

The Paradox of Human Rights Discourse and the Jewish Legal Tradition

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I INTRODUCTION

Nearly two decades ago, I was invited to contribute to a collection of essays convened to explore the possibility of “articulating a position of human rights on assumptions of humankind and of the cosmos other than those of Western liberal civilization.”¹ The project was self-consciously constructive: to creatively mine potentialities within a given religious tradition that could support certain desirable insights of modernity while maintaining a commitment to tradition and religious identity. The hope of the project was that, with sufficient effort and creativity, religions, no matter how diverse, would discover that human rights were, in some fashion, always already there. After all, religions were each, in different ways, concerned with human worth and flourishing even if they did not ascribe to the politics or philosophical anthropology of Western modernity. In the case of Protestant Christianity and other reformed religions, the leap clearly would be short, for certain basic assumptions about religion (as primarily concerned with belief rather than law or public practice and with private conscience rather than group cohesion or institutional authority) are most congenial to the worldview that gave rise to Western rights discourse in the first place. With respect to non-Western or non-reformed religions, especially competing law-based religions, the hermeneutic project would be vastly more complex. Indeed, translation and reinterpretation are all the more difficult in a self-conscious age already suspicious of liberal or reformed religion. So other denominations and religions would simply have to work harder to remain reasonably faithful to their traditional texts, traditions, and internal viewpoints.

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¹ Adam B. Seligman, “Introduction,” in *Religion and Human Rights: Conflict or Convergence*, ed. Adam Seligman (Hollis: Hollis Publishing Company, 2005), 11.

The conference also generated: Adam B. Seligman, ed., *Modest Claims: Dialogues on Toleration and Tradition* (Notre Dame: University of Notre Dame Press, 2004).

Suzanne Last Stone, “Tolerance versus Pluralism in Judaism,” *Journal of Human Rights* 2 (1) (2003).

Projects such as these have only proliferated in recent years among human rights advocates, civil society groups, and theologians. In turn, scholars within the growing field of critical human rights, such as Sally Merry and Seyla Benhabib, have provided new theoretical frameworks for supporting them. While Merry emphasizes how the idea of human rights becomes meaningful only through translation in specific cultural contexts into a distinct vernacular,² Benhabib, drawing on Robert Cover's idea of law's jurisgenerativity, emphasizes the inevitably interpretive character of human rights.³

In this chapter, I want to suggest that such efforts to reconcile human rights and religion are at risk of foundering because of two category mistakes highlighted by this volume of essays: The first mistake is the assumption that the human rights project, as it has evolved, is primarily about law – that is, a modern normative and political project. The second mistake is the assumption that “religions” such as Judaism – especially its non-reformed versions – are not law. I am not the first to observe that human rights, in pursuing a politics of meaning rather than of exchange, increasingly has taken on a structure that could be fruitfully compared to religion. As Mark Goodale has pointed out, the study of human rights as discourse increasingly has revealed “the way in which actors embrace the idea of human rights in part because of its visionary capacity, the way in which it embraces the normative and the aspirational.”⁴ Far from providing a common ground with traditional religions, I contend that the contemporary emphasis on the philosophical underpinnings of human rights has been largely detrimental to the original normative and political project of human rights and to a possible convergence between the human rights tradition and many non-Christian, non-reformed religions. The incontrovertible or absolute character of human rights blurs the division between secular morality based on unaided reason and the realm of the sacrosanct, inviolable, or the sacred occupied by religion. While the intention may have been for the creation of a common language of natural morality, it has led instead to ever more divisiveness, as adherents of religions perceive human rights discourse as imputing sacredness, understood as ultimate meaning or concern, where it does not belong.

My second argument, in turn, is that the legal dimension of traditional religions such as Judaism has been vastly underexploited in these various projects of reconciliation. Legal traditions almost invariably contain a variety of doctrines that enable an exchange of norms and smooth out conflict of laws between legal regimes. Judaism is no exception. Commonplace legal arguments and legal sources, such as respect for conventions and for consensus such as the custom of the nations, offer a more useful framework for creating a rapprochement between human rights and

² See Sally Engle Merry, “Transnational Human Rights and Local Activism: Mapping the Middle,” *American Anthropologist* 108 (1) (2006): 38–51.

³ See Seyla Benhabib, “Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty,” *American Political Science Review* 103 (4) (2009): 691–794.

⁴ Mark Goodale, *Human Rights: An Anthropological Reader* (Oxford: Blackwell, 2009).

religion when dealing with legally based religions, such as traditional Judaism (and, by some accounts, Islam)⁵ than appeals to biblical, religious imagery or an assumed common morality. Creating a rapprochement between human rights and traditional Judaism thus requires a double move: first, the retrieval of human rights as a lawyer's project – a normative project based on formal and informal conventions – and, second, the turn to legal doctrines and concepts within Judaism emphasizing the respect owed to international law and conventions, including informal law.

The chapter proceeds as follows: I will briefly survey what has happened in the discourse of human rights in the last several decades, focusing on developments that elide the difference between human rights as a modern secular political project (i.e., to extrapolate the concrete rights of citizens onto the international arena) and human rights as increasingly a quasi-religious project, or politics of meaning. I then offer a concrete example of the challenge of eliciting from Jewish sources, including from its most promising religious image – the creation of humans in the divine image – a common language of sanctity or a conception of rights equally held by all humans as such. That humans possess rights by virtue of being human alone detaches rights from the idea of desert, which I argue is central to the halakhic imagination. This does not mean that Judaism lacks a means of organizing life together with others, including on commonly recognized ethical notions, such as reciprocity. Reciprocity provides the crucial link to desert. Indeed, those thinkers within the halakhic tradition who have most advanced a discourse of human rights, such as Rabbi Hayyim David HaLevi, draw on a distinct tradition within Jewish legal thought that formulates duties owed to others around the ideas of reciprocity and recognition.

Finally, I will draw on Jewish legal sources to explore a different strategy of convergence between religion and human rights that emphasizes human rights as a purely political project revolving around consensus and convention. Indeed, there have been an increasing number of voices within the human rights tradition calling for a ratcheting down of the language of sacredness, of ethical universalism, of moral or ontological arguments, and a refocusing on human rights as a more limited international political project: a legal regime. Human rights, after all, as Adam Seligman writes, are a theory: "Though often treated as sacrosanct, they are but means to a further end . . . They are one way to live together based on some commonly acceptable notions of fairness and justice."⁶

II HUMAN RIGHTS AS A SECULAR POLITICAL PROJECT?

The standard history of the rise of human rights as a modern Western political project goes as follows: Talk of rights can be linked historically to the decline of the feudal order, the emergence of national states and market economies, and to the

⁵ See Sohail Hashmi, "Jihad and the Geneva Conventions: The Impact of International Law on Islamic Theory," in *Just Wars, Holy Wars, and Jihads*, ed. S. Hashmi (Oxford: Oxford University Press, 2000).

⁶ Seligman, "Introduction," 12.

invention of the autonomous individual in the European imagination at the origins of modernity. From political rights of peoples and minority groups, political, civil, and social rights became extended to individuals as citizens in the state and eventually conceived as held by humans as such, inviolate and inalienable.⁷ The discourse of human rights drew on diverse philosophic antecedents, from Locke and conscience to Kant and dignity and the reading of the self as a self-regulating agent. The common thread, however, was that identifying and securing human rights was a key political project of secular modernity and, as such, to be validated through public reason accessible to all.

What has changed? In order to make sense of the contemporary scene, it is useful to first distinguish between three expansive, modern visions of human rights that roughly correspond to three succeeding stages:⁸ The first is human rights as a legal regime consisting of hard law such as binding conventions and bills of rights. The second is human rights as a set of universal moral standards that apply to all people in all places, irrespective of their beliefs. In this view, rights are rooted in fundamental values shared by all human beings by virtue of their being human. While it is common to suppose that the idea of human rights as moral rights has driven human rights law, the relationship is primarily the reverse. The intense preoccupation with substantive moral theories today generally grew out of what William Twining calls the misguided view that human rights as a legal regime “can and should be founded on a coherent philosophy or ideology” – on the straightforward embodiment of moral universalism. The fact, however, of diversity of beliefs on the ground led to the third vision: discourse ethics, which seeks to shift the conversation to “rights talk” as a form of discourse in public reasoned discussions that provides a framework for argument across societies.⁹

In all of these versions, however, the discourse is almost always centered on rights and the individual human being is viewed as the basic legal subject and unit of morality. This language of human rights has become the dominant mode of public moral discourse, replacing such discourses as distributive justice, the common good, and solidarity. Indeed, it has become something of a faith of its own. And in the course of constituting itself as a quasi-faith, certain intellectual trends within the discourse of human rights have become clearer or, at least, far more prominent. The most pertinent for my purposes is an increased blurring of the line between religion

⁷ I rely here primarily on John Clayton, “Human Rights and Religious Values,” in *Religion and Human Rights: Conflict or Convergence*, ed. Adam B. Seligman (Hollis: Hollis Publishing Company, 2005). Other stories of origin have been told, some of which are discussed in the body of the chapter. See Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton: Princeton University Press, 2008); Max Stackhouse, “Why Human Rights Need God: A Christian Perspective” in *Does Human Rights Need God*, eds. Barbara Barnett and Elizabeth M. Bucar (Grand Rapids: Wm. B. Eerdmans Publishing Company, 2005).

⁸ See William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009).

⁹ *Id.*, 180.

and the secular and, in its wake, an increased confusion with respect to the question whether human rights is still a modern secular project or something else altogether.

Jürgen Habermas's "post-secular" turn was one step toward this blurring of boundaries.¹⁰ In his 1981 *Theory of Communicative Action*, Habermas presented the modern disenchantment and disempowerment of the domain of the sacred as an unequivocal gain for humanity. Now, however, Habermas has called, among other things, for secularly minded citizens to engage critically, along with their religious compatriots, with the cognitive contents of religion.¹¹ More to the point, he calls on philosophy to open itself to – and utilize for its own projects – the power of religious imagery and narrative. Among Habermas's cited reasons for doing so is the developments in biotechnology, which threaten an instrumentalization of human nature that fundamentally endangers our understanding of ourselves as members of the human species. Resurgent religion and the events of the September 11 terror attacks also prompt the question whether modernization can be rescued by purely secular means. Critical engagement with religious content to produce images, intuitions, and insights are, of course, intended to enrich secular projects – not validate religious truth claims, or lead to greater convergence between religious traditions and modern projects. On this Habermas is clear. The salvaging of religious images, narrative, and moral intuitions occurs in the public sphere – the sphere of public opinion in the weak sense – and not in the strong arena of democratic politics.¹²

Yet, putting aside the questions whether the instrumental turn toward religion is good for religion¹³ or coherent when shorn from any connection with metaphysical assumptions or beliefs,¹⁴ in the context of human rights discourse, one could argue that there is already a deep – perhaps too deep – convergence between the modern secular project of universal human rights and religious images via Christianity. The recent revival of Paul as a political figure in European intellectual discourse in the wake of post-secular philosophy is telling. Consider Alain Badiou¹⁵ and Slavoj Žižek's calls to the political left to discover the radical universalism of

¹⁰ This turn is analyzed in Maeve Cooke, "Salvaging and Secularizing the Semantic Contents of Religion: The Limitations of Habermas's Post-Metaphysical Proposal," *International Journal for Philosophy of Religion* 60 (2006): 187–207.

¹¹ See, generally: Jürgen Habermas, *Between Naturalism and Religion: Philosophical Essays* (Cambridge: Polity, 2008); Jürgen Habermas, "The Political: The Rational Meaning of a Questionable Inheritance of Political Theology," in *The Power of Religion in the Public Sphere*, eds. Eduardo Mendieta and Jonathan VanAntwerpen (New York: Columbia University Press, 2011).

¹² Cooke, "Salvaging and Secularizing the Semantic Contents of Religion: The Limitations of Habermas's Post-Metaphysical Proposal," 187–207.

¹³ Charles Taylor, "Why We Need a Radical Redefinition of Secularism," in *The Power of Religion in the Public Sphere*, eds. Eduardo Mendieta and Jonathan VanAntwerpen (New York: Columbia University Press, 2011).

¹⁴ Cooke, "Salvaging and Secularizing the Semantic Contents of Religion: The Limitations of Habermas's Post-Metaphysical Proposal," 187–207.

¹⁵ Alain Badiou, *Saint Paul: The Foundation of Universalism*, trans. Ray Brassier (Stanford: Stanford University Press, 2003).

Paul¹⁶ and Giorgio Agamben's project to restore Paul's letters to "the status of the fundamental messianic text for the Western tradition."¹⁷ As Jose Mendonca writes, the reclamation of Paul is clearly caught up in "the current need to respond to the crisis of multiculturalism and the universal."¹⁸ That crisis, at least in Europe, has taken the form of the demise of the multiculturalist paradigm in favor of a Christian, majority culture¹⁹ and the post-political search for ever-increasing universal norms. In short, the specter of a new Christianized form of politics has haunted the human rights movement.

How indebted the human rights tradition is to Christianity has become a much-debated issue. In the West, the discourse of rights played out, of course, in a Christian context. It is not surprising that its suppositions would be congenial with Christianity. The claim increasingly is made, however, that it was impossible to think it without Christianity, whether due to the "hidden God of Locke," to the natural rights tradition developed by canon lawyers and theologians in the Middle Ages and inherited by the philosophers of the Enlightenment, or in the traditions of sectarian Protestantism (a very particular Christian tradition defined by beliefs in the inner light and the privatization of grace), and in the humanitarian concern with suffering, with its origins in Christian pity (along with Enlightenment sympathy). On the standard account, the human rights tradition borrowed from religion and then superseded it. From a system of politico-legal norms, it became the shared moral vocabulary of our time. Upendra Baxi puts it succinctly when she writes:

Much of the twentieth century of the Christian Era (CE), especially its latter half, stands justly hailed as the Age of Human Rights. No preceding century in human history witnessed such a profusion of human rights enunciations on a global scale. Never before have the languages of human rights sought to supplant all other ethical languages. No previous century has witnessed the proliferation of human rights standards as a core aspect of intergovernmental desireconstitut[ing] "a common language of humanity." Indeed, in some ways, human rights sociolect emerges, in this era of the end of ideology, as the only universal ideology in the making, enabling both the legitimation of power and praxes of emancipatory politics.²⁰

And at the heart of the discursive tradition of human rights is the growing contention that its moral logic, and universalism, is ultimately conceptually incoherent apart

¹⁶ Slavoj Žižek, *The Fragile Absolute: Or, Why Is the Christian Legacy Worth Fighting For?* (London: Verso, 2000).

¹⁷ Jose Mendonca, "The Reactivation of Paul: A Critical Dialogue on Giorgio Agamben," *Didaskalia* 41 (2) (2011): 2.

¹⁸ *Id.*

¹⁹ On the demise of the multiculturalist paradigm, see: Susanna Mancini, "To Be Or Not To Be Jewish: The UK Supreme Court Answers the Question," *European Constitutional Law Review* 6 (3) (2010): 481–502. For an analogous argument, see Christopher McCrudden, "Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The JFS Case Considered," *International Journal of Constitutional Law (I-CON)* (2011) and *Oxford Legal Studies Research Paper* (2010): 72.

²⁰ Upendra Baxi, *The Future of Human Rights* (Oxford: Oxford University Press, 2006), 1–2.

from the religious presuppositions. Thus, Michael Perry,²¹ Max Stackhouse,²² and Nicholas Wolterstorff²³ – drawing on diverse Christian themes and history in varying ways – all assert that the foundation of human rights is essentially theological. Certainly, the language of sacredness permeates the discourse; indeed, bare statements are common about the inviolate nature of humans and their sacredness, decoupled from secular justifications for treating humans as sacred (i.e., of ultimate value). Thus, the discourse has shifted from a Western political conception that flourished in a Christian setting; to a secular political and then moral tradition that claimed to have been made possible only by Christianity; and now to a discursive tradition whose key insights are validated by Christianity and by moral intuitions preserved primarily in Christianized readings of the Bible and other religious traditions and narratives.

The Christian reclamation of the human rights tradition has not gone unnoticed. The presumption is quickly vanishing that human rights are in some strong sense neutral, while competing religious claims are local and confined to the communities of interest embracing them.²⁴ But this leveling is only increasing the tension between religion and human rights. Within theory, this leveling and competition is addressed through the debate about public reasons. On the ground, however, it is often seen as a clash between religions.

In one sense, as Shmuel Trigano writes, the modern political always relied on a certain “immanent transcendence,” as much as it may have also disavowed it. Both Spinoza and Rousseau recognized the need for religion – or religion under the guidance of the state – to bolster democracy.²⁵ In modern politics, nationalism, civic religion, and totalitarian political ideologies all took the structure of religion and contributed to a kind of re-enchantment.²⁶ Today it is the modern project of human rights that seeks, in Habermas’s words, to salvage religion for modernity’s purposes. As Sam Moyn argues in *The Last Utopia*, the birth of human rights on the heels of the death of prior political utopias, including communism, almost immediately led to the forgetting of the contingency of their emergence, especially among the philosophers. Whether this process is unconscious or a logical necessity, it is persistent and recurrent – and human rights discourse has followed this pattern.

In my view, the extreme tension today between resurgent religion and the liberal order seems less over secularism per se, but, rather, over this re-enchantment of the secular state. Whereas before, under thinner conceptions of liberalism, political and

²¹ Michael Perry, *Toward a Theory of Human Rights* (Cambridge: Cambridge University Press, 2007).

²² Max Stackhouse, “Why Human Rights Need God: A Christian Perspective,” in *Does Human Rights Need God*, eds. Barbara Barnett and Elizabeth M. Bucar (Grand Rapids: Wm. B. Eerdmans Publishing Company, 2005).

²³ Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton: Princeton University Press, 2008).

²⁴ Clayton, “Human Rights and Religious Values.”

²⁵ Shmuel Trigano, “The Rediscovery of Biblical Politics,” *Hebraic Political Studies* 4 (3) (2009): 306–07.

²⁶ *Id.*, 204–318.

public space was secular in the strict sense – profane, or not holy – and holiness resided in the private sphere, increasingly, universal human rights, for better or worse presents itself – and is certainly perceived – as a competing transnational, universal, transcendent realm. Within the religious worldview, however, imputing sacredness to the wrong place is the equivalent of idolatry.

To be sure, philosophical writing about human rights is not the same as human rights as a discourse in public life. Indeed, the characterization of human rights as an absolute and transcendent discourse runs counter to many characteristics of human rights activism in sociological and anthropological scholarship.²⁷ That scholarship attempts to show that human rights discourse bears different meanings across cultural contexts and that it is constantly being translated and reformulated both at the periphery (at the grassroots level) and the center (UN Human Rights institutions), and, indeed, even has been forced to move from charisma to bureaucracy. Thus, Sally Engle Merry’s concept of vernacularization, on which Seyla Benhabib builds, could be seen as congenial to my project here. All too often, in presenting this chapter to human rights activists, however, I have encountered a common objection resting on the continued assumption that the human rights project, in order to succeed, needs to retain its transcendent language and that, indeed, this is the best strategy in appealing to religious leaders.

III THE HUMAN AS SACRED: CREATION OF HUMANS IN THE IMAGE OF GOD

One can hardly imagine a more powerful religious image for philosophy to “salvage” from religion for its own political projects than the creation of humans in the image of God. Contemporary thinkers about human rights such as Michael Perry, Robert Dahl, Jeremy Waldron, and Max Stackhouse have all invoked the sacredness of humans, in different ways, to support human rights. In Stackhouse’s succinct phrasing, human beings possess “a divinely endowed core that is the ultimate basis for the right to have rights.”²⁸ The intuition that at the base of modern concepts of human equality and human rights is the sense of human sacredness is reflected in the invocation of creation in the image in the American Declaration of Independence and Lincoln’s Gettysburg Address, of course, but even a self-conscious theorist such as Ronald Dworkin invokes this language – human life is sacred – without providing formal justification.²⁹ As George Fletcher argued, a coherent formal philosophical justification for equality has proved quite elusive

²⁷ See, e.g., Mark Goodale and Sally Engle Merry eds., *The Practice of Human Rights: Tracking Law between the Global and Local* (Cambridge: Cambridge University Press, 2008).

²⁸ Max Stackhouse, “The Sources of Human Rights: A Christian Perspective,” in *Religion and Human Rights: Conflict or Convergence*, ed. Adam B. Seligman (Hollis: Hollis Publishing Company, 2005).

²⁹ Ronald Dworkin, *Life’s Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (New York: Alfred A. Knopf, 1993).

while holistic arguments (for him, Kant coupled with the Hebrew Bible) are far more successful.³⁰

The translation of biblical themes through Christianity into political thought is a process that bypasses the rabbinic tradition in Judaism, however. And, within the rabbinic legal tradition, by contrast, creation in the image of God occupies a relatively negligible role. It is worth first understanding why this is so before taking up the question whether, freed from the diasporic setting of much of the rabbinic tradition, the principle could be more dynamically elaborated to meet present intuitions and the contemporary needs of a Jewish state.

Certainly, from the perspective of the rabbinic tradition, the creation of humans in God's image implies that humanity has special worth that distinguishes humanity from other creatures. Creation in the image may even embody an ethical ideal of social harmony between the diverse members of humankind – one that the prophets envision as the goal of the end of days. But, even in the biblical portrayal, humanity is not intended to be a universal human order, 'one fellowship and societie,' as Locke wrote.³¹ The Tower of Babel, after all, is the closest analogue to a biblical image of world government. In his biblical commentary, the Netziv portrays it as the panopticon. The biblical remedy is the division of humanity into collectivities, each with their distinct language and identity.

Creation in the image of God is rather the beginning of the unfolding in biblical and especially rabbinic thought of a drama of hierarchy, distinction, and difference that moves from humanity to Noahide (i.e., civilized) society; to the political community of resident strangers and Jews; to the congregation of Israel charged with becoming "a holy nation of priests"; and, then, to the community of fellows, which at least in theory, excludes rebellious Jewish sinners.³²

The rabbinic tradition reveals two opposing tendencies: one emphasizing the particular dimension of Judaism, and the other, the universal. The first tendency countenances discrimination against others by reserving thick obligations of social solidarity for fellow Jews. Confining obligations of social solidarity and even equal juridical rights to Jews can be understood from several perspectives. First, Jewish tradition draws a sharp line between monotheists and non-Jewish idolators. Jews are forbidden to associate with or extend civil rights to those who practice idolatry, which symbolizes in the Bible moral corruption. Second, from a communitarian standpoint, confining positive obligations of social solidarity and fellowship to Jews

³⁰ George P. Fletcher, "In God's Image: The Religious Imperative of Equality Under Law," *Columbia Law Review* 99 (1999): 1608. Fletcher argues that the principle of equality is best grounded in a holistic view of human dignity, and he draws on the biblical ideal of creation in God's image as well as on Kant.

³¹ John Locke, "The Second Treatise of Civil Government," in John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1967), 401.

³² I address the rabbinic "ethical vision of social life" and its contemporary challenges at greater length in Suzanne Last Stone, "The Jewish Tradition and Civil Society," in *Alternative Conceptions of Civil Society*, ed. Will Kymlicka and Simone Chambers (Princeton: Princeton University Press, 2000), 208.

creates a strong sense of community and Jewish peoplehood. The more universal strain within rabbinic thought attempts to expand the circle of solidarity by imposing duties of fellowship based on factors other than Jewish membership, such as sharing political space or moral values.³³ The Talmudic rabbis mediated between these two poles essentially by upholding rules banning fellowship with idolators while also articulating certain principles, chief among them *darkhei shalom*, “pursuing paths of peace,” which obligated Jews to extend social solidarity to idolatrous neighbors with whom they shared political space. It remained unclear, however, whether “pursuing paths of peace,” was an ethical principle grounded in notions of equal human dignity or a pragmatic policy aimed at appeasing hostile neighbors, given the precarious situation of Jews as a minority within a larger pagan space. The protracted period of isolation, persecution, and disenfranchisement of Jews hardly created a context in which to develop the universalist strains within the tradition and even so potentially powerful a concept as creation in the image received scant attention.

As a halakhic category, man’s creation in the divine image is invoked to justify the intrinsic equal value of human life,³⁴ the duty to procreate,³⁵ and the respect owed to the human body – even to the corpse of a killer. All these invocations are limited to physical matters, raising the question how the rabbis understood the similitude between man and God. Concentrating on the tannaite layer, Yair Lorberbaum has argued that a school of early rabbis understood the notion as expressing an iconic relationship between man and God.³⁶ In some sense, according to this school, man is an ontological extension of God – a view consonant with philosophical and ethical notions of the time. The consequences of this viewpoint, he argues, were played out primarily in the domain of criminal or judicial taking of life.

Ontological conceptions of creation in the image are hard to enlist in the service of ethical or moral theories about human rights; indeed, they can lead in quite the opposite direction, as evidenced by the persistent strain of rabbinic thought that often seeks to restrict the ambit of creation in the divine image to Jews.³⁷ This problem resurfaces in the contemporary application of creation in the divine image as a halakhic category in connection with the question whether autopsies done for the advancement of medicine are permissible. In contrast to Rabbi Uziel, who equates all humans in the matter of respect for the dead,³⁸ Rabbi Kook rules that such autopsies may be conducted only on non-Jews. He comments: “The

³³ *Id.*

³⁴ Genesis 9:6.

³⁵ Tosefta, Yevamot 8:6.

³⁶ Yair Lorberbaum, *Image of God* [Hebrew] (Tel-Aviv & Jerusalem: Schocken, 2004).

³⁷ There is the view of Rabbi Shimon bar Yochai, which gave rise to the tosafists’ question: “Are the gentiles called man (adam)?” (Tosafot, Bava Kamma 38a, s.v. “ela”). The tosafists seem to reject Bar Yochai’s opinion, and Rabbenu Tam suggests that Scripture uses the term *adam* in different ways, some of which do include gentiles. But the Zohar and kabbalistic literature (although not halakhic sources) take up the view of bar Yochai in pursuing an ontological division between non-Jews and Jews.

³⁸ Piskei Uziel, *Orah Hayyim*, 178–79. See also Rabbi Eliezer Waldenberg, *Tzitz Eliezer*, 4:14.

prohibition of desecrating a corpse is derived from the divine image in man, which is unique to Israel in its greater sharpness as a result of the sanctity demanded by the Torah.”³⁹ Rabbi Kook’s romantic and idealistic tendency, and the role played in his rulings of the concept of the special sanctity of the Jewish people, is well known.⁴⁰ In this ruling, Rabbi Kook notes the unique sanctity of the body of Jews who are charged with ritual commandments such as kashruth that fashion the body’s sanctity.

It is an interesting question whether beneath the “conceptual and metaphysical garb” an “existential truth” regarding humans as sacred can still be rescued that is both consistent with the general rabbinic schema and does work in a larger secular context.⁴¹ As Shlomo Fischer points out, an ontological conception also emphasizes “the external source of the sacred value of human beings. The concern is for a God who is ‘present’ in the human being, a Being who is totally outside the immanent human world.” Even translated into the language of ethics, the perspective is distinctly heteronymous. “The value of humans lies in their subjection to commandments; it cannot anchor absolute human value in the immanent human being or in some human characteristic such as autonomy or the ability to self-legislate.”⁴² In short, the concept challenges, as much as it affirms, received notions of human rights.

Of course, the remarkable under-elaboration of this concept in halakhic thought also has much to do with lack of historical need or opportunity. The dynamic elaboration of principles such as creation in the image or the dignity principle, *k’vod habriyyot*, or pursuing paths of peace, *darkei shalom*, and even the possibility of generating new norms from them, is precisely what this collection of chapters is in part designed to explore.⁴³ And it should be noted that Rabbi Kook does not, strictly speaking, limit the concept of creation in the image to Jews. Instead, he writes that

³⁹ Rabbi Abraham Isaac Ha-Kohen Kook, *Da’at Kohen*, no. 199, 383.

⁴⁰ Michael Z. Nehorai, “Halakhah, Metahalakhah, and the Redemption of Israel: Reflections on the Rabbinic Rulings of Rav Kook,” in *Rabbi Abraham Isaac Kook and Jewish Spirituality*, eds. David Shatz and Lawrence J. Kaplan (New York: New York University Press, 1995), 120, 144–47.

⁴¹ Shlomo Fischer, “Kevod Ha’adam, Tzelem Elohim, and Kevod Habriot,” in *Religion and Human Rights*, ed. Adam Seligman (Hollis: Hollis Publishing Company, 2004), 20.

⁴² *Id.*, at 21–22.

⁴³ Gerald Blidstein, “Halakhah and Democracy,” *Tradition* 32 (1) (1997): 29.

Blidstein argues that norms such as *darkei shalom*, *kiddush Ha-shem* and *hillul Ha-shem*, which I term principles, have a dynamic quality, expanding and contracting “according to social realities and expectations.” They “seem to respond to, and assimilate, the expectations and standards of their surroundings when these cohere with basic Jewish ethics.” *Id.* at 29.

In his study of the principle *Kevod Habriot* (respect for human dignity), *Shenaton Mishpat Halvri*, Blidstein suggests that, in the medieval period, this principle served to generate several new norms (See Gerald J. Blidstein, *K’vod Habriyyot: Studies in the Development of Halakha* [Hebrew], *Shenaton Ha-Mishpat Ha-Ivri* (1982–83): 9–10). This argument is not free from difficulty, however. Blidstein’s own study of *Kevod Habriot* reveals that the range of halakhic application of this principle was severely circumscribed because of the principle’s subjective, “aggadic,” (narrative) character and its radical potential to supplant other halakhic norms.

Jews are, as it were, “more fully in the image” than non-Jews as a result of the sanctity bestowed by the Torah’s ritual commandments. Although hardly promising at first blush, it is interesting that Kook treats creation in the divine image more as a comparative concept, a matter of degree. Jews are more fully in the image than non-Jews because they perform more commandments. In this view, the concept of creation in the image is a statement about the potential of humans to perfect themselves through observance of the law. It is a theory about human potentiality to become full moral and legal subjects through their actions.

The conceptual link between human creation in the divine image and human equality seems as follows: All humans are born equal in their capacity to become full moral and legal subjects and perfect themselves. When humans sufficiently realize their potential, they become rights holders under Jewish law. But when has this potential been sufficiently realized? Rabbi Kook, in emphasizing the ontological aspects of the ritual commandments, implies that only full observance of Torah suffices. But other stopping points short of conversion might be posited. The Me’iri ruled, for example, that juridical equality is owed to the non-Jews of his time, because they are members of nations under the rule of their religious law. According to the Me’iri, societies bound by religious law occupy an intermediate category between idolaters of old and Jews. Such societies have critically progressed toward perfection.⁴⁴ Their final perfection, he writes, is conversion. Yet, those within the intermediate category are entitled to juridical equality. The critical question, then, is what makes a person or a society ethical or just so as to merit juridical equality under Jewish law: observance of the entirety of Torah, observance of Noahide commandments, or the empirically observed creation of a just and decent society committed to the rule of law?

Thus, some concept of desert, and not the possession of rights by virtue of being a human as such, seems implicit in the traditional Jewish conception of the idea of creation in the image.

In one of the more creative contemporary rabbinic attempts to grapple with human rights, this comes to the fore. The specific problem that Rabbi Hayyim David HaLevi addresses – the rights of non-Jews in the Jewish State to enjoy equal citizenship rights and social solidarity within Israeli society – is all too topical. The issue is not about the content of Israeli (secular) law; rather, he is addressing whether obligations of social solidarity extend to all citizens within the state, pursuant to Jewish religious norms. HaLevi argues that the right of self-determination granted to Jews by the international community not only creates moral constraints on the exercise of Jewish majority rule; it triggers a new moral obligation of human solidarity only hinted at before in Jewish teachings.

Jewish sovereignty creates the condition for Rabbi HaLevi to develop this ethical universal strain. But how precisely does the fact of Jewish sovereignty create this

⁴⁴ Rabbi Menahem Ha-Me’iri, *Sanhedrin* 59a.

perspectival switch? This question is all the more puzzling, given prevalent modern understandings of sovereignty. The Hobbesian conception of territorial sovereignty is concerned with legitimacy. Legitimate power over a defined territory is transformed into a centralized system of positive law. Morality and conscience may be equally obligatory domains, but they are political sovereignty's rivals. Thus, modern centralizing conceptions of sovereignty, coupled with the positivist separation of law and the legitimate exercise of power from morality, structures a certain relationship between sovereignty and ethics in which moral obligations arise from other domains of life but are not a consequence of sovereignty itself.

True, the social contract basis of democratic sovereignty is understood to create a political obligation on the part of the sovereign to treat all citizens equally. One could therefore easily understand Halevy as asserting that the constitution of Israel as a democratic state, and the new reality of Jews holding sovereign power over others, obligates the State to treat all its citizens equally. Halevy certainly so states. But this simple reading of the text still leaves unanswered, first, how the constitution of Israel as a democratic state is somehow halakhically obligating and, second, why individual Jews in civil society now owe a moral obligation of social solidarity to fellow non-Jewish citizens. The key to resolving this puzzle, in my view, lies in noting that Halevy offers a very different conception of Jewish sovereignty in the State of Israel than the one so prevalent in current statist, centralizing imaginations of sovereignty.

Because a variety of halakhic issues turn on the absence or presence of Jewish sovereignty, rabbinic jurists were forced to conceptualize whether the State of Israel was a manifestation of Jewish sovereignty *in the halakhic sense*. For in determining the applicability of various halakhic norms and the relevance of different possible analogies, halakhic decisors must first characterize the age or phenomenon under question. In the course of doing so, several rabbinic jurists, most prominently Halevy and also R. Herzog, proposed new conceptions of Jewish sovereignty.

The question arose primarily in the context of group relations – Jews and non-Jews – as a result of Maimonidean halakhic writings about the legal norms applicable when Jews have “the upper hand.” As is well known, Maimonides held that the distinction between the unredeemed world and the messianic age is freedom from the subjugation of foreign sovereigns. Talmudic tradition bequeathed a binary model that distinguishes between the days when Israel holds sway over other nations, implying exclusive or absolute dominion, or alternatively when it is powerless and suffering. Various halakhic norms – conquest, conversion, group relations, etc., – theoretically turn on this distinction. Thus Maimonides seems to hold that there will be no converts in the messianic age of Jewish sovereignty because the motivation for conversion could be instrumental: the attraction to power. Therefore, “in these days” converts must be instructed that Jews have no political agency and are suffering.⁴⁵

⁴⁵ See Moshe Hellinger, “Religious Ideology that Attempts to Ease the Conflict between Religion and State,” *Journal of Church and State* 51 (Winter 2009): 52–77.

The laws Maimonides codifies as part of his vision of the time of the upper hand are a vivid example of the ontology of sovereignty: the dedication of the king to the project of the perfection of the people. Maimonides repeatedly refers to the *ummah* or *am* and ascribes to the king the task of bringing the nation to political perfection. This requires purging the land of idolators and, read straightforwardly, drastically restricting the rights of non-Jewish residents.

Is Jewish sovereignty in the modern State of Israel equivalent to the Maimonidean age of the “upper hand” that is the condition precedent of the codified Maimonidean laws? Halevy and Herzog quickly dispel this illusion, each in subtly different ways, but there is one common thread: Jewish sovereignty in the State of Israel came into being through an act of recognition by the United Nations and therefore the State of Israel’s sovereignty is not only limited, it is shared.

R. Herzog is most explicit on this point. His analogy of Israel to a corporation or business partnership between Jews and non-Jews seems, at first blush, comical but it reflects a conceptual commitment to thinking about sovereignty in terms of state interdependence. R. Halevy is even more explicit: Israel was recognized as a Western democratic country and so Jewish sovereign power is limited by that principle. Halevy writes: “In the Western democratic world, *to which we belong*, society is founded upon equal rights for every person; there is no place in a democratic state for religious discrimination. Even were we a superpower, we could not practice such [discrimination].”⁴⁶ Halevy is claiming that Israel “belongs” to the Western world because it was brought into being by the United Nations no less than by Jewish efforts. For Halevy and Herzog this is nonetheless a genuine form of *Jewish* sovereignty, sufficient to penetrate into the normative sphere of halakha. For example, it is sufficient to trigger a halakhic obligation to recite the Prayer of Thanksgiving on Independence Day. By contrast, R. Ovadiah Yosef, though he held by and large a positive view of the state, ruled against reciting that prayer because he did not recognize the state as falling within a halakhic category of *Jewish* sovereignty.

Both Halevy and Herzog seem to have been operating from within a larger cultural understanding of sovereignty in their time that still is attested to in Israel’s Declaration of Independence. The shared assumption of the period was that the legitimacy of the state depended on recognition. Halevy goes a critical step further, however, in understanding recognition not merely as the ratification of an existing state of affairs but, instead, as constitutive of sovereignty. Recognition not only confers legitimacy on the state, it endows the state with its very identity.

This point warrants elaboration. There is a longstanding debate in international relations between the practice of recognition among states and the condition of statehood. While some theorists insist that states are states prior to their recognition

⁴⁶ Rabbi Hayyim David Halevy, “Ways of Peace in the Relations between Jews and Non-Jews,” *Tehumin* 9 (1988): 71–78. Emphasis added.

as such, others argue that the recognition of a state is a constitutive act: it brings statehood into existence. The debate, as Patchen Markell has helpfully observed, captures the two senses of the term recognition. In the first, recognition is an awareness of a pre-existing state of affairs, of a status that already really exists. In the second view, recognition is an act that brings something new into being or transforms the world in some way.⁴⁷

The different senses of recognition, Markell goes on to argue, trade on differing conceptions of self-determination and political agency. Zionism (and the view incorporated in Israel's Declaration of Independence), by and large, relies on the political imagination of the first sense of recognition. International acceptance ratified a pre-existing state of affairs: the national-collective will and identity of the Jewish people. But, pursuant to the constitutive sense of recognition, neither sovereignty nor political identity is the product of a singular will nor self-determination in its fullest sense.

It is this new relationship between Jews and the world that underlies Halevy's attempt to ground social solidarity in a principle "only hinted at before in Jewish teachings" – the creation of humans in the image of God. The "new reality of Israel," to which Halevy refers, is a new age of recognition by non-Jews of the humanity (and, hence, political agency) of Jews and not solely or even primarily the new reality that Jews are now a majority ruling over a minority. The question could have been framed within older talmudic paradigms addressing obligations of social solidarity in a mixed society – "pursuing paths of peace" could serve as a ready answer, for example. HaLevi refuses to follow this easy route. "Darkhei shalom," he insists, is a diasporic concept; it is only suitable to Jewish life as a minority population. Instead, Halevy insists that Jewish sovereignty demands a radical change in the mindset of Jews toward the world and that awareness of the new reality must penetrate the halakhic normative sphere. The exilic mindset requires alteration so that "we visit the gentile sick, bury their dead, and comfort their mourners out of a moral, human duty, not merely because of the 'ways of peace.'"

HaLevi insists that the source of this obligation is not contractual or conventional; it is a moral obligation rooted in the concept of a shared humanity. At the same time, HaLevi implies, one could not truly speak of a shared humanity before, given centuries of persecution and Jewish disenfranchisement. Now, with the recognition of Jewish sovereignty, HaLevi suggests, the immense distinction between Jew and non-Jew finally has been lessened. Consequently, Jews have a human moral duty to recognize the full humanity of others.

It is important to note the halakhic significance HaLevi assigns to the world's recognition of the political rights of Jews. It is equally important to note that this is the arena of reciprocity and exchange, not of transcendence, the moral absolute, or the sacred. The moral obligation Jews owe to the other – and to one another – is based on

⁴⁷ See Patchen Markell, *Bound By Recognition* (Princeton: Princeton University Press, 2003).

ethical reciprocity, norms of mutuality, moral symmetry, and gratitude. In retrospect, it is the principle of reciprocity that may also underlie prior rulings extending solidarity beyond Jewish borders. HaMeiri, whom HaLevi cites, reinterpreted Talmudic rules permitting discrimination as confined to idolators who are not “restricted by the ways of religion.” The nations who are under the sway of religion, Meiri implies, adhere to basic norms of morality that govern their behavior toward those with whom they share political space. Jews have a moral duty, in turn, to reciprocate.

The universal ideal of human solidarity that HaLevi draws out of Jewish teaching thus differs in an important respect from the core notion of Western human rights discourse: Rights are not absolute or inherent; they are not inviolable and they do not inhere in the human as such. Nor is HaLevi invoking sympathy, pity, or love for the other, irrespective of their actions or capacities for doing evil. A more fruitful comparison is to the political conceptions of rights and evocation of reciprocity made by John Rawls in his *Theory of Justice*. There, Rawls draws on principles of moral psychology, following Piaget, to argue that the sense of justice grows out of prior stages: first the morality of authority based on reciprocal love between parent and child and then the morality of association based on friendship.⁴⁸ “Because we recognize that they wish us well, we care for their well-being in return . . . The basic idea is one of reciprocity, a tendency to answer in kind.”⁴⁹ Genuine other-regard depends on receiving benefits, inaugurating the play of gratitude and indebtedness. Rawls extends this to those who have only the potential to reciprocate; but there is a close connection between Rawls’ invocation of a well-ordered society and the reasonableness of expecting benefits and therefore extending respect to those who only have the potential to reciprocate. HaLevi combines these notions: a well-ordered society is presupposed. “These are not the idolators of ancient times.” Given tangible evidence of an ordered society – “they have wished us well” – a moral duty of equal concern and respect is created.

The line of thought HaLevi develops is a disavowal of any shared vision of the human as such as sacred but it captures the more modest notion of a regime of rights based on the play of recognition and exchange. As Adam Seligman writes:

The world of the sacred and of religious authority is, by definition, a world marked off from the play of negotiation and exchange within which social order is defined. The

⁴⁸ While Rawls seemed to deny that the original position “explicitly” presupposed a principle of equal respect, Dworkin has claimed that this is the “deep theory” behind the original position. “This right, he says, is ‘owed to human beings as moral persons’, and follows from the moral personality that distinguishes humans from animals” (Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), 181.)

⁴⁹ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999), 433. By invoking Rawls here, I aim to elucidate my point in terms of modern political philosophy. I do not mean to suggest that HaLevi preempted Rawls’ theory of justice, or that Rawls drew upon rabbinic literature. It would be a distraction to further discuss Rawls’ relationship to Jewish thought in this essay. For an elaboration of Rawls and reciprocity, see: Thom Brooks, “Reciprocity as Mutual Recognition,” *The Good Society* 21 (1) (2012): 57.

sacred is that which is ineluctably Other, that which cannot be grasped, bartered, or exchanged. Its dictates impose obligations that are simply of a different order of experience, that involve totally different domain assumptions than those encompassed by the play of reciprocity and autonomy on which a regime of rights is based.⁵⁰

IV FROM THE ABSOLUTE UNIVERSAL TO INTERNATIONAL CONVENTION AND TRANSNATIONAL CONSENSUS

Since Kant, we tend to reflexively endow the universal realm with transcendent status and grant priority to the universal over the particular. But the universal was once conceived as a common or shared realm, expressing a kind of *consensus gentium*. Recently, Jack Donnelly, among others, has urged a return to this more modest conception of human rights.⁵¹

If we were to approach human rights in this way, the question becomes whether Judaism gives weight, as a matter of the religion's internal viewpoint, to world consensus. In other words, would the Jewish tradition defer to the international legal regime of human rights or to an emerging translational understanding of global norms, including informal ones, just in virtue of consensus?⁵²

This strategy of convergence between religion and human rights depends on retrieving the idea of human rights as a purely political discourse and emphasizing its legal forms by which immunities and liberties are inscribed as rights (e.g., the international legal regime of human rights), as well as "soft" or informal law, without recourse to the philosophy of the person and society with which human rights discourse has been entangled.⁵³ There need be no agreement between Judaism and human rights discourse on the content of the core principles of human rights – even a fine one. Deference, rather, would be based on second order reasons, such as tacit or hypothetical consent and possibly a certain moral – or religious – claim that consensus in itself makes on us.⁵⁴

⁵⁰ Seligman, "Introduction," 8.

⁵¹ Jack Donnelly, "The Relative Universality of Human Rights," *Human Rights Quarterly* 29/2 (2007): 281.

⁵² I do not mean to invoke a simple return to the classic conception of international law as the formal contracts made between sovereign states. On the contrary, the "soft" law character of international human rights law that Merry and others describe, need not be an impediment from the halakhic viewpoint. This needs further working out, but my initial reading of the halakhic material is that it is capacious enough to extend beyond formal norms and, indeed, writers such as Hirschensohn were early advocates of what might now be deemed "grassroots" loci of norm creation. On the problems associated with consent (weak, formalist basis), see Marti Koskenniemi, *From Apology to Utopia: The structure of international legal argument* (Cambridge: Cambridge University Press, 2015).

⁵³ Charles Taylor urges the disentanglement of the human rights discourse as a set of legal forms by which immunities and liberties are inscribed as rights from human rights as a philosophy of the person and society. Either the form or the philosophy could then be adopted alone without the other. See Charles Taylor, "Conditions of an Unforced Consensus on Human Rights" (speech given at Bangkok Workshop, 1996).

⁵⁴ See Clayton, "Human Rights and Religious Values," as to how this differs from Rawlsian overlapping consensus. Per Rawls, we would agree on the norms, while disagreeing on why they were the right norms.

These notions, it turns out, are quite deeply embedded in the Jewish tradition. I am now only beginning in a project of surveying halakhic attitudes to international law and global governance that will focus on the writings of R. Hayim Hirschensohn, who argued that the halakhic obligation of keeping “covenants” extends to international conventions and global agreements, whether formal or informal. These agreements need not be state-based; they can be embedded in global society and may even override halakha. The importance of consensus and custom also find expression in a variety of standard halakhic doctrines, such as *dina de-malkhuta dina* (“The law of the kingdom is the law”); *minhag Yisrael din hu* (“the custom of Israel is the law”), etc. Through these doctrines, contemporary practices of the people were incorporated into the halakhic system and translated into norms. These practices usually pertained to private law or fiscal matters, and parties are permitted to vary Jewish private law by contract, in any event. With the rise of the State of Israel, Jewish contemporary practice includes matters of public law, such as practices of war, statecraft, and the shaping of civil society. These practices pertaining to public law are absorbed from the larger environment: that is, the “family of nations.” Recall HaLevi’s statement: “In the Western democratic world, to which we (i.e., Jews in the State of Israel) belong, society is founded upon equal rights for every person.” In other words, the environment of the State of Israel is the Western democratic world and its norms.

Still, incorporating norms generated from outside the halakhic world into the halakhic system raises a number of deep and complex issues, chief among them the question of limits. Contemporary responsa even in the area of private law well illustrate the dilemma. Thus, some rabbinic decisors have held that contemporary practices such as gender equality in splitting marital assets, meet the technical requirements of incorporation doctrines such as *dina de-malkhuta dina* and “customs of the people;”⁵⁵ while others contend that laws stemming from a “worldview” or a “religious or social ideology” cannot be incorporated because the “religious and social worldview of the Jewish people derives exclusively from the Torah.”⁵⁶ To put it starkly, if the Declaration of Human Rights is absorbed into the halakhic system as the norm of the family of nations to which the State of Israel belongs, the halakhic tradition would no longer serve as a resource for contributing to a critique of contemporary politics, including human rights discourse itself. Instead, the halakha would be confined primarily to the ethico-spiritual realm; its political dimension would simply parallel that of the law of nations. What, then, is the role of the Jewish religion and the halakha in shaping a specifically Jewish politics as an expression of Jewish religious ideals and identity?

⁵⁵ See R. Shlomo Dichovsky, “The Shared Assets Rule – Is it Dina De-Malkhuta?” 29 (1997) *Techumin*: 18.

⁵⁶ See R. Avraham Sherman, “The ‘Shared Assets’ Rules in Light of the Laws of the Torah,” 18 (1997) *Techumin*: 32.

I have dealt with these questions at length elsewhere and will only summarize here one fascinating line of thought supporting halakhic incorporation of the international legal regime of human rights in virtue of world consensus. Whether such deference to the international regime of human rights is halakhically permissible or even obligatory touches on a large and, at times, highly technical debate within Judaism concerning the status and contours of its doctrine of universal law, the Noahide Code. Put highly schematically, the claim is that international law and consensus are binding on Jews through the complex interaction of Noahide law with the Talmudic principle, “the law of the kingdom is the law.” While Noahide law is ordinarily thought of as the universal moral law that God gave to humanity – superseded at Sinai for Jews – in fact, the relationship of Noahide law to Jewish obligations is far more complex. Noahide law can be seen, or so I have argued at length elsewhere, as an alternative source of norms even in a purely internal Jewish context, a form of fallback or residual law, which can be invoked when the particular law requires supplementation or functional adjustment.⁵⁷

Paradoxically, although Noahide law is presented as a universal moral code given by God, the content of which is discerned and elaborated by Jewish tradition, it is sometimes the case that the content of Noahide law is essentially determined by the convention of the nations.

An analogous claim was, indeed, made by Rabbi Shaul Yisraeli, in a different – and highly politically charged – context when he ruled that the Jewish state was obligated by – and only by – international standards of war.⁵⁸ Rabbi Yisraeli based his view that the rules of war are those agreed to by the global community of nations on two legs. The first is that war is a part of statecraft – an activity committed to the Jewish king and its successor institutions such as the modern Jewish state. He cites Deuteronomy 17:14, in which the people ask for a king “like all the nations.” And he couples this with the view, most clearly articulated by the Netziv in the nineteenth century, that war is a universal activity permitted to all societies and therefore should be waged by universal rules.

⁵⁷ Suzanne Last Stone, “Sinaitic and Noahide Law: Legal Pluralism in Jewish Law,” *Cardozo Law Review* 12 (3–4) (1991): 1157; Suzanne Last Stone, “Religion and the State: Models of Separation from Within Jewish Law,” *International Journal of Constitutional Law*, 6 (3–4) (2008): 631–61; Suzanne Last Stone, “Law without Nation? The Ongoing Jewish Discussion,” in *Law without Nations*, eds. Austin Sarat, Lawrence Douglas and Martha Umphrey (The Amherst Series in Law, Jurisprudence, and Social Thought, Stanford, Stanford University Press, 2010), 101–37. And now see the decision of the Jerusalem Rabbinical Court (R. Dikhovski, Sherman, Ben Shimon) #4276 (citing Zafnat Paneach for the proposition that Jews were given additional obligations at Sinai, including marriage and divorce laws, but were not relieved of their obligations imposed by Hebrew Law on Noahides), which function as fall-back law when the former are not applicable.

⁵⁸ See Harav Shaul Yisraeli, *Amud Ha-Yemini*, 15:165–205. The ruling was a retrospective justification of the Kibiye massacre; however, as Gerald Blidstein commented, his innovative legal thinking would have traction, nonetheless. (Gerald Blidstein, “The Treatment of Hostile Civilian Populations: The Contemporary Halakhic Discussion in Israel,” *Israel Studies* 1 (2) (1996): 27–45).

Deuteronomy 17:14 is ordinarily not viewed as a legal source. R. Yisraeli, it seems, is compressing a long tradition of legal and political discourse about Jewish kingship. To grasp both the inner logic at work here and the ethical and identity dilemmas they raise requires a bit of a detour through halakhic discourse about the status and validity of conventional government. I have dealt with this issue at length elsewhere and will only summarize the contours of the argument here.⁵⁹

Within Judaism, there are a variety of doctrines that roughly correspond to a division between religious and political spheres. Several were developed in tandem with Islam and Christianity in the twelfth and thirteenth centuries along with the emergence of criminal law as public rather than religious law. Biblical evidentiary restrictions on conviction were jettisoned by all three religions, and various justifications emerged for the assignment of certain extralegal powers to political authorities who were not restrained by religious law. Far from positing a total society, unified under one sacral law, several medieval Jewish legal thinkers imagined the halakha as composed of different jurisdictions generating law in accordance with different principles. The political realm emerges in these writings as a space with its own distinct logic and laws.

The medieval Jewish discussion centers on the rights of monarchs, including the prerogatives of the “Jewish king,” and is revived in modern halakhic discussions of the legitimacy of the law of the state, including a Jewish state. The Hebrew Bible sets up a tension between a model of kingship that is particular and culturally specific and one that is universal. That tension is fully exploited in the medieval discussion. Whether kingship is a realm of politics, discretion, and wisdom, or a realm of distinctive law, is a large and lingering question. Maimonides’ codification of the laws of Jewish kings seems to transfer over to the Jewish king a separate body of Talmudic law about the universal “Noahide” laws that bind non-Jewish societies, from the Jewish perspective.⁶⁰ In addition to six substantive commands – exemplifying a civilized political community, such as prohibitions on murder, theft, and the like – Noahide law includes a seventh command of justice, *dinin*. For Maimonides, *dinin* is nothing but the requirement to establish governmental structures capable of preserving order by punishing violations of the other Noahide laws. As Gerald Blidstein noted, “Maimonides’ entire edifice of monarchic powers identified Jewish and gentile governance as a single structure possessing similar goals and utilizing similar instruments.”⁶¹

⁵⁹ For further analysis, see Suzanne Last Stone, “The Jewish Law of War: The Turn to International Law and Ethics,” in *Just Wars, Holy Wars, and Jihad*, ed. Sohail Hashmi (Oxford: Oxford University Press, 2012); see also Arye Edrei, “Law, Interpretation, and Ideology: The Renewal of the Jewish Laws of War in the State of Israel,” *Cardozo Law Review* 28 (1) (2006): 187–228.

⁶⁰ Gerald J. Blidstein, “‘Ideal’ and ‘Real’ in Classical Jewish Political Theory,” *Jewish Political Studies Review* 2 (1–2) (1990): 58–60. Traditional jurists commenting on Maimonides note this connection. See Meir Simhah Cohen of Dvinsk, *Ohr Sameah*, Laws of Kings 3:1.

⁶¹ Blidstein, “‘Ideal’ and ‘Real’ in Classical Jewish Political Theory,” 58.

The most far-reaching articulation of Jewish kingship as social order is that of Rabbi Nissim Gerondi who posits a central gap in the Halakha: the lack of conventional modes of governance able to preserve social order. Yet, the Torah itself provides the means for correcting this deficiency: monarchical powers. The monarch is merely the site of social order historically chosen by the people who may consent to another institutional form if they so desire. Although Gerondi is largely silent on whether this is a space of discretion or law and whether there are any inherent limits, I believe we can read him against the background of his predecessors and contemporaries as at the least implicitly incorporating the conventional rules of non-Jewish societies, insofar as they relate to matters of enforcing social order.

This underlying concept – that government, the task of which is the preservation of social order, is a universal Noahide norm incumbent on all societies, Jewish and non-Jewish alike and in more or less the same way – also underlies Rabbi Yisraeli's approach to war. Thus, Rabbi Yisraeli relies on prior precedent holding that war is not only permitted to non-Jewish societies but that it is a logical outgrowth of the Noahide command of *dinin*, because war in present times is a means to reduce social conflict and therefore to preserve social order. And the War Convention sets the limits of what is permissible. Thus, the link between Noahide law as a universal body of norms that was Jewishly discerned and elaborated and accordingly subject to internal standards of some sort – Judaism's contribution to discourse about human rights as a moral theory – becomes reversed. Now at least this one Noahide law is imagined as the tacitly agreed upon practices of conventional societies in pursuit of good governance.

The second leg of Rabbi Yisraeli's opinion relies on a more familiar halakhic principle: *dina de-malkhuta dina* (the law of the kingdom is the law, henceforward DDM), but he gave it a radically innovative meaning. Where formerly the dictum governed the obligations and privileges of individual Jews relative to their host states, in the elaboration by Yisraeli, it now governs the obligations and privileges of the Jewish nation acting in the international context. And where formerly, the dictum extended only to the laws of a sovereign ruler, such as king or state, here it extends to international law on the theory that the non-Jewish kingdom could be defined in global terms, as long as the collective will of the world's citizens ratified the global kingdom's law. (The perspective is quite similar to that of current United States Supreme Court jurisprudence holding that the convention and customs of the nations is incorporated into federal law.)

DDM is first articulated in the context of the power of foreign rulers to tax and expropriate land and eventually became a cornerstone for the successful integration of the formerly legally autonomous Jewish communities into the legal systems of the nation-state. Paradoxically, the principle originally served to make the halakha fully functional in exile but then the postulate took on a life of its own as the jurists began to theorize in the Middle Ages about its conceptual basis. The most prevalent conceptual base is one or another version of consent theory. Rashi, interestingly,

connects the principle to Noahide law. He explains the Talmudic permission to Jewish litigants in an intra-Jewish dispute to take advantage of non-Jewish methods of validating deeds as resting on the notion that non-Jews are commanded to “institute justice” – citing the Noahide norm of *dinim*. Accordingly, they can be effective agents for all matters subsumed under that command. Recall that, from the internal perspective of rabbinic Judaism, this command obligates humanity to preserve social order by enacting systems of law. Accordingly, non-Jewish legal activity can serve here as an alternative norm even for Jews and even when it is at variance with Jewish law. The implication of Rashi’s rationale is that large portions of the halakha are in fact replaceable by foreign law, thus shrinking the scope of halakha to matters of ritual and religious prohibition (including marriage and divorce).⁶²

Yisraeli’s opinion about the binding nature of international law seems to blend the underlying rationales of the consent school and of Rashi’s turn to Noahide *dinim*. Jews can consent to be governed by international norms, just as they can consent to be governed by the civil laws of host states. Consent to laws pertaining to war is legitimate even though war involves the religious prohibition of bloodshed. War, however, is a chosen means to settle disputes in contemporary life and, as such, fulfills the goal of civilizing the world and securing social order, even if such wars are not undertaken for the sake of enforcing Noahide norms.

The laws of the Jewish king, the principle that the “the law of the kingdom is law,” and the Noahide command of justice thus become all facets of a single concept. Still, the very existence of a “universal” code within a particular legal system has opened a deep fissure in Jewish thought. If Noahide law is God-sanctioned, what precisely is the point of the particular laws given later at Sinai? The various eighteenth- and nineteenth-century debates within Judaism about the modern state, from that of the Reformers to Mendelssohn, are in part attempts to answer that question.

Gerondi, too, anticipates this issue. For, in the course of outlining the Jewish king’s powers, he addresses the purpose of the halakha’s highly nonconventional system of order, as reflected in its criminal procedures. Certain biblical laws, such as judging in accordance with two witnesses, he argues, were never intended as a practical means to govern society. Rather, they are intended to bring on the divine effluence and to judge individuals in a manner exquisitely attuned to the rights of individual defendants without regard to social need. Gerondi is working off earlier rabbinic sources as well as extending the doctrine of Noahide law to one logical

⁶² Jewish law maintains that with respect to financial matters, as opposed to religious matters, it is possible for parties to contract out of the law in any event, despite the fact that these norms originate in divine law. But the rationale which links the validity of Gentile law to the Noahide command of *dinim*, would suggest that it could extend to all laws subsumed under the Noahide command, including criminal law and punishment, traditionally categorized as “religious.” Rashi’s theory has very few internal limits, except that subjects unique to Jewish law cannot be displaced.

conclusion. He is following, as Blidstein pointed out, Yehuda Halevi, who wrote about “the social – ethical law given to humanity (i.e., Noahide law) to which the spiritual-ceremonial law is added at Sinai,” and decisively splitting the two into the realm of the sacred and particular, where true justice is possible, as opposed to the realm of the profane and universal, where the needs of society are irreconcilable with the rights of individuals.

As we know from modern Jewish history, the coexistence of universal and particular elements in one tradition led to an internal splitting of the tradition along lines generally analogous to the modern differentiation of political and religious realms. Increasingly, the particular laws given exclusively for Jews at Sinai becomes seen as religion or ethics, even from an internal standpoint – and not only from the standpoint of the host nation-states in which Judaism later was set.

Modern separation or differentiation of realms not only allows different realms of human experience to proceed in accordance with different conceptual logics. It also provides a means for one realm or activity to critique the other. This is the most powerful claim of modern positivism’s separation thesis: by differentiating between law and morality, strong moral critique of modern law is made possible. One of the more interesting questions for those observing the Jewish tradition today revolves around this issue of critique. What resources should or could the tradition use to critique the organization of the contemporary political sphere, including the discourse of human rights? Keen observers of the tradition will note that, outside the State of Israel (which presents a unique set of problems), the standards used to judge the political sphere are not, by and large, the particular religious or ethical aspirational norms of the Jewish tradition but, rather, they draw on the large body of Jewish sources which develop the universal Noahide Code. That body of law is in itself an ongoing project that develops in tandem with developments in the larger political sphere. For example, while the original markers of good government in the service of religion from the Talmudic period through the medieval period cite the Noahide ban on idolatry and blasphemy, over time, these criteria are reinterpreted to fit a secular age. Thus, the ban on idolatry is in the process of reinterpretation in terms of commitment to the rule of law. In short, the tradition continues to provide a standpoint from which to judge the very space it authorizes. In doing so, we can catch a glimpse of what – in the eyes of Judaism – is a well-ordered political space and what is, instead, seen as inimical to the common project of government.

It is here that Yisraeli’s turn to the international legal regime is most vulnerable, for it entails abandonment of any standpoint from which criticism is possible. International codes of war, treaties, and so on, govern the state of Israel – from the halakhic perspective – and not indigenous, national-collective norms or particular, aspirational norms developed to govern relations of members within a covenantal community. In his analysis, Yisraeli makes clear that halakhic norms pertaining to use of force developed within the context of individual self-defense could not countenance the manner of conducting warfare acceptable within the international

community. But rather than view halakha as a ground for ethical critique, he sees halakha as allowing the incorporation of looser standards of behavior when the nation acts beyond its borders. Should international society adopt more stringent norms than halakha, these too would be binding on the nation acting in the international arena. The Jewish nation-state is no longer modeled on a concept of exceptionalism; instead, it is merely a member of international society whose norms should converge.

Rabbi Yisraeli's position was re-examined recently in two American symposia on the topic of Jewish law and war. The responses it invoked are telling. Even those thinkers who are sympathetic to the idea that the laws of the Jewish king and Noahide law bear a "family resemblance" were deeply troubled both by the complete "surrender to comparative law" and by "the suspension of the normative ethics of Jewish law." The gist of both objections is that in turning to international law, Yisraeli left no standard for ethical critique or reason to contribute a distinctively Jewish ethical voice to society at large. What is at stake is both the role of the halakha as a resource for ethical thought (without necessarily a modifier) as well as the role of traditional Jewish sources, developed from within, in shaping a particular Jewish character and sensibility and providing an aspirational set of norms or set of super-erogatories. In short, what is at stake is not only the status of halakha as an ethics, and not solely autonomous law, but also identity and exceptionalism, of carving out rules – even in heart of the political realm such as warfare – that reflect particularist ideals even if not adhered to by the rest of the world.

These internal debates about politics as a shared, universal realm of experience, about the Jewish tradition as a resource for ethical critique, and about Jewish identity, also shed light on the place of human rights discourse in contemporary Jewish Orthodox society. I do not need to belabor certain trends in the discourse of traditional Judaism, especially in Israel: increased ethnocentrism and the rise of romantic, utopian strains of religion emphasizing authenticity. Not that long ago, it was common to debate how coterminous halakha was with ethics and whether there was an equally obligatory ethic independent of halakha – and these debates were not confined to rarified academic or intellectual circles. Pursuant to that conception, human rights as an ethical theory need not always be elaborated from within; it could be obligatory independent of halakha. Now there is an increasing tendency to view halakha as comprehensive and all-encompassing, in which all rights and obligations, including political ones, must be generated exclusively from within a single sacral framework that emphasizes only one pole of biblical and rabbinic thought: the particular. At its most extreme, the sacred is perceived as the holy, in the face of which the norms of general society are irrelevant. The subject of religion and human rights is an occasion not only to resuscitate the question of the independence of ethics, but also to reflect on the reservoir of Jewish sources that speak to the other pole of biblical and rabbinic thought: the universal.