judge *within* the legal system itself.[29] Lamm and Kirschenbaum, in particular, have claimed that the *halakhah* itself

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24 Hart, *The Concept of Law*, *supra* n.8, at 123, quoted at B.S. Jackson, *Making Sense in Jurisprudence* (Liverpool: Deborah Charles Publications, 1996), 186 (and see 185-190 for Hart's overall argument).

25 See my "Hart and Dworkin on Discretion: Some Semiotic Perspectives", in *Semiotics, Law and Social Science*, ed. D. Carzo & B.S. Jackson (Reggio and Rome, Casa del libro editrice, 1985), 158-165; *Semiotics and Legal Theory* (London, Routledge & Kegan Paul, 1985, reprinted Liverpool: Deborah Charles Publications, 1997), 193-203.

26 Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 68 on "arguments on issues of normative political theory" and "community morality", understood as the "political morality presupposed by the laws and institutions of the community" (at 128); see further Jackson, *Making Sense in Jurisprudence*, *supra* n.24, at 267f.

27 115 N.Y. 506, 22 N.E. 188 (1889), discussed in Dworkin, *Taking Rights Seriously*, *supra* n.26, at 23ff. see further Jackson, *Making Sense in Jurisprudence*, *supra* n.24, at 199f., 208, 241f.

28 Later, he conceded that principles existed within the legal system (at least where explicitly incorporated in accordance with the secondary rules of the system), thus compromising his "demonstrability" thesis to some extent. This has come to be known as "soft positivism". See further Jackson, *Making Sense in Jurisprudence*, *supra* n.24, at 205-209.

29 See further Jackson, "*Mishpat Ivri* ...", *supra* n.3, §2.2.3 at 73; *idem,* "Judaism as a Religious Legal System", *supra* n.14, at 36. See now the recent Symposium on "Halakha and Morality", ed. Sam Fleischacker, *Journal of the Society for Textual Reasonin*g, Volume 6, Number 1, December 2010, available at http://etext.virginia.edu/journals/tr/volume6/number1/index.html. The lead article, by Daniel Statman, argues that "the question regarding the role of moral considerations in halakha is first and foremost an historical one, which should be kept separate from ideological and jurisprudential issues". There are responses by Shalom

has internal "principles"[30] (such as: *ve'asitah hayashar vehatov*) which they see as operating in a similar manner.[31] Nor are Jewish theorists attracted by the positivist thesis of the separation of law and morality.

The attractiveness of such models for modern Orthodoxy lie also in their explanation of the legitimacy of legal *development.* The argument can be presented that Jewish law, just because it is a system of law, may be expected to possess such mechanisms; and it is not difficult to proceed from that point to illustrate their existence from the treasure-house of data of the history of Jewish law. Legal development is itself regarded as a positive value, in the context of debates with conservatives who deny the *moral* authority of the current generation to initiate change. The debate then becomes centrally relevant to the issue of incorporation of Jewish law into the law of the State of Israel, since few would deny that a necessary precondition of such incorporation is a degree of clarification, restatement and development – as was argued quite explicitly by Chief Rabbi Herzog in his attempt to reform the halakhah of inheritance.[32]

Yet the jurisprudential responses to the two problems outlined at the beginning of this section do not immediately strike one as authentically Jewish.[33] "Principles" are hardly a staple of halakhic study,[34] nor is the judiciary given a "legislative" discretion to fill gaps. But the problem is not simply one of "fit". The jurisprudential debate is based upon external secular, assumptions about the nature of language, rationality and morality. Any theory of *halakhah* must take account of the internal, theological assumptions of the Jewish 'legal system'. We shall therefore return to these issues in section 3.

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Carmy, Suzanne Stone, Devorah Schoenfeld, Menachem Kellner and Mark Rosen, and a reply by Daniel Statman. On the use of Dworkin's approach, see particularly Stone's contribution: "Halakha and Legal Theory".

30 Already in 1960, the Biblical scholar Moshe Greenberg sought the underlying principles (for him, "postulates") of Biblical criminal law in a famous article: "Some Postulates of Biblical Criminal Law", in *Yehezkel Kaufman Jubilee Volume*, ed. M. Haran (Jerusalem: Magnes Press, 1960), 5-28. I replied to this in "Reflections on Biblical Criminal Law", in my *Essays in Jewish and Comparative Legal History* (Leiden: Brill, 1975), ch.2; Greenberg responded in "More Reflections on Biblical Criminal Law", in *Studies in Bible,* ed. S. Japhet (Jerusalem, Magnes Press, 1986; Scripta Hierosolymitana, XXXI), 1-17; I revisited the debate in my *Studies in the Semiotics of Biblical Law* (Sheffield, Sheffield Academic Press, 2000), ch.7, noting the rationalist character of Greenberg's model, comparing it to that of Dworkin (at 180f.), and indicating alternative methods for the reconstruction of the values underlying Biblical law.

31 N. Lamm and A. Kirschenbaum, "Freedom and Constraint in the Jewish Juridical Process", *Cardozo Law Review* 1 (1979), 99-133. See also E. Dorff, "Judaism as a Religious Legal System", *Hastings Law Journal* 29 (1978), 1331-1360, at 1339.

32 B. Greenberger, "Rabbi Herzog's Proposals for Takkanot in Matters of Inheritance", in B.S. Jackson, ed., *The Halakhic Thought of R. Isaac Herzog* (Atlanta: Scholars Press, 1991: Jewish Law Association Studies, V), 49-112, esp. at 49f., 62f.

33 Notwithstanding the Jewish descent of Kelsen, Hart and Dworkin. In "A Semiotic Perspective …", *supra* n.23, at 322, I remarked that "… the notion of coherence currently deployed in some theories of legal reasoning are of truly rabbinic proportions. It may not be accidental that Dworkin describes his Hercules as a "lawyer of superhuman skill, learning, patience and acumen"…" (citing *Taking Rights Seriously, supra* n.26, at 105). See also below, at n.77.

34 Nor does Israel's Foundations of Law Act of 1980, which replaces residual reference to English law with the "principles (*ikronot*) of freedom, justice, equity and peace of Israel's heritage" advance the argument. In our Agunah research, we became very aware of the importance of what have come to be called "meta-halakhic" issues, such as the stability of marriage and relations between different religious (and non-religious) groupings (see also *Agunah: The Manchester Analysis* (*supra* n.3), at §1.7 (p.13) and ch.1 generally); §2.47 (p.76); §5.20 (p.225); §6.6(a) (p.263); §6.38 (p.277) ); §6.41 (p.279). The Dworkinian distinction between "principles" and (here religious) "policies" would clearly not apply here.

2.3 The Judicial Role: Finality of Judgment and the Personal Responsibility of the Judge

The secular conception of the Rule of Law attaches great importance to certainty, even at the price of error. Not only must judicial decisions (subject to the appeals system) be final *inter partes*; the system of precedent (in theory, absent from Jewish law[35]) must also possess this quality, if citizens are to be able to choose their courses of action in reliance on it. But what if a precedent was based on (legal or factual) error, but has not been challenged in any way authorised by the legal system? In the interests of certainty, secular legal systems commonly regard it as a valid, binding norm. This led the "purest" positivist of the 20th century, Hans Kelsen,[36] to develop what has been termed a theory of "normative alternatives": the courts " ... are authorized by the legal order to create either an individual norm whose content is predetermined by the general norm *or* an individual norm whose content is not predetermined, but to be determined by the organs themselves ..."[37]

Elon cites what appears to be a similar approach in Jewish Law: there is an obligation to follow the judges' verdict: "even when it appears to you that they are saying that right is left and left is right, you must obey them", from which he concludes that "The *Halakhah* is thus identified with those to whom it is entrusted, to the point that even an error of the halakhic authorities is still *Halakhah*".[38] This, however, cannot be taken in any unqualified way, as we may see from Rema's qualification of the doctrine of *hilkheta kebatra'ei*.[39]

Indeed, the midrashic dictum may well be confined to the individual *psaq*. Rabbenu Tam viewed the Gaonim as in error in having allowed coercion of the husband who refused a get to his wife who claimed "he disgusts me" (*me'is alay*). But Rabbenu Tam is credited with the proclamation of a *herem* against anyone who cast doubt on the *gittin* of another Rabbi.[40] So perhaps we should conclude that, despite his criticism of the

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35 Elon, "Ma'aseh", *Enc. Jud.* XI, 642-50, at 647-48: "The stated theoretical nature of a judgment, which applies even as regards determination of the law for the instant parties themselves, has necessarily entailed the conclusion that a judgment shall not have the force of a binding precedent in relation to a similar problem arising between different parties; hence "if another case comes before him even if it be a like case in all respects – he may deal with it as he sees fit, since the *dayyan* need only act according to what his own eyes see" (Nov. Ran to BB 130b; Nov. Ritba, BB *ibid.*)."

36 Author, inter alia, of *The Pure Theory of Law,* trld. M. Knight (Berkeley and Los Angeles: University of California Press, l967). Kelsen insisted that (positive) law be pure of all external considerations, whether moral, religious, social, psychological or political, in order to maintain the objectivity of its norms. On his analysis of religious law, in this light, see "*Mishpat Ivri ...*", *supra* n.3, §§3.2.2-3, at 80f.

37 *Pure Theory*, *supra* n.36, at 269, 354. See further Jackson, "*Mishpat Ivri ...*", *supra* n.3, §4.2.2, at 94f.; Jackson, *Making Sense in Jurisprudence*, *supra* n.24, at 114-16.

38 Elon, *Jewish Law, supra* n.15, at I.244, citing *Sifre Shoftim* 154 on *Deut.* 17:11; Nahmanides, *Commentary on Deuteronomy*, ad loc. At "*Mishpat Ivri ...*", *supra* n.3, §4.2, at p.91, I commented that Elon would thus appear to deny the possibility of dogmatic error in the *halakhah*. However, Elon himself notes alternative views of the meaning of the midrashic dictum: see esp. Abrabanel *ad loc.*, at Elon, I.246-47. Moreover, the justification for the dictum given by Nahmanides (as contrasted with that of the *Hinnukh* and Nissim Gerondi, quoted by Elon at I.245) is theological, rather than jurisprudential.

39 On the doctrine, see text at n.11, *supra.* On Rema's qualification: "However, if a responsum by a *gaon* is found that had not been previously published, and there are other [later] decisions that disagree with it, we need not follow the view of the later authorities (*aḥaronim*), as it is possible that they did not know the view of the *gaon*, and if they had known it they would have decided the other way" (*Rema* to *Shulḥan Arukh Ḥoshen Mishpat* 25:2, as quoted by Elon, *supra* n.15, I.271), see further *Agunah: The Manchester Analysis* (*supra* n.3), §§2.28-29 (pp.61-63).

40 See Rav Moshe Morgenstern, *HATOROT AGUNOT - Sexual Freedom from a Dead Marriage* (privately published, 1999), vol.I, ch.II, p.27f. (previously at http://www.agunah.com/): "Rabbenu Tam cited by Mordecai, end of Laws Gitin tractate Gitin #455 made a cherem with a death penalty — by heaven — to anyone who libels another Rabbi's Get. See Ramo Even Hoezer 154:22 ... The Noda Beyahudoh expanded on this cherem and stated even if those Rabbis, who criticize another Rabbi's Gitin and libel them, be as tall as the Cedars of Lebanon, be great scholars, if they libel another Rabbi's Gitin they will be guilty of the sin of violating Rabbeim

Geonim, Rabbenu Tam accepted the doctrine of (no) dogmatic error in respect of the individual *psak.* But the case of *gittin* may well be exceptional.

Even at the level of the individual *psaq*, there is a notable distance between Jewish law and secular legal systems. It is said that there is in principle no doctrine of *res judicata* in Jewish law:[41] "If a judge was mistaken in his judgment, the case should be reopened and retried correctly."[42] Although there is no regular system of appeals through a hierarchy of court, it is possible to request the original court to reopen a case,[43] or to go to another *bet din*, especially if it is larger in number and greater in wisdom than the original. Nor does this apply only to questions of fact, as where new evidence becomes available. A distinction was drawn between errors on settled law (*bidvar mishnah*) and errors in the exercise of discretionary judgements (*beshiqul hada'at*); in the former case, judgments were subject to revision.[44]

Correlated with this difference is another, that concerning the personal responsibility of the judge. Secular judges are immune from legal responsibility for errors,[45] it being assumed that the law is sufficiently certain for them to arrive at objective judgments, and that the appeal mechanism is there to rectify any mistakes. In Jewish law, on the other hand, judges who err in law may be personally liable, both financially to injured litigants[46] and to God (the Supreme Judge). Mishnah Horayot sets out the circumstances in which they must

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(sic) Tam's cherem carrying the gravity of the death penalty by Heaven. In 1768 Nodah Beyohudah warned the Bet Din of Frankfort of the death penalty invoked for slandering the Get of another Rav. Rav Moshe Feinstein reiterated the cherem lgros Moshe Even Hoezer 1:137. The prohibition of Mamzaras is considered from the point of view of Halacha, Jewish Law, as set apart from every other Law of Torah."

41 Elon, *supra* n.35: "According to the original Jewish law, no judgment is absolute and final in the sense of *res judicata* in Roman law, except in so far as it accords with the true objective state of affairs as regards both the facts and the law … A judgment in Jewish law accordingly has a dual nature: theoretically it is not final until the truth has been fully explored; in practice reservations were laid down – which would be accepted by the parties and normally would apply automatically – aimed at ensuring an end to litigation between the parties to a dispute and at acceptance of the judgment as decisive and as determining the respective rights of the parties." See further M. Chigier, *Judge and Justice in Jewish Law* (Jerusalem: Ariel, n.d., but based on a lecture of 1987), 157-63; J. Bazak, "*Res Judicata* and the Authority of Arbitrators and Law Courts to Amend or to Change their Award in Jewish Law", in *The Paris Conference Volume*, ed. B.S. Jackson and S.M. Passamaneck (Atlanta: Scholars Press, 1992), 10-16 (Jewish Law Association Studies, VI); B.S. Jackson, "The Practice of Justice in Jewish Law", *Daimon* 4 (2004), 31-48, at 47.

42 *Shulhan Arukh, Hoshen Mishpat* 20:4.

43 H.H. Cohn, "Practice and Procedure", *Enc. Jud*. XIII.952-62, at 957-58: "A judgment is always subject to revision, normally by the court that made it in the first place, if new evidence has come to light disproving the facts which the judgment was based on, provided the party seeking to adduce such new evidence is not debarred from so doing (see above; Sanh. 3:8; Yad, *Sanhedrin* 7:6; HM 20, 1)."

44 Cohn, *supra* n.43, at 957-58, offers the following historical reconstruction: "Every judgment is also subject to revision for errors of law. Originally the rule appears to have been general and to have applied in all civil cases, whatever the quality of the error (Sanh. 4:1); later it was confined to erroneous judgments of nonprofessional and non-expert judges (Bek. 4:4); finally, the rule was confined to errors of mishnaic (i.e., clear and undisputed) law, as distinguished from "errors of discretion" (Sanh. 6a, 33a; Ket. 84b, 100a). While "discretion" was originally understood in its wide literal sense (cf. Sanh. 29b; TJ, Sanh. 1:1, 18a), it was eventually confined to matters on which there were different views in the Talmud and the *halakhah* had not been decided; whatever view the judge followed, his judgment would not (for that reason alone) be subject to revision. It might otherwise be where the court followed one opinion in ignorance or disregard of the fact that another opinion had been accepted and put into practice "throughout the world" (Yad, Sanh. 6:2; HM 25:2)."

45 In some jurisdictions they are impeachable, and thus removable from office, for corruption and even incompetence, but they are not generally accountable to litigants for mistakes in particular cases.

46 R. Meir of Rothenburg, *Responsa* (Germany, 13th century): "One who holds that the judges decided against him wrongfully, can later sue them (for damages)." Cf. Cohn, *supra* n.43, at 958: "The revisable error could (in certain well-defined circumstances) be of great moment to the judge personally, as he might find himself saddled

bring sin offerings. But the destruction of the Temple has not entailed a diminution in the sense of the judge's accountability to God. The Talmudic image of the "chip of the beam" (*Sanh*. 7b) has become a metaphor for judicial reluctance to "go out on a limb", but rather to insist on consensus or at least collegial support, so that any responsibility to God for error may be shared rather than fall on one shoulder alone.[47] Thus Ribash (R. Isaac b. Sheshet Perfet, Spain and North Africa) made his approval of a communal enactment imposing additional requirements (including a *minyan*) on *qiddushin* conditional on agreement of "all the halakhic authorities of the region".[48]

### 2.4 Certainty v. (Religious) Truth(s)

The weaknesses of application of secular jurisprudence to the halakhah, as discussed thus far, manifest basic differences in values and outlook. On one level one may contrast the (secular) emphasis on certainty (as the basis of the Rule of Law) with the (religious) concern for truth. Thus secular law functions through a system characterised by (human) rationality[49] while the halakhah functions through a system in which rationality is, in one sense, a function of revelation. But whereas for the secularist, judicial recourse to anything other than publicly available rationality presents a threat (Rule of Men rather than Rule of Law), for the halakhist, revelation is not necessarily confined to publicly available rationality.

It follows that, for the secularist, any gap between the (psychological, private) process of decision-making on the one hand and the (discursive, public) process of justification on the other presents a problem.[50] Decision-making in the courtroom is assumed to proceed in an entirely logical fashion: by that very process of application of (known) law to the facts established in court which is later represented in the judgment, in the discourse of justification. Against this, different forms of legal realism insist upon a distinction between decision-making and the justification of decisions: the former is private (and may be based on non-legal considerations, including political biases), and necessarily involves the psychology of cognition; the latter is public, and necessarily involves the pragmatics of persuasion. And at the boundary between positivism and

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with the obligation to pay out of his own pocket any irrecoverable damage caused by his error (Yad, loc. cit. 6:3; HM 25:3)."

47 I am not sure on what presupposition it is assumed that such collective responsibility would reduce the divine sanctions for error on the part of the individual …

48 Rivash Resp. #399: "I would not rely on my own opinion, in view of the seriousness of declaring that she needs no divorce to be free [to marry], unless all the halakhic authorities of the region concurred, so that only a "chip of the beam" [i.e. a share of the responsibility] should reach me", discussed in *Agunah: The Manchester Analysis* (*supra* n.3), §§5.36-37 (at 235-37). But see further below, s.3.5.

49 This is part of a wider spectrum of differences, which I described in "The Practice of Justice in Jewish Law", *supra* n.41, at 31, thus: "The practice of justice in secular law — or, as we call it in England, the administration of justice — is based upon the following principles: (1) it functions through a system characterised by rationality; (2) that system entails the deployment of a hierarchy of rule-making institutions, including courts; (3) it functions in the public, rather than the private, domain, its operation being, in principle, subject to public accountability; (4) it possesses enforcement powers in order to give effect to its decisions. Jewish law appears to proceed from a quite different set of premises: (1) it functions through a system in which rationality is, in one sense, a function of revelation; (2) its system of rule-making institutions exhibits a far less clear hierarchy, as indeed do its courts; (3) it functions in the private, rather than the public, domain, its operation not being, in principle, subject to public accountability; (4) it frequently lacks enforcement powers in order to give effect to its decisions."

50 In *Making Sense in Jurisprudence* (Liverpool: Deborah Charles Publications, 1996), 233-36, I dissent from the conventional view, arguing that decision-making in the courtroom often proceeds from forms of rationality different from the logical process of application of (known) law to the facts established in court, and that where the law is not known, its construction by the court involves processes of non-legal as well as legal sense-construction. Much of my *Making Sense in Law* (Liverpool: Deborah Charles Publications, 1995) is concerned with the elucidation of those non-legal forms of rationality which I claim to be necessarily implicated in the legal process and legal reasoning.

natural law we find the debate over whether decision-making in cases where there is an apparent gap in the law are resolved by a creative, new act of human rationality or whether the judge is "only" discovering something already implicit in the legal system.

One leading positivist, the late Neil McCormick (a student and follower of H.L.A. Hart) in his later work sought to incorporate an account of intuition (prompted by the model of Solomon's judgment[51]) into his theory of legal justification. He seemingly adopted a dualist model: on the one hand rationality — indeed, the application of his favoured syllogistic model;[52] on the other, a form of emotivism, now seemingly incorporated into the justificatory process, albeit operating only as a safety net, when there is a sense that something has gone wrong with the application of (his favoured) rationality. This would enable him to argue, for example, that the (formalist, rational) decision of the lower court in *Riggs* v. *Palmer* (in favour of the murderous grandson)[53] just seemed wrong; it did not depend upon Dworkin's "Herculean"[54] deployment of general principles. Yet many secular lawyers would object to this as violating the "Rule of Law". After all, this is only one human being's intuition. Why rely on that?

I argue in the next section that the theology of halakhah provides a quite different (and, for one who assumes the validity of its theological presuppositions) satisfactory account of this phenomenon.

## 3.0 *Theology*

When we turn to theology, we are presented with a complex of issues, some of which would appear to be purely "internal" (religious) concerns (such as the relationship between law, salvation and covenant), while others are clearly relevant to the "external" legal issues already highlighted in the jurisprudential analysis above. I commence with the latter.

But first, it is necessary to look more closely at what Judaism understands as religious law, and in particular at the impact on this understanding of different forms of revelation. Elsewhere I have discussed this issue in terms of the tension between two different models of religious law, which I term "monistic" and "dualistic".[55] Is human activity within Jewish law regarded as an integral part of a single system of divine justice (the "monistic" model), reflecting the claim of Deuteronomy 1:17 that (all) justice belongs to God (*ki hamishpat lelokim hu*); or is the human element conceived as a separate system from the direct operation of divine justice, operating under delegated authority from God in some semi-autonomous manner, and sharing significant elements in common with secular models of human justice (the "dualistic" model)?

## 3.1 The Authority System

### 3.1.1 The Hebrew Bible

Scholarly accounts even of the early history of Jewish Law have been much influenced by the dominant legal positivism of the modern age, leading to an unreflecting importation of a model of the operation of law

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51 See my "Universalisability and Intuition: Solomon and Secularisation", in *The Universal and the Particular in Legal Reasoning*, ed. Z. Bankowski and J. MacLean (Aldershot: Ashgate, 2006), 223-33.

52 At 224 n.3 I quoted MacCormick as writing: "… justification of claims and decisions will contain and focus on a syllogistic element, showing what rule is being applied, and how." This was from his pre-conference circulated paper. As published in the book, in his chapter entitled "Particulars and Universals", this formulation appears to have been dropped, although the substance of the argument, particularly at 20f. ("Universalization in Justification") remains consistent with it.

53 Text at n.27, above.

54 See n.33, above.

55 B.S. Jackson, "The Practice of Justice in Jewish Law", *supra* n.41, at 31f.; *idem,* "Human Law and Divine Justice: Towards the Institutionalisation of *Halakhah*", *JSIJ* 9 (2010), 1-25, §§1.0, 1.3-4, 7.1, at pp.1, 2-4, 23, available at http://www.biu.ac.il/JS/JSIJ/9-2010/Jackson.pdf or http://www.biu.ac.il/js/JSIJ/fa.htm.

and justice which is simply inappropriate. That model views the law as consisting in authoritative texts, and views the role of the judge as that of application of those texts to the case before him. There is, however, considerable evidence to suggest that justice in the Hebrew Bible was originally conceived not as a function of a revealed text, but rather as the activity of an inspired judge, bringing to bear a divinely-inspired sense of justice to the particular situation in dispute. The judge was not, originally, an interpreter of texts; he was a doer of justice.[56] Perhaps the most famous charge to the judges in the Bible is that of *Deuteronomy* 16:18, where they are commanded to deliver a "righteous judgment" (*mishpat tsedek*). This is further explained in both negative and positive terms: negatively, that the judges must avoid both partiality and corruption; positively, that they must pursue "justice": *tsedek tsedek tirdof*. But what is this *tsedek?* There is no suggestion that it consists in following the rules of a written law book. We encounter elsewhere the expression *tsedakah umishpat* (the standard to be followed by Abraham and his descendants, stated immediately before the dialogue over the fate of Sedom!: Gen. 18:19), and there may be a link to ancient Near Eastern *andurarum* tradition.[57] Indeed, the function of the written law book is described quite differently in the following chapter (*Deut.* 17): as a text which the king must have prepared for himself (whether for his general edification, or, more likely, as a reminder of the "constitutional" restraints upon his power).

This division between written law and the administration of justice is echoed in other sources, most notably in the two different aspects of the "reform" of King Jehoshaphat (in the ninth century). On the one hand, he sends his officers with a book of the law to "teach" the people (*2 Chronicles* 17). On the other, his charge to the judges he appoints (*2 Chronicles* 19) makes no reference to their using a written law book; rather, he tells them to avoid partiality and corruption (as in Deuteronomy) and assures them that "(God) is *with you* in giving judgement" (*ve'imakhem bidvar mishpat*).[58] In other words, judicial decisions were conceived to be inspired: this, we may understand as a legitimation of the intuitive sense of justice. It receives explicit expression in relation to royal adjudication: "Inspired decisions are on the lips of a King; his mouth does not sin in judgement" (*Proverbs* 16:10). The account of Solomon's judgment (*1 Kings* 3:16-28) concludes with the narrator's observation: "And all Israel heard of the judgment which the king had rendered; and they stood in awe of the king, because they perceived that the wisdom of God was in him, to render justice."

The claim that justice "is" divine, or "belongs" to God — *ki hamishpat lelokim hu* (*Deut.* 1:17) — has often been watered down in modern scholarship, into what I have described as a "functional" model of divine adjudication, one which maintains that special divine procedures of adjudication (we think of cases of oracular consultation, oaths, the ordeal by bitter waters, etc.) are used *only* when the human rationality of the judge runs out, i.e. in cases of special evidentiary difficulty.[59] But the Bible is far from uniform on this matter. Recall the vivid picture in *Exodus* 18 of Moses as the overloaded first instance judge. The problem, Moses explains, derives from the fact that the people expect him, in dealing with each and every case, "to inquire of God" (*lidrosh elohim* — a term which refers to oracular consultation). Jethro, the story continues, advised Moses to create a system of judicial delegation, and to deal himself only with the "great matters" which the judges bring to him. According to *Exodus* 18, the newly appointed judges adjudicate on the basis

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56 See further Jackson, "Judaism as a Religious Legal System", *supra* n.14, at 36f.; *Studies in the Semiotics of Biblical Law, supra* n.30, at 90-92, 141-43.

57 See further Jackson, "Justice and Righteousness in the Bible: Rule of Law or Royal Paternalism?", *Zeitschrift für Altorientalische und Biblische Rechtsgeschichte* IV (1998), 218-262.

58 *2 Chronicles* 19:5-7: "Consider what you do, for you judge not for man but for the LORD; he is with you in giving judgment. Now then, let the fear of the LORD be upon you; take heed what you do, for there is no perversion of justice with the LORD our God, or partiality, or taking bribes." The fact that Jehoshaphat is elsewhere concerned with the use of a book of written *torah,* which he has used for public instruction (2 *Chron.* 17:9), makes its absence from the judicial reform all the more striking. On these sources, see further B.S. Jackson, *Studies in the Semiotics of Biblical Law*, *supra* n.30, at 116-119.

59 For a critique, see my "Modelling Biblical Law: The Covenant Code", *Chicago-Kent Law Review* 70:4 (1995), 1745-1827, at 1807-16; *Wisdom-Laws* (Oxford: Oxford University Press, 2006), 398-403; "Human Law and Divine Justice…", *supra* n.55, at 7-8.

of the "ordinances and laws" which Moses teaches them. But that reflects, as the narrative itself indicates in its own way, a later stage. We see here a transition from the monistic to the dualistic model.[60]

### 3.1.2 Early Rabbinics

Nevertheless, the conception of the inspired judge survived for several centuries. It is reflected in the Rabbinic concept of *semikhah*, literally the "laying on of hands", the traditional form of transmission of Rabbinic authority whose origins lie in the appointment by Moses of Joshua as his successor and which is reflected in the famous "chain of authority" in *Mishnah Avot* 1:1. It was only when the Rabbis perceived a break in this "chain", around the fourth century C.E., that *semikhah* came to acquire its present meaning: ordination as a result of qualification in the *yeshivah*. The Rabbis recognised the consequences of such a change: in a number of important jurisdictional respects, the judicial power of Rabbinical judges who lacked the original *semikhah* was reduced.

The famous story of the oven of Akhnai (B.M. 59b) may be viewed as a talmudic expression of the tension between the two models, R. Eliezer representing the monistic view, validated not only by performance of miracles (the classic form of validation of prophetic authority[61]) and ultimately by the interventions of a *bat kol*, R. Joshua representing the dualistic view (*lo bashamayim hi*, supported by a proof text). It is arguable that the transition towards a predominantly dualistic model received impetus from the need to distance Judaism from Christianity, in which the role of Jesus in relation to the halakhah was unequivocally monistic.[62] The tale is usually presented as a contest between a notion of (delegated) democracy of interpretation and inspired interpretation, which the Talmud resolves in favour of the former.[63] But even the notion of a democracy of interpretation has itself been reinterpreted in revelational terms: according to R. Solomon Luria, the variety of opinions is explicable in terms of the variability of perception of the one true revelation, which all had personally (through the presence of their souls at Sinai) received.[64]

A dramatic piece of talmudic rhetoric may be viewed as an attack upon the then-developing dualistic model:

> R. Johanan said: Jerusalem was destroyed only because they gave judgements therein accordance with Torah law. Where they then to have judged in accordance with untrained arbitrators? — But say thus: because they based their judgements [strictly] upon Torah law, and did not go beyond the requirements of the law. (*Baba Mezia* 30b)

The text presents a sequence of three voices: (1) the original dictum of R. Johanan; (2) a question/objection offered by the Talmud: surely he is not saying that the appointed judges should have been replaced by lay arbitrators; (3) a talmudic response which indicates that the problem may not reside in the nature of the judiciary, but rather in its mode of operation. The judges chose (in my terms) the dualistic approach, in which they preferred the rationality of the rule of law (conceived as a semi-autonomous system, which they were delegated to apply), rather than divine justice itself, according to which they ought to have been prepared to transcend the rules of law where appropriate.

However, the monistic model never completely disappeared, despite the constraints imposed by a written text. Hanina Ben Menachem has studied some thirty cases recorded in the Babylonian Talmud where it is

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60 *Wisdom-Laws*, *supra* n.59, at 422f. See further Jackson, "Judaism as a Religious Legal System", *supra* n.14, at 38f., on the relationship of this transition to the problems of a hereditary judiciary (*1 Sam.* 7:15-8:3).

61 *Deut.* 13:1, 34:10-12. See further my *Essays on Halakhah in the New Testament* (Leiden: E.J. Brill, 2008), 14, 18f.

62 Based, I have argued, on an interpretation of the "prophet like Moses" of Deut. 18: see *Essays*, *supra* n.62, at 20-25, 28f. Note in this context the accusation of *minut* levelled against R. Eliezer: *Avodah Zarah* 16b-17a.

63 *B.M.* 59b. R. Nissim Gerondi, in commenting on the oven of Akhnai passage, suggested that the sages realised that R. Eliezer came closer to the truth than they, but felt bound nevertheless to follow the reason of the majority. See further Lamm and Kirschenbaum, *supra* n.31, at 103.

64 See Lamm and Kirschenbaum, *supra* n.31, at 104f.

said that the rabbinic judge decided the case "not in accordance with the *Halakhah*".[65] Such a practice of deciding "not in accordance with the Halakhah" proved controversial: though accepted by the Babylonian Talmud, it appears to have been opposed by the Palestinian authorities, and it has never been formally incorporated into the powers of the judiciary (though that, one may argue, is precisely in line with its very nature).[66] Nevertheless, the proceedings of the Rabbinic law court should not be seen as identical to those of its secular counterparts. The very fact that the Rabbinic court is *not* conceived as a public forum, that its proceedings are *not* reported, and traditionally there was no hierarchy of courts to sustain an appellate system, reflects the perception that the Rabbinic court is engaged in a private activity of moral/religious persuasion, and that its function is primarily to secure justice (in the sense of that which is conceived to be moral according to the tenets of the religion) in the particular situation faced by the parties.

### 3.2 Religious Language

In Judaism, the Hebrew language has special properties, those of *Lashon Hakodesh*. Not only is it the language in which the Torah was given to Moses; it is also the language of creation.[67] The effects of this understanding for our construction of a theory of halakhah have gone largely unaddressed, certainly in the academic literature. From a religious viewpoint, it opens up a greater multiplicity of levels of meaning[68] and forms of signification (such as its numerical connotations, generating exegesis by *gematria*[69]) which go well beyond human language — God being capable of addressing simultaneously different audiences, at different levels of sophistication, simultaneously. This in turn allows us to resolve some otherwise difficult paradoxes, such as the claim, on the one hand, that the torah is written *bilshon adam*, while on the other, it is capable of affirming the truth of logically contradictory propositions (*elu ve'elu ...*).[70]

We also have to grapple with the theological implications of the different channels of communication: orality on the one hand, writing on the other, together with the implications of the phenomenon of the ultimate (and controversial[71]) reduction to writing of an originally 'Oral Torah'. Modern linguistics is rightly interested in

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65 See Haninah Ben-Menahem, *Judicial Deviation in Talmudic Law* (Chur etc.: Harwood Academic Publishers, 1991); see, e.g., *Ketubot* 50b and *Baba Kamma* 96b. See also, more broadly, his "The Judicial Process and the Nature of Jewish Law", in *An Introduction to the History and Sources of Jewish Law*, ed. N. Hecht, B.S. Jackson, D. Piattelli, S.M. Passamaneck and A.M. Rabello (Oxford: The Clarendon Press, 1996), 421-437, concluding, at 434f., that "we are justified in doubting the sufficiency of the modern, Western concept of law for the purposes of describing the *halakhah*."

66 See further "*Mishpat Ivri ...*", *supra* n.3, §5.1.2, at 104f.; "Judaism as a Religious Legal System", *supra* n.14, at 39f.

67 On the role of *Torah* in the creation of the world, see Mishnah Avot 1:4; cf. Philo, *de opif. mundi* 20, 25, 36 (divine *logos,* identified with Torah in *de migrat.* 130): see further W.Z. Harvey, "Torah", *Encyclopedia Judaica* (Jerusalem: Keter, 1973), XV.1236.

68 On the distinction between *peshat and derash*, see R. Loewe, "The Plain Meaning of Scripture in Early Jewish Exegesis", *Papers of the Institute of Jewish Studies* 1 (1965), 140–85; articles on 'Peshat', and 'Derash' by L.I. Rabinowitz in *Encyclopedia Judaica* (Jerusalem: Keter, 1973) and older literature there cited; S. Kamin, *Rashi's Exegetical Categorization in respect to the distinction between Peshat and Derash* (Jerusalem: Magnes Press, 1986; Hebrew, English summary); D.W. Halivni, *Peshat and Derash* (New York and Oxford: Oxford University Press, 1991), 52-88.

69 Though not generally used for halakhic purposes.

70 On the latter, see B.S. Jackson, "Some Preliminary Observations on Truth and Argumentation in the Jewish Legal Tradition" (Heb.), *Moreshet Israel* 3 (2006), 22-33, at section 4; English version in *Law and Philosophy in the XXIth Century: Festschrift for Csaba Varga*, ed. Bjarne Melkevik (Budapest, Akadémiai Kaidó, forthcoming, but available on this web site and from my academia.edu page).

71 J. Faur, *Golden Doves and Silver Dots*: *Semiotics and Textuality in Rabbinic Tradition* (Bloomington, Indiana University Press: 1986), 100f., 135-138, plausibly understands the meaning of the original ban on the writing down of the oral law as a rule relating to the transmission rather than the recording of the text, based on the dictum of R. Judah b. Nahmani: "Matters that are written you are not at liberty to recite orally; matters

the different communicational characteristics of writing and orality.[72] In the context of the halakhah we have to grapple also with their theological implications. For the written and the oral law are different forms of divine communication, and that difference is relevant to the tension between the two models of divine justice outlined in this article, for we may associate writing with the dualistic model, having the characteristics of permanence and public availability; orality with the monistic model, as where it 'speaks' to the intuition of the individual judge.

The special characteristics of the written Torah, from a theological viewpoint, reflect the superhuman capacities of the divine author, who is assumed to have delivered a text which is both internally consistent and bereft of redundancy. Any apparent inconsistencies are resolved by rabbinic interpretation (through the medium of the oral law). Every word, often every letter, counts. Apparent redundancies are resolved (again through the medium of the oral law) by the identification of added meaning. Beyond all this, however, there is a superhuman level of discursive coherence, as may be seen in the operation of several of the *middot*, but notably *gezerah shavah*: the same word appearing in totally different contexts, which may well be located in different books of the torah, is there for a purpose: to indicate an analogy which justifies the transfer of meaning from the one context to the other.

Such analogy is not limited to the kind of analogy we find in the legal reasoning of secular legal systems. It extends to analogy based upon what, by secular criteria, might be regarded as arbitrary literary links.[73] However, if these literary links are found in the text of the Pentateuch, they cannot be regarded as arbitrary: the drafting being regarded as divine, we have a unique combination of the application of human reasoning to a divinely revealed text.[74] Leib Moscovitz originally termed such analogy "non-propositional"[75] – based not on substantive comparison but rather upon purely literary (formal) aspects of the text.[76] The use of such arguments, we may note, manifestly lacks the "demonstrability" which Hart sought within a secular, liberal legal system, one wedded to the conception of the "Rule of Law"; rather, they call for a "Hercules", whom Dworkin has described as a "lawyer of superhuman skill, learning, patience and acumen".[77] It is the very

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transmitted orally, you are not at liberty to recite from a writing" (Gitt. 60b). See also M. Elon, *Jewish Law. History, Sources, Principles* (Philadelphia: Jewish Publication Society, 1994), I.224-227; B.S. Jackson, "*Peshat/Derash*", *Textual Practice* 1/3 (1987), 333-339, at 335.

72 See W. Ong, *Orality and Literacy* (London and New York: Methuen, 1982); B. Bernstein, *Class*, *Codes and Control* (London: Routledge and Kegan Paul, 1971), Vol.I, chs. 5-7, esp. pp.108f., 123-137; B.S. Jackson, *Making Sense in Law*, *supra* n.50, at 77-84, 93-95; *idem,* "Literal Meaning: Semantics and Narrative in Biblical Law and Modern Jurisprudence", *International Journal for the Semiotics of Law* 13/4 (2000), 433-457, at 447.

73 See further B.S. Jackson, "A Semiotic Perspective on the Comparison of Analogical Reasoning in Secular and Religious Legal Systems", in *Pluralism in Law,* ed. A. Soeteman (Dordrecht: Kluwer Academic Publishers, 2001), 295-325; *idem,* "Analogy in Legal Science: Some Comparative Observations", in *Legal Knowledge and Analogy,* ed. P. Nerhot (Dordrecht etc., Kluwer Academic Publishers, 1991), 145-165. See further "Internal and External Comparisons of Religious Law…", *supra* n.13, at 186-89, analysing the difference between secular and religious analogy in terms of narrative semiotics.

74 In "On the Nature of Analogical Argument in Early Jewish Law", in *The Jewish Law Annual* XI (1994), 137-168, at 137, I presented the hypothesis that "Analogy in Jewish law is distinctive from that in modern secular law (but perhaps not from that in Islamic law or other systems of religious law) in that the justification of the choice of comparanda lies within some conception of the uniqueness of the canonical text, an uniqueness deriving from the perfection of the Torah as the product of divine, rather than human, draftsmanship."

75 L. Moscovitz, "Some Aspects of Legal Analogy in Rabbinic Literature", (Unpublished) Paper delivered at the Zutphen Conference of the Jewish Law Association, July 2000; cf. Jackson, "*Mishpat Ivri …*", *supra* n.3, §5.2.1, at 105. In his *Talmudic Reasoning* (Tübingen: Mohr Siebeck, 2002), ch.6, he presents this as "Non-Principled Analogy".

76 See particularly, Jackson, "A Semiotic …", *supra* n.73.

77 *Taking Rights Seriously*, *supra* n.26, at 105. I have described the methodology of this Dworkinian Hercules as involving "a hermeneutic holism of truly rabbinic proportions": "Historical Observations on the Relationship between Letter and Spirit," in *Law and Religion*, ed. R.D. O'Dair and A.D.E. Lewis (Oxford: Oxford University Press, 2001 = Current Legal Issues Vol. 4), 110.

scope or freedom of interpretation thereby implied which generated conceptions such as *elu ve'elu divre elohim hayyim* (itself, we may note, mediated by a *bat kol*).[78]

When we turn to orality, we replace discursive (textual) relationships with features of direct, face-to-face communication. Here, as Bernstein has maintained, we do not need to say everything we mean,[79] but we also communicate, in a variety of ways, more than we say. We do this by forms of non-verbal communication (including body language and tone of voice), and by the narrative images, and their emotive implications, which our language evokes.[80] But what is evoked is also a function of the communicational group(s) to which we belong.[81] Yet here too the theological context of the halakhah adds further dimensions. The chain of tradition in Avot 1.1 presupposes oral (if not mystical) communication: it is a claim to the transmission of the oral law, not a transit manifest of the tablets of stone or the *sefer hatorah*. But what, exactly, is transmitted? On this, different views are found in the tradition.[82] Underlying the specific proposals lurks a vital theological issue: are the tradents of the tradition expected to be conscious of the totality of what they transmit? Or is there a sense in which a collective memory of that totality is conveyed from generation to generation? To the extent that we endorse this latter (huge) claim, we again transcend normal human models, in a way which presupposes a monistic rather than a dualistic model of divine justice.

### 3.3 The Halakhic Process

In the light of this tension, otherwise difficult aspects of the halakhic process admit of an internal (theological) explanation.

One is the status accorded to the *gedolei hador* or even to a single *gadol*, despite the basic principle (however difficult its application without a formal Sanhedrin) of following majority decisions.[83] The issue is well reflected in a story told by Menachem Elon: "R. Hayyim of Brisk had a query regarding a practical matter. He decided to turn to the leading authority of these times, R. Isaac Elhanan of Kovno. He wrote: "These are the facts and this is the question; I beg you to reply in a single line – 'fit' or 'unfit,' Guilty' or 'not Guilty', without giving your reasons." When R. Hayyim was asked why he had done so, he replied "… decisions of R. Isaac Elhanan are binding because he is the *Posek* of our generation, and he will let me know his decision. But in scholarship and analysis my ways are different from his and if he gave his reasons I might see a flaw in it and have doubts about his decision. So, it is better if I do not know his reasons."[84] We see here a clear tension between rationality and charismatic authority (albeit that the latter may be based upon scholarly reputation). It is as if R. Joshua had replied to R. Eliezer in the controversy over the oven of

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78 *Erub.* 13b (on which see also n.131, below), though whether the continuation should be read as a distinction between *halakhah* and *ma'aseh* is not entirely clear: see further B.S. Jackson, "Secular Jurisprudence and the Philosophy of Jewish Law: A Commentary on Some Recent Literature", *The Jewish Law Annual* 6 (1987), 3-42, at 33f.; *idem*, "Jewish Law or Jewish Laws", *The Jewish Law Annual* 8 (1989), 28-30; *idem*, "Literal Meaning and Rabbinic Hermeneutics: A Response to Claudio Luzzati and Jan Broekman", *International Journal for the Semiotics of Law* XIV/2 (2001), 134f.

79 For Bernstein's conception of restricted code, see n.72, *supra*.

80 B.S. Jackson, *Making Sense in Law*, *supra* n.50, at 152-54.

81 B.S. Jackson, *Making Sense in Law*, *supra* n.50, at 96-98.

82 The Mishnah, according to R. Judah b. Shalom in Tanhuma*, Ki Tissa* 34; the *halakhot,* according to Tem. 14b; 'General principles', according to *Exod. Rabb., Ki Tissa* 41:6; see also Eliezer Berkovits, *Not in Heaven. The Nature and Function of Halakha* (New York: Ktav, 1983), 71, on Albo; M. Elon, *Jewish Law, supra* n.71, at I.225f.

83 See further "*Mishpat Ivri …*", *supra* n.3, §§4.3.7, 5.2.3, at 102f., 106f.

84 See M. Elon, "More about Research into Jewish Law", in *Modern Research in Jewish Law,* ed. B.S. Jackson (Leiden: E.J. Brill, 1980), 89f. n.52. In "Some Preliminary Observations on Truth and Argumentation…", *supra* n.71, at 31f. (Heb.), I associate this with a "procedural" approach to truth. See also see "*Mishpat Ivri …*", *supra* n.3, §4.3.5, at 100f., on the related distinction between doctrine and decision-making.

Akhnai: "fine, but do not tell me your reasons." The tension between the monistic and dualistic models continues. But the monistic is clearly making a comeback.

Indeed, a *gadol* may be regarded as having sufficient authority to rule against what otherwise would be a consensus.[85] Much of the debate regarding the availability and scope of annulment in cases of marriage contracted on the basis of a mistake (*qiddushe ta'ut*) has centred around a number of decisions of Rav Moshe Feinstein. Of these, Rabbi Howard Jachter observes:

> Rav Moshe in these responsa certainly stretched the halacha to its outer limits and virtually no other halachic authorities have adopted his position (although a great rabbi may choose to issue a ruling in accordance with Rav Moshe's views in case of emergency when it is absolutely impossible to procure a Get from the husband).[86]

On this view, it would appear that even today it is possible for a "great Rabbi" to follow these decisions of Rav Moshe Feinstein, even *without* a consensus on the halakhic issue in question. The paradox may, perhaps, be resolved if we interpret the demand for consensus not as consensus on the substance of the law, but rather consensus as to which authority, which *gadol,* to follow. In other words, to whom we attribute the role of the direct recipient of divine inspiration (the monistic model), as opposed to a divine delegate.

It also follows that the authority of a *gadol* cannot be circumscribed by narrow considerations of what is *halakhah* and what is some other form of torah teaching. A delegate is restricted to the terms of his jurisdictional mandate. A direct recipient of divine inspiration is subject to no such restriction. Underlying issues of halakhic policy (meta-halakhic issues, including those we may subsume under the rubric of *da'as torah*) are within his competence.[87]

Yet there is a view which would not necessarily restrict this wider conception of halakhic decision-making to the *gadol*, but rather would see it as inherent in the halakhic process, properly understood. Rav Elisha Ancselovits argues that this process has traditionally been one in which formalist argument is tacitly understood in the context of intuitive understandings of what is just and appropriate in the circumstances.[88] It is not difficult to find a theological basis for such an understanding. It is not simply the charismatic authority of the *poseq*, functioning as a direct recipient of divine inspiration on each particular occasion. Rather, it resides in the collective memory and experience of generations of such *psaq*, conveyed through the unique communicational qualities of the oral law.

Occasionally, we encounter more explicit expressions of the "providential" element in the halakhah. One such is in the debate over the halakhic significance of new manuscript discoveries.[89] In a recent study of this

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85 On which, see "*Mishpat Ivri …*", *supra* n.3, §§4.3.2-4, at 98-100.

86 "Viable Solutions to the Aguna Problem", "Unaccepted Proposals to Solve the Aguna Problem", http://www.tabc.org/koltorah/aguna.

87 For a strong critique of this view, see A. Yuter, "The Contemporary Varieties of Orthodox Judaism", in *Mishpetei Shalom: A Jubilee Volume In Honor of Rabbi Saul (Shalom) Berman*, ed. Y. Levy (New York: Yeshivat Chovevei Torah Rabbinical School, 2010), 533-606. Yuter has long sought to view the halakhah in terms of Kelsenian objectivity.

88 E. Ancselovits, "Independent Judgment in Relation to God", *Amudim: Bit'on ha-Kibbutz ha-Dati* 635 (2000), 32-33 (Hebrew); "Using Formalist Language Appropriately for Halakhic Decision-Making", *Maagalim* 5 (2007), 157-184 (Hebrew); "Towards a New Theory of Halakhic Development", PhD Thesis, Liverpool Hope University, 2011.

89 See "*Mishpat Ivri …*", *supra* n.3, §4.1.1, at 86-89, in the context of MS Leningrad Firkovitch's reading of the w of Amemar on *kefiyah* in the case of a *moredet me'is 'alay* in *Ketubot* 63b. While the traditional text has "she is not forced" (לא כייפינין לה), MS Leningrad Firkovitch has "he is forced" (כייפינין ליה). The issue raised by the variant text of Amemar's opinion is of great importance for the later development of the *halakhah.* The Geonim accepted and developed compulsion against the husband of a *moredet,* but their view was ultimately rejected by Rabbenu Tam. For the latter, the Geonim had no authority to go beyond the Talmud, and the Talmud referred to coercion, in the case of the *moredet*, only in respect of the wife, not in respect of the husband. But

problem, Rabbi Moshe Bleich stresses divine providence in the transmission of the MSS tradition (but not, apparently, in the discovery of new MSS),[90] and appeals to the "consensus of contemporary authorities that inordinate weight not be given to newly published material".

### 3.4 Law and Morality

Viewed from a theological perspective, the issue of the relationship between law and morality also takes on a different dimension than that which informs the debate in secular jurisprudence.

To a large extent, this is merely to state the obvious. "Law" is an inappropriate translation of *torah* (and even of *halakhah*). Torah means instruction – the function which the officers, priests and levites of Jehoshaphat fulfilled when they went round the cities of Judah with a book of written *torah,* for the purposes of *public* instruction (2 *Chron.* 17:7-9). Little surprise, then, that "law" is closely associated with wisdom in the Hebrew Bible,[91] and, indeed, in the Mishnah, given the inclusion of *Avot*. Torah is not conceived as the preserve of a specialised, technical class, nor is its enforcement a matter exclusively for the state. Hence, its survival in the Diaspora, fortified by socio-religious sanctions.[92]

The role of morality in halakhic argumentation should not, I would suggest, be framed in terms of the opposition between "rules" and "principles" as currently discussed.[93] After all, any legal system can incorporate moral principles of any level of generality. The Torah does just that with *ve'asitah hayashar vehatov*. The degree to which halakhic injunctions are "binding" is not a matter of classifying them as "rules" or "principles". Rather, it is a question of what halakhic modality is applied to them. Indeed, the same may be said even of the term *mitzvah*: depending on context, it refers either to a binding obligation, or to an optional, or supererogatory, good deed.

This provides a clue to the manner in which the halakhah conceives of the relationship between law and morality, and the difference between it (and some other religious legal systems) and secular systems.[94] Modern logicians of law view secular law as applying just three "deontic modalities" to the forms of behaviour it regulates: behaviour may be required, permitted or prohibited (and their negations). These are the only forms of sense in which the law is interested. Other forms of discourse may be interested in the emotions prompted by forms of behaviour, both in the actor and others, but the law is not. In particular, "permitted" behaviour is no more and no less than that: beyond permitting it, the law takes an entirely neutral stand. The *halakhah*, on the other hand, rejects the sufficiency of these three deontic modalities. For the rabbinic structure implies that behaviour may be recommended (or, conversely, discouraged), as well as required, permitted or prohibited. Indeed, Islamic law explicitly adopts such a fivefold classification of modalities.[95] Jewish law does not systematise the matter in this way; nevertheless, institutions such as *middat ḥasidut*[96] clearly imply the existence of such a wider range of modalities.[97]

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Rabbenu Tam apparently did not have access to *this* variant MS tradition. See further *Agunah: The Manchester Analysis* (*supra* n.3), 64-66 (§§2.32-33).

90 M. Bleich, "The Role of Manuscripts in Halakhic Decision-Making: Hazon Ish, His Precursors and Contemporaries", *Tradition* 27/2 (1993), 22-55, at 43-44, citing *Ḥazon 'Ish*, '*Orlah* 17:1; *Qovets 'Iggrot Ḥazon 'Ish* (Beney Beraq n.d.) part 1, no. 32 and part 2, no. 23.

91 As in the coda to the story of Solomon's judgment, *1 Kings* 3:16-28: s.3.1.1, *supra*. See further M. Weinfeld, *Deuteronomy and the Deuteronomic School* (Oxford: Clarendon Press, 1972); Jackson, *Wisdom-Laws*, *supra* n.60.

92 A nice illustration comes from a responsum of R. Israel b. Hayyim of Brunn, who was consulted about a murder which occurred within the Jewish community of 15th century Posen, in Germany. See s.3.6.3, below.

93 See text at n.31, above.

94 On what follows, see "Human Law and Divine Justice…", *supra* n.55, at 23-25; "*Mishpat Ivri …*", *supra* n.3, §2.2.4, at 73-75; "Judaism as a Religious Legal System", *supra* n.14, at 43f.

95 See, e.g., Robert Brunschvig, "Logic and Law in Classical Islam", in *Logic in Classical Islamic Culture*, ed. G.E. Grunebaum (Wiesbaden: Harrassowitz, 1970), 11: "The five *ahkam* or principal juridical types that the

Interestingly, this issue exercised the Israel Supreme Court in a 1977 tort case, *Kitan* v. *Weiss*.[98] It illustrates the tensions resulting from incorporation of a non-positivist religious system within a positivist secular system. The facts were as follows. A man employed as a watchman had lost a son in an automobile accident. He had used a lawyer to sue the driver responsible for the accident. The driver had been acquitted of the criminal charges, and the compensation paid by his insurance company fell far below the amount expected by the father. The latter was dissatisfied at the performance of his lawyer. He became mentally depressed, and began to drink heavily. In his employment as a watchman, he was in possession of a gun provided by his employer. He used the gun to shoot and kill his lawyer. The lawyer's widow then sued the employer of the watchman. The District Court awarded her damages. The employer appealed, on the grounds that there was no sufficient causal connection between the employer's having allowed the watchman to keep possession of the gun, and his use of it to kill the lawyer. The Supreme Court upheld the appeal.

Justice Menachem Elon noted that the employer in the case had offered to make a voluntary payment to the widow of the employee, and observed that this type of offer corresponded to the halakhic institution of behaviour "beyond the letter of the law" (*lifnim mishurat hadin*). He referred to the talmudic sugya on *dine shamayyim* (B.K. 55b), taken to be concerned with indirect causation in tort. For Elon:

> ... there is a special reciprocal tie between law and morality ... which finds its expression in the fact that from time to time Jewish law, functioning as a legal system, itself impels recourse to a moral imperative for which there is no court sanction, and in doing so sometimes prepares the way for conversion of the moral imperative into a fully sanctioned norm.

In so arguing, Justice Elon was going beyond the deontic modalities with which secular, positivist legal systems are familiar. He was advocating supererogatory action: payment of compensation which was not required by the law. The role of the judge was not simply to sit by as a neutral, and say that such a payment was permitted, but that it was a purely private matter between the parties. Rather, he saw the role of the judge as one of active persuasion to the parties to do that which the *halakhah* viewed as the "recommended" behaviour. And this, in a case where the religious courts had no jurisdiction (unless the parties voluntarily went to them, as arbitral bodies — which had not occurred in this case). Elon's approach, however, was severely criticised by Justice Shamgar, who took it to represent a systematic blurring of the border between law and morality, which was totally unacceptable in a system of positive law such as that of the State of Israel.

If the "dualistic" model is one of delegation, its application by the *mishpat ivri* movement in Israel clearly prompts the question: "who, in the context of the legal system of the State of Israel — and even after the *Ḥok Yesodot HaMishpat* —is the delegator?" At root, so it seems, Justice Elon would appear to regard the *halakhah* as providing the *Grundnorm* for the secular State, rather than the secular state providing the *Grundnorm* for incorporation of the *halakhah*.

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classical doctrine retained, according perhaps to a Stoic precedent, completing them when required with subdivisions and intermediate shadings, range from the obligatory to the forbidden by way of the recommended, the permissible, and the disapproved." See also his remarks in "Hermeneutique Normative dans le Judaïsme et dans l'Islam", *Accademia Nazionale dei Lincei, Rendiconti della Classe di Scienze morali, storiche e filologiche*, Ser. VIII vol. XXX, fasc 5-6, pp.1-20 (May-June 1975), at 5.

96 See also the comments of Ben Menachem, "The Judicial Process and the Nature of Jewish Law", *supra* n.22, at 422, on talmudic judgments that "the Sages are pleased with him" and "the Sages are displeased with him".

97 Also relevant here is the internal sense of the performance of *mitsvot*, both psychological (as frequently expressed in orthodox parlance) and metaphysical (as in Soloveitchik's *Halakhic Man*, discussed briefly below).

98 *Kitan* v. *Weiss,* C.A. 350/77, 33(2) P.D. 785; see D.B. Sinclair, "Beyond the Letter of the Law", *The Jewish Law Annual* 6 (1987), 203-206.

### 3.5 The judicial role

We noted above the understanding that the religious judge or jurist cannot escape his personal religious responsibility, and ultimate accountability to God, for his decisions, resulting in a reluctance to take halakhically controversial decisions in the absence of a consensus. But what does this indicate, we may ask, in terms of our models of Jewish law as a system of divine justice? Might it not be regarded as the very negation of the claim of Jehoshaphat, that God "is with you in giving judgment" (s.3.1.1, above)? As already noted, the role of such direct revelation in the operation of the legal system was much played down by the talmudic rabbis. What remained, however, was the conception of the basic equality of the judiciary, based upon their personal piety. It was such piety which was relied upon to ensure that the judge would not "stand on ceremony" or rely upon his supposedly oracular status, in refusing to reopen a case. Moreover, underlying conceptions of providence would indicate that the availability of fresh evidence was not to be conceived as some regrettable interference with the stability, and smooth workings of, the legal system, but rather that there was a divine imperative behind it. Here again, it seems, we find support for the monistic, rather than the dualistic, model.

Moreover, in the context of the *agunah* problem, influential voices have been raised in recent times urging the judiciary to prioritise the interest of justice even at the cost of taking personal risks. Discussing coercion in a case of '*iggun*, Dayan Waldenberg writes in *Tsits Eliezer* 4.21 (at ¬)

> Therefore, according to the poverty of my understanding, the words of Mahara' Tawwa'ah in *Ḥut HaMeshulash* may be relied on. He writes that even according to the opinion that one must not coerce, if the hour requires compulsion, let them coerce, for a judge must be guided by the circumstances confronting him – so long as the judge's intention is for the sake of Heaven and he investigates the matter as is proper.

On this view, the judge's personal responsibility to God for his decisions depends not on their "objective truth" (if there is only one such), but rather on the judge's motivation and thoroughness. True, R. Waldenberg counsels, in this situation, that "the final decision in this matter should be through a general agreement of all the rabbinic courts in the land so that we should not find ourselves divided into splinter groups in so fundamental an area of the *Halakhah*." But this "meta-halakhic" motivation is pragmatic, and is not based on the "chip of the beam" argument (s.2.1, above). Indeed, in the same *teshuvah*,[99] Dayan Waldenberg maintains that *dayanim* are *obliged* to risk their souls to save wives trapped in marriages they cannot bear. The same sentiment has been expressed very recently by Rav Daichovsky, in his retirement message to his colleagues in the Rabbinical Courts of Israel.[100]

### 3.6 Other Theological Issues

Justice cannot be done in the present context to the multitude of theological issues which any full theory of halakhah would need to take into account. Here it must suffice to comment briefly on a few issues which bear upon the theme of the present article, the insufficiency of the jurisprudential model and the tension between "monistic" and "dualistic" models of divine justice.

#### 3.6.1 Judaism's "internal point of view"

Secular jurisprudence is not uniform in the attention it pays to people's motivation for obedience to the law. For the 19th century positivists, advocates of the "command" theory of law, such motivation could consist purely in fear of sanctions. But such a viewpoint, Hart pointed out, resulted in a failure to distinguish between law and the use of illegitimate brute force. A legal system, he argued, entailed an "internal point of view" in relation to the legitimacy of the system. For him, this was satisfied by acceptance of the secondary

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99 See further *Agunah: The Manchester Analysis* (*supra* n.3), 189-90 (§§4.58-59).

100 R. Shlomo Daichovsky, "Derekh Hashiput Hare'uyah Bevatey Hadin Harabaniyim", *Teḥumin* 28 (5768), 20. See further *Agunah: The Manchester Analysis* (*supra* n.3), 77 (§2.49).

rules of the system as the basis of the legitimacy of the primary rules.[101] Behind this, no doubt, resides an endorsement of the (democratic) political system presupposed by the secondary rules. But this conception of the "internal point of view"[102] does not entail any motivation in relation to the content of the specific rules. No doubt citizens would have their views on such matters, but that was a matter of politics or ethics, not law.[103]

The halakhah, by contrast, has a quite different "internal point of view", attaching specific religious significance to halakhic observance, which thereby becomes far more than mere performance of duties imposed by a legitimate authority. A particularly vivid account of this is provided by Rav Soloveitchik in his *Halakhic Man*,[104] where his concern is to explore the *experience* of *Halakhah*, and this not from the ("public") vantage point of the judge but rather from the ("private") vantage point of the ordinary Orthodox Jew, who is observant of the *Halakhah*. Soloveitchik seeks "to penetrate deep into the structure of halakhic man's consciousness" (p.4). Halakhic man seeks to fashion mundane reality in accordance with the halakhic model, and this creative activity has an emotional (or spiritual) as well as a cognitive dimension: "Both the halakhist and the mathematician live in an ideal realm and enjoy the radiance of their own creations" (p.25). Indeed, the mundane world of halakhic man is, from this vantage-point, even more desirable than is the world-to-come:

> The Halakhah is not at all concerned with a transcendent world. The world to come is a tranquil, quiet world that is wholly good, wholly everlasting, and wholly eternal, wherein a man will receive the reward for the commandments which he performed in this world. However, the receiving of a reward is not a religious act; therefore, halakhic man prefers the real world to a transcendent existence because here, in this world, man is given the opportunity to create, act, accomplish, while there, in the world to come, he is powerless to change anything at all. (p.32) … When the righteous sit in the world to come, where there is neither eating nor drinking, with their crowns on their heads, and enjoy the radiance of the divine presence ..., they [*can only*] occupy themselves with the *study* of the Torah, which treats of bodily life in our lowly world ... (p.38f., emphases supplied)

This, the reward for observance of the *halakhah* is conceived by Soloveitchik as the capacity (merely) to *contemplate* the application (in the empirical world) of *halakhah* from the (non-empirical) domain of the world-to-come. The reward is thus less satisfying than the act by which the reward is merited, for it is the latter which *transforms,* which is *creative.*

> The ideal of halakhic man is the redemption of the world not via a higher world but via the world itself, via the adaptation of empirical reality to the ideal patterns of Halakhah. If a Jew lives in accordance with the Halakhah ... then he shall find redemption. A lowly world is elevated through the Halakhah to the level of a divine world. (37f.)

### 3.6.2 Natural Reason and Divine Command

Judaism's religious approach to the concept of law encompasses both social and theological issues. That society depends upon order, which requires a system of law,[105] is taken to be a universal truth, but one

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101 For his distinction between primary and secondary rules, see s.2.1, above.

102 On this issue in relation to the exclusive jurisdiction of Rabbinical Courts in marriage and divorce in Israel, posing the question whether the secular population can view this as "religious law" from an internal point of view, see "Judaism as a Religious Legal System", *supra* n.14, at 45.

103 Hart regarded as desirable for all citizens, but actually required only of the officials. See *The Concept of Law*, *supra* n.8, at 113-117.

104 See further "Internal and External Comparisons of Religious Law", *supra* n.13, at 193-96.

105 This has implications for the approach of Judaism to both gentile governments in the countries of the Jewish Diaspora, and to the various forms of internal Jewish self-government in different historical periods. Thus, *Mishnah Avot* 3:2 records: "Rabbi Hananyah, the Prefect of the Priests, says: 'Pray for the welfare of the government, since, were it not for the fear it inspires, men would swallow each other alive'"; the Shabbat morning service still includes a prayer for the Welfare of the Government (in the UK, including specific mention of members of the royal family).

already revealed to humanity as one of the laws communicated to Noah as part of the covenant relationship established on exit from the ark (*Gen.* 9).[106] Some take these Noahide Laws to be a Jewish version of natural law thinking.[107] But the religious issue here is not confined to whether and how such universal law is revealed: the same theological issue as has played a major role in debates between Judaism and Christianity – that of the role of law in relation to salvation[108] – arises here too. Judaism maintains that salvation, in the form of meriting the world to come (*olam haba*) is closely tied up,[109] for Jews, with observance of the Torah. What, then, of Gentiles? Judaism affirms that they, too, may gain salvation if (but not necessarily only if) they observe the Noahide laws. But here the particular relationship of Noahide to natural law becomes crucial. Maimonides teaches that gentiles merit salvation only if their observance of the Noahide laws stems from their acceptance that these laws are divine commands, not if they attribute to them the status (only) of human reasoning.[110]

### 3.6.3 Law and Covenant

The *halakhah* operates within the context of God's covenant with Israel. This is very different from a Hobbesian social contract. The latter assumes the need for a powerful State, a Leviathan,[111] in order to restrain the otherwise savage and competitive urges of mankind.[112] The context of covenant, on the other hand, presupposes (i) a reciprocal relationship of loyalty to and protection by God; and (ii) a basic sense of community, despite inevitable disputes (which are to be solved in a co-operative rather than confrontational manner). This underlies various aspects of halakhic procedure, one of which we have seen already in the approach of Justice Elon in the case of *Kitan* v. Weiss.[113] Another is reflected in a responsum of R. Israel b. Hayyim of Brunn, who was consulted about a murder (committed in a state of drunkenness) which occurred within the Jewish community of 15th century Posen, in Germany. Notice the communitarian elements in the disposition he recommends for "Simha":

> He shall journey about as an exile for a full year. *Every day he shall appear at a synagogue* — or at least on every Monday and Thursday. He shall make for himself three iron bands, one to be worn on each of his two hands, which were the instruments of his transgressions, and one to be worn about his body. When he enters the synagogue, he shall put them on and pray with them on. In the evening he shall go barefoot to the synagogue. The hazan shall seat him (publicly) prior to the *Vehu Rahum* prayer. He shall then receive a (symbolic [?] public) flogging and make the following declaration: "Know ye, my masters, that I am a murderer. I wantonly killed Nissan. This is my atonement. Pray for me. When he leaves the synagogue he is to prostrate himself across the doorsill; the worshipers are to step over him, not on him. Afterwards he is to remove the iron bands ... After one

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106 *Tosefta Avodah Zarah* 9:4: "The children of Noah were given seven commandments concerning law (*dinim*), idolatry, blasphemy, adultery, bloodshed, robbery [and eating the limb of a living animal]. Just as Israel is commanded to institute courts of law ... so the children of Noah were commanded to institute courts." Earlier sources, notably *Jubilees* 7:20-21 and *Acts* 15:19-20, are often seen as precursors, but they omit the rabbinic insistence on a system of justice.

107 Notably, David Novak, *The Image of the Non-Jew in Judaism* (Lewiston, NY: The Edwin Mellen Press, 1982); *idem, Natural Law in Judaism* (Cambridge: Cambridge University Press, 1998); see further my review of the latter in *Journal of Jewish Studies* LII/1 (2001), 136-145.

108 See s.3.6.4, below.

109 According to *Mishnah Avot* 3.15: "The world is judged with mercy. Yet everything is according to the amount of work."

110 *Mishneh Torah, Laws of Kings* 8:11. See further J.I. Dienstag, "Natural Law in Maimonidean Thought and Scholarship (*On Mishneh Torah, Kings*, VIII.11)", *The Jewish Law Annual* 6 (1987), 64-77; D. Novak, *The Image of the Non-Jew in Judaism* (Lewiston NY: The Edwin Mellen Press, 1983), 278 and 305f. n.8.

111 Albeit based on a theological model: "God's natural world is imitated by man in making the great LEVIATHAN or COMMON-WEALTH or STATE which is but an artificial man, with sovereignty as soul, officers as joints, reward and punishment as nerves, wealth as strength, laws as reason": Thomas Hobbes, *Leviathan* (1651).

112 Without which the life of man, in a state of *bellum omnium contra omnes*, would be "solitary, poor, nasty, brutish, and short".

113 In s.3.4, above.

> year he shall continue his fasts on Mondays and Thursdays. He shall, for the rest of his days, carefully observe the anniversary month and the anniversary date of the killing. He shall fast at that time (the date) three consecutive days if he is healthy or only two days, the day of the wounding and the next day, the day of Nissan's death, if he is infirm. *He shall, for the rest of his days, be active in all enterprises to free imprisoned Jews (i.e., hostages held by gentiles), charity, and the saving of lives. He shall work out an arrangement with his (Nissan's) heirs to support them properly. He shall ask their pardon and the widow's pardon.* He shall return to God, and He shall have mercy on him. *And since Simha has expressed remorse and seeks repentance and atonement, immediately upon his submission to the program of public degradations, he becomes our brother once again for every religious purpose* (i.e., the quorum for worship, cf. *B. Makkot* 23a) ... (emphases supplied)

Whether the covenant remains in force, and unchanged in nature, has however been questioned, in the light of the Holocaust. Insofar as it is premised on a reciprocal relationship of loyalty to and protection by God, we can see why. Thus Irving Greenberg[114] has argued that the covenant has now lost its binding character; it is up to each individual whether he wishes to reaffirm it, in the light of (what lawyers would call) a "fundamental breach". His argument commands respect, but little adherence.

### 3.6.4 Law, Redemption and Salvation[115]

The relationship of redemption and salvation[116] to the halakhah involves particular applications of the doctrine of reward and punishment, which in the Bible is certainly a prominent theme in relation to Torah in general and idolatry in particular. But motivation to abide by the halakhah is not to be reduced to mere considerations of reward and punishment:[117] we have noted in s.3.6.1 a much wider conception, both experimentally and philosophically, of the concept of fulfilment of mitsvot.

Punishment, whether in the form of denial of redemption (continuing cycles of exile) or denial of *olam haba*, presents a greater problem for the theory of halakhah, since we have to take account of human weakness, the threat of intergenerational punishment and ultimately the very question of the form in which divine law is received and processed not by a "legal system" but by the individual subject.[118] This was the dilemma addressed by Jeremiah in a passage which (not surprisingly) has become a key text for Christianity. But the crucial phrase, *berit hadashash* (found here and only here in the Hebrew Bible) is often quoted and discussed outside its full context. The full passage reads as follows (*Jer.* 31:29-34).[119]

> In those days they shall no longer say: "The fathers have eaten sour grapes, and the children's teeth are set on

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114 "Cloud of Smoke, Pillar of Fire: Judaism, Christianity, Modernity After the Holocaust" in *Auschwitz: Beginning of a New Era?*, ed. Eva Fleischner (New York: Ktav, 1977), observing (at 41) that "no statement, theological or otherwise, should be made that would not be credible in the presence of burning children.".

115 See further Jackson, "Judaism as a Religious Legal System", *supra* n.14, at 40f.

116 For present purposes, redemption may be used to refer to particular forms of reward in this lifetime, salvation to the next. There is no doubt that soon after Judaism came to adopt the notion of a future life (for such a claim is doubtful through much of the Hebrew Bible), it accepted the view that the standard route to such salvation was through performance of the *mitsvot*. (I shall not try to specify whether such performance was a suffiecient, or merely a necessary condition).

117 This incidentally, would represent a very Benthamite position: see Jackson, "*Mishpat Ivri* ...", *supra* n.3, §3.1.1-2, at 75-77, for the difference between Bentham and John Austin on the definition of the "sanctions" required by their definitions of a positive law. Bentham defined a religious sanction as where either the pleasure or pain derived "from the immediate hand of a superior invisible being, either in the present life, or in a future": *An Introduction to the Principles of Morals and Legislation*, ed. J.H. Burns and H.L.A. Hart (London: The Athlone Press, 1970), 34f. Austin rejected such "praemary" sanctions: see *The Province of Jurisprudence Determined* (London: Weidenfeld and Nicolson, 1954), 16f. For his definition of sanctions as involving a threatened "evil or pain", see *Province*, 13f., quoted in *Making Sense in Law*, *supra* n.50, at 35.

118 This, too, should come as no surprise. Torah is to be taught to all, and many biblical laws appear to be (in my terminology) "self-executing", rather than requiring the involvement of legal institutions. See further my *Studies in the Semiotics of Biblical Law*, supra n.30, at 82-87; *Wisdom-Laws*, *supra* n.60, at 289-95 *et pass*.

119 Discussed further in my *Essays on Halakhah in the New Testament*, *supra* n.61, at 7f.

> edge." But every one shall die for his own sin; each man who eats sour grapes, his teeth shall be set on edge. Behold, the days are coming, says the LORD, when I will make a new covenant with the house of Israel and the house of Judah, not like the covenant which I made with their fathers when I took them by the hand to bring them out of the land of Egypt, my covenant which they broke, though I was their husband, says the LORD. But this is the covenant which I will make with the house of Israel after those days, says the LORD: I will put my law within them, and I will write it upon their hearts; and I will be their God, and they shall be my people. And no longer shall each man teach his neighbor and each his brother, saying, "Know the LORD," for they shall all know me, from the least of them to the greatest, says the LORD; for I will forgive their iniquity, and I will remember their sin no more.

This is often regarded as an expression of Jeremiah's counsel of despair.[120] Experience showed that human beings could not voluntarily rise to the standards required by the Decalogue.[121] He therefore anticipates a new form of covenant, one "written in the heart", compliance with which would appear to be automatic,[122] in the form of an unbreakable spiritual bond between God and the believer. This would appear to reflect something akin to our monistic model of divine justice: God communicates his will directly to each individual, and though the image of writing is still maintained (indicating, perhaps, that the *content* of the old covenant is not changed,[123] as indeed the context clearly presupposes), no issues of linguistic interpretation, involving institutions following the dualistic model, arise. Nor, in fact, is this aspect of Jeremiah's conception unique. Moses promises in Deut. 30:6: "And the LORD your God will circumcise your heart and the heart of your offspring, so that you will love the LORD your God with all your heart and with all your soul, that you may live." Since Deuteronomy also includes the Decalogue threat of transgenerational punishment, this would appear to provide an immediate response, and here without aid of any *berit hadashah*.

### 3.6.5 Law and Eschatology

The aspiration of Jeremiah for a "new covenant" was certainly eschatological. But that begs the question of the form of the *eschaton*. Though speculation on the afterlife came to be discouraged in Judaism, we commonly find an attempt to harmonise the conception of an ideal, corporeal messianic age, and that of a purely spiritual afterlife, into a two-stage approach: the messianic age is earthly, and characterised by perfect social justice (equated with complete observance of *Torah*); ultimately, however, this mundane *eschaton* (often associated with bodily resurrection) would give way to a purely spiritual, and eternal afterlife (the *olam haba)*. The ultimate objective of performance of the *mitsvot* was to gain sufficient purity of soul to merit admission to it. The status of *Torah* law once in that ultimate state was, however, a matter of considerable obscurity and debate.[124] I content myself by referring to the classic treatment by W.D. Davies.[125]

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120 Cf. M. Greenberg, *Studies in the Bible and Jewish Thought* (Philadelphia, Jewish Publication Society, 1995), 18f., citing also *Ezek*. 36:24-27 (at 19f.). On the Hebrew Bible's conception of covenant renewal, see Jackson, *Studies in the Semiotics of Biblical Law, supra* n.30, at 231-36.

121 "…visiting the iniquity of the fathers upon the children to the third and fourth generation of them that hate me": *Exod*. 20:5-6, cf. *Deut.* 5:9-10.

122 See literature cited in Jackson, *supra* n.61, at 8 n.21.

123 Here the Pauline use of Jeremiah radically differs. For him, the new covenant entails salvation by faith only, the old covenant having been superseded. Some see the later development of a strong Christian doctrine of "original sin", meaning that every human born by intercourse (hence the need for a doctrine of virgin birth of Jesus) after the sin of Adam and Eve is irretrievably sinful, and can be redeemed only by acceptance of the new covenant, entailing faith in the eradication of that sin by the sacrifice of Jesus (hence, for example, the practice of forced baptism of terminally ill infants, as in the famous 18th cent. case of Edgardo Mortara: see David Kertzer, *The Kidnapping of Edgardo Mortara* (New York: Knopf, 1997)).

124 *Pace* the vivid description of Rav Soloveitchik, described in s.3.6.1 above.

125 W.D. Davies, *Torah in the Messianic Age and/or the Age to Come* (Philadelphia: Society of Biblical Literature, 1952), ch.IV.

Yet there is a sense in which eschatological beliefs impinge upon our understanding of *halakhah* in *olam hazeh*. If we accept that the object of halakhah is to restore the perfection of God's original creation,[126] in anticipation of the coming of the eschaton,[127] this may influence our understanding of particular legal institutions, even when they appear at first sight merely to be the counterpart of what is found in any system of secular law. Marriage is just one example.[128] Moreover, the degree of eschatological expectation at any time may provide further intensification; I have argued that this explains some of the differences between (inter alia) Qumranic and rabbinic marriage law.[129] Moreover, the issue has implications also for contemporary halakhic authority. Following Rav Kook's conception of the modern State of Israel as "the beginning of redemption", some *mishpat ivri* scholars have argued that a revival of the power to issue *taqqanot* applicable to the Jewish people universally is now justified.[130]

## 4. *Conclusion*

In concluding the section of this article on the applicability of jurisprudential models (s.2.4, above), I suggested that at one level one may contrast the (secular) emphasis on certainty (as the basis of the Rule of Law) with the (religious) concern for truth. But from the subsequent review of the theology which must be taken into account in constructing a theory of halakhah, it becomes evident that the concept of truth is itself by no means transparent.[131] This is hardly news to any philosopher; the legal philosopher, moreover, has to grapple with its applicability to norms[132] as well as facts, and in so doing take account of the range of different conceptions of truth currently debated.[133]

Is this the point at which we should have recourse to a "moderate external point of view" (s.1, above)? I do not think so. That would be to privilege a different branch of Western, secular philosophy and impose it on the halakhah. We are engaged here in an exercise in comparison, and external models provide, at best, hypotheses which must stand or fall in terms of the internal evidence.[134] Thus any evaluation of the suggestion that (secular) jurisprudence is less useful to use than (Jewish) theology insofar as the latter

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126 Here in accordance with Rav Soloveitchik's vision in *Halakhic Man.*

127 Cf. J. Neusner, *The Halakhah: An Encyclopaedia of the Law of Judaism* (Leiden: E.J. Brill, 2000); *idem, The Theology of the Halakhah* (Leiden: E.J. Brill, 2001), defining the theology of the *Halakhah* in terms of the following three propositions (*Theology* xxix): "[1] As recapitulated by the Halakhah, Scripture's account of Eden portrays not an event but a condition. "Eden" stands for Man and God dwelling together. [2] Restoring that condition, the Halakhah sets forth the norms for a society formed by Israel in the Land that is worthy of God's presence in this Eden. [3] The Halakhah systematizes the laws of the sanctification of the social order that God himself has revealed to Israel at Sinai in the Torah, and theology states the results of reading those laws — that religion's story — philosophically.". See further B.S. Jackson, "On Neusner's Theology of *Halakhah*", *Diné Israel* 25 (2008), 257-92, reprinted in *The Review of Rabbinic Judaism* 12/1 (2009), 129-56 and in *The Documentary History of Judaism and its Recent Interpreters*, ed. J. Neusner (Lanham: University Press of America, 2010), 21-46.

128 On Neusner's account of *qiddushin*, see Jackson, "On Neusner's Theology of *Halakhah*", *supra* n.127, at 273-76*.

129 See further Jackson, *Essays*, *supra* n.62, at 167-225; *idem,* "Marriage and Divorce: From Social Institution to Halakhic Norms", in *The Dead Sea Scrolls. Texts and Context*, ed. C. Hempel (Leiden: Brill, 2010), 339-64.

130 See *Agunah: The Manchester Analysis* (*supra* n.3), 251f. (§5.60), for the views of M. Elon (in the context of the use of *hafqa'ah*) and A.H. Freimann.

131 See, for example the observations of Schwarzschild on Hermann Cohen and Martin Buber, in "Some Preliminary Observations on Truth and Argumentation in the Jewish Legal Tradition", *supra* n.70, at 25, and the observations on *elu ve'elu* at n.78, *supra*.

132 See further "Some Preliminary Observations on Truth and Argumentation in the Jewish Legal Tradition", *supra* n.70, at 25.

133 See A. Pintore, *Law Without Truth* (Merseyside, Deborah Charles Publications, 2000), examining the respective claims of truth as correspondence, truth as coherence, truth as consensus and procedural truth.

134 See further "*Mishpat Ivri ...*", *supra* n.3, §§6.1-3, at 108.

privileges certainty while the latter privileges truth, must look more carefully at what "truth" actually means in Jewish theology in general, and the halakhic context in particular. Elsewhere, I have offered some preliminary remarks on this issue, indicating its complexity.[135] Indeed, it may be argued that the halakhic process, so many aspects of which are subject to doubt and controversy (s.2.1, above), relies more on the trustworthiness (*emunah*) of its leading practitioners than on a single conception of objectively knowable truth (*emet*).

More useful, in my view, is an external framework which itself provides a basis of comparison for both the jurisprudential and theological models. I have argued for the use of semiotics in both the jurisprudential[136] and theological contexts: a "Jurisprudence of Revelation".[137] Such a basis is purely descriptive: it seeks to analyse how both external and internal frameworks of understanding make sense to their adherents. In the course of so doing, it seeks to reveal the "modalities" deployed in each form of discourse, and thus the values communicated in such discourse, in terms of a narrative conception of the perceived goals of the Senders of such discourse.[138] It must thus take full account of the theology both explicit and implicit in halakhic discourse, not excluding the perceived objectives of the divine Sender and the concepts of certainty, truth and justice conveyed by revelation, in its multiple forms. Such an exercise may well show that the balance between certainty and "truth", and thus the relative pertinence of the jurisprudential models, is a function of the presuppositions and activities of different "semiotic groups" within the Jewish world, as indeed has been suggested in the present article for the *mishpat ivri* movement.

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135 "Some Preliminary Observations on Truth and Argumentation in the Jewish Legal Tradition", *supra* n.70, at 23f., 28-32.

136 See especially my *Semiotics and Legal Theory*, *supra* n.26; *Law, Fact and Narrative Coherence,* Merseyside, Deborah Charles Publications, 1988.

137 See further Jackson, "On Neusner's Theology of *Halakhah*", *supra* n.128, at 292 (noting the need to take account of theological *authorisation* of non-theological reasoning in some areas – such, indeed, as might legitimate incorporation of external sources); *idem,* "Universalisability and Intuition …", *supra* n.51, at 232f.*, idem,* "*Mishpat Ivri …*", *supra* n.3, §5 at 103-107; "Internal and External Comparisons of Religious Law", *supra* n.13, at 196-99; and in the particular context of analogy, "A Semiotic Perspective …", *supra* n.76; "Internal and External Comparisons of Religious Law", *supra* n.13, at 188f.

138 I call this the "narrativisation of pragmatics". See further the brief account of this approach in the last paragraph of s.3.2, above, and the literature there cited.