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State, Law, and *Halakhah*–Part Two

FACING PAINFUL CHOICES

Law and *Halakhah* in Israeli Society

Yedidia Z. Stern

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INTRODUCTION

The centrality of state law and of legal bodies in Israeli society is axiomatic. The long arm of the law reaches everywhere, and recently, it has been meeting with popular resistance. The law's prominence and its increasing involvement in our lives have been of constant concern to Israeli politicians, academics, and journalists.

A similar development, though less obvious to the wider public, is presently taking place concerning the place of *Halakhah* (Jewish religious law) in Israel's Jewish religious communities. For many religious individuals, Halakhah is the central, almost exclusive expression of contemporary Jewish culture. Halakhah is the source from which they derive most of their life practices, as well as the substance of their Jewish identity. Although the religious space is not devoid of values, philosophy, creativity, and historic memory, primacy is unquestionably reserved for normative statements, such as ritual injunctions, responsa, commandments, and transgressions.

Is there any room for comparison between these two developments? Can one cause-and-effect narrative, one unified frame of meaning, explain the tendency of Israel's Jewish society toward the "lawlization"* and "halakhization" of reality? Leaders within both normative systems may not be unduly pleased with these parallels, and may even view the very comparison as an affront to the ethos of their own system. Scholars of the two systems may also argue that each system needs to be considered separately, resting their case on a series of substantive distinctions that can and must be examined. Thus it may seem, for example, that these systems differ in the source of their authority (a social contract v. a divine command), in their purpose

(social-material attainments v. religious-spiritual perfection), in their target audiences (the citizenry v. the members of the Jewish religion), and so forth. Yet, given that both function within one socio-cultural reality, the question of whether they have a common denominator is worth asking. This paper will present a unifying theory that can clarify the preference of Israelis, both religious and secular, for legal solutions. In so doing, I will indicate the price we pay because of the heavy shadow that state law and Halakhah cast upon Jewish society in Israel. The analysis will also suggest parameters for the necessary reform.

Let me open with a personal reference. I belong to those segments of the Jewish Israeli public who are simultaneously subject to the rule of the political sovereign and to the rule of God. We observe *mitzvot* (the commandments) on the strength of our religious responsibility, and abide by the law on the strength of our civic responsibility. For me and others like me, normative duality in its more common Israeli manifestation creates a genuine existential difficulty, unique in its character and entailing considerable practical implications. We are fully and unreservedly committed to the rule of law (except for obvious reservations anchored in widely accepted democratic principles). At the same time, we are fully and unreservedly committed to Halakhah (as interpreted within the religious circles to which we belong). Subjectively, we approach both legal systems as part of our primary and unconditional responsibility. State law cannot compel freedom of religion; as part of its adherence to values of tolerance, it is also wary of harming religious sensibilities. Hence it is difficult—though not impossible—to find actual conflictual situations that require choosing between these different loyalties.[1] The main point, however, is that the very consciousness of this normative duality—both elements of which are dominant—is not easy for a person who is aware of and sensitive to his twofold commitment.

When faced with the inner discourse of either of the two legal systems, such persons become conscious of their alternative commitment, which, as noted, represents a cultural perspective (sometimes) antagonistic toward the discourse in which they are participating at a given moment. This realization is even more pronounced for the religious judge, lawyer, or law professor. In court and in the law faculty they are challenged by Halakhah; at the *bet midrash* (where Talmud is studied) or in their Torah studies they are challenged by the law. Although they are at home in both worlds, they are doomed to observe each of them also as outsiders. Their cultural and professional world is nurtured by both sources, and therein lies their advantage; but their yearning to attain full intimacy with both is marred by the emotional and intellectual difficulties stemming from their dual commitment. Sometimes their friends in each of these worlds, who are usually aware of this dual pledge but do not share it and have difficulty internalizing its complexity, may ascribe to them a touch of strangeness or distancing from their own "truth" when they discover the "other side" of the religious jurist's commitment.

This "confession" may clarify why, notwithstanding my legal training, I am tempted to suggest in some parts of this paper a strain of social criticism. My writing here is sometimes personal, and I have deliberately refrained from weeding out evaluative or judgmental statements. I write here as a man of a time and a place who has a unique perspective because, for better or worse, I am rooted in two worlds. The "situation" I describe is personal but definitely not private, since it is relevant to my surroundings. The cautious reader should certainly take into account my personal background, as well as the limitations of the legal prism through which I observe the world outside the law.

I will open with a description of normative duality within the context of a wider duality between Western and Jewish culture (Chapter Two). The main communities in the Jewish public arena in Israel—ultra-Orthodox, religious, and secular—find contending with cultural duality an arduous endeavor. In the past, each of these three communities had developed unique strategies for coping with cultural duality (Chapter Three). Recently, however, these strategies have been collapsing, given that Israel has shifted from being a consensual democracy to a democracy in crisis (Chapter Four). At present, I submit that the Israeli marketplace of ideas offers no significant ideological paradigms that might enable coherent functioning and the consolidation of a solid identity combining the two hegemonic cultural approaches. Given this lack, the ethical-ideological struggle intensifies and, in part, spills over onto the normative battleground. The analysis suggested here argues that "lawlization" and "halakhization" were meant to create a clean field for deciding the *kulturkampf* (Chapter Five). Each of these competing normative systems developed different attitudes toward its own values, with the law externalizing these values and Halakhah keeping them hidden (Chapter Six). Nevertheless, an interesting finding shows that each one relies on its own (opposite) attitude to values in order to reinforce judicial imperialism. Both the law and Halakhah proclaim the totality of their scope, aspire to implement this stance, and hint at their reluctance to ascribe any significant role in public life to the other system (Chapter Seven). This background clarifies some of the professional constructs of current Israeli law (such as expanded standing, judicial activism, involvement in areas pertinent to other authorities) and of Halakhah (such as monistic rulings, the lack of halakhic activism, rejecting the "new") (Chapter Eight).

Lack of agreement among the communities making up Israeli Jewish society is too often translated into friction between competing normative orders that seek to regulate a given reality on the basis of different sources of authority and different value systems. Against their better interests, the law and Halakhah serve as the main ammunition in a *kulturkampf*.

This move carries a heavy price: waging this controversy in the normative arena vitiates the functioning of Israeli Jewish society. Exchanging a cultural discourse for a normative one leads to trivialization. The shift attempts to replace process with decision, inner experience with external dictates, public discourse with professional discourse, complexity with banality, dialogue with monologue. Israeli society as a whole must relinquish the delusion that normative answers to existential problems emerging in a diverse cultural reality are at all possible.[2] Cultural controversies cannot be settled through legal or halakhic discussions.[3] Instead, each of these communities should assume responsibility for developing genuine and relevant strategies for living with cultural duality. A rich repertoire of alternatives for coping with cultural variety is vital to Israel's existence as a Jewish and democratic state.

CULTURAL DUALITY 2

Jewish society in Israel is based mainly on two cultures: the Western-liberal and the Jewish-traditional. The two are clasped in a mutual embrace, and in many ways draw on each other and constitute an organic element of one another. Although presenting them as alternatives is to some extent artificial, I relate to them here as separate cultures for the purpose of the analysis. Public discourse tends to categorize Jewish society in Israel along a religious axis divided into four groups: secular, traditional, religious, and ultra-Orthodox.[4] A majority within each of these groups appears to identify, at various levels of internalization and awareness, with both cultures. They experience Western and Jewish cultures immanently, and both are components of their identity, shaping their lifestyles and behavior.[5] Thus, for instance, many within the secular and the traditional groups (grouped together for purposes of this discussion) use certain symbolic and material products of Jewish culture, and even of Jewish religion.[6] For their part, members of the religious group have adopted central values of Western-liberal culture, such as equality, self-realization, freedom, a positive attitude toward science and the rule-of-law. Even members of the ultra-Orthodox community, who declare their rejection of anything "new" and conduct their lives "within bastions of holiness," internalize cultural duality at the personal level[7] (though not in their discourse with their community). The substantial majority of Jews living in Israel, then, fashion their lives out of the rich lodes of both cultures.

Theoretically, cultural duality (or multiplicity) involves a complex potential. On one hand, it enables a diversification of cultural sources. In a pluralistic society, open to the possibility of validating the truth of the "other," duality can bring great blessing. Diversity allows every individual and every community

to construct their identity from the dialogue between the two cultures. Diversity could also lead to growth and development within each culture, arising from the challenge posed by the other. On the other hand, duality could also be a catalyst for the growth of a lethal competition for budgetary primacy, ideological influence, and political power. Although this competition exists in pluralistic societies as well, its effects are particularly virulent in a monistic society, where it could focus on one purpose: silencing the other's voice. Furthermore, if truth zealots are not satisfied with a hierarchy of truths (our truth above the other's truth) but are also intolerant toward the other's truth, competition could slide into confrontation.

Which of these possible consequences of duality—from rewarding diversity to stifling confrontation and all the options in between—is implemented in Israel's Jewish society? If we accept the assumption that members of all its groups fashion their identity from the lodes of both cultures, we might expect that none of the segments of society—secular, religious, or ultra-Orthodox—would relate to either of these two cultures as an "other" to be gagged or restrained. In the absence of an "other," conditions appear ripe for open discourse between the two cultures, marked by mutual respect. In practice, however, observers of current Israeli society do not sense the joy of diversity's blessing, but only the sorrow of multiplicity's curse. Agents of influence in both cultures tend to downplay the similarities and the interface between them, preferring to present them as mutually hostile alternatives deployed for an inevitable *kulturkampf*.[8] They market each culture as an exclusive socio-cultural product that "belongs" to one of the groups, concealing the inclusive dimension of cultural duality in the Israeli Jewish experience. They also shift the relationship between the two cultures from a course of process to one of decision. They prefer a simplistic

to a complex perception of reality and choose to engage in the cultural dispute on a monistic rather than on a pluralistic basis.[9]

Why this schizophrenia? Why, although every group is both "Western" and "Jewish," is Israel's public space daubed with the war paint of a cultural conflict? This critical question will not be the focus of the present discussion, although the discussion does occasionally touch upon it. My main concerns are not the causes of this state of affairs, but the description and analysis of its implications for the place of law and Halakhah in Israeli society.

3 EXISTING STRATEGIES FOR COPING WITH CULTURAL DUALITY

How is it possible to function in a reality of dual cultural loyalties[10] sometimes perceived as disharmonious? Although the question is not new, in recent years it has recurred more frequently and acrimoniously.[11] It is hurled with increasing force at all Israeli Jews. It touches, spiritually, the very essence of some of us, and practically, the cohesion of Israeli society and its ability to survive.

I will characterize three strategies of behavior adopted by three key groups facing this threatening duality. The common denominator of the three strategies is that none of them offers a substantive ideological option for grappling with the reality of existence in circumstances of cultural duality. None offers contemporary Israeli Jews the practical option of being "Jews" and "human beings" simultaneously. The existing strategies are concrete, practical coping options that a frantic reality has allowed to develop and survive over time, but which are obviously incapable of providing personal or national solace.

The religious-Zionist community (also called Orthodox) has adopted and perfected with exceptional success a technique of compartmentalization and evasiveness.[12] For this community, dual loyalty is not harmonious.[13] The Orthodox person is made up of different drawers, each opening up at the appropriate time and place in order to be filled with contents and norms from one of the two cultures. When the Orthodox person is studying at a *yeshivah*, poring over a page of Talmud, involved in education, thinking of ideas or engaged by moral dilemmas and existential questions, s/he is loading the "Judaism drawer."

When training for a profession, working, reading literature, having fun, consuming goods, and sustaining bourgeois life, s/he closes the first drawer, sometimes hermetically, and opens up the "liberal-Western drawer" to load it with other contents and norms.[14] The dresser (and its drawers) is both the private individual and the Orthodox community. Compartmentalization and evasiveness ensue from the partitions separating the drawers, precluding integration between the worlds.[15] As double security doors, with one programmed to open only after the other closes, so the world of the Orthodox, who beware of mingling the two parts of their identity.[16] Note that Orthodox ethos and ideology resort to a language of renaissance and renewal, intended to discover the modern facets latent in tradition. The actual attempt to cope with duality, however, both individually and communally, is based on compartmentalization and evasiveness.[17] Rather than a harmonious solution, this is a technique of survival in a world of multiple identities perceived as contradictory.[18]

The strategy of the ultra-Orthodox (*haredi)* community is relatively easy to discover. Alienation replaces compartmentalization, and retreat supplants evasiveness. Faced with cultural duality, members of the *haredi* community adopt the mentality of the vanquished. They define their immediate surroundings as their "little piece of Heaven."[19] In despair, they renounce "*Klal Yisrael*" (the community of Israel), who have sinned, and mourn the cultural death of all other Jews. Having adopted this perspective, they can cooperate in civic matters, although cooperation is minimal and instrumental,[20] not at the experiential level, and certainly not at the level of values.[21] The *haredi* strategy, therefore, does not promote shared responsibility.

What does the secular public do? Against compartmentalization and alienation, it endorses abdication.[22] Instead of evasiveness

and retreat, we find oblivion. In fact, the secular public generally draws away from intimacy with its heritage.[23] Although a deliberate call for full abandonment of the Jewish heritage resonates at present only within limited (though prestigious) circles, this idea has gained a large, and far broader, concrete following among Israelis. First, replacing national identity with neutral individualism is a project attuned to the *zeitgeist*, which courts the idea of normalcy and integration into the family of nations. Second, and most significant for my argument, many are interested in a Jewish identity steeped in the historical legacy, but do not act upon their wishes. General Israeli culture—as manifest in the educational system, the arts and local creativity, philosophy, ethics, the economy, the law, the language, the media, politics, symbols, and role models, and in the complex of life-cycle social practices—bears hardly any trace of the Jewish cultural legacy. Direct involvement in Jewish studies is also gradually decreasing.[24] This means renouncing current experiential applications of the wealth of knowledge, memory, and meaning of Jewish existence throughout the ages, as preserved in the cultural heritage. In Gadamer's terms, this is a renunciation of the vital fusion between the horizon of the past and the horizon of the present.[25]

The loss of cultural and national identity and the severance of historical continuity are easily evident in an area where Jewish culture was for long highly prominent, and will be the focus of my discussion in the rest of this paper: the law. When Knesset legislation did occasionally enable a meaningful use of elements of Jewish culture to interpret modern norms, the courts charged with the implementation and interpretation of this legislation chose to ignore this option. Examples are well-known: the section in the Foundations of Law Statute, 1980, stating that the court will resort to "the principles of freedom, justice, equity, and

peace in Jewish tradition" as complementary sources in cases of legal lacunae, remains a dead letter.[26] For over twenty years, the court has not sought inspiration in these principles of Jewish heritage. Even more significantly, when a Basic Law in the early 1990s coined the phrase "the values of the State of Israel as a Jewish and democratic state," it was suggested that those values be interpreted as values addressed at their level of universalist abstraction, suited to the democratic character of the state.[27] In other words, the values of a Jewish state will assume normative meaning in state law if they are compatible with the values of a democratic state, not necessarily Jewish.[28] The values of Judaism are subject to judicial review according to criteria set by democratic values. When cultural duality exposes an intractable discrepancy between these two cultural systems, the judge will decide according to the views of the "enlightened public."[29]

Judges making hermeneutical choices of this kind[30] are not adopting a personal judicial policy. They are conveying an attitude widespread in Israeli society, accepting Jewish outlooks when compatible with a general *weltanschauung* and renouncing deeper layers of traditional Jewish culture when they convey unique values and priorities incompatible with Western-liberal culture. This signals a renunciation of "Judaism" in its traditional-halakhic sense as a relevant factor in a value decision unacceptable in the universal marketplace of ideas.

THE COLLAPSE OF THE STRATEGIES 4

These three strategies are presently collapsing. Compartmentalization, alienation, and abdication served each of the communities in Israeli Jewish society and enabled them to survive without dealing with the implications for the Israeli "whole" of the strategies adopted by the other communities. Their relative success in the first thirty years of the state reflected the priority that the young State of Israel ascribed to the preservation of a broad consensus among members of the various Jewish communities in the country. At the time, everyone was wary of pushing the other beyond the pale of the consensus that united all. Thus, for instance, David Ben-Gurion, who was personally alienated from religion, guided the political system to adopt a consociational model of democracy on matters of religion and state. He understood the national importance of agreeing upon a status quo on matters of religion, and was willing to pay the high price of the secular majority's relinquishing control over some of its ways of life.[31] Yet, the traditional consensus between the Jewish communities in Israel is now gradually collapsing, and the pressure on each of these three strategies is intensifying.

Many are concerned with an analysis of this breakdown, and with Israel's transition from a consociational democracy[32] to a democracy in crisis.[33] In the last decade, when many believed we were about to find a peaceful solution to the Israeli-Arab conflict, the perception of an attenuated security threat allowed us to focus on our cultural disagreements. Less obvious is the effect of the collapse of the prevalent hegemonies and of the reallocation of political, economic, and social resources, shifting from the old elites to peripheral forces.[34] In the future, we may have to pay attention to the effects of globalization on the ties binding Israelis together. As foreign cultures become more

accessible and their marketing instruments more aggressive, and as the national unit becomes less important and is replaced by other forms of social organization (such as multinational or supra-national bodies),[35] individual Israelis may become progressively estranged from their "Israeliness."[36] Consensus will then be threatened not only from the inside, by the inter-communal struggle for dominance in influencing Israeli identity, but also from the outside, by the global alternative.[37]

How do the decline of social and political consensus in Israel and the focus of the public discourse on internal cultural controversies affect the behavioral strategies of each of the three communities?

The Orthodox community, which has yet to develop practical alternatives to the compartmentalization of its identities, pays a heavy price every day. In the new reality of open contest between Israel's various cultures, the partitions between the drawers are being removed against its will. The Orthodox find it hard to persist in their compartmentalization while faced with an ongoing confrontation between the two components of their identity. Barring a strategy enabling the harmonious coexistence of both components, they are forced to choose between the available alternatives.[38] They can opt for the Jewish drawer and then, to push away the "other," incline toward ultra-Orthodoxy;[39] or they can opt for the liberal drawer and then, at times, feel they must shed the religious identity that ostensibly contradicts this option.

Statistics show that the religious-Zionist community faces considerable difficulties in keeping its youngsters within the ideological framework accepted by its adults.[40] In my view, the compartmentalization strategy is the built-in flaw, the faulty gene of

religious-Zionism, which led to this result. Compartmentalization is not marketable, and cannot be bequeathed either, because it cannot function as a mechanism for coping with a reality torn by cultural conflict. The constitutive text offering the non-*haredi* Orthodox a harmonious, or at least dialectical, solution to the complex riddle of their existence between two cultures has yet to be written.

Neither does the *haredi* alienation strategy offer a real solution. An ideology that readily dispenses labels of good and evil according to rigid criteria enjoys the advantage of clear and sharp messages. But the cost of alienation has proven too high for *haredi* society. First, in the past, alienation offered an option for operative functioning because it had developed in a context that took consociational existence for granted. At present, when the shared web is tearing, alienation begins to pose a real threat to the possibility of a shared existence.

Second, *haredi* society is growing and so are its needs, necessitating increasing recourse to political power. To use this power for its natural and obvious needs, *haredi* society has taken over large segments of the government.[41] With power and government come responsibility, and with it cooperation. In the long range, however, cooperation and alienation cannot coexist since they represent a contradiction in terms.

Third, the economic pressures affecting *haredi* society[42] almost preclude the withdrawal option. In the new world, where capital, land, manpower, and material resources make way for information as the major resource asset, *haredi* society must resort to non-traditional forms of knowledge, as news about intentions to establish a *haredi* university confirms. According to original *haredi* ideology, the very idea of a *haredi* university

is absurd, but economic reality has its own laws. Education, power, and responsibility will necessarily lead to the collapse of the alienation and withdrawal strategy.

As for the secular strategy of abdication, there are initial signs of acknowledgment that "normal" existence, a desirable goal for some of the public, could emerge as a significant threat to Israeli culture because it would blur its uniqueness. In the wake of this acknowledgment, the thorny question of identity, [43] as well as others,[44] has cropped up again. The "Jewish bookshelf" is of interest to secular Jews sensitive to identity issues. They are unwilling to surrender this shelf, since it could hold the most significant answer to the riddle of their national and cultural uniqueness.[45] I do not share the perception that this is a passing fad. In my view, this is the existential need of a culture seeking meaning in its sources,[46] possibly leading to the creation of a modern *midrash* (commentary) that will pour unique and novel content into secular Jewish existence.[47] At present, however, this is essentially an avant-garde phenomenon in which most secular Jews take no part.

The analysis suggests that despite signs of change, all Jewish communities in Israel have difficulties coping with cultural duality, and none of them has adopted ideological models integrating both cultures. In the past, this was not enough to lead to an open identity crisis and to a confrontation between cultures because Israeli society functioned within a consociational framework. A practical arrangement, in a supportive political environment, provided a substitute for ideological confrontation with the tension resulting from cultural duality. Consensus created a reasonably firm and stable bulwark, which enabled joint survival while evading open discussion of fundamental questions of identity. Today, when Israel is a democracy in crisis, hidden

strains have burst into the open. The primary impulse is no longer the search for a common denominator, for compromise or reconciliation, but a search for achievements, for the final truth, accentuating differences and stigmatizing the faults each finds in the other. Hence, the external defense line is now collapsing. The crisis paralyzes the ability to reach an "arrangement" through political and social mechanisms for releasing tension. The dispute over the question of identity is fully evident at the ideological level. Each community, exposed to pressures by the others, stands in the Israeli marketplace of ideas equipped with the strategy it had adopted for a life facing cultural duality—compartmentalization, alienation, or abdication. But these are flimsy props, since they have nothing to say to those seeking inclusiveness and integration of the two cultures. The collapse of past strategies brought about by the present crisis leaves key groups (and individuals) in Israeli Jewish society bereft of the ideological thinking patterns that had helped them to contend with the identity tension between Western and Jewish cultures. But, as King Solomon teaches: "Where there is no vision, the people become unruly."[48] In circumstances of ongoing crisis, the Israeli public agenda includes more and more items whose core is inter-cultural tension. The general ideological failure hinders the attainment of inclusive solutions to these problems, with the unfortunate result of pushing everyone into a power struggle. The common fabric of Israeli society is stretched to the breaking point. The two cultures face each other as though deployed for war, each viewing the implementation of its platform as a deterministic need. Not only interests are at stake, although they are certainly at play, but also elements that, subjectively, constitute and explain reality.[49]

FROM CULTURAL DUALITY TO NORMATIVE DUALITY

5

The increasing dominance of the law and of the legal system in Israeli society[50] (and in other democratic societies as well, although on a smaller scale)[51] has been explained in various ways. The literature offers cultural-liberal explanations (the growing strength of liberal sentiment in Israeli culture, including the expansion of individual rights and the protection of individuals vis-à-vis the government, requires greater intervention by the Supreme Court as the protector of these values); arguments focusing on the institutional character of the courts and on the political context in which they function (courts fill the vacuum created by the weakness of the Israeli political system and the difficulties in functioning that beset the legislative and executive branches); neo-realistic cultural approaches (the law and its systems are perceived as having objective and professional powers of persuasion), and so forth.[52] Besides these explanations, which I do not discuss here,[53] I argue that the increasing recourse of Israeli society to judicial decisions on issues involving inter-cultural friction can be ascribed, *inter alia*, to the failure of the existing strategies for coping with cultural duality.[54] Due to the collapse of these three strategies, Israelis are now suffering from an identity malaise that leads them to translate intercultural discourse into a discourse between legal systems: state law and halakhic law.[55]

The identity malaise is evident on several levels, and is primarily an intrapersonal problem, one an individual struggles with within himself. In this context, unresolved identity questions do not have social implications linked to the subject being discussed here.[56] But this identity malaise is also an interpersonal problem,

and as such, entails social implications with a direct bearing on the status of the law in society. It poses problems for each of the three groups seeking to define their inner identity but now unable to cope with the problem due to the collapse of the traditional strategy that had guided them thus far. The intra-group ideological failure projects further, to inter-group relationships. How? Were each group to succeed in easing its inner identity tension by integrating both cultures, a shared language of values would emerge between the secular, religious, and ultra-Orthodox populations, enhancing the chances of settling group differences through persuasion or negotiation. A shared language does not mean agreement on the content of identity, but simply acknowledgment of the legitimacy and validity of a dual cultural presence in the identity of every group. This acknowledgment could be an excellent foundation for fruitful inter-group dialogue that would not need to resort to judicial decisions at every step.[57] The strategies of compartmentalization, alienation, and abdication, which do not present genuine options for a full life within normative duality, have restricted the shared public space required for inter-group dialogue, leaving us bereft of ideological goods with which to cope with the "other."[58] This reinforces the urge to attain cultural victory over the "other" through judicial rulings. Furthermore, let us assume that each group develops a clear identity doctrine vis-à-vis cultural duality, and that this doctrine can answer the needs of group members yearning for an integrated identity. When formulating their attitudes to questions evoked by cultural duality, group members will then probably follow the thinkers who developed the group identity doctrine, the people charged with disseminating it, marketing it, and educating in its light, and those who are elected on the basis of its platform. These individuals would eventually coalesce into the ideological leadership of each group, and negotiations between the groups would then be

conducted between these ideological leaders. Unfortunately, the inner ideological failure within each group has lowered our expectations of organizations and individuals involved in thinking, education, or the dissemination of ideas. Instead, we seek the help of legal institutions. Overstating the case, one could argue that we choose the leaders of the competing legal systems as the leaders of each culture.[59] We mark the borders of the competing cultural territories by defining the limits of the competing legal systems.

What is the motivation for this process of "lawlization" and "halakhization" in Israeli society? Turning to the law appears to enable adversaries in all camps to achieve a complex goal: twisting the arm of the cultural "other" while exempting themselves of all responsibility for the intolerant and aggressive implication of this act; waging a *kulturkampf* while preserving their self-image untainted.

Arm twisting in what way? Courts, secular and religious, serve as ammunition because the judicial product, by definition, sharpens the decision. The judicial ruling acts as a guillotine, encouraging a discourse of victors and vanquished.[60] The judicial procedure fits an environment of strife because it unfolds within a drama of competition and of decision-making, and because it sometimes results in the demonization of the "other."[61]

Exemption from responsibility in what way? Turning to the courts does not tarnish the self-perception of litigants, who do not consider themselves as having adopted an aggressive attitude. In their view, the judicial procedure is bound by an inner, "pristine" system of rules, autonomous and universal, projecting "professional immaculacy," objectivity, neutrality free of political bias, sterility absent of external considerations, expertise and

authority.[62] The same is true of those turning to Halakhah, with an a fortiori addition: if law, a human creation, is viewed as acting within an autonomous space unaffected by the power struggles of a particular society, all the more so Halakhah, which is perceived by the religiously observant public to be the "true Torah," originating in a unique divine revelation whose validity and persuasive powers are unquestionable. Furthermore, as the public discourse tends to present judges as being loyal only to the law and never suspect of promoting their personal values, so does intra-religious discourse present halakhists as implementing *da'at Torah* (Torah wisdom). *Da'at Torah* is purported to be external to halakhic judges and uninfluenced by their personal values; hence all are commanded to comply with their rulings for reasons of unconditional "faith in the sages."

Each group, then, is characterized by an unresolved inner identity tension that has deleterious effects on the possibility of dialogue, pushing groups toward confrontation and an ambiance of *kulturkampf*. The increasing recourse to law and Halakhah was intended to gain validity for the inner identity of each group. The law and Halakhah provide a clean field for this war, which enhances their social status.

Translating cultural duality into normative duality could create severe cumulative effects. A judicial decision is liable to lead to the banalization of the dispute,[63] and to blithe disregard of the complexity of cultural duality.[64] It intensifies and sharpens the alienation prevailing between various segments of Israeli society; it escalates differences and entrenches the parties behind defense lines formulated in binary terms—rights and duties, commandments and transgressions, forbidden and allowed. It hinders the development of moderate, complex, experiential, or ongoing educational possibilities. It fences in the camps

and undermines the possibility of broadening the common denominator uniting different communities. It compels an essentially monological rights discourse—which effaces the "other" and relates to him instrumentally—on an essentially dialogical identity discourse.[65] It paralyzes the marketplace of ideas, dilutes the social importance of political procedure and, ultimately, could considerably erode the trust that large segments of the public place in the judiciary.[66]

NORMATIVE DUALITY AND VALUES 6

Court rulings, and particularly Supreme Court rulings, have undergone significant change over the last decades. Until the 1980s, the legal narrative was distinctly formalistic: the legal realm was perceived as an autonomous professional system with a domain and a language of its own. The aim of judicial procedure is to impose on any given conflict the normative answer available in the law, and in a sense, it is a clarification of a technical nature. The judge is a professional, a state employee, whose role is to find the specific norm relevant to the conflict, reveal it, and proclaim it.

Menachem Mautner outlined the change that the Israeli court underwent during the 1980s, shifting the emphasis from formalism to the value dimension.[67] Court rulings externalized the fact that every judicial ruling, even those considered technical, involves a value choice. Rather than being impersonal, the normative answer depends on the value preferences of the judge, who is the final arbiter. Indeed, a word frequently found in Supreme Court rulings of the last twenty years is "balance."[68] The court decides after weighing several values—one against the other—that sometimes lead to contradictory outcomes. The very recourse to the term "balance" indicates that the façade of one mandatory answer to every given question has been abandoned. In the process of objective balance, judges obviously rule according to their best understanding, in line with the relative weight they feel should be assigned to conflicting values and interests at a given time and place.[69] In a process resembling legislation, they thereby carve out the legal result from within themselves, by exercising judicial discretion.[70]

A contrary process takes place in halakhic law. Avi Sagi has exposed the centrality of the pluralistic approach within Halakhah.[71] Whereas a monistic halakhic approach holds that every dilemma has only one halakhic solution, a pluralistic view holds that the response may be found among a range of options, all legitimate. From the spectrum of legitimate responses that fill halakhic discourse, all equally close to the truth, the halakhist must choose the one he considers most plausible. According to the pluralistic perception, which has been widely accepted throughout the history of Halakhah, the halakhist is not only a legal expert who knows how to disclose the "truth" latent in the halakhic code. Rather, the halakhist creates a Halakhah imbued with personal characteristics,[72] expressing the values and social considerations to be taken into account.[73] After the halakhist rules out those options beyond the realm of halakhic legitimacy, he must ask himself what would be a worthy ruling in the specific case.[74] According to this approach, halakhic activity—as opposed, for instance, to scientific activity—is not meant to describe or discover reality, its structure or its characteristics, but to determine it. Halakhah is a product of human activity, and therefore reflects human consciousness in its multifaceted and changing dimensions.[75]

At present, however, the monistic perception of Halakhah[76] has clearly gained ground, and halakhic pluralism has become increasingly restricted. Halakhic rulings are now envisaged as coming into being without human intervention. The consumers of Halakhah expect the halakhist to proclaim the legal result they deem necessary as the only possible one, handed down to Moses on Mt. Sinai.[77] The common assumption is that halakhic rulings, rather than creating the response and thus being constitutive, only discover it and proclaim it, thus being merely declarative. According to this view, Halakhah is not affected by extra-halakhic

factors either, be they the halakhist's personality[78] or his ethical philosophy.[79] The values of the halakhist and his personal preferences are irrelevant to his legal conclusion.

In sum, the two legal systems relate to values in opposite ways: state law now chooses to externalize the realm of values underlying the law, while contemporary Halakhah emphasizes the formal-technical-logical aspect of judicial rulings, as if they were devoid of value choices and personal discretion.

JUDICIAL IMPERIALISM

It is fascinating to discover that despite their diametrical approach to values, the attitude of both systems to their place and role in Israeli reality is almost identical: both endorse an unmistakable rhetoric of judicial imperialism. This trend creates problems for consumers of both systems, and is a unique and major source of distress for people who personally experience normative duality. This dual judicial imperialism narrows the range of options available to a public wishing to resort to the norms of both systems.

First, each system maintains, at least at the rhetorical level, that its scope is total. Some religious sayings (which are admittedly philosophical declarations rather than halakhic injunctions) claim, "Turn it (the Torah) and turn it, for everything is in it,"[80] and "nothing exists that was not intimated in the Torah."[81] At the same time, in a conceptualization borrowed from the religious domain, Chief Justice Barak holds that "the law fills the earth."[82] Both legal systems, then, pretend to regulate all aspects of reality, leaving nothing uncovered.[83]

Second, is the totality of law at the theoretical-philosophical level expected to be concretized in reality? Does the legal policy of these competing systems direct judges to actually decide on every question placed on the public agenda? Here too, both systems give similar answers. Chief Justice Barak states, as a matter of policy, that the Court is required to refrain from ruling only in a small number of cases, because "without the judge, no law is kept."[84] Halakhah has also shown a tendency to expand its scope over the last decades through a novel use of the notion of *da'at Torah*. *Da'at Torah* was once perceived as

the pronouncement of the community's sage, the learned rabbi. Its power stemmed from the rabbi's relative advantage as an educated man.[85] Later, *da'at Torah* came to be accepted as a kind of divine inspiration, requiring the public to grant it special meaning.[86] Recently, we have seen the concept develop in a legally binding direction: *da'at Torah* is sometimes placed beside "halakhic ruling" as an alternative normative product, equally important,[87] or perhaps even more so.[88] The problem, however, is that the topics and issues on which *da'at Torah* is demanded and supplied are not at all defined (in striking contrast to the restriction and limitation of the content of issues included in the classic halakhic code, the *Shulkhan Arukh*).[89]

Third, the imperialism characterizing both legal systems is also manifest in their attitudes toward one another. Some of Halakhah's consumers question the binding validity of Israeli state law. The religiously observant sometimes publicly verbalize their contempt for state courts and their incumbents, and contemporary halakhists tend to support the view that recourse to state courts should be forbidden.[90] Many, whether ultra-Orthodox or religious-Zionists, hold that the courts of the Jewish state should be viewed as "Gentile courts."[91] The halakhic and cognitive implications[92] of these statements create profound discord with the surrounding reality for most observant Jews. This pertains not only to religious judges, lawyers, and jurists, but also to the wider public of religious and ultra-Orthodox Jews, including their rabbis, who all routinely resort to Israeli courts. Nor do rulings of state courts recognize the value of Halakhah as a vibrant legal system in a multicultural state.[93] Claims have been voiced stating that the legal system seeks to restrict the influence of halakhic norms on Israeli reality.[94] Both systems claim exclusivity in the regulation of reality, thereby hinting at the illegitimacy of the other.

JUDICIAL REALITY 8

The proceeding analysis could provide an explanation—which I postulate but do not prove here—for some of the constructs of professional activity adopted by both state law and Halakhah. I begin with state law.

First, the expansion of standing.[95] In the past, the Court was wary of opening its doors to all who might be interested in litigation. Petitioners had to prove a personal link to the issue in question. Selectivity was meant to ensure that only "relevant parties" would seek remedy through legal procedures, and that these would not be exploited for unworthy purposes. At present, standing is almost unrestricted, and the Court is willing to consider a conflict without ascribing too much importance to the identity and to the interest of the petitioner.[96] The increasing accessibility of legal services may reflect the general responsibility assumed by the courts in regulating values in Israeli society.[97] If the Court holds that its task is not only to solve a specific dispute but also to formulate a set of values for Israeli society in general, no great importance should be ascribed to the somewhat technical question of the petitioner's identity. In a rough generalization, the question of standing determines only the identity of the specific peg on which to hang a trailblazing ruling, which will serve society as a whole.

Second, judicial activism, according to one of its definitions,[98] prevails when the Court, out of all the possibilities at its disposal for ruling on a dilemma, chooses the one furthest removed from the law as heretofore practiced. An activist Court is more willing than other courts to change existing law through interpretive means. Changing the law is a means enabling the Court to bridge the

gap that sometimes emerges between the law and reality. A legal system is by nature conservative and committed to custom and precedent; by contrast, the reality of our lives is dynamic, and raises new questions requiring decisions. New ideological currents change conventional thinking patterns concerning old questions. These general remarks are particularly true concerning Israel, which in recent years has undergone several shakeups in values, which have been both the cause and the effect of its present plight as a society in crisis. Changing value preferences, reflecting the spirit of Israeli society and its time-related needs, are supposed to affect the judicial outcome for which an involved judge, sensitive and socially responsible, would wish. Not surprisingly, then, the Court assumes responsibility for reforming the law through its rulings.[99] Indeed, the more judges and their surroundings are aware of this commitment, the greater the judge's legitimacy and daring when relying on interpretation to change the law through adjudication.[100]

Third, judicial activism in its other sense—the Court's growing involvement in issues usually appertaining to other branches of government—is also related to the leading role assumed by the Court concerning values. Some hold that the response expected from a Court attentive to social values concerning social needs cannot wait until clumsy legislative procedures mature. Furthermore, the legislative branch, partly because of its representative character and its sectarian fragmentation, is sometimes tainted by obstructive interests, and even by the suspicion of misuse of power. The executive branch also wields wide-ranging powers in Israel (anachronistically anchored in the relationship between the British Empire and its colonies, and presently justified by a longstanding state of emergency), incompatible with the present preferences of democratic Israel. Hence, in order for the Court to fulfill its role in influencing

society's way of life and shaping it so that it reflects the public's current choices, it must cast a wide net and enlarge the scope of "justiciability"[101] by including issues more germane to the legislative or executive branches. Not only ordinary citizens[102] but even members of the legislature tend to seek the Court's assistance to implement their own value preferences,[103] in a move seemingly puzzling in theory[104] but easily explained in practice.[105] Thus, as the value infrastructure of judicial activity is externalized, the justification for strengthening the status of the courts vis-à-vis other branches of government becomes clearer.[106]

Fourth, similarly, we can understand the tendency of the Supreme Court to formulate its rulings, sometimes at great length, as part of a comprehensive and systematic doctrine even when this is not required by the case in point.[107] Quite simply: if the Court envisages its task as providing a broad social service while solving a private conflict, it must present in its ruling the entire panorama of values. Only a full perspective will enable us to determine a hierarchy of values and a solid order of priorities that will stand the test of criticism. Therefore, when the conflict between the parties arguing before the Court does not bring to light the full complexity of the underlying priniciple in the case in point, the Court takes the liberty of expanding the range and suggesting a broad solution, even if it thereby exceeds the boundaries of the specific legal dispute.

In sum, the externalized value dimension in the Court's rulings is the bridge across which march the imperial forces of the law in Israeli society.[108]

What about Halakhah? Although the end result is similar, it is attained through opposite means: the concealment of the value dimension in halakhic rulings is what enables its expanded influence.

As noted, a halakhic ruling, like any judicial ruling,[109] relies on a value choice.[110] The current monistic perception of Halakhah, however, tries to conceal this.[111] This strategy emerges as a *sine qua non* element for contemporary halakhists: were a value language evident in their rulings, Halakhah would be forced to adopt a direct attitude toward "modern" values, which on one hand are generally accepted by Halakhah's present consumers, and on the other, is one "your fathers dreaded not" (Deuteronomy 32:17).

Emphasizing the discourse of values underlying halakhic rulings would force halakhists to bring their own attitudes to liberal culture and its values to the surface. They would be forced to choose between a clear and explicit rejection of liberal values and the endorsement and legitimation of these values, internalizing them into the halakhic discourse.[112] Both these options, however, are bad for halakhists. If they reject liberal values, they might alienate their listeners who, as noted, experience cultural duality in their daily lives and have therefore internalized many dimensions of the liberal worldview. If they endorse them, their halakhic rulings would reflect this, and they would be functioning as judicial activists.[113] Contemporary halakhists find it hard, for reasons I will not discuss here, to become halakhic activists, although this is an acceptable option in halakhic history (through decrees, interpretation, or *midrash*, as well as through legislative means, such as ordinances).[114] Hence, halakhists prefer to expunge value references from halakhic language. When Halakhah is monistic, a "mandatory" outcome of the Torah given to Moses on Mt. Sinai, halakhists need not, and perhaps are even forbidden to, discuss the value basis of their ruling. This enables compartmentalization (for the modern Orthodox) and alienation (for the ultra-Orthodox)—Halakhah and reality do not meet.

Concealing the values in halakhic rulings extracts a heavy price: a "value-laden" Halakhah could have been more spiritual, more intellectual, and more relevant. It could have expanded the meaning of contemporary religious existence because it would have narrowed the gap between Halakhah and reality. Instead, some contemporary halakhists incline toward entrenchment within the walls: "the Torah forbids the new."[115] Unfortunately, the new refuses to disappear and increasingly threatens the old.[116] An entrenched, immutable Halakhah must defend itself. It endorses an imperialistic policy—"Turn it and turn it, for everything is in it"—and proclaims exclusivity in the regulation of reality. Halakhah thereby enables the compartmentalized and alienated existence of the halakhic individual in a world of dynamic values.

The picture that emerges, then, is one of a struggle between two cultures that is manifest in both legal systems: halakhic law conceals the place of values out of weakness, and state law flaunts the place of values from a position of strength. The common denominator is that their—opposite—attitudes to values encourage them to endorse judicial imperialism. Furthermore, on one hand, some contemporary halakhic mediators fail to internalize the full complexity of democratic values into Jewish-religious discourse, and feel threatened by them. On the other, state law has difficulty internalizing a perception of Jewish tradition, including its philosophy and its norms, as potentially contributing to shaping Israeli identity. This reality of growing disharmony between two imperialistic legal systems places individuals experiencing normative duality and multiple commitments in an impossible situation: they are required by both systems to choose between the yoke of the Heavenly Kingdom and the yoke of the world of law.

SUMMARY

9

All the main Jewish communities in Israel find it difficult to deal with the complexity of cultural duality. Barring an inclusive ideological model, and faced with the reality of a democracy in crisis requiring decisions, all are dragged into a *kulturkampf*. Hence the mutual choice of both religious and secular camps to conduct most of their discourse in a normative language. Normative systems are perceived as effective instruments for reaching a clean decision and a professional, precise victory over the "other."

The primary responsibility for the overstated centrality of the law when determining cultural decisions lies with Israeli society rather than with the judiciary. Judges do not choose the issues brought before them and are dragged into involvement in cultural disputes by parties seeking rulings in particular cases. They are forced, by definition of their roles, to answer such questions as: Is the conversion valid? Can the street be closed on the Sabbath? Does a same sex partner have rights? The demand for legal restraint in settling cultural questions, therefore, should be directed towards society in general. Legal restraint can be promoted in a society that adopts a culture of open discourse; that has effective institutions for settling conflicts in extra-legal ways at the local and national levels; that is highly consensual, offers political rewards for easing tensions, etc. Having said that, judicial systems should not be exempted from responsibility for exacerbating cultural controversy through their rulings. This is a serious responsibility, which courts and halakhists do not always discharge successfully.[117]

In my view, leaders in both normative systems are not sufficiently cautious regarding the ways in which they allow others to use

them in order to reach cultural decisions. They emphasize theoretical positions about the totality of the law and of Halakhah that could prove extremely harmful, since the other side, for whom the norm is crucial, might infer from these pronouncements an intention to deny it a role in Israeli culture.[118] Moreover, people involved in law and Halakhah must, by the very nature of their activity, make value choices. Although the law and Halakhah relate to this necessary feature of judicial work in different ways (the law empasizes it and Halakhah conceals it), both use it to achieve the same aim: the creation of an intellectual environment that will enable them to endorse imperialistic patterns of activity and will legitimize their assumption of exclusive responsibility for molding social reality.

The consequences of translating cultural duality into normative duality, and of reducing the former to the latter, are problematic. Everyone must be aware of the limitations inherent in the law, its language, and its frameworks: a legal decision, whether religious or secular, is contingent and haphazard (according to the factual limitations of the case in point), artificial (because it cannot always include macro considerations), and also unprofessional (since the deciding agent lacks relevant training).[119] Settling essential, fundamental conflicts between two dominant cultures in a given society is an unusually complex task. It cannot be achieved by reaching a "correct" decision, and no extant institution can offer "professional" solutions. The anticipated consensus cannot emerge from the application of an external criterion to the experience of those involved in the process.

From this perspective, the task that Israeli society imposes on the law and on Halakhah is far too heavy. It tends to view them as determinant weapons in the intercultural struggle; it resorts to them as gurus, oracles yielding true answers in a complicated

reality. The intensive and inflated use of normative systems interferes with the ability of each community to speak with itself, internally, and with the other, externally. As many in Israeli society have now sobered up from the illusion that power can be the main instrument for tackling problems of security and foreign policy, they must also sober up from the delusion that the law can be the main tool for solving social problems.[120] Just as power is a vital component of foreign policy, so is a strong and independent judiciary vital for the relationships between the tribes that make up Israeli society; and so is a halakhic system that is autonomous (but engaged in a dialogue with "life") vital for preserving the unique character of the religious way of life. Use of state law and of Halakhah, however, must be conscious and responsive to the limitations noted above and, like power, should be viewed as a last resort in the molding of society. Overuse of the law and of Halakhah erodes the authority of the institutions and the personalities implementing both normative systems. It mars the rule of law as well as the authority of Halakhah and, above all, it activates forces that shred the web of shared existence within cultural duality.

This analysis indicates the need to restrict the role of the law and of Halakhah as the bellwethers in the controversy over the character of Israeli society. The discourse between the two cultures requires a change of venue. Social regulation will not be attained in the courts, but in social and political settings. Normative decisions will not heal society nor daunt the opponents. Over the last two decades, decision-making in Israeli society has slipped from ideological systems, through political arrangements, into legal structures. The slide needs to be reversed.

The real chance of stabilizing Jewish society in Israel—however colorful, multifaceted, and sectarian it may be—lies in the ability

of each community to reshape its inner attitude toward the two fundamental cultures of Israeli life. As the analysis shows, the three strategies for coping with cultural duality—compartmentalization, alienation, and abdication—share a common denominator that is the main reason for their failure: they preclude the very confrontation with the meanings of life within cultural duality. Neither of the communities offers its members a texture of identity that is both existentially and spiritually satisfactory and coherent with the community's fundamental principles. The ideological credo of each community as conveyed, for instance, in its models of leadership or in its cultural products, is detached from the basic needs of community members, who experience the complexity of cultural duality.

It is in the distinct interest of each community, therefore, to clarify its own relationship toward cultural duality. Continuing the present pattern, impervious to the basic questions troubling the community's members, may eventually harm the very ability of each community to preserve itself as an alternative relevant to future generations. I do not place my trust in an increased sense of national responsibility or a preference for mutual responsibility over particularistic interests.[121] Rather, the particularistic interests of each community are those imposing a need for examining the options it can offer its members concerning ways of coping with cultural duality. Communities anxious to survive must react to the collapse of the strategies that served them in the past. They must engage in an authentic ideological renewal that will seek real and experientially persuasive solutions toward a harmonious, or at least dialectical, existence in a reality of cultural diversity.

The trivialization of the cultural discourse and its reduction to normative discourse were part of an attempt to force determination.

But cultural duality does not need a determination.[122] Quite the contrary: all parties can actually yield vast benefits from the existence of a cultural other. On one hand, secular Jewish society in Israel is searching for its own uniqueness vis-à-vis global trends toward uniformity; on the other, religious and ultra-Orthodox society needs renewal to cope with hitherto unknown phenomena, such as Jewish sovereignty, secularism, and the demotion of halakhic law from its position of dominance. These overall trends signal the latent advantages of developing and deepening the discourse between the two basic cultures shaping Jewish society in Israel. Each culture must internalize that living its life within a closed, autarchic system is unworthy (and actually impossible). Instead, they must assume their place as partners in a dynamic intercultural discourse where each will shape the other and be shaped by it.[123] Diversity, then, rather than a dubious blessing, will turn out to be a hidden treasure, for the benefit of all.

NOTES

* "Lawlization" refers to the filtering of reality through legal terms.

1. The freedom to observe religious commandments, derived from the basic defense of human dignity, is generally guaranteed by Israeli law, as is the protection of religious sensibilities. Yet, this freedom is not absolute. See, for instance, HCJ 292/83, *Temple Mount Faithful v. Jerusalem Police Commissioner*, PD 38(2) 449, 455; see also HCJ 7128/96 *Temple Mount Faithful v. the Government of Israel*, PD 51(2) 509, 521. Situations might be possible in which the relative balance between conflicting values could result in an affront to religious sensibilities, or even in an infringement of religious freedom. In two fascinating examples from recent Supreme Court decisions, the minority opinion argued that the majority ruling entailed a direct violation of one litigant's religious freedom, tantamount to actual coercion to transgress a religious commandment. In CA 6024/97, *Frederica Shavit v. the Rishon le-Zion Burial and Benevolence Society*, PD 53(3) 600, the Supreme Court decided to allow the petitioner to engrave the tombstone with the deceased's dates of birth and death according to the Gregorian calendar, despite a ruling of the official local rabbi (the *mara de-atra*) forbidding it. Justice Englard, in a minority opinion, posed the question: "Now we must decide if we will compel the burial society to allow an engraving on the tombstone forbidden by the halakhic ruling of the *mara de-atra*.... An important halakhic principle states that the public is bound by the halakhic rulings of the *mara de-atra*" (par. 16). Hence his conclusion: "In my view, this court is not authorized, in principle, to coerce a religious body—be it public or private—to act against one of its religious laws. This type of coercion is a grave infringement of the principle of religious freedom" (par. 21). Justice Cheshin related to this

claim: "The controversies between the parties are, in fact, controversies between the will and the dignity of the individual—the petitioner—and the halakhic ruling issued by the *mara de-atra* to the burial society. The opinion of the *mara de-atra*, however, is only binding on observant Jews, or when compelled by state law. We must remember that the State of Israel is not ruled by Halakhah but by the law. Israel is a democracy ruled by law—this is the-rule-of-law.... Our considerations hinge on the individual, on the person, on his will, his well-being, his welfare—all according to state law. In principle, then, our state of mind is anthropocentric rather than theocentric" (par. 26). Chief Justice Barak chooses to answer the claim that the ruling transgressed freedom of religion in two ways. First, he clarifies that the ruling does not impose on the burial society an obligation to act contrary to the *mara de-atra*'s ruling, since engraving the tombstone is a task incumbent on professionals and not on the society's members (par. 5). Nevertheless, Chief Justice Barak does acknowledge that this ruling might affront the religious sensibilities of members of the burial society and of other observant Jews among relatives of people buried at the cemetery. Second, Chief Justice Barak answers the claim of Justice Englard on the level of principle. In his view, a balance is required between two values (or liberties): freedom of religion and freedom from religion, both of which he considers aspects of human dignity. "We cannot say, then, that in the clash between freedom of religion and freedom from religion, one of them will always prevail.... The proper way is to strike a balance between clashing values or principles.... Within the framework of this balance, we must aspire to preserve the 'core' of each of these liberties ... taking into account the essence and the gravity of the affront. The actual decision must take into account considerations of plausibility, fairness, and tolerance" (par. 9). Concerning the case in point, Chief Justice Barak decided

that balance would be best served by preferring freedom from religion to freedom of religion.

The second case is a recent ruling, HCJ 1514/01, *Yaakov Gur Aryieh et. al. v. The Second Television and Radio Authority* (unpublished). A group of observant Jews was filmed for a program that the television network wanted to screen on the Sabbath. The rabbi of the petitioners ruled that by appearing in a program screened on the Sabbath, they themselves would be transgressing a religious commandment, even if others (and not they) were involved in the actual broadcast, and even if it was accompanied by a caption stating it had been filmed on a weekday and they themselves had opposed its screening on the Sabbath. Chief Justice Barak, joined by Deputy Chief Justice Shlomo Levin, held that the religious transgression involved in the Sabbath broadcast was incurred by others (The Second Television and Radio Authority and its employees). Hence, the screening did not infringe the petitioners' freedom of religion but only their religious sensibilities. Against the offended religious sensibilities of the petitioners, however, was the defendants' interest in freedom of expression, and in the balance between them, freedom of expression prevails. Hence, the Court decided to allow the Sabbath broadcast. By contrast, Justice Dorner held that this was a direct affront to the petitioners' religious freedom. Since they themselves appear in the film, they thereby become unwilling partners in an act involving the transgression of a religious commandment, as stated in the ruling of their *mara de-atra*. In her view, the ruling allowing the screening infringed the petitioners' freedom to observe religious commandments, as understood by the petitioners and by the religious authority they accepted. The ruling allowing the Sabbath broadcast makes them unwilling partners in a desecration of the Sabbath, and is tantamount to "forcing the petitioners to transgress the commandments of their religion."

2. In the title as well as in the discussion, I refer to Israeli society, although this article deals only with Israeli Jewish society. Readers are invited to consider the relevance of the present analysis, with the necessary adjustments, to the context of Jewish-Arab relationships. Can Israeli society benefit from its cultural diversity, which reflects its national diversity? Is a forcibly imposed normative regulation the only option for dealing with the aggravated tensions between Arabs and Jews? Has the law actually played a central role in this arena so far? If not—why not? If yes—are there better alternatives?
3. Note that the call for reducing the role of the law in cultural decisions is addressed, above all, to Israeli society in general and not only to the judiciary. See ch. 9.
4. An up-to-date survey found that 6% of Israeli Jews define themselves as ultra-Orthodox; 9% as religious; 34% as traditional, and 51% as secular. See Uryiah Shavit, "Playing It Safe" [Hebrew], *Haaretz*, 6 October 2000, Weekend Supplement.
5. "Jewish Israel is characterized by two cultures or two frames of reference.... Among Israeli Jews, we find more than one 'People' concerning the decisive issue, the spiritual legacy. Rather than a social problem, this is one of tribes and spiritual constituencies. The two cultures are like two worlds, and each of these worlds holds up a mirror in which reality is reflected differently.... Each mirror, then, reflects part of the contents of the other: the new (Western) Zionist mirror reflects quite a bit of the Jewish legacy, and actually accepts that without something from what was preserved in the traditional world of the *yeshivot*, the 'soul of the nation' will not prevail ... while the traditional mirror reflects that part, at least, of the new and the rational that is embodied in the very existence of the civic State of Israel, including its institutions and its bureaucracies." See Avigdor Levontin, "A Riddle of Twin Worlds" [Hebrew], *Bar-Ilan Law Studies* 16 (2001): 7, 12, 13, 15.
6. According to a survey by the Guttman Institute, about 80%

of the Jewish population in Israel has some connection to Jewish religion and its commandments. See Shlomit Levy, Hanna Levinsohn and Elihu Katz, *Beliefs, Observance, and Social Relationships among Israeli Jews* [Hebrew] (Jerusalem: Guttman Institute for Applied Social Research, 1993). For an interpretation of the findings of this report, see Charles S. Liebman and Elihu Katz, eds., *The Jewishness of Israelis: Responses to the Guttman Report* (Albany: SUNY, 1997). Data published in the media shows that about 77% of all Israeli Jews believe in God, including more than half (53%) of the people who define themselves as secular. See Shavit, "Playing It Safe," 24. Several religious practices are widely accepted, such as fasting on the Day of Atonement (73%), placing a *mezuzah* on the door (96%), and male circumcision (97%). For a report and analysis of these findings, see Tom Segev, "Who is Secular?" [Hebrew], *Haaretz*, 25 September 1996, B1. Note that observance by traditional and secular segments of the population, although partial and selective, is not haphazard, personal, or unsystematic. Observance is not an indication of intention (in the religious sense of the word) or of halakhic observance, but of awareness of the meaning of these acts from the perspective of Jewish survival. See Elihu Katz, "Behavioral and Phenomenological Jewishness," in *The Jewishness of Israelis*, 71. According to Baruch Kimmerling, "Israel has secular individuals, secular groups, and even secular sub-cultures. Their day-to-day behavior and their self-identity are secular. Some are even involved in a cultural (or religious) war against the occasional use of the state to impose a particular religious practice, or even a halakhic rule, on the entire population or on part of it. Yet, when most of the Jewish population in Israel relates to its collective national identity, this identity is largely defined through terms, values, symbols, and a collective memory largely rooted in Jewish religion. In other words, there

are secular Jews in Israel and in the world, but the existence of a secular Judaism is extremely dubious." See Baruch Kimmerling, "Religion, Nationalism and Democracy in Israel" [Hebrew], *Zmanim: A Historical Quarterly* 13 (1994): 116, 129. On the percolating of beliefs, symbols, and behavior patterns originating in tradition down to the modern society and state, see Eliezer Don Yehiyah and Charles S. Liebman, "The Dilemma of Reconciling Traditional Culture and Political Needs: Civil Religion in Israel" [Hebrew], *Megamot* 28 (1984): 461.

7. Breakthroughs in "the bastions of holiness" can be identified in several areas, such as the political realm (with ultra-Orthodox elements assuming increasing responsibility at the national level) and the geographical realm (with ultra-Orthodox elements leaving their traditional dwelling areas and settling in mixed cities). As Yosef Shilhav shows, these processes change the attitude of ultra-Orthodox society, and particularly of its youngsters, to the outside world: "*Haredi* attempts to encourage different rejections of modernism, i.e., to adopt its instrumental components but reject its cultural ones, have been fruitless: modern cultural and social values are penetrating *Haredi* society." See Yosef Shilhav, *Ultra-Orthodoxy in Urban Governance in Israel* (Jerusalem: Floersheimer Institute for Policy Studies, 1998), 90.
8. Among the religious and the ultra-Orthodox, many tend to relate to theological dimensions in Jewish culture as a self-sustaining whole that fully explains reality. Hence, they sometimes perceive the very possibility of liberal-Western culture playing a significant role in the lives of Jews as a threat. By contrast, the secular public tends to relate to the two cultures as hierarchically ranked: Jewish culture, as embodied in Jewish tradition, is an earlier stage, meant to be superseded by liberal-Western culture. Due to the rebellion against tradition, this replacement is viewed as a necessary stage in an evolutionary process. In line with

this analysis, the threat of a *kulturkampf* reflects the problem the religious public faces when required to give up the notion of wholeness, and the problem the secular public faces when required to give up the notion of rebelling against tradition.

9. Even in a pluralistic culture with an open marketplace of ideas, each culture could obviously consecrate a separate system of authority; champion unique values and priorities; uphold a separate ethos as well as different symbols and myths; and promote autonomous systems of meaning. Yet, it could do so in a non-imperialistic mode, assuming room for another "good" beside it.
10. For a general discussion of various aspects of dual loyalty, see Ruth Gavison, *Can Israel Be Both Jewish and Democratic? Tensions and Prospects* [Hebrew] (Jerusalem and Tel Aviv: Van Leer Institute and Hakibbutz Hameuhad, 1999), 21-45; Gershon Weiler, *Jewish Theocracy* [Hebrew] (Tel Aviv: Am Oved, 1976); Ariel Rosen-Zvi, "'A Jewish and Democratic State': Spiritual Parenthood, Alienation, and Symbiosis—Can We Square the Circle?" [Hebrew], *Tel Aviv University Law Review* 19 (1995): 479; Uzzi Ornan, *Asmodeus' Claws: Eight Chapters on Secularism* [Hebrew] (Kiryiat Tiv'on: Einam, 1999); Levontin, "A Riddle of Twin Worlds."
11. Thus, for instance, the issue of dual loyalty among the religious (and in recent years among the ultra-Orthodox as well) assumes specific meanings in the context of the controversy over the peace process. As early as the mid-seventies, *Gush Emunim* [Bloc of the Faithful] leaders anchored their a-legalism not only in the pragmatic secular context of the political dispute about the value of settlements, but also in the theoretical religious context of a religious commitment, which may sometimes contradict democratic allegiances. To justify their illegal action, they relied not only on Yitzhak Tabenkin (1887-1971), a Labor leader who had championed the cause of "Greater Israel" after the Six Day

War, but also on Maimonides. See Ehud Shprinzak, *Every Man Did Whatsoever Is Right in His Own Eyes: Illegalism in Israeli Society* [Hebrew] (Tel Aviv: Sifriat Poalim, 1986), 126-145, and references. Halakhic rulings issued at the time of the Oslo Accords forbidding territorial concessions and stating an obligation to disobey orders to vacate IDF bases in Judea and Samaria sharpened the question of dual loyalty. Prime Minister Yitzhak Rabin's assassin also adduced religious motives. The question, however, arises in other contexts as well. For instance, the validity of laws and judicial rulings regulating matters of religion and state (such as the character of the public space on the Sabbath); the status and authority of state courts defined as "Gentile courts," etc. The "Der'i is innocent" campaign also exhibits religious characteristics. When Shas minister Aryeh Der'i was convicted for misuse and misappropriation of public funds, his supporters claimed he was innocent in the heavenly court, further illustrating the strains resulting from dual loyalties.

12. For an up to date description of religious-Zionist society see Yair Sheleg, *The New Religious Jews: Recent Developments among Observant Jews in Israel* [Hebrew] (Jerusalem: Keter, 2000), Part 1. Several periodicals document the complexities of self-definition in the religious-Zionist community and the painful soul-searching that many of its members experience in contending with cultural duality. Among them are *Meimad* (issued by a religious-Zionist movement supportive of peace initiatives rejected by mainstream religious-Zionism); *De'ot* (issued by *Ne'emanei Torah va-Avodah* [Torah and Labor Followers], who urge a return to the founding principles of religious Zionism); the ten volumes of *Akdamot* (a journal issued by the Jerusalem Beth Morashah Center for Advanced Jewish Studies), and Hadas Goldberg, ed., *Ke-Lavi Yakum: A Reappraisal of the Principles of Religious-Zionism and Modern Orthodoxy* [Hebrew] (Tel Aviv: Modan, 2000). Many of

the articles in these publications call for renewal and for a philosophical revolution, motivated by the strain of contending with duality.

13. The tension between tradition and modernity is a primary experience and an existential challenge for the religious-Zionist public. Many rabbis presently leading this public are clearly inclined towards an anti-modernist stance. Some of them adopt the ultra-Orthodox model, which negates modernity in principle. These findings are surprising, given the vast philosophical and educational efforts that the spiritual historical leadership of neo-Orthodoxy invested in the intellectual and spiritual integration of tradition and modernity. The three outstanding thinkers in this area are Samson Raphael Hirsch, founder of the *Torah Im Derekh-Eretz* movement in nineteenth century Germany (see, for instance, Eliezer Stern, *The Educational Ideal of Torah Im Derekh-Eretz* [Hebrew] [Ramat Gan: Bar-Ilan University Press, 1987]); Abraham Yitzhak Kook, the first Chief Rabbi in the Land of Israel (see, for instance, Nachum Arieli, "Integration in the Philosophy of Rav Kook," in *The World of Rav Kook's Thought*, ed. Benjamin-Ish-Shalom and Shalom Rosenberg, trans. Shalom Carmy and Bernard Casper [New York: Avi Chai, 1991], 156-186), and Joseph Dov Soloveitchik, who was the spiritual inspiration and the leader of twentieth century North-American Orthodoxy (see, for instance, Avi Sagi, ed., *Faith in Changing Times: On the Doctrine of R. Joseph Dov Soloveitchik* [Hebrew] [Jerusalem: WZO, 1996], particularly Part 4). The approaches of these thinkers have been classified into models of co-existence (Hirsch), harmony (Kook), or dialectics (Soloveitchik). See Aviezer Ravitzky, *Freedom Inscribed: Diverse Voices of the Jewish Religious Thought* [Hebrew] (Tel Aviv: Am Oved, 1999), 161, 167. Others offer a classification of models as rationalist (Maimonides), cultural (Hirsch), mystical (Kook), instrumental, and others. See Norman Lamm, *Torah Umadda:*

The Encounter of Religious Learning and Worldly Knowledge in the Jewish Tradition (Northvale, N.J.: J. Aronson, 1990). Although these philosophical efforts have had some impact on sections of the religious public, none of these options enjoys wide following among contemporary religious-Zionists. My concern here is not with the reasons for this failure, but only with its detection.

14. "The religious public, faithful to the Torah on one hand and a collaborator in the various communal life arrangements on the other, is at the impasse of inner contradiction. It no longer says that the world is not important, given that Zionism took upon itself to re-emerge on the stage of history and, until the last crisis, had even done so with considerable success. Yet, the traditional frameworks to which it is committed continue to view this world as a marginal place. The result is a sharp dichotomy: all values related to the world—from honest government and an efficient army to the public's level of education—are considered part of the secular dimension of life, while religiosity is limited to areas within its exclusive purview: the religious community, rituals and proscriptions." Yoav Shorek (Schlesinger), "The Unbearable Irrelevance of the Torah" [Hebrew], *Tkhelet: A Journal of Israeli Thought* 2 (1997): 56, 78.

15. Sociologists of religious societies have recognized and analyzed the phenomenon of compartmentalization. See, generally, Peter L. Berger, *The Heretical Imperative* (Garden City, N. Y.: Anchor Press, 1979). For the phenomenon of compartmentalization in Jewish religious society, see Charles S. Liebman and Eliezer Don Yehiyah, *Civil Religion in Israel* (Berkeley and Los Angeles, California: University of California Press, 1983), 191-194; Charles S. Liebman, "The Rise of Neo-Traditionalism among Moderate Religious Circles in Israel" [Hebrew], *Megamot* 27 (1982): 231, 234-235; Zeev Safrai, "Religion, Halakhah, Tradition, and Modernity" [Hebrew], in *A Good Eye: Dialogue*

and Polemic in Jewish Culture, ed. Nakhem Ilan (Tel Aviv: Hakibbutz Hameuhad, 1999), 582, 591-592. Some scholars place the roots of the compartmentalization strategy in the Orthodox community in Germany at the end of the nineteenth century, led by Samson Raphael Hirsch. See Ismar Schorsch, *Jewish Reactions to German Anti-Semitism 1870-1914* (New York: Columbia University Press, 1972), 10.

16. But see Yeshayahu Leibowitz's early thinking in Aryei Fishman, "The Search for Existential-Religious Unity: The Early Writings of Yeshayahu Leibowitz" [Hebrew], in *Yeshayahu Leibowitz: His World and Philosophy*, ed. Avi Sagi (Jerusalem: Keter, 1995), 121.
17. "In modern Orthodoxy today, ideology tends toward synthesis or dialectic, but consciousness tends more strongly toward compartmentalization and a separation of roles and powers." Ravitzky, *Freedom Inscribed*, 175.
18. Compartmentalization is certainly not the only technique. For instance, religious-Zionism successfully resorted to hermeneutical mechanisms to contend with the cognitive dissonance resulting from the gap between the ethos and consciousness of religious-Zionism, which are traditional, and the ways of life of religious-Zionism, which are modern. On this issue see Avi Sagi, "Religious-Zionism: Between Closure and Openness" [Hebrew], in *Judaism: A Dialogue between Cultures*, ed. Avi Sagi, Dudi Schwartz, and Yedidia Z. Stern (Jerusalem: Magnes Press, 1999), 124.
19. On this issue, see Menachem Friedman, *The Haredi (ultra-Orthodox) Society: Sources, Trends and Processes* (Jerusalem: The Jerusalem Institute for Israel Studies, 1991), 144-161.
20. Generally, the ultra-Orthodox reject the cultural-ethical dimension of modernity while accepting its instrumental dimension. In daily life, however, it is hard to sift out one dimension from the other, and alienation is inevitable. In other words, unlike the

compartmentalization that characterizes religious-Zionists, the alienation of the ultra-Orthodox is essential to the character of *haredi* religiosity.

21. See Eliezer Schweid, "Is Judaism a 'Separate Domain' or a Culture?" [Hebrew], in *Judaism: A Dialogue between Cultures*, 407.

22. Defining their identity through a conscious renunciation of the legacy of Judaism is not widespread among secularists. The usual stance is that Jewish secularism "has been nurtured by Hebrew and Jewish culture throughout Jewish history. It includes the Hebrew language, its culture and literature—sacred as well as mundane—which has been part of our literature since its inception. Secular Jewish culture also includes the principles of Jewish faith as one of the important cultural values of Judaism; the Jewish way of life, including the rich religious literature; Jewish philosophy through the ages, religious and non-religious; and the Jewish culture that has emerged over the last generations and is still unfolding at present, in Hebrew and in other languages. All these and many others belong to our national culture, on which we base our Jewish identity. Our vast cultural legacy is the foundation of our Jewish identity." See Yedidia Yitzhaki, *Principles of Jewish Secularity* [Hebrew] (Haifa: Haifa University Press and Zmora-Bitan, 1999). Others view secular Judaism in shallower terms: "A common language, a common history, a few basic shared myths, and ownership of a share in the organization called 'state' are enough for a citizen of Israel to feel that he belongs to the Jewish nation. The existence of a national feeling, which is a subjective essence, is a patently objective fact." Yaron London, "Religious and Freethinkers" [Hebrew], in *We Secular Jews*, ed. Dedi Zucker (Tel Aviv: Yedioth Aharonoth, 1999), 23, 30. Another shallow approach holds: "The Bible is the only basis common to the culture of all movements in Judaism." See Yaakov Malkin,

What Do Secular Jews Believe [Hebrew], (Tel Aviv: Sifriat Poalim, 2000). As we know, many secular leaders and thinkers, including Ben-Gurion and Ahad Ha'am, preferred the Bible and its heroes and ignored the subsequent rich tradition and culture that developed in Judaism. The extraordinary leap into biblical romanticism enables secular Judaism to thrust aside the huge and amazing endeavor called "the Oral Law." Secular culture dismisses the sages of the Mishnah and the Talmud, the *geonim*, the early [*rishonim*] and later [*aharonim*] authorities, as well as halakhists and Jewish thinkers throughout the ages. As Sagi notes, by choosing the romantic track and "skipping back to the 'clean' beginning," secular culture can shape a new myth and a new ethos that deliberately reject those of traditional halakhic Judaism. Avi Sagi, *Society and Law in Israel: Between a Rights Discourse and an Identity Discourse* (Ramat Gan: Zivion-Bar Ilan University, 2001). For additional views see Weiler, *Jewish Theocracy*; Abraham B. Yehoshua, *Between Right and Right* [Hebrew] (Tel Aviv: Schocken, 1980); Joseph Agassi, *Religion and Nationality: Towards an Israeli National Identity* [Hebrew] (Tel Aviv: Papyrus, 1984); "Pratt" (Avigdor Levontin), *Dawn and Dusk* [Hebrew] (Jerusalem: Shashar, 1991). At the end of the spectrum is a view holding that Israeli culture must be detached from any link to Judaism and its heritage: "There is a need to move ahead to a more Western, more pluralistic, less 'ideological' form of patriotism and citizenship. One looks with envy at the United States, where patriotism is centered on the Constitution; naturalization is conferred by a judge in a court of law; identity is defined politically and is based on law, not on history, culture, race, religion, nationality or language." Amos Elon, "Israel and the End of Zionism," *The New York Review of Books*, 19 December 1966, 27-28.

23. Eliezer Schweid analyzes the concern surrounding the place of religious content in Israeli secular culture: "A categorical and

total rejection of religious content, then, implies a rupture of the cultural-historical continuity and the loss of the cultural-national identity. Zionism also brought with it remarkable spiritual creativity, but its attainments failed to fill the void that the rejection of halakhic religious content had left behind. Nor has the effort to create a national secular "equivalent" of this content … proven successful, despite its many achievements. Although the foundation was laid in the course of the twentieth century for a Hebrew Israeli culture, this culture is lacking in two regards: it reached neither the depths nor the heights of religion, which answers questions about the meaning of human existence, and it lacked compelling normative validity. The feeling soon began to surface that a vacuum had opened up, that Hebrew education remained trivial and superficial, that intellectual life was slack and shallow, that a comprehensive worldview touching not only on political life but also on questions of personal and interpersonal relationships was missing, and that the social and cultural achievements of Zionism are taken for granted by the second generation rather than as an ideal still to be pursued." See Eliezer Schweid, *Judaism and Secular Culture* [Hebrew] (Tel Aviv: Hakibbutz Hameuhad, 1981), 221-222. Yeshayahu Leibowitz, who rests the cultural controversy not on differences of concepts and beliefs but on different ways of life that convey acceptance or refutation of the commandments' validity, states unequivocally: "Scraps falling off the table of Jewish history and tradition even now reach a large segment of the secular population, and through the power of these scraps, most of them still view themselves as links in the chain of Jewish history. This continuity, however, remains only an aim, openly contradicting the actual rupture that characterizes reality for the secular public, and for the state and the society whose profile this public determines…. The unconscious, and at times even the conscious aim of the secular public is to create a

synthetic "Jewish People." Membership in this people will not be determined by Judaism but by an identity card signed by a clerk working at Israel's Ministry of Interior." Yeshayahu Leibowitz, *Judaism, the Jewish People, and the State of Israel* [Hebrew] (Tel Aviv: Schocken, 1976), 268.

24. Particularly touching are the words of Yosef Dan, an Israel Prize laureate, on receiving the award: "Today, the only group in the universe casting doubts on the legitimacy, the dynamism, and the relevance of Jewish studies is the secular public in Israel, to which I belong. When I began my studies in this field, most teachers and most of my fellow students were avowed secularists, who had no trouble integrating Jewish and Western culture, and felt at home in both. Not so today. The extreme radicalization process that developed among both ultra-Orthodox and secularists has largely worn down anyone found in the middle…. The result is that today, more books on Jewish studies are printed abroad and in other languages than here and in Hebrew. The number of students and of scholars is dropping in Israel and rising abroad. The gap between the secular majority in Israel and everything related—even slightly and indirectly—to the Jewish legacy is progressively widening. The secular scholar and the secular student of Jewish studies have become increasingly rare figures…. All this is driven by the mistaken belief that only a repudiation of all Jewish culture (which is perceived essentially as ultra-Orthodox) will draw us closer to the big world beyond." See Yosef Dan, "The Liberation of Ultra-Orthodoxy: A Product of Secular Israel" [Hebrew], *Alpayim* 15 (1998): 234, 236-237.

25. Gadamer explains the concept of "horizon" as follows: "… an essential part of the concept of situation is the concept of 'horizon.' The horizon is the range of vision that includes everything that can be seen from a particular vantage point. Applying this to the thinking mind, we speak of narrowness of horizon, of the

possible expansion of horizon, of the opening up of new horizon etc.… A person who has no horizon is a man who does not see far enough and hence overvalues what is nearest to him. Contrariwise, to have an horizon means not to be limited to what is nearest, but to be able to see beyond it. A person who has an horizon knows the relative significance of everything within this horizon, as near as far, great or small." Hans-Georg Gadamer, *Truth and Method*, trans. revised by Joel Weinsheimer and Donald G. Marshall (New York: Crossroad, 1988), 269. This is the basis for understanding the concept of the "fusion of horizons" and its link to the present discussion on the value of tradition: "In fact, the horizon of the present is being continually formed, in that we have continually to test all our prejudices. An important part of this testing is the encounter with the past and the understanding of the tradition from which we come. Hence, the horizon of the present cannot be formed without the past. There is no more an isolated horizon of the present than there are historical horizons. Understanding rather, is always the fusion of these horizons which we imagine to exist by themselves. We know the power of this kind of fusion chiefly from earlier times and their naive attitude to themselves and their origin. In a tradition, this process of fusion is continually going on, for there old and new continually grow together to make something of living value, without either being explicitly distinguished from the other." Ibid., 273. See also, at length, Menachem Mautner, "Gadamer and the Law" [Hebrew], *Tel Aviv University Law Review* 23 (2000): 367.

26. This legislation was accompanied by great controversy. See Aaron Kirschenbaum, "The Foundations of Law, 1980: Today and Tomorrow" [Hebrew], *Tel Aviv University Law Review* 2 (1985): 117-126; Menachem Elon, "More about the Foundations of Law Act" [Hebrew], *Shenaton ha-Mishpat ha-Ivri* 13 (1987): 227-256; Hanina ben-Menachem, "The Foundations of Law

Act: How Much of a Duty?" [Hebrew], *Shenaton ha-Mishpat ha-Ivri* 13 (1987): 257-264; Aharon Barak, "The Foundations of Law Act and the Heritage of Israel" [Hebrew], *Shenaton ha-Mishpat ha-Ivri* 13 (1987): 265-284; Eliav Schochetman, "On Analogy in Decision Making in Jewish Law and The Foundations of Law Act" [Hebrew], *Shenaton ha-Mishpat ha-Ivri* 13 (1987): 307-350; Shmuel Shiloh, "Comments and Some New Light on the Foundations of Law Act" [Hebrew], *Shenaton ha-Mishpat ha-Ivri* 13 (1987): 351-370; Leon Sheleff, "On Criminal Law and Jewish Law: Toward Legal Foundations for the Jewish Heritage" [Hebrew], *Plilim: Israeli Journal of Criminal Justice* 3 (1992): 102-146.

27. See Aharon Barak, "The Constitutional Revolution: Protected Basic Rights" [Hebrew], *Mishpat Umimshal* 1 (1992-1993): 9, 31.
28. Elon criticizes this position based on the discriminatory approach he identifies in Barak's treatment of the twin concepts of a "democratic state" and a "Jewish state." See Menachem Elon, "The Values of a Jewish Democratic State in Light of the Basic Law: Human Liberty and Dignity" [Hebrew], *Tel Aviv University Law Review* 17 (1993): 659, 686. Barak rejects this interpretation of his outlook. He clarifies that his intention refers to a neutral and reciprocal stance, whereby each of these terms will be interpreted, as far as possible, in a way compatible with the inner content of the other. In other words, the term "democratic state" should also be interpreted at a level of abstraction that allows for a content that is also suitable to the values of a Jewish state. See Aharon Barak, *Constitutional Interpretation* [Hebrew], vol. 3 of *Interpretation in Law* (Jerusalem: Nevo, 1994), 343-344.
29. Ibid., 345-347.
30. One of the more enraged responses to this approach came from the Shas Party, in a document that Attorney Yaakov Weinrot

submitted on 28 December 1992 to Minister of Justice David Libai, entitled *The Position of Shas on Basic Law: Basic Human Rights*. Shas viewed this hermeneutical move as a hostile act, analogous to the one Jean Paul Sartre claims is embedded in the thinking of the liberal democrat in his attitude to the Jew "who insists on remaining Jewish." Jean-Paul Sartre ascribes "a tinge of anti-Semitism" to the liberal democrat on these grounds: "He wants to separate the Jew from his religion, from his family, from his ethnic community, in order to plunge him into the democratic crucible whence he will emerge naked and alone, an individual and solitary particle like all the other particles.… For a Jew, conscious and proud of being Jewish, asserting his claim to be a member of the Jewish community without ignoring on that account the bonds which unite him to the national community, there may not be so much difference between the anti-Semite and the democrat. The former wishes to destroy him as a man and leave nothing in him but the Jew, the pariah, the untouchable; the latter wishes to destroy him as a Jew and leave nothing in him but the man, the abstract and universal subject of the rights of man and the rights of the citizen." Jean-Paul Sartre, *Anti-Semite and Jew*, trans. George J. Becker (New York: Grove Press, 1962), 57; originally published as *Réflexions sur la question juive* (Paris: Paul Morihein, 1946).

31. See Zvi Zameret, "Judaism in Israel: Ben-Gurion's Private Beliefs and Public Policy" 4 *Israel Studies* (1999): 64. See also Zvi Zameret, "Yes to a Jewish State, No to a Clericalist State: The Mapai Leadership and its Attitude to Religion and Religious Jews" [Hebrew], in *On Both Sides of the Bridge: Religion and State in the Early Years of Israel*, ed. Mordechai Bar-On and Zvi Zameret (Jerusalem: Yad Ben-Zvi Press, 2002).
32. The model of consociational democracy was suggested by Arendt Lijphart, *The Politics of Accommodation* (Berkeley: University of California Press, 1968); Arendt Lijphart, *Democracies* (New

Haven and London: Yale University Press, 1984). In Israel, the concept was used to understand the organization of the Jewish political community during the British Mandate (Dan Horowitz and Moshe Lisak, *Origins of the Israeli Polity: Palestine under the Mandate*, trans. Charles Hoffman [Chicago: University of Chicago Press, 1978]); as a key for understanding the relationships between religious and secular Jews after the establishment of the state (Dan Horowitz and Moshe Lisak, *Trouble in Utopia: The Overburdened Polity of Israel* [Albany, N.Y.: State University of New York Press, 1989], 16-17), and to deal with various aspects of the religion/state relationship (Eliezer Don Yehiyah, *Cooperation and Conflict between Political Camps: The Religious Camp and the Labor Movement and the Education Crisis in Israel*, Ph.D. diss., Hebrew University of Jerusalem, 1977).

33. Asher Cohen and Bernard Susser, "Changes in the Relationship between Religion and State: Between Consociationalism and Resolution" [Hebrew], in *Multiculturalism in a Democratic and Jewish State: Memorial Volume for Ariel Rosen-Zvi*, ed. Menachem Mautner, Avi Sagi and Ronen Shamir (Tel Aviv: Ramot, 1998), 675; Asher Cohen and Bernard Susser, *Israel and the Politics of Jewish Identity: The Secular-Religious Impasse* (Baltimore: Johns Hopkins University Press, 2000).
34. Menachem Mautner, "Israeli Law in a Multicultural Society" [Hebrew], in *The Rule of Law in a Polarized Society: Legal, Social, and Cultural Aspects*, ed. Eyal Yinon (Jerusalem: The Israel Democracy Institute, 1999), 27.
35. Peter Ferdinand Drucker, *Post-Capitalist Society* (New York: Harper Business, 1993), Part 2.
36. The process of estrangement extends to several elements of the sense of belonging, such as the attitude of Israelis to their surroundings (Joshua Meyrowitz, *No Sense of Place: The Impact of Electronic Media on Social Behavior* [New York: Oxford

University Press, 1985]); their attitude toward sovereignty and the political unit (Joseph A. Camilleri and Jim Falk, *The End of Sovereignty: The Politics of a Shrinking and Fragmenting World* [Aldershot, U.K.: Edward Elgar, 1992]); their mutual relationship with the local society and economy (Thomas L. Friedman, *The Lexus and the Olive Tree* [New York: Anchor Books, 2000]).

37. See Charles S. Liebman, "Secular Judaism and its Prospects" [Hebrew], *Alpayim* 14 (1997):97; Samuel Avigdor Ben-Sasson, "The Ascent of Man and the Absence of God: Notes on the Question of Our National Identity" [Hebrew], *Alpayim* 14 (1997): 117.

38. Many are not decisive and unequivocal in their choice of drawers. Were it otherwise, the Orthodox community would become an empty cell. Indeed, many in this community continue to shape their lifestyles through some kind of compromise, despite the difficulties, although they too are influenced by the social and cultural processes that Israeli society is undergoing. Thus, for instance, "the new religious-Zionists" who preserve their religious identity while internalizing aspects of the secular lifestyle in ways hitherto unknown, continue to live a compartmentalized existence. But the relative dose of influences absorbed from the contents of the two drawers changes. Thus, for instance, the attitude to the status of women, which had previously been drawn from the Jewish drawer, is now influenced by general cultural content. Only a minority in the religious community anchor their changing attitude to women in Jewish sources. From time to time, the new religious-Zionists also exchange some aspects of their existence between drawers. Thus for instance, the political identity of many is no longer defined by the Jewish drawer, and they can now, therefore, vote for a non-religious party. This transition is not backed by arguments drawn from the intra-religious discourse. For a description of this group, see Sheleg, *The New Religious Jews*, 54-93.

39. Charles Liebman, who analyzed this phenomenon about twenty years ago, enumerated five elements defining the decline of non-*haredi* Orthodoxy in Israel and the increasing tendencies toward religious extremism (neo-traditionalism or *haredi*-nationalism): increased levels of religious observance; the marginalization of family traditions; acceptance of a monistic approach; rejection of religious meaning to the State of Israel; and the style of religious observance. See Liebman, "The Rise of Neo-Traditionalism," 237-240. These trends have definitely expanded over the last two decades, as evident in the significant numbers of non-*haredi* Orthodox youngsters studying at private institutions that are not part of the state-religious educational system. Whereas this had once been true of high school students (for instance, the *Bnei Akiva* networks of educational institutions for boys and girls), today it also applies to primary school children (for instance, the *No'am*, *Ahino'am* and *Tsviah* networks). Some of these educational institutions have gradually reduced the time devoted to secular subjects. Additional signs are the preference of many religious-Zionists for residence in homogeneous surroundings; their recourse to separate social and communal agencies different from those dealing with the rest of the population; a dress code that sets them apart through special and conspicuous features (such as big and colorful skullcaps); increasing recourse to rabbinical authority on everyday matters, and so forth.
40. For empirical studies of religiosity levels among students and graduates of the state-religious system, see Abraham Laslevi and Mordechai Bar-Lev, *The Religious World of State Religious Education Graduates* [Hebrew] (Ramat Gan: Bar-Ilan University, 1993). Findings show that 33% of the male students and 23% of the female students estimate that their levels of religiosity are lower than those of their parents. Only 7% of the male students and 10% of the female students assess their levels of religiosity as higher (109-111).

41. For a description of the mutual relationships between the perception of democracy by the Israeli public and by the *haredi* public see Shilhav, *Ultra-Orthodoxy in Urban Governance*, 103-105. The demands of ultra-Orthodox parties during the negotiations preceding the creation of Ariel Sharon's coalition government [in 2001] attest to their increasing involvement. *Yahadut ha-Torah* [Torah Judaism—an ultra-Orthodox party] requested representation in the government (a commitment it had avoided since the 1950s). This is an innovation, since for ideological reasons, ultra-Orthodox representatives had so far confined themselves to such posts as parliamentary committee chairmen or deputy ministers. Shas, a party that from the outset had not refrained from participating in the government, asked at first for the finance portfolio, one of the three top positions in the government. At the local level, ultra-Orthodox forces are on the verge of accumulating enough power to appoint the mayor of Jerusalem, Israel's largest city. On the ideological aspects of ultra-Orthodox attitudes toward the state, see Aryeh Naor, "The Sovereignty of the State of Israel in Orthodox Religious Thought" [Hebrew], *Politika* 2 (1998): 71, 77-80.

42. Bnei Brak and Jerusalem are among the poorest cities in Israel. For extensive information on Jerusalem's ultra-Orthodox population see Momi Dahan, *Ultra-Orthodox Jews and the Municipal Authorities* (Jerusalem: Jerusalem Institute for Israel Studies, 1998). About 55% of the gross income of an average ultra-Orthodox family in Jerusalem originates in state institutions, as opposed to 17% of the gross income of the rest of the city's population. In 1995, about 69% of Jerusalem's ultra-Orthodox population was living below the poverty line, as opposed to 6.9% of the rest of the city's Jewish population. The cause of this poverty is twofold. The first reason is the low participation of the ultra-Orthodox population in the workforce. Whereas an ultra-Orthodox head of household in Jerusalem works an

average of fourteen hours a week, the average for the rest of the city's population is about thirty hours. About 62% of all ultra-Orthodox heads of household in Jerusalem do not work at all. The second reason is obviously the high average number of children in ultra-Orthodox families.

43. "Not only are the significant and sustained achievements of two hundred years of secular creativity in the spirit of the Enlightenment an insufficient foundation for the building of an Israeli national-cultural identity, but they themselves rest inseparably on three thousand years of essentially religious creativity.... A national culture that rules out conscious self-impoverishment must be wary of a devastating secularization, manifested in detachment from the sources and contempt for the importance of organic cultural continuity. Given the seductive ease surrounding attachment to the fruits of Western culture, one must remember that this culture is not supra-national but multi-national; hence, creative participation in it is possible only through a national culture. The trap is thus real, and so is the danger that assimilation, whose prevention was one of Zionism's central aims, lies in wait for us in our own land." Uriel Simon, "Religious-Secular Cooperation in the Building of a 'Jewish Democratic State'" [Hebrew], *Alpayim* 13 (1997): 154, 158.

44. Rosen-Zvi assesses the recourse of secular Jews to Judaism as follows: "The democratic-secular-Jew passes through traditional Judaism in his attachment to the Land of Israel.... Secular Zionism needs the religious concept of the right of the Jewish people to the Land of Israel as an (almost axiomatic) basis for the very claim to the Land of Israel as the historical home of the Jewish people.... Unquestionably, the Judaic concept in its religious sense (both in its philosophical and halakhic dimensions), and certainly in its broader cultural meaning, confers a dimension of uniqueness on the Jewish people, or at least contributes significantly to their self-definition. It constitutes

a solid foundation for the absorption of communal values and their balanced incorporation into an ideology of individual freedom and personal rights. It also bestows added value on the Zionist idea whenever it comes into confrontation with the democratic component. In this case, the added value of the Jewish component joins the Zionist value to override the demand posed by the democratic element." See Rosen-Zvi, "A Jewish and Democratic State," 488-489.

45. On the burgeoning of study settings for an open discussion of Jewish sources, now numbering over one hundred and intended also for secular Jews, see Tamar Rotem, "Each One Will Choose Whatever He Wants from Judaism" [Hebrew], *Haaretz*, 13 October 2000, B12. The *Panim* association, a roof organization for pluralistic Judaism, reports 169 study settings where secular Jews study Jewish sources (sometimes together with religious people, in an attempt to have these venues function as meeting places as well). These study settings focus on a personal and intimate encounter with the text. Some deal with unique issues, such as Judaism and art, or Judaism and ecology. For a description, see Micha Oddenheimer, "In the Backyards" [Hebrew], *Eretz Aheret* 1 (2000):10.

46. I have no data on the success of the Conservative and Reform movements in spreading their message in Israel. The general sense is that Israelis are showing growing interest in the cultural and religious options that these movements offer, and that rates of membership in their communities have largely increased over the last decade. In my view, this success, though still small in absolute numbers, should be ascribed to the search of the secular public for links to their Jewish heritage.

47. "Opponents of Halakhah who uphold the notion of Israel as a Jewish national state are the ones who must find answers to the unique essence of Jewish nationalism. They are the ones who must impart this answer to new generations of Israelis who

did not come here on the strength of the 'Zionist revolution' or because of a deep and existential struggle with their self-identity. Should they lack such an answer, two possible lines of development can be foreseen: either this vacuum will be filled once again by Jewish content as a religion, including all its isolationist elements, or all Israeli Jews will be people who speak Hebrew (some poorly and ungrammatically), but have no particular attachment to Jewish national culture." See Ruth Gavison, "A Jewish Democratic State: Political Identity, Ideology, and Law" [Hebrew], in *A Jewish Democratic State*, ed. Daphne Barak-Erez (Tel Aviv: Ramot, 1996), 169, 216. See also Liebman, "Secular Judaism and its Prospects," 113-116.

48. Proverbs 29:18.

49. An unfortunate instance of this is the political move known as the civic-secular revolution adopted by Ehud Barak's government. The very idea of dealing with such acutely sensitive issues through one blunt stroke devised by a random political constellation is evidence of the crisis affecting Israeli society and of its leaders' immaturity. A decision that favors one side in a *kulturkampf* setting is a proven recipe for disaster. For liberal truth zealots, Barak's decision is a vital rite of passage that Israel must undergo on its way to normalcy. For them, the presence of religion in public life makes religion loathsome, corrupts politics, harms human rights, trivializes rational discourse, and diverts Israel from mainstream Zionism. By contrast, for zealots of the Jewish legacy in its ultra-Orthodox version, Ehud Barak's proposed revolution confers the seal of state authority on the loss of national identity. The removal of religion from the state betrays Jewish history, subordinates Jewish culture to Western culture, and deprives the national revival of any meaning. When each side becomes entrenched in one cultural truth, the realization of one's dream is possible only at the cost of the other's nightmare. In my view, both contradictory views about

the meaning of the civic-secular revolution are to some extent true. Barring a philosophy or ways of thinking that leave room for the values of both cultures to coexist, however, we will forever be forced to choose between them. The inevitable consequence will be the losing side's unyielding refusal to accept the result.

50. Amnon Rubinstein preceded others in pointing to the "lawlization of Israel" in a series of three articles with this title, which he published in *Haaretz* in June 1987. Rubinstein wrote: "It must be stated unhesitatingly that Israel is going through an amazing process of profound "lawlization," unequalled and unparalleled in any other country." See Amnon Rubinstein, "The Lawlization of Israel," *Haaretz*, 6 June 1987, B1.

51. Indeed, legal imperialism is not exclusive to Israel or to countries characterized by cultural duality or identity problems. Hence, my remarks on this question are not meant as the sole explanation of a local phenomenon. Thus, for instance, some see the law as a meta-narrative serving to anchor contemporary post-modern culture. See Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld and Nicholson, 1990). On the central role of the law in current American culture and on different perspectives on this topic, see Paul F. Campos, *Jurismania: American Culture and the Madness of Law* (New York: Oxford University Press, 1998); Lawrence Meir Friedman, *Total Justice* (New York: Russell Sage, 1985); Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (New York: Truman Talley, 1991). The law also plays a special role as a by-product of the globalization process, affecting economic and social aspects. Nevertheless, the current legal and halakhic imperialism in Israel is still uniquely prominent by comparison with other places.

52. For the various approaches and for references, see Gad Barzilai, "Judicial Hegemony, Sectarian Polarization, and Social Change" [Hebrew], *Politika* 2 (1998): 31, 32-35.

53. Note, however, that all the explanations so far refer only to the dominance of state law. They do not contribute to an understanding of the parallel phenomenon concerning the dominance of Halakhah. In contrast, in this discussion I seek an overall explanation for the reliance on both these legal systems.
54. I do not claim that this is the sole explanation. Findings reveal increasing recourse to litigation in Israel on issues not directly related to the inter-cultural strife, as is also true of societies that are not characterized by identity conflicts. See the text above and note 51.
55. For a perception of the law as a separate cultural system and for a clarification of the mutual influences between external culture on the one hand, and the law and legal culture on the other, see Menachem Mautner, "The Law as Culture: Toward a New Research Paradigm" [Hebrew], in *Multiculturalism in a Democratic and Jewish State*, 545. On the culture's influence on the law and its development, see Ariel Rosen-Zvi, "Legal Culture: On Judicial Review, the Enforcement of Law and Inculcation of Values" [Hebrew], *Tel Aviv University Law Review* 17 (1993): 689.
56. Thus, for instance, American Jews are also troubled by similar identity problems and adopt the same coping strategies: American modern Orthodox compartmentalize themselves, the ultra-Orthodox are often alienated, and the bulk of Jews who are non-affiliated, abdicate. These strategies survive better in the United States so far because they are not implemented in an environment characterized by ongoing crisis.
57. The literature acknowledges the link between social cohesiveness—based on a cultural, economic, or other common denominator—and extra-legal social regulation. As social cohesiveness breaks down, the power of social authority and of extra-legal normative systems is weakened, intensifying the need for authoritative legal rulings. See, for instance, Robert

C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge, Mass.: Harvard University Press, 1991); Jonathan R. Macey "Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules," *Cornell Law Review* 82 (1997): 1123.

58. Thus, for instance, a common denominator between ultra-Orthodox who choose exclusion from Western culture and secular Jews who have actually relinquished the option of significant links with Jewish culture and are oblivious to its values, is hard to find. If each of these two groups were to develop, separately, ideological models that leave room for both cultures within their own (different) worldviews, they could probably discuss their disputes in more leisurely, empathetic, and trusting terms, striving for an arrangement. Furthermore, if each group could preserve its traditional strategy of action vis-à-vis cultural duality, across-the-board normative decisions to regulate the relationships between them would probably not be required. Compartmentalized religious-Zionists and alienated ultra-Orthodox would not make demands on the secularists, since these strategies would enable them to accept their existence without unnecessary strife. In other words, the combined effect of the collapse of traditional strategies and the lack of inclusive ideological models is a crucial element in the rush to the courts.

59. See Moshe Gorali, "The Duel of Our Masters and Teachers" [Hebrew], *Mishpat Nosaf* 1 (2001):16, which describes the controversy between former Chief Rabbi Ovadia Yosef, who serves as the spiritual leader of the Shas Party, and Chief Justice Aharon Barak.

60. Justice Cheshin states: "The law is like the guillotine: a sharp cut, a categorical ruling, a clear-cut decision, guilty and innocent, good and bad, black and white, a winning and a losing side." HCJ 5364/94 *Wellner v. The Alignment Labor Party*, PD 49(1) 758, 825.

61. "Two competing and 'equal' parties enter the court, and then leave as right and wrong, culprits and blameless, winners and losers, reasonable and unreasonable. Supreme Court decisions tell the story of a dramatic truth, emerging in the course of the competition and the conflict between the parties, who bring different and conflicting versions. The Court provides the public with a show, a television drama, the tension of waiting for the judges' utterances, the decisive, clear-cut result, the truth refined through conflict rather than through compromise and negotiation." See Ronen Shamir, "The Politics of Reasonableness: Reasonableness and Judicial Power at Israel's Supreme Court" [Hebrew], *Theory and Criticism* 5 (1994): 7, 19.
62. See, for instance, Baruch Kimmerling, "Legislation and Jurisprudence in a Settler-Immigrant Society" [Hebrew], *Bar-Ilan Law Studies* 16 (2001): 17, 18; Shamir, "The Politics of Reasonableness," 19.
63. Rosen-Zvi claims in "Legal Culture," 702, that this implies placing social and cultural questions in "the 'Procrustean bed' of solely partial and narrow legal aspects."
64. In the introduction to his ruling concerning the Bar-Ilan road, Chief Justice Barak appears to be aware of this: "In Israel's public discourse, Bar-Ilan is no longer a road and has become a social concept. It signals a deep political controversy between the ultra-Orthodox and secularists. It is not merely a conflict about freedom of movement on Friday and Saturday on Bar-Ilan Street. Fundamentally, it is a harsh conflict about the relationship between religion and state in Israel, a fierce dispute about the character of Israel as a Jewish or democratic state…. Our concern is not the social dispute; our considerations are not political. Our interest is the legal controversy; our considerations are normative. We do not deal with the relationship between the ultra-Orthodox and secularists in Israel; the issue for us is not the

relationship between religion and state in Israel…. Our interest is simply Bar-Ilan Street; our interest is the mandate of the Central Signposting Authority and the latitude of its discretion. Our concern is the relationship between freedom of movement on one hand, and harming religious sensibilities and a religious way of life on the other." HCJ 5016/96, *Lior Horev v. The Minister of Transport*, PD 51(4) 1, 15. This is an instance of the Supreme Court's awareness of the limitations of legal discourse: the Court is required, against its better interests, to cope with cultural duality. It is required, against this matter's better interests, to do so in a symbolic and highly publicized case, by examining how the Central Signposting Authority exercises its discretion.

65. In *Society and Law in Israel*, Sagi develops an important conceptual distinction. The rights discourse resorts to the legal system and to arguments drawn from legal language. This is a discourse between plaintiffs and defendants, in which the meeting with the other touches on a conflict of interests, and the relationships between the parties are hierarchical and asymmetrical. By contrast, an identity discourse evolves between individuals who do not ascribe characteristics and do not apply categories to the other, allowing the self and the other to meet in their "concrete fullness." In this discourse, people talk, listen, confess, and tell. They are interested in the other and in developing a mutual dialogue, based on an understanding of their unique identity. Sagi therefore states (27): "The social and interpersonal dynamic that develops in a public discourse confined to a context of rights is strikingly different from those evolving in an identity context. When a discourse of rights is dominant, the parties have clearly lost their sense of solidarity and of personal attachment. A rights discourse points to self-seclusion and possibly alienation. The law predicated on this discourse is the product of a balance of power. It cannot provide

a basis for social solidarity nor can it replace the intricate web of personal relationships, and society comes perilously close to losing its connecting bonds. In these circumstances, the rights discourse both confirms and accelerates the centrifugal processes of closure and social collapse."

66. In the past, Israeli society had evinced considerable trust in its Supreme Court. A majority of the Jewish public held that judicial rulings were fair, egalitarian, wise, and ethical, and the Court was perceived as an all-inclusive and non-particularistic institution. See Gad Barzilai, Ephraim Yaar-Yuchtman and Zeev Segal, *The Israeli Supreme Court and the Israeli Public* [Hebrew] (Tel Aviv: Papyrus, 1994). Over the last few years, the public, the media, and the professional community have intensified their attacks against the Court. If support for the judiciary has indeed weakened, this could imply the fulfillment of Dan Avnon's prediction: "When the Court rules on the content of the expression 'the values of the State of Israel as a Jewish democratic state,' individuals and groups in Israeli society will argue that its interpretation represents only a narrow segment within it…. We can plausibly assume that the Court will provide the impetus for social change through which various groups in Israeli society will try to promote their views and their values, be it through petitions or through an attempt to appoint judges. Groups feeling that their access to the Court and ways to influence it are blocked will become alienated from the judiciary and turn their backs on an institution implementing a fundamental principle of the democratic regime, the principle of equality before the law." Dan Avnon, "The Non-Democratic Aspect of Basic Laws on the Issue of Human Rights" [Hebrew], *Politika* 2 (1998): 53, 60.

67. Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law* [Hebrew] (Tel Aviv: Ma'agalei Da'at, 1993). Ruth Gavison offers another description of the changes affecting

the Court. In her view, this is a change in the perception of its judicial role. The older, more restrictive approach, which had viewed the judge as responsible for fair adjudication between parties, was replaced by a broader approach, which views the judge as responsible for leading the entire society in the right moral direction. See Ruth Gavison, Mordechai Kremnitzer and Yoav Dotan, *Judicial Activism—For and Against: The Role of the High Court of Justice in Israeli Society* [Hebrew] (Jerusalem: Magnes Press, 2000), 74-91.

68. On Justice Barak's perception of balance, see Barak, *Constitutional Interpretation*, 215-227.

69. For instance: the Court is requested to rule on whether a bereaved family has a right to depart from the uniform engravings on military tombstones. The judges do not assume that an answer is necessarily available in extant law, and bring into the discussion the clashing values (uniform inscriptions as opposed to the principle of human dignity manifest in the wish of the bereaved family), weigh one against the other, and decide. See HCJ 5688/92, *Weckselbaum v. Minister of Defense*, PD 47(2) 812. Throughout all stages of the judicial procedure—defining the question, configurating it in value categories, encoding these categories in legal codes, assigning weight to each value, and deciding on the balance between clashing values—the judges sitting in the case implement judicial discretion.

70. Although judges exercise personal discretion when ruling, they cannot decide arbitrarily. According to Barak's theory of judicial interpretation, the balancing task must fit criteria of reasonableness. Reasonableness refers to the appropriate weight to be assigned to clashing interests and values. The criterion for determining the relative importance of a value or an interest depends, *inter alia*, on the views endorsed by the enlightened public. The social importance that the enlightened public

ascribes to these values, rather than the judge's private opinions, determines their weight when searching for a balance. Thus, the judge's personal interpretive task acquires its objective dimension. See Barak, *Constitutional Interpretation*, 227-241. Justice Elon holds that "the concept of an 'enlightened' public or individual is indeterminate and altogether lacking in any content." See CA 506/88 *Shefer v. The Government of Israel*, PD 48(1) 87. Elon argues that the test Barak proposes is inappropriate, since it is thoroughly vague. Barak rejects this critique, although he himself admits that the potential guidelines that can be drawn from the worldview of the Israeli enlightened public are vague. Yet, although "it does not provide the judge with a road map … it does provide a compass concerning the correct direction of the judicial ruling." Barak, *Constitutional Interpretation*, 240. It appears that the gap between the general guideline providing direction and the precise navigation of the judicial decision toward a safe haven in every specific case must be bridged by the judges through their personal interpretation of actual reality. Judges must function within consensual value settings, but beyond this general directive, they cannot apply any objective truth and must resort to their personal scale of values.

71. Avi Sagi, *Elu va-Elu: A Study on the Meaning of Halakhic Discourse* [Hebrew] (Tel Aviv: Hakibbutz Hameuhad, 1996), Part 2.

72. Thus, for instance, many scholars have tried to disclose the theoretical foundation underlying many famous disputes between the House of Shammai and the House of Hillel. For an extensive review of the pertinent literature, see Haim Shapira and Menachem Fisch, "The Debates between the Houses of Shammai and Hillel: The Meta-Halakhic Issue" [Hebrew], *Tel Aviv University Law Review* 22 (1999): 461, 463-468. All these research endeavors share an attempt to explain the archetypal

controversy between the two houses, extending over more than three hundred issues, by tracing characteristics specific to each of them on a variety of issues: ethics, politics, social stratification, conservatism as opposed to openness to change, different evaluations of the importance of the physical as opposed to the spiritual element, and so forth.

73. These two views on the character of Halakhah are illustrated in the controversy between Haim Soloveitchik and David Hartman on the appropriate classification of Maimonides' *Epistle on Martyrdom*. In this epistle, Maimonides rules contrary to the formal halakhic principles regulating the event discussed in it. Soloveitchik, therefore, who adheres to a formalistic view of Halakhah, holds that the *Epistle on Martyrdom* is not a halakhic document but a propaganda piece. See Haim Soloveitchik, "Maimonides' *Iggeret Ha-Shemad: Law and Rhetoric*," in *Rabbi Joseph H. Lookstein Volume*, ed. Leo Landman (New York: Ktav, 1980), 281-318. David Hartman, however, holds that the deviation from the rules does not invalidate the legal-halakhic character of the *Epistle on Martyrdom*. In his view, Halakhah is not a closed system of rules; it also exercises human discretion, taking into account not only the content of halakhic rules but also their purpose. See David Hartman, "Maimonides' *Epistle on Martyrdom*" [Hebrew], *Jerusalem Studies in Jewish Thought* 2 (1982-1983): 362. For the description of the dispute and its characterization in this light see Yair Lorberbaum and Haim Shapira, "Maimonides' *Epistle on Martyrdom*: The Hartman-Soloveitchik Controversy in Light of the Philosophy of Law" [Hebrew], in *Renewing Jewish Commitment*: *The Work and Thought of David Hartman*, eds. Avi Sagi and Zvi Zohar (Jerusalem and Tel Aviv: Shalom Hartman Institute and Hakibbutz Hameuhad, 2001), 1: 345-373.

74. The process whereby halakhists exercise discretion is complex. They must ask, *inter alia*, what is the general norm relevant to

the case in point? What is the preferable interpretive choice when applying the norm? What weight should be ascribed to extra-halakhic values (such as moral considerations)? For a discussion of these issues see Avi Sagi, "Halakhah, Discretion, Responsibility, and Religious-Zionism" [Hebrew], in *Between Authority and Autonomy in Jewish Tradition*, ed. Avi Sagi and Zeev Safrai (Tel Aviv: Hakibbutz Hameuhad, 1997), 195.

75. Sagi, *Elu va-Elu*, 107-117.

76. See, for instance, Pinhas Shiffman's formulation: "We see recourse to a defense mechanism that denies the freedom of halakhic man. Often, we see the halakhist deluding himself into believing that he is 'compelled by the word of God': the text forces itself upon him, and he is not allowed to change it. No one can object, then, since he was urged to reach a conclusion directly compelled by a binding text. He thereby feels he is exempt from any responsibility for the gravity of consequences forced by Halakhah. The judge, as it were, can only go by what he sees in the language of the text, this is the text's decree, and justice must be done." Pinhas Shiffman, "Halakhic Man is Sentenced to Freedom" [Hebrew], in *Between Authority and Autonomy*, 244.

77. The problem is that the methodology of the halakhic ruling—which includes an analysis of the facts, the postulation of several hypotheses, reliance on precedent and references, and the formulation of a rationale—may expose it to substantive rebuttals. Discussion and controversy encourage halakhic pluralism. Some hold that this is the background of the increasingly widespread use of the *da'at Torah* notion in recent times. By diverting the decision from the "halakhic ruling" context to the *da'at Torah* context, the halakhist can express his view as an authentic Torah outlook that does not require discussion, analysis, and clarification, and does not require the exposure immanent in the methodology of halakhic rulings.

See Lawrence Kaplan, "*Daas Torah*: A Modern Conception of Rabbinic Authority," in *Rabbinic Authority and Personal Autonomy*, ed. Moshe Sokol (Northvale, N.J.: Jason Aronson, 1992), 1. The notion of *da'at Torah*, then, does not draw its power and legitimacy from the quality of the argument, but from an a priori decision to accept the contender's argument as the one and only truth, the view of the Torah itself.

78. Soloveitchik describes the way endorsed by his grandfather, R. Haim from Brisk, concerning halakhic debate: "He first cleansed Halakhah of all outside influences. In his view, all attempts at psychologizing and historicizing must be firmly rejected.... Halakhic thinking flows along a unique course of its own. Its laws and principles are not factual-psychological, but ideal-normative, as in logical-mathematical thought. The truth or efficiency of halakhic judgments is determined by the ideal norm to which the halakhic judgment and its truth cling, rather than by any retrospective factual causality. The accuracy of logical-mathematical thinking is not measured by psychological factors. Halakhah need not reflect the character of the halakhist, nor do changes of circumstances or historical situations leave their mark upon it. Hence, according to this method, Halakhah cannot express thinking patterns borrowed from other realms. It has its own rhythm, which cannot be changed. It is pure thought, distilled from spiritual sources. It is not dependent on external stimuli and on the human reactions to them." Joseph Dov Soloveitchik, *Divrei Hagut ve-Ha'arakha* [Hebrew] (Jerusalem, WZO, 1981), 76-77.

79. Thus, for instance, Abraham Yeshayahu Karelitz (known as *Hazon Ish*) claims that morality is not personal but derives from Halakhah: "Moral duties are sometimes one with halakhic rulings, and Halakhah tells us what is allowed and what is forbidden concerning ethics." See *Sefer Hazon Ish: Emunah u-Bitahon* (Tel Aviv: Sifryiati, 1984), 21. When individuals

face a moral decision, their only criterion for choice is the halakhic ruling rather than their personal moral stance: "It is a moral obligation for a person to try and implant in his heart the following crucial principle: when encountering someone, he should measure with the spirit level of Halakhah who is the pursuer and who the pursued, because the study of ethics imparts love and compassion for the pursued, and bitter anger against the pursuer. How great is the hindrance when we mistake the pursuer for the pursued and the pursued for the pursuer, and the truth will only be found in the books of halakhists that our sages, may their memory be blessed, delivered to us from the heights of their wisdom" (22). Further on, he states: "The definitions of robbery and plundering are not determined by human beliefs but only by the laws of the Torah, and whatever is against the Torah is robbery even if people feel it is not so, and whatever abides by the Torah is lawful, even if it contradicts human beliefs" (27). For a systematic analysis of whether Jewish tradition acknowledges the existence of a morality independent of God's command, see Avi Sagi, *Judaism: Between Religion and Morality* [Hebrew] (Tel Aviv: Hakibbutz Hameuhad, 1998).

80. *Mishnah Avot* 5:22, and *Avot de-Rabbi Nathan*, Version B, ch. 27, s.v. *u-mah-hu*.

81. This formula, although used quite routinely, does not appear in the sources in this form and meaning. The meaning of the talmudic formulation closest to this notion, "is there anything written in the Hagiographa to which allusion cannot be found in the Torah?" (*TB Ta'anit* 9a), is entirely different. Rashi *ad locum* explains: "Because the Torah is the foundation of the Prophets and Hagiographa, and all rely on the Torah."

82. Aharon Barak, "Judicial Philosophy and Judicial Activism" [Hebrew], *Tel Aviv University Law Review* 17 (1993): 475, 477.

83. See the opinions of Justices Aharon Barak and Menachem Elon in HCJ 1635/90, *Zerzevski v. The Prime Minister et. al.,* PD

45(1)749. Despite his categorical opposition to the approach that presumes the totality of state law, Justice Elon seems to have adopted an approach that presumes the totality of Halakhah. Reacting to Justice Barak's view that "there is no action that is not covered by the law," Justice Elon states: "My colleague's opinion is correct and appropriate with only a slight change, namely, wherever the term 'law' appears, it should be replaced by the term 'Halakhah.' Halakhah is indeed a system of prohibitions and dispensations covering all human actions. Concerning every action, it may be said whether it is allowed or forbidden according to the Halakhah; there is no 'halakhic vacuum'" (767). For an extensive discussion of questions bearing on the scope of both legal systems, see Yedidia Z. Stern, "The Halakhic Approach on Political Affairs" [Hebrew], *Mishpat Umimshal* 4 (1997): 215, 217-229. In a private conversation, Justice Elon clarified he had not intended to support the totality of Halakhah, but only to state that the scope of Halakhah is broader than that of state law.

84. HCJ 1635/90, *Zerzevski v. The Prime Minister et. al*, at 773.

85. In this context, see Gershon C. Bacon, "*Da'at Torah and Birthpangs of the Messiah*" [Hebrew], *Tarbiz* 52 (1983): 497.

86. Thus, for instance, R. Abraham Shapira, the former Chief Rabbi of Israel, holds that the sage enjoys a status similar to that of the prophet regarding the assessment of reality. See his "Rabbinic Authority" [Hebrew], *Tehumin* 8 (1987): 363-364. In his view, the appeal to *da'at Torah* is suitable after attempting to solve the problem by applying common sense.

87. See, for instance, Shalom Dov Wolpo, *Da'at Torah: On the Situation in the Holy Land* [Hebrew] (Kiryiat Gat: n.p., 1981), based on conversations with the late leader of the Habad movement, R. Menachem Mendel Schneersohn of Lubawitz. Throughout the book, the terms "*da'at Torah*" and "halakhic ruling" are used interchangeably. In his preface, the editor

states: "We considered it our duty to publish this book and inform Torah students concerning the explicit halakhic view." He also states that returning the occupied territories and entering into peace agreements is halakhically forbidden (8). In the introduction, the editor states that *da'at Torah*, which is the subject of the book, rests on three elements: the rabbi's vast halakhic knowledge; his knowledge about the military, defense, and political situation, and the fact that "God is with him" (17-19).

88. Concerning the halakhic ruling issued by rabbis identified with religious-Zionism, which called on IDF soldiers to refuse orders if required to retreat from occupied territories in Judea and Samaria, R. Israel Rosen states: "It is well known that the famous proclamation is entitled '*da'at Torah*'.... Let me clarify from the outset that the concept of *da'at Torah* is far more valid than a 'ruling' or a 'law' and overrides them.... *Da'at Torah* is never explained; it is like an angelic decree and relies on rabbinical authority and on faith in the sages.... *Da'at Torah* is the message resonating in the greatness of 'a sage is preferable to a prophet'.... We can definitely enter into halakhic discussions concerning the limits of compliance with the kingdom [state law], but *da'at Torah* cannot be contested." Israel Rosen, "*Da'at Torah* Is above a Ruling" [Hebrew], *Hatsofeh*, 20 May 1994.

89. Jacob Katz holds that the term *da'at Torah* "is meant to confer legitimacy on the halakhist's role, beyond the usual domain of halakhic procedure." He illustrates this through historical examples of the halakhist's new functions beyond the halakhic realm. See Jacob Katz, "*Da'at Torah*: The Unqualified Authority Claimed by Halakhists," in Sagi and Safrai, *Between Authority and Autonomy*, 95.

90. See, for instance: "The prevalent view among contemporary halakhists is that the rulings of Israeli courts, although made by Jewish judges, do not abide by the law of the Torah but by a

legal system that Torah law considers alien. Since this forestalls the Torah's tendency to solve all legal questions according to Jewish law, recourse to them [state courts] is forbidden not only on grounds of 'before them and not before laymen' but also on grounds of 'before them and not before idolaters'." See Eliav Shochetman, "The Halakhic Status of Israeli Courts" [Hebrew], *Tehumin* 13 (1992-1993): 337, 346.

91. Yaakov Ariel, the Chief Rabbi of Ramat Gan and a religious-Zionist leader, writes as follows: "All halakhists, including religious-Zionist ones, view it [the judicial system and all its components—Y. Z. S.] as *arka'ot* [Gentile courts], which Halakhah strictly forbids." See Yaakov Ariel, "Not at a Crossroads: 'The Beginning of Our Redemption' through the Test of Time" (Hebrew), *Tsohar* 5 (2001): 95, 108 (note 15).

92. The late Justice Haim Cohen related to a directive published at the time by then Chief Rabbi Ovadia Yosef concerning the prohibition of turning to the courts: "The most disgraceful aspect of this directive is its timing. It is symptomatic of the disrespect and the contempt that has recently characterized the attitudes of religious circles and their spiritual and political leaders toward the judiciary or, if one may say so, this is a supposedly halakhic form of deriding and denigrating the judges of Israel. Its timing attests to a link—not even concealed—to the abuse and invective poured upon 'secular' judges throughout the ultra-Orthodox press. This is nothing but a softened and revised, though very authoritative, version of the slander and the public defamation of the judiciary in the public sphere." Haim Cohen, "Gentile Courts and Jewish Values," *Mishpat Umimshal* 4 (1997): 299, 300.

93. As noted in ch. 3 above, cases wherein the judiciary chose to fill statutory lacunae by recourse to the "principles of Israel's heritage" are hard to find. The use of Jewish legal sources is usually confined to religious judges (obviously except when

the law in force relies directly on religious sources, such as family law). The Court often resorts to comparative law, drawing examples from all over the world, but does not look for inspiration in "its own backyard." Chief Justice Barak stated that in principle, the halakhic dimension is one of the two main features of the State of Israel as a Jewish state (the other being the Zionist dimension). This statement may prove important in changing the feeling now prevalent among both the religiously observant and secularists, that state law does not recognize Halakhah, but this interpretation has yet to be concretized in a significant yield of legal rulings. See Barak, *Constitutional Law*, 330-331.

94. As is the case, for instance, in the context of court rulings seeking to limit the authority of the rabbinical court. The deeper layers of this controversy emerge, in fascinating ways, in HCJ 3269/95, *Yosef Katz v. The Regional Rabbinical Court in Jerusalem*, PD 50(4) 590. The case hinged on the rabbinical court's authority to issue a "refusal writ" against a man who had refused to try a case that did not deal with personal law before it. Is the rabbinical court allowed to act on such issues as a private court, bound by Torah law (unlike its usual, authorized functioning as a state institution)? Justice Yitzhak Zamir points to the fact that the rabbinical court is a government institution, created by the State of Israel. Justice Zvi Tal views the rabbinical court as part of a long chain of rabbinical courts abiding by Torah law since "time immemorial." In his perception, the laws of the State of Israel merely grant official authorization to the endeavor of the rabbinical courts, which had existed before the establishment of the state. Indeed, this authorization extends only to the substantive authority handed over to the rabbinical courts by the law (namely, issues of personal law), but this does not detract from the power of these courts to implement Halakhah in other issues, beyond the explicit authorization of the state. Justice

Zamir, who is joined by Justice Dorner, dissents: the rabbinical courts did exist in the Diaspora and in the Land of Israel before the creation of the state, but "this makes no difference. Every public body, including every court, can presently wield only the authority that the law confers on it today. Even if in the past its authority was much broader, it cannot retain this authority if the present law has narrowed it" (par. 15). Furthermore, "even if the rabbinical court is allowed to perform a certain act by Halakhah or by tradition … this is not enough for this court to have the authority to do so. As a state institution, the rabbinical court must act within the authority it has been granted within state law"(par. 14). Justice Tal finds this formulation infuriating: "In order for the actions of the rabbinical court on matters of marriage and divorce to be recognized and accepted by all, even by the most radical ultra-Orthodox, the rabbinical court of the State of Israel must be a rabbinical court for all intents and purposes, as it has been since the days of Moses. Otherwise, it will become a kind of 'puppet rabbinate,' like those 'puppet rabbis of the kingdom' in Tsarist Russia, who were not considered spiritual leaders and served as registrars of marriage and divorce, births and deaths, with no one taking their 'rabbinic' status seriously. The Halakhah itself does not recognize a strange creature of this kind, a rabbinical court devoid of authority, unauthorized to deal with all matters in the Torah and in life, but only with one issue" (par. 2). The controversy between Justice Zamir and Justice Tal appears to be deep and fundamental: it deals with the rabbinical court's source of legitimation, and only then with its scope. According to Justice Zamir, on any issue except marriage and divorce, the court functions as an arbiter, whose authority follows from the parties' agreement to appear before it. By contrast, Justice Tal holds that the authority of the courts rests on divine law, as agreed in Jewish tradition since time immemorial. In his view, requiring the parties' signature

on an arbitration writ is not a condition of the rabbinical court's authority, which ensues naturally from Halakhah. The only purpose of the arbitration writ is to enable the use of state instruments to enforce the ruling on those trying to evade it. Justice Zamir wishes to bind the rabbinical court by state frameworks, whereas Justice Tal views these frameworks only as an additional, later feature, added to the central characteristic of the rabbinical court as a halakhic institution according to Jewish law. The practical implication of this controversy touches on the very core of the rabbinical court's ability to regulate reality according to halakhic principles; according to the majority decision, the rabbinical court cannot issue a compelling halakhic ruling on matters beyond its realm of authority (barring the absence of the parties' signature on an arbitration writ) even when the parties appearing before it are observant Jews. Furthermore, it also states that the refusal writs issued by the rabbinical court are invalid. According to Justice Tal, the rabbinical court is allowed to exercise the full force of Torah law (even barring agreement to the arbitration), including the implementation of religious sanctions, such as issuing a refusal writ. Finally, Justice Tal's objection to the involvement of the Court in an issue that seems to him unnecessary is worth noting: "the duty of mutual respect between judicial instances requires that the Court should apply restraint when interfering in the activity of the rabbinical court, without pushing aside and curtailing the latter's authority" (par. 1).

95. For a general discussion, see Zeev Segal, *Standing before the Supreme Court* [Hebrew], second edition (Tel Aviv: Papyrus, 1993).

96. Indeed, the expansion of standing rights, at least so far, extends only to public law. The distinction is as follows: "The attitude of one individual to another differs, after all, from the attitude of the authorities toward the individual. Although a relationship

between private individuals does entail a duty to behave in good faith, one is not the trustee of the other. Not so in public law. The public authority is the trustee acting for the individual. In areas of public law, every individual has a right to demand that the government act within the framework of the law." See Aharon Barak, "The Idea of Judicial Activism: Judicial Philosophy and Judicial Activism" [Hebrew], *Tel Aviv University Law Review* 17 (1993): 475, 488.

97. "The judge's approach to rules of standing conveys his view of the role of the court in a democratic society and of its standing vis-à-vis other branches of government." Ibid.
98. For this definition, see Aharon Barak, *Judicial Discretion*, trans. Yadin Kaufmann (New Haven: Yale University Press, 1989), 113.
99. "The activist judge clearly experiences the need to amend the law; he is convinced that he knows the correct way of amending the law; he is impatient and unwilling to wait until the law is amended, if at all, by others; and he is willing to assume responsibility for deliberately and explicitly amending the law through a judicial ruling. In brief, judicial activism, as far as it entails changes in the law, expresses an intent to reform the law through the judiciary." Yitzhak Zamir, "Judicial Activism: The Decision to Decide" [Hebrew], *Tel Aviv University Law Review* 17 (1993): 649.
100. Since these value changes are taking place in a society in crisis, considerable sections of the public will indeed identify in the value decisions of the Supreme Court a concrete threat to their own values. Activism, in the sense of changing the law, alienates segments of the public not only from the specific ruling but also from the institution that creates it—the Supreme Court.
101. See, for instance, Ariel Bendor, "Justiciability in the High Court of Justice" [Hebrew], *Mishpatim* 17 (1987): 592.
102. See, for instance, Dan Maler, "The High Court of Justice: The

Secular Israelis' Option in the Fight against Religious Coercion" [Hebrew], *Free Judaism* 14 (1999).

103. "The civil judicial system is now viewed by a considerable portion of the Israeli population as an active participant in a political debate, an actor identified with the secular liberal segment of Israeli society." See Menachem Hofnung, "The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel," *American Journal of Comparative Law* 44 (1996): 585, 602. Yet, the Court's tendency to assume a responsibility incumbent on other branches of government extracts a heavy price. Part of the public identifies this tendency as a deliberate effort by an elite, entrenched in the legal system, to impose its scale of values without testing them in the political marketplace of ideas. They view this as a power struggle between the Knesset, which is a representative system, and the Court, which is not. Critics do not accept the claim that judicial decisions are professional (so that the Court need not be representative), and that the judicial effort seeks to arrive at a result that will objectively reflect the values accepted in Israeli society. They describe Knesset members petitioning the Court as "bypassing the Knesset," seeking assistance among ideological allies and bypassing the democratic procedure that should purportedly come to the fore in the Knesset's political negotiations. Objections are voiced not only by political and cultural representatives of special minority groups in Israeli society (the ultra-Orthodox, modern Orthodox or Arab constituencies) or by interested parties, but also resonate increasingly in the media, in academia, and in various professional groups, including the legal community.

104. The politicians' obvious interest is to prevent the seepage of decision-making powers from the political into the judiciary realm and to protect, as far as possible, the autonomy of the game and of the rules of the game in which they all participate.

Quite obviously, although the two systems coexist, they also compete.

105. "Until the mid 1970s, politicians turned to the Court only in rare cases and only as a last resort.... [In the course of the 1980s] Israeli courts became quite a tempting option for opposition parties and individual politicians ... trying to implement their own agendas through litigation, as well as for other players in the public arena, such as public interest groups.... The highly activist tendencies of the HCJ (the Supreme Court sitting as the High Court of Justice) with respect to governmental policy-making served as an invitation for many politicians (mainly from opposition parties) to challenge in Court all sorts of decisions made either by the cabinet or by other administrative agencies.... [P]etitioning the Court became quite an attractive arena for members of the opposition who wished to challenge government policies." Menachem Hofnung and Yoav Dotan, *Litigating Legislators*: *Political Parties in the Court* (unpublished manuscript).

106. "The growing strength of the non-formalistic approach in judicial rulings means that the Court has become increasingly vocal concerning the values that should prevail in the various areas of life in Israel. The Court is therefore 'activist' in the sense that it places itself clearly and prominently in the position of being the one expected to decide on the ethical content of life in Israel (even if not directly at the expense of other branches of government). Broadening the scope of legal obligations means that behaviors that had previously been viewed as events on which the legal system has nothing to say, are today viewed as legally regulated. The Court is thus activist in the sense that it expands the scope of application of legal norms and the scope of the domain controlled by the legal system." Mautner, *The Decline of Formalism*, 108.

107. This procedure involves high costs. See Ruth Gavison, "The

of Halakhah." See Abraham Yitzhak Kook, *Epistles* [Hebrew] (Jerusalem: Mosad Harav Kook, 1962-1965), nos. 103, 123. It could be that precisely because of the abundance of value considerations explicitly manifest in aggadic discourse, Aggadah became less attractive to contemporary scholars, to *yeshivah* students and to halakhic authorities. On the relationship between Aggadah and Halakhah see, for instance, Yair Lorberbaum, *Imago Dei: Rabbinic Literature, Maimonides, and Nahmanides* [Hebrew], Ph.D. diss. (Jerusalem: Hebrew University, 1997); Zipora Kagan, *Halakhah and Aggadah as a Code of Literature* [Hebrew] (Jerusalem: Bialik Institute, 1988); Shulamit Almog, "Law and Literature, Halakhah and Aggadah" [Hebrew], *Bar-Ilan Law Studies* 13 (1996): 432-435.

112. In the halakhic homilies that Halbertal discusses, the sages reveal great awareness of their own value choices. The schematic language structure of some of the homilies indicates that the sages were aware of alternative interpretations, and even raised them as options, but rejected them if they contradicted the values they wished to promote. See Halbertal, *Interpretive Revolutions*, 171-183.

113. Halbertal proves that in the issues he discusses, the rabbis' value preferences change the contents of their halakhic rulings: "The various *halakhot* evolving in the course of interpretation reflect moral attitudes that had played a crucial role in the interpretation process. The moral realm, then, rather than beside or beyond Halakhah as an extra-legal consideration, is part of it through the act of interpretation and in its course. The crucial function of the moral domain in the shaping of Halakhah is evident in its decisive role in the choice between various hermeneutical options or in the creation of novel readings.... The perception of Halakhah as a cluster of specific commandments from which to draw conclusions through the application of a formal hermeneutical system is thus groundless." Ibid., 172.

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114. See Menachem Elon, *Jewish Law*: *History, Sources, Principles*, trans. Bernard Auerbach and Melvin J. Sykes (Philadelphia and Jerusalem: Jewish Publication Society, 1994), Part 2.

115. R. Moshe Sofer, known as *Hatam Sofer*, was the first to use a defined halakhic injunction (forbidding the "new") to formulate a general ruling objecting to innovation *per se*. See, for instance, *Responsa Hatam Sofer*, Part 1 (*Orah Hayyim*), no. 181.

116. For a definition of the threat that the "new" poses to Jewish tradition, see Ravitzky, *Freedom Inscribed*, 166-167.

117. Furthermore, judicial systems can refrain from issuing rulings on questions they categorize as non-justiciable. Obviously, this option entails a significant cost: by relinquishing the regulation of specific issues, the law may leave them open to be regulated by other agencies, free of supervision.

118. Whatever the conceptual view one endorses concerning the totality of the law or of Halakhah, any emphasis on theoretical approaches should be discouraged. Now that normative duality threatens social integrity, airing these conceptual views could have substantive damaging effects. A more cautious formulation, even if not fully suited to the jurisprudence of the halakhic philosophy some may embrace, would be willing to recognize that the law and Halakhah do not necessarily uphold a normative perception—forbidden or allowed—concerning every human situation. In actual reality, a gap prevails between (maximalistic) declarations concerning the scope of law and Halakhah and their (qualified) implementation in both legal systems. The substantive concession required from each system is not unbearable, nor can it undermine either of them. State law and Halakhah should both show to each other, and together to the public, a "smiling face," which leaves a human space without normative regulation. Such a space does exist in practice, and should be acknowledged.

119. Note Justice Landau's remarks on the "who is a Jew?" issue:

"Does anyone seriously think that nine learned judges will be able to issue a majority, or even a unanimous, decision on a political-ideological problem of this kind, after the well-known request of the prime minister to dozens of Jewish scholars in 1958 led to nothing?" HCJ 68/58, *Shalit v. The Minister of Interior et. al.*, PD 23(2) 477, 522. Questioning the suitability of the judge's or the halakhist's training for decisions on matters of principle arising from cultural duality is not meant to undermine their authority or their formal qualifications. Rather, the purpose is to call attention to the substantive gap between the formal legal training (or in the case of a halakhic sage, the knowledge required for rabbinic ordination) of the person in authority, and the background that is relevant for making this decision. This gap is a necessary outcome of the decision of human societies to entrust the power to settle conflicts between social groups to judges, who are service providers specializing in decision-making (as opposed to specialists on the matter at stake in the conflict). This gap cannot be closed, but we must not ignore its very existence. When we develop expectations from normative decisions, we should be fully aware of the substantive limitations that the educational training of both judges and halakhists impose on this process.

120. The deceit entailed by reliance on normative solutions as a tool for shaping Israeli society has become increasingly obvious. Irresponsible attempts seeking a breakthrough or a *coup de grâce* in the social arena by resorting to a normative weapon may still lie ahead. Both might initiate them. Secularists still brandish the ultimate Armaggedon weapon: a unilateral constitution, broad and ironclad, to be imposed on future generations by a random Knesset majority. The religious side is still involved in rearguard battles, meant to observe modern reality and determine the attitude toward it solely through the limited prism of a narrow and preset inventory of halakhic categories as interpreted in previous generations. A wider understanding, however, seems

to be ripening concerning the hopelessness of the endeavor to stretch the cover of the normative bubble far beyond its logical borders.

121. Although responsibility for the whole is supposedly incumbent on all its parts, I do not believe that in the Israeli reality we can expect any of these communities to withdraw from its position out of consideration for the common interest. Furthermore, the very search for a compromise, as opposed to an agreement, is inappropriate, since it may be opposed to the basic integrity of each community's inner outlook.

122. This is also Levontin's conclusion concerning the solution of "the riddle of twin worlds": "The multiple mirrors are not a passing malaise but the embodiment of existential pluralism. The solution to the riddle is to acknowledge the long-term existence of two or more entities; it seems best to accept this solution gracefully, since nothing is more divisive than the hopeless effort to impose unity." Levontin, "A Riddle of Twin Worlds," 16.

123. On this question, see Sagi et. al., *Judaism: A Dialogue between Cultures*, 1-4.

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