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TITLE PRINCIPLES OF POWER: THE APPLICATION OF ETHICAL NORMS
WITHIN THE HALACHA

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This rabbinic thesis offers an examination of the nature and function of certain principles of ethical tikkun within Jewish Law. In so doing, it attempts to probe aspects of the halachic ability to respond to changed conditions of life. We pursue this endeavor through a detailed analysis of a collection of takkanot designed to effect palpable legal alteration.

The thesis opens with an introductory chapter that begins by describing the mechanism of tikkun, and discussing the role of the takkana within traditional Judaism. We then provide a clarification of what is considered an "ethical takkana," and establish a differentiation between rabbinic mitzva-oriented ethical thinking, and modern values-ordering conceptions. We specify what is understood by the term "explanatory norms," and point to the subjectivity inherent in attempting to evaluate the mooted ethical intent of such norms.

Three subsequent chapters, comprising the main body of the thesis, explore the application of a sampling of these norms in providing justification for halachic refinement. Examples of takkanot containing the principles of darchei shalom, darchei noam, and tikkun haolam are studied, in order to determine the role played by these explanatory principles within halachic enactments. Each of these three central chapters scrutinizes a single principle, tracing its development through the texts of the Mishna and Talmud, as well as through the prisms of a variety of medieval and later respondents.

Our inquiry discerns that while the principles were utilized in a number of applications that were essentially pragmatic, they were also regularly applied within takkanot that attempted to act for the ethical. In these latter instances, they were often the catalysts of substantive alteration in the halacha, inspiring change that ventured well beyond the cosmetic.

A final, concluding chapter investigates the possibilities for contemporary ethical adjustment of the halacha. The positions of three modern Orthodox thinkers (Louis Jacobs, Eliezer Berkovits and Walter Wurzburger) are assessed in regard to the question of potential halachic reform in an ethical direction. We distinguish between current fundamentalist and non-fundamentalist approaches to the halacha. By analogy to the debate over critical legal theories within contemporary jurisprudence, we appraise the present-day merits of

alternative views on halacha. We explore the differing modern perspectives on the functioning of the "ethical principles," and suggest possible capacities in which they might be effective within current halachic structures.

Throughout this thesis, our attention is focused upon the uncovering of these quietly powerful principles of tikkun, and their role--both past, present and potential--in shaping certain ethical features of the halacha as we know it today.

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Part of being a Jew is recognizing that there are times when one must pause before hurrying on. We must seek to interrupt the endless stream of activity which, for so many, abides no delay. There are moments which call us to disengage ourselves from the ongoing struggle, and simply to appreciate the priceless gifts that are ours.

This is such a moment. At the threshold of endings and beginnings, with nights--and years--of journey ahead, I pause now to nod my acknowledgements (for surely it would be chutzpa to think that one could express them fully), to those who have helped, sustained, and nourished me.

I firstly voice my thanks to the individuals who have inspired, guided and encouraged this work: to Dr. Ben Zion Wacholder, a master Talmudist, who first introduced me to the captivating nature of Talmudic wisdom, and who patiently illumined for me the deeper levels of so many beloved texts; to Dr. Barry Kogan, who began to teach me Jewish philosophy in Jerusalem, and whose penetrating mind continues to raise the most probing questions...his kind and gentle perspicacity has been highly valued; and to Laurie Simon Goldman, whose exceptionally fine grasp of the English language enabled her to edit this work with consummate skill and care, and whose friendship has always been a source of warmth. To each of them goes my profound appreciation.

This thesis, though, denotes the impact of an even wider sphere of influence, over a far longer period. Too numerous to mention are the individuals whose sagacity and sensitivity have shed light upon my path during these past few years. Those who have nurtured my intellectual and spiritual development are spread over a number of continents, and have contributed to the richness of my life in many diverse ways. To each of them--family members, teachers and friends--may this note convey my sense of gratitude. It is, however, my fervent hope that they will not find the fullest articulation of my thanks merely within the generalities of these printed words. Rather, may they find my appreciation reflected in the contributions I might make as a result of that which I have learned from them. May the fruits of this aspiration, in some small way, bespeak the highest values and the most cherished ideals of these exceptional men and women.

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CHAPTER 1

Realigning The Mirrors

It was Yochanan ben Bag Bag, a sage of the first century prior to the common era, who was credited with the immortal words, "hafoch ba vehafoch ba, dechula ba," "turn it [the Torah] and turn it, for everything is in it." (1) The Torah, like a supreme kaleidoscope, could--through a process of judicious rotation--refract light through its given quantity of translucent particles, and thereby capture every pattern allowable, from the most simple to the most sublime. A self-contained system, it was seen to be capable of offering new facets and presenting altered arrangements, if one would but turn it and look into it in the appropriate manner.

Photons, however, are amenable to rigid laws in ways that communities of human beings, observed over long periods of time, are not. Once the mirrors have been placed in the tube of an actual kaleidoscope, it will continue to provide consistent spectral brilliance for every person who uses it. But the same cannot be said of the way that human beings have interacted, over time, with the legal mirrors of established law codes. Humans do not always travel neatly in straight lines, and so they sometimes come into contact with old laws at unexpected new angles, in ways that their forebears could never have anticipated. The resulting intersection of such altered

paths with static laws can often be an opaque gloom, far removed from visions of spectral brilliance.

Under such circumstances, it is no longer sufficient merely to "turn" the kaleidoscopic Torah, hoping that light will reemerge. A more radical movement is required: the mirrors--the laws--themselves need to be realigned so that light may again emanate from the new path upon which human beings have embarked. A new understanding of the law needs to be formulated so that it might suitably reflect the altered human condition. Within the halacha (Jewish law) which flows from the Torah, such a realignment, such a correction of the legal angles, is known as "tikkun." And just as mirrors within a tube can only be adjusted within certain prescribed limits, so too for the laws of halacha. The process of tikkun was traditionally undertaken within the parameters of specific guidelines. These led to new legal enactments, apposite to changed situations and referred to as "takkanot." (2)

Deuteronomy 17:11 contains the following instruction to B'nai Yisrael: "According to the law which they shall teach thee and according to the judgement which they shall teach thee, thou shalt do; thou shalt not turn aside from the sentence which they shall declare unto thee to the right hand, nor to the left." (3) Further along, the passage "Ask thy father and he will declare unto thee, thine elders, and they will tell thee," is found in Deuteronomy 32:7. (4) The right of the "halachic scholars and other competent bodies" to enact

takkanot was said to derive from these proof-texts.

Consequently, takkanot were viewed as constituting the products of the activity of competent halachists in each age, in so fashioning the law of the Torah as to make the mitzvot (commandments) fully applicable in the lives of the people. And tikkun was seen as a utopian process of repairing, improving and perfecting, such that the resulting takkanot might reach for the greatest good. As one modern halachist has formulated it,

the takkanot usually consisted of positive actions enacted by the authorities of every generation from Moses on down, including prophet, sage, rabbinic court, and general community, and addressed themselves to specific situations where the good and moral welfare of society were involved.(5)

The social welfare component of the takkana was further attested to by Maimonides, who wrote in his commentary on the Mishna that this "category consists of laws based on empirical investigation regarding the social behavior of individuals...or matters which are helpful to society with respect to the observance of the Torah."(6) Thus, by way of example, one of the most straightforward takkanot, and--through its ascription to Joshua--mythically one of the earliest, was the enactment that although the Kinneret (Lake Tiberius) was part of the tribal area of Naftali, anyone was permitted to fish there, so long as he did not use equipment that could interfere with boat traffic.(7) The Torah might have led one to believe that the Kinneret was set-aside for the use of the Naftali'im only, but the legislation embodied in the takkana established the Torah's

intention in a manner which simultaneously facilitated the social interest.

The Kinneret issue provides a good illustration of the first of the two aims of halachic legislation discerned by Menachem Elon:

(1) to fill a lacuna in the law created in consequence of changed social and economic realities and the emergence of problems which find no answer in the existing halakhah; in this event the takkanah generally serves to add to the existing halakhah;

(2) to amend and vary the existing halakhah to the extent that this is dictated by the needs of the hour; in this event it cannot be said that the existing law fails to provide guidance but, on account of changed circumstances, the law as it stands creates difficulties of a social, economic, or moral nature, which the takkanah seeks to rectify or resolve. (8)

The takkana, from its inception in the period of the tannaim, was thus utilized both to create new law, as well as to alter existing law in those cases where the rabbinic techniques of interpretation did not prove wholly sufficient to revitalize the law in changed conditions. This had the potential, of course, to be a controversial process since it was a Toraitic injunction not to add to, nor diminish from, the laws which had been commanded (Deut. 4:2, 13:1). Thus, while many of the earlier rabbis perceived it as being permissible to create, under their aegis, substantive legal innovation, this became the cause of a degree of uneasiness amongst later authorities. Often, such discomfort resulted in attempts being made to transmute the changes into forms which exhibited an interpretative appearance. In short we might say that the process of tikkun, since its inception--and throughout its

Talmudic, Geonic, and Medieval stages, down to our present day--has embodied a delicate dialectic requiring astute sensitivity. For even when only modified perceptions are sought, change, of course, is rarely smooth, and when divine commandment is at stake, how much the more is this true.

Many takkanot, like our Kinneret example, were primarily enacted as pragmatic measures. They were designed to respond to practical circumstances, and concurrently to ensure that the "Torah, its ways and precepts, should not become strange to the Jewish people." (9) They aspired to no grand ethical reshaping of social relationships. The rabbinic mind, however, did not comprehend the differentiation between pragmatic considerations and lofty ethical ambitions in any way approaching the approximate bifurcation of our twentieth century view. As Boaz Cohen has observed, "it has often been noticed that in ancient society in general, and in Hebrew society in particular, religion, law and morals were undifferentiated." (10) For the rabbis, whose legal system was inexorably characterized by its religious context, the very act of tikkun was a religious endeavor since it sought to discover the Torah's intended meaning, and desired to make the mitzvot live. Hence, insofar as it was an ethical mandate to strive for "havashar vehatov," "the right and the good" (Deut. 6:18) within human society, the entire effort for tikkun could be viewed as an ethical venture to a greater or lesser degree. As Jacob Lauterbach has claimed, "the teachers of the Halakhah believed that every law

and commandment of the Torah rested on an ethical foundation."(11)

However, while it is important to recall the pioneering nature of halacha as a religious legal system, still "it would be misleading to conclude...that in the eyes of the inspired legislator these rules were of equal significance, ...albeit they were of equal divine provenance."(12) This too was recognized by the rabbis, as is evidenced by their application of different sanctions for varying levels of transgression. Though the sages saw all law as having religious value--and hence, ethical import--they were also aware that equal provenance did not imply equal significance.

Two factors must, therefore, be borne in mind when examining rabbinic takkanot. First, the rabbis did not systematize or elevate the "ethical," as the modern mind might do, since, for them, the ethical and the practical were viewed as components of an over-arching religious framework. As we shall have cause to observe through actual examples, the upbuilding and support of the mitzva was the rabbis' primary ambition in shaping Torah, a task which itself was considered to embrace ethical dimensions.

Second, the rabbis nevertheless acknowledged that their takkanot were deployed along a scale of values, and, in some cases, aspired to attain to high ethical ambitions. The rabbis were aware of a moral hierarchy within Judaism which was not "reduced to legal imperatives." While this is not the place to

enter into the ongoing discussion over whether this hierarchy was and is a part of, or independent from the halacha, still its existence must be posited if we are to make any sense of the reasoning behind many of the takkanot. Just as we could not understand Abraham's question to God, "Shall not the Judge of all the earth deal justly?" (Genesis 18:25), if we had no idea of what it meant to "deal justly" independent of God's commandments, so we could not understand Rabbi Shimon's decision (Sanhedrin 71a) to render the law concerning the rebellious son "inoperative," if some higher concept of justice did not propel him to do so. (13) Hence, the rabbis perceived (just as we do) that

the two acts of neglecting to don phylacteries and committing murder--even though they are both halakhic transgressions--differ in kind as well as in degree. The first is strictly legal, while the second possesses moral dimension. Consequently, they warrant different logical, psychological, and correctional responses from us. (14)

Our discussion, then, will not assume that the "ethical," is to be found in every takkana, though clearly--within a religious context--this is a feasible understanding. Rather, we shall refer to a scale of value which differentiates between the pragmatic or legally opportune at the one end, and elements which aim to cultivate a higher ethical intent at the other. The definition of "ethics" that we will employ in analyzing the takkanot from a modern perspective will assume, then, that ethics refers to a system that "distinguishes right from wrong, right being that which harmonizes with the moral order of things and serves its purposes, wrong being that which is out

of consonance with this order and would conflict with and oppose it."(15) We shall further assume that the pursuit of the ethical inspires humans "with the will and the power to choose and do the right [and the good] and eschew and abandon the wrong."(16)

But in what areas does Judaism most assiduously pursue the ethical? To try to define them in any comprehensive way would be tantamount to providing an overview of the values structure of Jewish theology, and this we shall not attempt. Instead, we will indicate the general direction of Jewish ethical thinking by pointing to several "ethical factors" which Aharon Lichtenstein has considered to be of sufficient moment to "sanction the breach, by preemptive priority or outright violation, of specific norms."(17) The factors Lichtenstein distinguishes include "the preservation of life, the enhancement of human dignity, the quest for communal or domestic peace, [and] the mitigation of either anxiety or pain."(18) Beyond these examples, in further attempting to denote ethical aspirations, we shall ultimately rely on a shared sense of supreme value which both includes and transcends the Jewish community.

The Jew committed to halakhah can share with others the same moral concepts. When he speaks of goodness, he means essentially human happiness and fulfillment. He talks of moral rightness, referring to the fair protection of individual interests, and he utilizes the word 'justice' to connote reciprocity and the elimination of arbitrary inequalities. As a result of these conceptualizations, his ethical reasoning is governed by certain principles of inference. He need not retreat into a private moral language, for the logic of moral reasoning is identical for both the Jew and the non-Jew. It is a universal king whose

sovereignty over clear thinking knows no ethnic or cultural boundaries. (19)

It will become immediately clear, then, that when we refer to "ethical takkanot," our intention will be to takkanot which--beyond the hundreds of takkanot governing practical rulings for public utilities, roads, et cetera--demonstrably exhibit ethical priorities, and strive toward the highest of human ideals.

Menachem Elon has noted, though, that many, if not the majority of Talmudic takkanot, were promulgated without the provision of specific reasons for their enactment. "The sole explanation accompanying many takkanot was the factual background and circumstances leading to their enactment." (20) For some takkanot, however, the general principle, which supposedly accounted for their legislation, was included. A variety of such explanatory norms was devised and applied during both the tannaitic and amoraic periods, including such motives as "mipnei takkanat hashavim," "to facilitate rehabilitation," "mishum eiva," "to prevent hostility," and "mishum kevod habriot," "out of respect for the dignity of the individual."

Perhaps three of the most well-known principles, which became a part of the reasoning structure of a number of takkanot, were "mipnei darchei shalom," "for the sake of the ways of peace," "mipnei darchei noam," "for the sake of the ways of pleasantness," and "mipnei tikkun haolam," "for the sake of the repair of the world." The phrase mipnei tikkun

haolam appears about thirty-five times in the Talmud Bavli, with mipnei darchei shalom to be found at least seventeen times, (21) and the rarer mipnei darchei noam being evident in approximately six instances. Each principle also appears in other rabbinic sources, as well as in later responsa material. The common denominator shared by these principles is that they appear, *prima facie*, to present structured ethical considerations, simply through the priorities which they seem--at first blush--to be espousing. For, after all, if the aspirations for peace, pleasantness, and the mending of social relations were the criteria by which these fifty-eight takkanot were enacted, then it would seem logical to deem them ethical takkanot of a high calibre, merely by dint of the ethical principles invoked to substantiate their raisons d'etre.

But were these nominally ethical principles also principles which prompted action for the ethical in reality? Is the impression of first encounter sustained by deeper analysis? How influential in the steering of particular aspects of the halacha in an ethical direction were darchei shalom, darchei noam, and tikkun haolam able to be? In what type of enactments were these principles most gainfully employed? Did the rabbis utilize these finely-crafted components of the halacha to sustain radical ethical alterations, without which warrant for tikkun might not have been forthcoming? And is there a place for the application of such principles within twentieth century ethical takkanot, that might act to strengthen the ethical nature of contemporary halacha? We shall seek to address these

questions as our survey, designed to explore these principles, unfolds.

"No investigation of the river's course is possible without an examination of the spring from which it emanates."(22) Our study, which will focus upon the functioning of the takkanot containing these three principles, will, therefore, pay close attention to the Talmudic settings in which these norms were found. It will proceed--for each principle in turn--to attempt to arrive at some tangible answers to the questions we have posed, before finally moving toward a consideration of the possibilities for tikkun within the watershed we call modernity.

Louis Jacobs has written that "law, by its very nature, is categorical and for all. It is down to earth, precise, and exact, whereas the ethical ideal is bound to be, to some extent, at least, individualistic and subjective."(23) We begin, then, with the caveat that our evaluation of the functioning of the ethical in rabbinic times, and the possibilities for the extension of ethical legislation in our own day, will, unavoidably, contain subjective elements. The virtue inherent in this apparent flaw, of course, is that the responsibility will then fall to the reader to critically analyze the texts we shall cite in order to ascertain his/her own individual perspective regarding their "ethical" content.

"One can be an ethical human being without faith in the covenantal God, but one cannot commit oneself to the fullness

of the covenantal mitzvah without appreciating the way the ethical impulse is intrinsic to Judaism as a way of life."(24) The activity of tikkun is an enterprise which awakens realization of the enormous potential for the actualization of the "ethical impulse" within Jewish life. For it is, perhaps, when takkanot are enacted with ethical motivations that the "fullness of the covenantal mitzvah" is most resoundingly affirmed. Discerning the extent to which this affirmation was amplified through the presence of these principles, may well make us more sensitive to the possibilities for, and the limitations upon ethical tikkun within the halacha of our own generation.

CHAPTER 2

VeHaEmet VeHaShalom Ehavu

Ever since Noah's turtle-dove first fluttered back carrying an olive-branch in its bill, the bird has had a symbolic connection to peace the world over. It must be observed, however, that those humans who dealt with and handled birds were not necessarily always the most peace-loving of people. The pigeon-trainers of the Jewish communities of Babylonia, for example, represented a conspicuous illustration of a tendency toward the unscrupulous. Barred from being witnesses or judges in the batei din (courts) of Israel, their disqualification was grounded in the observation that the pigeon-flyer was sometimes not only a bird-racer, but an Ara--"a fowler, one who puts up decoy-birds to attract other birds from another's dovecot"--as well. And though the conduct of the Ara could not be technically defined as robbery in a legal sense, still it was so regarded in terms of supra-legal relations between neighbors. "Mipnei darchei shalom," "for the sake of the ways of peace," luring from the dovecots, though not technically outlawed, was considered a sufficient breach of proper moral conduct to make the Ara ineligible for any responsible role in the rabbinic courts.(25)

Rashi observes that the disqualification of the Ara originated from the Exodus verse, "You shall not join hands

with the guilty to act as a malicious witness." (26) De iure, of course, the Ara was not guilty since "according to strict law, these birds were considered as semi-wild, and therefore ownerless. Yet it was robbery on account of 'the ways of peace.'" (27) In the interests of peace, the Ara was not allowed to get away with his behavior, but was branded as wanting in integrity, and sanctions were applied against him in order to attempt to discourage such unfair conduct.

In this case and others in which the rabbis felt the need to create innovative legislation in order to perfect the law, they turned to the principle of darchei shalom. An axiom which sought the "ways of peace," darchei shalom began as a tannaitic device designed to ensure that "the legislative purpose of the statute was the prevention of communal conflict which would result from some immoral practice not otherwise limited by law." (28) Though utilized by the amoraim, truly extensive application of darchei shalom clearly belonged to the period of the tannaim. Indeed, so great was the concern for communal harmony amongst the tannaim that they applied this principle in the context of a plethora of varying takkanot, enacted, by and large, in order to ensure that the halacha would not be a source of societal friction.

Mishna Gittin contains within it the greater proportion of the enactments made mipnei darchei shalom. The mishna first turns its attention to issues of public honor, determining that "a cohen [priest] reads [the Law] first, and after him a

levite, and after him an Israelite--in the interests of peace."(29) Originally, though the Law required that the cohen should read from the Torah first,(30) he was nevertheless permitted to yield this honor to an Israelite, and the Israelite was allowed to accept.(31) On Shabbat and festivals, however, when the synagogue was crowded, the rabbis disallowed this practice of letting others read in the cohen's stead, mipnei darchei shalom. Rashi explains that this takkanah was constructed in order to prevent quarreling and jostling for the honor of reading first.(32) R. Menachem b. Shlomo Meiri elaborates that it prevented rancor against a cohen who apportioned his honor to one person and not another, and accusations that a given person had read the last time in place of a cohen, so another should read this time. Whenever, according to the Meiri, large numbers are to be found in the synagogue, jealousy is also to be found there, and hence, as R. Mattena observed in the gemara, on Mondays and Thursdays when Torah was read but the multitudes were not present, the cohen was authorized to reapportion his honor.(33) The Meiri immediately indicates, however, that Mattena's observation had since become theoretical because, as the Tosafot note, numbers began to appear in the synagogue on weekdays as well, and hence the cohen was required to read first, just as he would on a Yom Tov.(34)

In the midst of the gemara's discussion, Abaye questioned R. Joseph about the need for this mishna:

Is this rule only [a Rabbinical one] in the interests of peace, or does it derive from the Torah?--He answered: It does derive from the Torah, but its object is to maintain peace. But the whole of the Law is also for the purpose of promoting peace, as it is written, 'Her ways are ways of pleasantness and all her paths are peace' (35)

R. Joseph here appears to express a fundamental perception that the intention of the entire corpus of Toraitic Law was none other than the pursuit of peace, and hence the objective of any takkana could only be to elicit the Torah's already implicit harmonious purposes. This somewhat hyperbolic statement cannot, however, be taken too far. For the Talmudic text would seem to provide more of a rhetorical, contextual support, than a definitive ideological position. In the words of Walter Wurzburger,

There is no indication whatsoever in the Talmudic passage cited, that 'the ways of peace' represent the ultimate aim and overall objective of the Torah. The texts in question really emphasize that 'the ways of peace' represent one of the numerous features characterizing the precepts of the Torah. (36)

The importance, though not the paramount distinction of peaceful intentions, is hereby affirmed.

But why, it might be inquired, did the Torah--which was recognized as being divine--require tikkun in order to assure its smooth, peaceful integration into a particular societal context? Eliezer Berkovits provides an answer which is ably demonstrated time and again:

"Often, in the area of interpersonal relationships, corrective innovation had to be attached to the law. This becomes necessary because the law is always general. But its very general validity is, at times, unable to do justice to the particular or specific." (37)

Such also was the nature of the answer which Abaye eventually provided to R. Joseph in this particular section of gemara. For one might have thought that the darchei shalom principle would suggest that the cohen pay respect to teachers or superiors by deferring his primary position to them, even if they were not cohanim, in much the same way as he who breaks bread--though he has the right to help himself first at the table--might invite his teacher to precede him. But such an interpretation would have led to disputes in the synagogue, and hence the takkana was required in order to stipulate that darchei shalom in this situation demanded that the specific sequence be adhered to--virtually without deviation--even to show respect for one's masters.(38) The appropriate specificity of the law is hereby clarified.

The gemara, however, immediately provides a case apparently contrary to this sense of the principle. It is reported that R. Ammi and R. Assi, "the most distinguished cohanim of Eretz Yisrael," used to defer to the Israelite R. Huna even on Shabbatot and Festivals. This led to a difference of opinion amongst the rishonim as to what exactly constituted darchei shalom in this situation. Some maintained that in the case of one who was a gedol-hador, preeminent in his generation, it was appropriate to defer to him, since--considering that there was nobody of equivalent status--it could hardly be the cause for ill-feeling. Others, however, were of the opinion that darchei shalom did not indicate such deference, since generational renown through all communities was no longer so definitive as

it had been in the time of R. Huna, and hence it was better for an ignorant cohen to precede the most outstanding levite or Israelite, so as to ensure darchei shalom. (39) Darchei shalom then, had an adaptable application in this context, implying different potential outcomes, according to the form of the varying calls for societal harmony. Each application appeared, however, to seek the most appropriate balance between the values of honor and orderly equality, in aspiring to the summum bonum for that particular generation.

Moreover, such adaptability is amply affirmed by the corresponding text in the Talmud Yerushalmi. There, the Palestinian rabbis ordained that in "a town which is entirely [composed of] cohanim, [if there is one Israelite amongst them] the Israelite reads first for the sake of the ways of peace," in order to prevent competitive strife amongst the cohanim. (40) This apparent inversion of the Torah's ruling prompted the Korban Ha-Eida to question:

And is this not [different] from Scripture? How are they permitted to change [such a matter] in the interest of peace? But surely the rabbis have such authority to uproot something from the Torah through [the principle of] kum v'asei--acting to suspend the law in a positive manner! (41)

There were those amongst the rishonim, however, who disagreed with this insight completely. R. Yosef Kolon (MaHaRiK), a fifteenth century respondent from Italy, for example, maintained that if one held that the cohen's primacy was Toraitic, as appeared to be the case, then "there is no authority in the hands of the rabbis to uproot the sanctity of the cohen for the sake of the ways of peace." (42) Here we

apparently have variant interpretations concerning whether the cohen's honored position was in fact Toraitic or rabbinic. It could well be, of course, that the extent of the perceived need for tikkun may have influenced disparate views on this issue, as well as consequent possibilities for flexibility. What is certain, however, is that whether the paradoxical situation depicted by the Palestinian gemara was acceptable or not, the promotion of peaceful relations was the intention which called forth this rather daring solution.

This intention was not nearly so clear though when the matter of the honor due a cohen was further discussed in an altogether different framework. Mishna Shekalim records that "they did not exact pledges from the priests, in the interests of peace," and Maimonides (RaMBaM) adds to this that though pledges might have been demanded, they could not be forcibly extracted from the cohen.{43} The gemara to the Talmud Yerushalmi represents the mishna's use of darchei shalom with the term "derech hakavod," "the way of honor," and the Korban Ha-Eida explains that honor was accorded the cohanim because of the work of service they performed with the sacrifices, or because of their own holiness.{44} While there were those who disputed the conflation of darchei shalom with honor in this case, it would seem that it provided at least some cogent reasoning for this use of the principle. For otherwise, far from ethical considerations, it would have to be conceded either that this particular usage seems wholly out of keeping with its context, or that the cohen's privilege could indeed

have been the potential cause for added strife, rather than increased tranquility.(45)

It is likely that the requirement to pay the pledge had given rise to enmity between the cohanim and other groups, and that, as a result, the law was not enforced for the priests, in order to restore peace. In this, sense, of course, darchei shalom was very much upheld. But a consequence of the cohen's differentiated status meant that the possibility for renewed controversy remained. This points to an important tension potentially present in any takkana. The process of tikkun had to be an ongoing one since, sometimes, what began as a determination to secure peace, could, over time, come to be perceived as a source of inequality and privilege. Once enacted, the response of society to a takkana was often no more static than it was to the law itself.

Beyond concerns over honor, we find in Mishna Gittin other diverse purposes for employing darchei shalom. A subsequent enactment, which deals with matters of suspicion, legislates that "an eruv should be placed in the room where it has always been placed, in the interests of peace."(46) The eruv represented common property which enabled those who lived in a "courtyard to have unrestricted access to the premises of other tenants," and especially to carry between premises on Shabbat. The gemara, however, examines in what manner leaving the eruv in one place promoted concord, given that it could conceivably be viewed as encouraging discord as well:

Shall we say it is out of respect for the owner of the room? Then what of the shofar [which was used for announcing the Shabbat] which at first was in the house of Rab. Judah and later in that of Rabbah and then in the house of R. Joseph and then in the house of Abaye and finally in the house of Raba?--The real reason is so as not to excite suspicion.(47)

Rashi explains the suspicion that could potentially arise as follows: "If the eruv was regularly placed in that house, and you then changed its place, those who entered the house and did not see it there would suspect that the inhabitants of the courtyard were carrying things about [on Shabbat] without an eruv."(48) Consequently, darchei shalom, in this context, was not so much apprehended in the role of preventing disputes over honor, as it was in the capacity of protecting reputations and averting distrust. This same function, moreover, was also attested to by the Tosafot, even though they explained the suspicion differently, saying that it might be intimated that the eruv was moved because the owner, in whose house it had been placed, was stealing from its contents.(49) Other explanations of the suspicion are provided by the rishonim, including the suggestion that the owner of the house, who derived reward from keeping the eruv, might surmise that moving it was designed to cause him loss, and this could lead to quarreling.(50) We might, of course, surmise that practical considerations of consistency played a substantial role in determining the ruling. Nevertheless, it must be asserted that darchei shalom appears to have been applied within this takkana in order to ensure the preservation of household integrity, and the avoidance of uncertainty over issues of propriety. The importance here of the ethical sentiment behind darchei shalom

should not be underestimated, particularly given the fact that if the practical problem involved had been entirely self-evident, there would have hardly been a need for the takkana in the first place.

Further, it is instructive to note that in the fifteenth century, the MaHaRiK penned a responsum concerning synagogues, in much the same spirit as the mishna's takkana. In answer to a question posed by residents of the upper Galilee, the MaHaRiK maintained that, whether or not there was reasonable argument for doing so, a beit kneset should not be moved from the premises in which it was located. This he derived through analogy to the mishna, for reasons of darchei shalom, lest it be said that people refused to go to the synagogue because the inhabitants of the place in which it was housed were not suitable, decent people. (51) It must be noted that the case discussed here referred to a situation in which the community wished to move the synagogue to another private residence, but not one in which they wished to build a fixed house of worship. Moving to a fixed house of worship would, of course, have been permitted. (52)

Not only did darchei shalom watch over reputations and honor, but it also guarded legitimate financial concerns. As with many financial matters, however, who exactly was supposed to be guarded was open to various elucidations. The mishna contains the unambiguous statement that "the cistern nearest to a water-channel is filled first--in the interests of

peace."(53) But what seemed to have had no ambiguity for the tannaim became a rather complicated matter indeed for the amoraim. The gemara records that the great amoraim, Rav and Shmuel, differed on the proper understanding of the mishna. So long as the water was permitted to flow freely, there was no problem, since anybody could draw sufficient quantities of water as needed. But disagreement arose in regard to the question of damming for purposes of watering. In the words of the Talmud,

Shmuel says that those above can draw off water first [i.e. by damming], for they can say 'We are nearer to the source,' while Rav holds that those below can draw off first for they can say 'The river should be allowed to follow its natural course' [till they have drawn off what they require].(54)

But what, it might be asked--according to Rav--is the sense of the mishna under such circumstances? The gemara reports that Shmuel explained Rav's understanding of the mishna as referring to those cases where the river was sufficiently close to the cistern that the pit could be filled without damming. In such cases, nobody should suggest that a person higher up should close up his pit so that everybody might draw proportionately; he whose pit was automatically filled first had no need to block it in the interests of peace. Shmuel, on the other hand, argued that no matter what the conditions, those above may first dam or fill naturally, in order to prevent confrontations over primary water usage. The confusion caused by the divergent opinions of these two authorities is ably demonstrated in the Talmud with the story of what happened to Abaye:

R. Shimi b. Ashi presented himself before Abaye with a request that he should give him lessons. He [Abaye] replied: I use my time for my own studies. Then, he said, would your honour teach me at night? He said: I have to do some irrigation. Said the other: I will irrigate for your honour by day, and you will teach me by night. Very well, he said. So he went to the people higher up and said to them: The people lower down have the right to draw water first. Then he went to those lower down and said: The people higher up have the right to draw water first. Meanwhile he had dammed the watercourse and irrigated Abaye's fields. When he presented himself before Abaye, the latter said to him: You have acted on my behalf according to two contradictory authorities; and Abaye would not taste of the produce of that year. (55)

The gemara relates that R. Huna b. Tachalifa then declared that since the law had not been determined one way or the other, whichever view proved to be the strongest would dominate. Nevertheless, in the twelfth century, R. Avraham b. David (RaBaD) urged sensitivity to the principle of darchei shalom, and was of the opinion that he who was closer to the source should be viewed as being in the more dominant position, and, as suggested by the plain meaning of the mishna, he should be allowed to fill first. (56) The Meiri too lent support to Shmuel's view, in opposition to those who maintained that the inhabitants lower down might rightfully claim some priority over those closer to the source. (57)

It seems clear, then, that where the economics of irrigation were concerned, the mishna's takkana proved insufficient to ensure the interests of peace. Though it attempted to preempt conflict by detailing who should draw water first, its failure to specify the exact conditions under which the ruling applied, allowed Rav and Shmuel to establish contradictory interpretations, both of which could be read as

being faithful to the mishna. Ironically, they were both also intended to further the interests of peace, but, without being reconciled one to the other, they simply led to further contention. As a result, altercation arose because the principle which was designed to focus the law, did not detail the specifics minutely enough. It is illuminating that the RaBaD calls for a renewed sensitivity to the spirit of darchei shalom even as he is delineating new, narrower understandings of the law to guard the interests of peace. The observation that darchei shalom was most often used to "do justice to the particular or specific" (Berkovits, supra), is hereby upheld. Upheld also is the consideration that--in this case at least--the task of tikkun was completed neither by the tannaim nor the amoraim, since they differed on what would be an appropriate ethical outcome of the law. Paradoxically, it became evident that darchei shalom, when not precisely detailed, could itself become contentious. Hence, the removal of discord was left to later authorities to perfect, and even in the Middle Ages, disagreement remained over which path to follow.(58) Clearly, darchei shalom did not assume one stable meaning which remained constant throughout time, but exhibited a dynamic aspect, and had the potential to be viewed differently by later generations.

The fluidity involved in this issue was not, however, mirrored in the principle's determination of what constituted robbery, which was characterized by a marked degree of conformity. We have already had occasion to refer to the case

of the Ara and the reasons for disqualifying him from the performance of legal functions. It is, though, important to heed Steinsaltz's differentiation that whereas the Ara's behavior was wholly inappropriate within the confines of a settlement, in the desert or country, where birds might naturally come to a dovecot, and were considered in an ownerless (hefker) state, such behavior was not deemed improper. (59) This led to the question of whether--in cases where birds came to roost in one's dovecot without being lured--it was considered robbery if a stranger came and took away these (technically ownerless) birds. Two tannaitic sources inform us that this was indeed considered robbery, mipnei darchei shalom: "The pigeons of a dovecot and the pigeons of an attic are liable to the requirements of sending forth and prohibited because of robbery, in order to keep peace." (60) Though ownerless according to the letter of the law, the principle ascribed possession to the owner of the dovecot in order to prevent strife and fighting over the birds.

In like fashion, the mishna denotes that "[the taking of] beasts, birds and fish from snares [set by others] is reckoned as a kind of robbery, in the interests of peace. R. Yossi says that it is actual robbery." (61) The gemara reports that all agree in cases where "loose or close nets" were employed, since these, "having a hollow, certainly confer ownership on the one who set them, and to take the contents would be robbery." (62) Here, all concur that this was actual robbery, but disagreement between the rabbis and R. Yossi arose when the method of

entrapment was fishhooks or traps. This disagreement is further elaborated in the context of the subsequent part of the mishna which deals with the taking away of objects found by a deaf-mute, an idiot or a minor. As Eliezer Berkovits explained it,

Children, insane people, etc., are not legal persons to acquire property. Consequently, if they found a lost object it would not pass into their possession. Consequently, anyone could come and take it away from them. However, it was ruled that to do so would be robbery. (63)

According to the rabbis, however, robbery in this context implied "a form of robbery for the sake of peace," but, in the view of R. Yossi, both cases represented actual robbery, subject to set judicial procedures. R. Hisda held that what R. Yossi intended, in declaring these instances actual robbery, was not the Torah's notion of robbery, which would have precluded the robber from giving evidence, but the rabbis' conception of robbery, which mandated that the article could be recovered by legal process before judges. In the view of the rabbis, however, "rabbinic robbery" was not applicable here, and--according to their position, which became halacha--the item could not be recovered through the legal system. (64)

This difference in outlook is continued in the mishna, in the context of discussing food gathered by the poor. "When a poor man beats the top of an olive tree [in taking gleanings], the law of theft applies to what is beneath him [that has fallen owing to his searching]--in the interests of peace. R. Yossi says: The law of theft applies in every respect." (65) According to the gemara, all seemed to agree that if the poor

person handled the fruit before it was on the ground, and then someone took some of it, this was considered actual robbery. But, if he had not handled the fruit, still--in the eyes of the rabbis--it was robbery mipnei darchei shalom. The gemara then relates this story:

R. Kahana was once going to Hutzal when he saw a man throwing sticks [Rashi: at a tree; according to the Tosafot, however: down from a tree] and bringing dates down, so he went and picked up some and ate them. Said the other [man] to him [Kahana]: See, Sir, that I have thrown them down with my own hands. He [Kahana] said to him: You are from the same place as R. Josiah, and he [Kahana] applied to him the verse, 'The righteous man is the foundation of the world.' (Prov. 10:25)(66)

The Meiri discerned that mipnei darchei shalom was applied within this mishna specifically to the poor, and not just to any passerby.(67) For in the case of a passing traveller, only taking what he had actually touched would be considered robbery, whereas gathering the fruit that had fallen to the ground untouched, as a result of his picking, was not considered robbery of any type. Hence, the Meiri apparently perceived the man whom R. Kahana encountered to be a passerby, not a poor person. For otherwise it would have been clear to R. Kahana that he could not take of the dates. According to this understanding, Kahana then ate the dates on the assumption that throwing sticks to bring fruit down was not the equivalent of handling; this, however, was a conclusion with which the other man clearly disagreed. Whoever was right, it is of importance to stress that according to the Meiri's interpretation, darchei shalom was employed here not merely to demarcate material ownership and circumvent dispute, but also

to provide special added protection to the interests of the needy. This tendency appears to receive some support in the Tosefta where it was suggested that one may protest the presence in one's fields of those poor people who are ineligible to glean for whatever reason, but that if one does not do so immediately, it would be better to let them continue to glean--even though they are technically disqualified--minnei darchei shalom. (68)

Others amongst the rishonim did not, however, agree with the Meiri's explication. R. Moshe b. Nachman (Nachmanides - RaMBaN) suggested that perhaps the man throwing sticks at the tree was a Samaritan, in which case darchei shalom would not be operative for R. Kahana, or that maybe Kahana thought that he would not be seen, and that if he was, the man would not concern himself with darchei shalom. (69) R. Shlomo b. Adret (RaSHBA) also raised the possibility that the man was a gentile, and that hence no transgression would be involved, and the Tosafot opined that possibly Kahana thought the man was more interested in the branches than the fruit; but if so--reasoned the Tosafot--robbery would still be at stake. (70) Here then, the thinking behind the application of darchei shalom, appears to have become somewhat blurred over time.

In the 'material interest' cases we have reviewed, R. Yossi was far more stringent in his approach than his colleagues. Nevertheless, the "deviations from the generality of the law" on the part of the majority of the rabbis, remain profoundly

expressive of the sensitivities of the chachamin, and their ability to communicate these attitudes through the use of darchei shalom. In the words of Berkovits again, "In these examples the rabbis went against the law or beyond it because of the importance of the Ways of Peace." (71)

Beside problems arising from matters of honor, suspicion and financial competition, darchei shalom was also employed in a variety of ways to strengthen direct neighborly relations. Quite explicit, in this regard, were the various takkanot concerned with conduct toward non-Jewish neighbors.

The mishna and gemara record that we do not bar gentiles from "gathering gleanings, forgotten sheaves and the corner of the field," that "we support the poor of the heathen along with the poor of Israel, visit the sick of the heathen along with the sick of Israel, bury the poor of the heathen along with the poor of Israel," and may inquire after the welfare of gentiles--even on their feast days, though this could be misunderstood as a compliment to their idolatrous gods--all in the interests of peace. Biblically, of course, all these activities were enjoined only in regard to Jews, but the rabbinic sources universalized their reach. According to the mishna, one could also provide assistance to gentiles during the Sabbatical year, though the gemara clarifies that this only pertained to verbal encouragement. (72) To these the Tosefta added that in "a city in which Israelites and gentiles live--the collectors of funds for the support of the poor

collect equally from Israelites and from gentiles, for the sake of peace. They provide support for the poor of the gentiles along with the poor of Israel," and they also eulogize gentile dead and console their mourners, all for the sake of peace.(73) The RaMBaM also included the additional ruling that the gentile poor should be clothed along with the poor of Israel, and--in line with the Talmud Yerushalmi--that gentile property should be protected from robbery, as was the property of Jews.(74) The rishonim, moreover, while echoing Rashi's admonition that non-Jews were not to be buried in Jewish graves, nevertheless stressed that one performs all these acts for gentiles, even should there be no Jews that require corresponding service. Hence, wherever it was written "with the poor of Israel," this was to be understood to mean "just as one would do for the poor of Israel."(75)

It is important, of course, to question whether these 'neighborly' takkanot were enacted primarily as pragmatic survival strategies, or were established for more purely ethical purposes. The RaMBaM seemed to be in no doubt that there was a fundamental ethical vision involved here. In explaining the extensive use of darchei shalom in regard to the gentile, he quoted two scriptural verses as representing the rabbis' intentions: "The Lord is good to all; and His tender mercies are over all His works" (Ps. 145:9), together with "Her ways are ways of pleasantness, and all her paths are peace" (Prov. 3:17).(76) Walter Wurzburger has perceived the RaMBaM's motivation for using these verses in this way:

Apparently, Maimonides went out of his way to guard against any attempt to look upon moral actions towards non-Jews as grounded exclusively in purely pragmatic considerations calculated to secure the peace of the Jewish community... Significantly, the verse 'God's mercy extends to all His creatures' is also cited by Maimonides as evidence that the cultivation of compassion constitutes one of the ways in which we comply with the mandate to emulate divine attributes of ethical perfection. (77)

Moreover, in our own century, this theme has been further accentuated by Chief Rabbi Unterman of Israel. In response to those who suggested that the rabbis fixed such regulations in regard to gentiles, "only for the [political] motive of the interest of peace," and not to establish the essential primary level of the law (shurat hadin), Unterman wrote:

There is, therefore, a need to elucidate the true understanding of the concept 'darchei shalom,' which is not within the category of a measure of saintliness, and not a means by which to defend ourselves, but derives from the essence of the morality of the holy Torah... .

Hence we learn that the ways of the Torah and her paths are [founded] in pleasantness and peace, and are directed towards our great aim, to be like--in our deeds--the blessed Creator; just as He is good and has compassion for all, so do we aspire to be good and have compassion for all. Therefore the RaMBaM provides, as the basis and root for the takkanot designed to perform righteous acts and loving-kindness also to gentiles, the verse 'The Lord is good to all; and His tender mercies are over all His works,' which is the aim of our aspirations; and afterwards, 'her ways are ways of pleasantness, and all her paths are peace,' that lead us to this aim.

...For everything that we correct mipnei darchei shalom there needs to be an attitude of devotion to behavior that leads to paths of Jewish living, like those that were fixed by the sages of the Torah. And just as it is impossible to designate somebody who depreciates the fixed halachot of the sages--like the second day of the festival, or [eating] poultry with milk, or the like--as one who preserves the Torah and mitzvot, so we do not give this designation...to one who refuses to follow the takkanot of darchei shalom, for all of these derive from the source of the living vitality of our Torah, through the development of the Oral Torah. (78)

If there was any equivocation over whether--according to a contemporary halachic authority--these takkanot were instituted for reasons of expediency, or in order to actualize the Torah's latent yearning for the ethical treatment of the gentile, such equivocation is hereby alleviated. But equivocation over the final intent of the principle within this context, is not. While noting that it is a somewhat subjective matter as to whether one sees the ethical or the practical at work here, we might nevertheless agree with the conclusion that at least "for Maimonides, and possibly for many other Jewish authorities, 'the ways of peace' are treated as the ethical religious norm and not merely as a pragmatic device to safeguard Jewish self-interest." (79)

Beyond considerations of relations with non-Jews, intra-community neighborly relations between Jews and Jews were also subject to change through the influence of darchei shalom. In this context, the mishna determined that "a woman may lend a sifter, a sieve, a handmill, or an oven to her neighbor that is suspected of transgressing the Seventh Year law, [i.e. of keeping produce gathered after the inauguration of the year] but she may not winnow or grind corn with her." (80) Something of a mental circumvention is utilized in this instance, since the rishonim--in line with the Yerushalmi--explained that the woman could lend provided that her neighbor was vague about the purposes for which she intended to use the implements, but not if she spelled out explicitly what their function would be, thereby making clear the transgression involved. The question

was then asked as to why darchei shalom is necessary in this situation, since Beit Hillel had given legal approval to the sale of such items, wherever it was conceivable that they could be put to some proper purpose. The answer provided was that, whereas in the case of selling, the vendor benefits, and indeed might need to sell for some reason, no benefit or necessity was to be found in the case of lending. Not only was there no benefit, but the potential existed that one's implements might be put to improper use. As a result, were it not for darchei shalom, even lending where it was possible that the items were being acceptably employed, would be forbidden.(81)

In contrast to the perception of the role of darchei shalom in Jewish.gentile relations, the principle is here viewed as having a rather technical, utilitarian function. Indeed, it might be argued that though allowing lending clearly improved the climate of neighborly relations, nevertheless in leaving open the possibility for transgression being committed with the lent tools, it was feasible that the ethical might be weakened rather than enhanced.

Insofar as the ethical is reflected in the greatest possible acceptance of society's less competent, the continuation of the mishna dealing with intra-communal relations, does, however, appear to strive for more ethical aims:

The wife of a chaver [associate] may lend a sifter or a sieve to the wife of an am-haaretz [one who does not observe the ordinances] and may winnow, grind, or sift corn with her; but when she pours water over the flour she may not

draw near, since help may not be given to them that commit transgression. All these have they enjoined in the interests of peace.(82)

Even though it was forbidden to assist a person committing a transgression during the perpetration of the violation,(83) here it was seemingly permitted to lend the utensils--mipnei darchei shalom. For in this case, it was not only explicitly known how the woman was going to use the implements, but the lender was even able to use the various instruments alongside her. The gemara consequently inquires, "why is the rule in the first case [of the Sabbatical year] different from that in the second [of the am haaretz]?"(84) In the second case, it is answered, the woman was not suspect concerning the Sabbatical year (a Toraitic transgression), but the loaf of bread, upon which she was working, was itself at issue. Abaye maintained that the matter referred to the am-haaretz being suspect in the matter of tithing, but that since most amei-haaretz did in fact tithe, and since this was in any event a suspicion which involved only a rabbinic transgression, they were allowed to work together. Rava, however, disputed Abaye's interpretation. Instead, he conjectured, the matter concerned itself with the am-haaretz who was suspect regarding the rabbinic "precept of preserving the loaf from uncleanness," and since assistance in such cases was not prevented by the Torah, it was permitted to help, in the interests of peace.(85)

Both interpretations manifested qualms from which the rabbis would have preferred to be distanced. Still, since only rabbinic prohibitions were involved, they deemed the interests

of promoting harmonious neighborly relations to be of sufficient moment to warrant the risk of appearing to abet transgression. A compromise is hereby arrived at between the different values inherent in the Talmud's discussion: between the need to uphold the appeal for darchei shalom and the need to nevertheless preserve observation of tradition. Personal gain from lending being slight, the quest for optimal social conditions appears to provide a reasonable explication of the use of darchei shalom within this particular takkana.

It must be noted, of course, that the quest for more harmonious social conditions was by no means only conducted through the overt application of darchei shalom. The rabbis also established a variety of enactments with the language "limno'a eiva," "to prevent hostility," "mishum shalom malchut," "for the sake of the peace of the kingdom," and "limno'a ketata," "to avert quarreling," inter alia. Without doubt too, regulations governing "peace and goodwill" in matters concerning "respect due to persons, casting aspersions upon others, fiscal matters," and disputes between neighbors, were also able to be indicated without the explicit invoking of one particular principle or another. (86) From the point of view of rabbinic Judaism, there was, of course, a great "stress on the actualizing of peace in the world," and so peace, through a number of different approaches, "remained a cardinal theme in the thinking, writing, and aspirations of the Jewish nation." (87)

In comparison with other principles, Ze'ev Falk has, however, raised an important question regarding the internal structure of mipnei darchei shalom in the form employed by the rabbis. Suggesting that we have received some principles in more pristine prototypical forms than others, he has pondered why the principle presently under discussion was constantly recorded as "mipnei darchei shalom," rather than simply "mipnei hashalom." In discussing this question, Falk recalls that in the Verushalmi, Masechet Eruvin, R. Yehoshua b. Levi made the following statement:

Why do we create an eruv in courtyards? For the sake of the ways of peace. There once was a woman who was disputing with her neighbor, and she sent her eruv to her [neighbor] in the hands of her son. Her neighbor lifted him up and hugged him and kissed him. He returned and told his mother. She said to herself--to this extent she loves me, and I did not know. As a result, they made peace. As it is written: 'Her ways are ways of pleasantness and all her paths are peace.' (Prov. 3:17)(88)

According to Falk, the matter of peace seems out of place here, especially in view of the fact that a quite different reason for the eruv is given in the mishna of the same section. Hence Falk postulates that the 'peace explanation' in Eruvin actually reflected R. Yehoshua's attempt to link the gemara in Gittin (Talmud Bavli) which dealt with the eruv and problems of suspicion, to its mishna, which portrayed the matter in terms of peace. This R. Yehoshua achieved by means of the above case study, reasoning as follows:

Initially, the woman who was hostile to her neighbor, did not want the eruv to be in its established place, i.e. in the house of her hated neighbor, but wanted it in her own home. But in heaven, they wanted to make peace between the neighbors, and so they placed [the urge] in her heart to dispatch the eruv to its established place. As things

transpired, the [matter of] the eruv brought them closer together, and made peace between the neighbors. From this the rabbis declared that the eruv should be placed where it had always been, in the interests of peace.{89}

Destined for Gittin, the story, Falk avers, subsequently found its way into Eruvin because it dealt with an eruv. The hypothesis it contains concerning darchei shalom is, however, clear: darchei shalom became part of the mishna as a result of this peace process between neighbors, which was supported by the verse from Proverbs (3:17), "Deracheiha darchei noam, vechol netivoteiha shalom." Hence, the term darchei shalom was essentially a contraction derived from this verse. It became an accepted part of rabbinic parlance in dealing with matters of peace since the Proverbs verse had--in all likelihood--previously been utilized in other cases where tikkun was required.{90} More than this, however, it became firmly incorporated into the rabbinic nomenclature since its linguistic structure was found to be so very useful in assorted halachic areas.

Viewed in such a light, darchei shalom, seems to have originally crystallized as a type of bridging term. It was used to create connections between issues of diverse substance, such as suspicion, or financial interests, and the rabbis' vision of the societal peace desired from on high. By using darchei shalom, the rabbis successfully raised these arguably mundane needs for legal change to a plane of ethical discussion, which propelled these issues toward becoming the subject of tikkun. For while functional change was not openly

embraced by the rabbis, still they took it for granted that the Torah could not be seen to be at odds with the ways of peace. This is ably demonstrated by the fact that an entire series of takkanot was created mipnei darchei shalom, in spite of the injunction that "we do not enter into legal debate over matters of Torah on the basis of the words of the Writings."(91) Utilizing darchei shalom from within the Proverbs verse--and the other principle deduced from the verse, darchei noam--the foundations were laid for a series of takkanot intended to ensure that the Torah conformed not only to the ways of peace, but to the ways of pleasantness as well. These takkanot were designed to incrementally reduce perceived deviations from the Torah's fundamentally peaceful and harmonious nature.

Darchei shalom became, then, a potent tool for the rabbis. In most of the instances cited it aimed to provide a legal dimension for "a status quo which was both orderly and fair, or to extend legal rights to situations or persons otherwise excluded."(92) Though darchei shalom was also applied in circumstances in which the ethical was not readily discernible, it seems fair to evaluate that in the predominant number of its appearances it was used in an attempt to rectify what we might deem ethically problematic realities. To be sure, practical considerations prompted these changes as well, but where the explanation of mipnei darchei shalom was provided, it seems safe to assume that generally the rabbis saw injustices or deficiencies in legal arrangements that were leading to

communal discord, and resolved to act to bring about peaceful ordering.

Often, of course, the result of inaction may well have been a plethora of possible practical problems, yet this--we shall posit--was not the uppermost consideration in these instances. While it might be concluded from the evidence that darchei shalom possessed differing meanings, depending on the context, "ranging from mere considerations of expediency to the loftiest moral maxims,"(93) still--even in modern terms--more than practical interest seems to have been at work within the majority of these applications. The preparedness to propose reasonably dramatic alterations in the law appears to have been imbued with a higher ethical purpose. Indeed, in certain cases, the rabbis were prepared to undertake decisive action even if this required substantive deviation from what had been understood to be the shurat hadin up until that point. Elements of this ability appear also to have extended beyond the amoraim to the rabbis of the Middle Ages, though we have not adduced evidence to suggest that they applied darchei shalom to new situations.

The question that remains to be answered, then, is whether in such new situations, in a contemporary milieu potentially open to the revitalization of tikkun, the rabbinic spirit of refinement for the sake of peace, might provide practical inspiration for substantive contemporary retuning. Could the

olive-branch again become the leitmotif of a halacha determined to dissipate communal conflict and promote harmony?

CHAPTER 3

Derocheiha Darchei Noam

When the knives used for cutting figs from the trees had been folded, the summer harvest was deemed to have ended in Eretz Yisrael. Any person who had sworn a vow which was to remain in effect "until the summer shall be," was no longer bound by it. Anybody who, passing a field, noted that the knives were no longer in use, was permitted to take of the figs that were left by the owner, without being subject to tithes.(94) The harvesters had gone, and the business of the summer was at its end.

Late one summer, however, it happened that a man came upon R. Tarfon eating of the produce of his [the man's] field after most of the knives had been folded. Immediately, he threw Tarfon into a sack and carried him away, intending to throw him into the river. From inside the sack, the rabbi cried out, "Woe unto Tarfon, whom this man is about to murder." Upon hearing these words, the man abandoned the sack and fled, clearly frightened for attempting to harm the great personage of R. Tarfon. R. Abbahu, on the word of R. Hananiah b. Gamaliel, later recalled that all his life Tarfon grieved over this event, lamenting, "Woe is me that I made [improper] use of the crown of the Torah," since he had taken advantage of his identity as a sage to save his own life.(95)

This matter greatly perplexed the rabbis. If most of the knives had been laid-away they asked, why did the man mistreat R. Tarfon? Because, the reply is recorded, somebody had been stealing this man's grapes the whole year, and when he found Tarfon, he thought that he had apprehended the thief. But if so, the gemara persists, why did R. Tarfon so regret revealing his identity? Because, the rabbis maintain, Tarfon, who was a very wealthy man, should have pacified him with money, offering to make good the owner's losses, rather than invoking his own status.

From this the Talmud draws the conclusion that one must never learn text simply in order to be called "wise," nor teach with the aspiration to be called "rabbi," but one must study out of love--and honor will come in the end of its own accord. The perspective of such a view is that there can be no greater ambition than Torah for its own sake, and that knowledge of the Law should never be used for personal gain. Unequivocally, respect and nobility will accrue to the individual merely through being steeped in Torah teaching. Amongst the several proof-texts adduced to demonstrate this point is Prov. 3:17, "Deracheiha darchei noam," "Her ways are ways of pleasantness." (96) The clear implication of the use of these words is that the natural result of involvement with Torah will be nothing but the highest and most agreeable forms of rectitude. It is only indecorous utilization of Torah that might potentially lead one to grief.

Ensuring that nothing but the "highest and most agreeable forms of rectitude" will be the natural result of Torah, is, however, a task which requires painstaking care and attention. For, as we have seen, the halachic instrument is one which requires periodic adjustment in order to most closely approximate the "highest rectitude." In this regard, the principle of darchei noam has been used time and time again in the context of discussions of proposed halachic refinement, involving practical applications that go far beyond illustrations of aggadic flourishes.

One of these practical applications, for instance, was the function of darchei noam in determining the composition of the lulav to be used on Sukkot. The Torah (Lev. 23:40) requires the Jew to gather together, amongst other species, kapot temarim, the branches of palm trees, and anaf eitz avot, the boughs of thick leaved trees. But the Talmud, unsatisfied with this general statement, inquires as to what exactly kapot temarim are, and how one is to define anaf eitz avot. (97) In the case of the palm, it rejects two possibilities on the grounds that they do not meet the rabbinic requirements that the leaves must be capable of both being bound to and separated from the stem. Then it is suggested that perhaps the kufra, which fulfills both demands, and which is thought to be "a spike covered with flowers, and enveloped by one or more spathes," (98) is a potential candidate. To this, Abaye responds with the words "deracheiha darchei noam, vechol netivoteiha shalom." Rashi, in commenting on this statement,

makes reference to the plant's numerous thorns and its ability to perforate the hands. It is inconceivable that the Torah might subject one to potential injury, and hence it is clear that such a plant represents anything but the "ways of pleasantness" for which the Talmud calls.

A similar case is mounted against the proposal of hirduf (assumed to be oleander(99)) as fulfilling the criteria of anaf eitz avot. Though the Talmud's stated requirements of anaf eitz avot are that the tree must be wreathed, and that its branches must cover its trunk, hirduf, which fulfills both these demands, is rejected. Its repudiation is likewise explained by Abaye with the words "deracheiha darchei noam," since it is a bitter plant with stinging leaves, which, in Rashi's estimation are "as sharp as a needle." Rava declares hirduf unacceptable with the quote "haemet vebashalom ehayu"--"You shall love truth and peace." Rashi explains this reference by pointing to the fact that a lethal poison may be extracted from hirduf. By either interpretation, the Torah could not possibly have meant hirduf, nor in the case of the palm could it have intended kufra, since both stand in contradiction to any feasible comprehension of the Torah's perceived pleasing design.

The role of darchei noam in this context should not be lightly dismissed as just charming coloring. For, as Menachem Elon has pointed out, though it seems quite likely that the choice of plants derived from ancient traditions, nevertheless

"this changes nothing in respect of our conclusions that Abaye and Rava, these distinguished masters of halacha, determined that the intention is to [the agreeable, aesthetic] hadas, and not hirduf on the basis of the reason 'Her ways are ways of pleasantness,' and 'You shall love truth and peace.'" (100) The implication is clear: no cogent fixing could have been provided for this particular designation of plants were it not for the application of darchei noam, and the additional reasoning of haemet vehashalom ehavu in grounding the halachic direction.

Of far greater significance than its role in ascertaining lulav structure, however, was the part played by darchei noam in matters of personal status. A critical instance of this function is the example of the principle's apparent capacity to alleviate and prevent potentially humiliating situations for certain women in connection to levirate marriage. (101) It is a mandate of the Torah (Deut. 25:5) that if a man dies without having a son, it is a mitzva for his brother (yavam) to marry his widow (yevama) in levirate marriage, in order that his line should not perish. And if for some reason the brother cannot or will not fulfill his obligations in this regard, then the ceremony of chalitza is performed to release him of his filial responsibilities. It was understood, therefore, that if the first marriage had produced a son, then the woman was not available for levirate union, nor was chalitza demanded.

R. Yehuda of Diskarta, however, raised a question in respect of the case of an only son who died subsequent to the

death of the first husband. Logical consistency, R. Yehuda maintains, should require at least the performance of chalitza by a yevama whose only son dies. Employing a kal vechomer argument, (102) he constructs his reasoning based on the case of the Israelite woman who was married to a cohen that died. Just as she may continue to eat of the teruma so long as her (cohen) son is alive, but must cease to do so should he die, on the basis that the dead are not treated as living, so the dead should not be treated as living in the case of levirate marriage. Halachically, one would therefore expect that levirate marriage or chalitza would be required upon the death of the child.

Rava's response to R. Yehuda displays no quibble with the internal logic of the latter's kal vechomer justification. Instead, his refutation is couched simply in the words, "deracheiha darchei noam, vechol netivoteiha shalom." Rashi, in explaining the use of the verse, avers that if the woman were required to perform chalitza she would be disgraced or placed in an embarrassing situation in the eyes of any new husband she may have married. We are then, Rashi continues, to understand Deuteronomy's words "and leaves no son," (25:5) as meaning [leaves no son] "at the time of death;" but in this case, there was a son at the time of the father's death, and so release is not required. As Eliezer Berkovits summarizes it: "It is inconceivable that the Torah should in this case require Halitza. The woman is already married. To subject her to such a ceremony would be humiliating for her vis-a-vis her present

husband."(103) Steinsaltz observes in this regard that such a chalitza would be particularly detrimental since it might appear to her husband as if she had been retroactively prohibited to him up until that point.(104)

Slightly different nuances of the principle's function in this situation are communicated by several of the rishonim. Meiri expresses the concern that a required chalitza in such cases might not only lead to embarrassment, but might bring husband and wife to the point of quarreling, thereby truly upsetting darchei noam.(105) The RaSHBA and R. Yom Tov b. Avraham (RiTBA) go even further in this regard, averring that if the woman was made liable for levirate marriage following the death of her son, she would need to leave her husband for the purposes of levirate union, and this demand would be in clear contradiction to any sense of darchei noam.(106)

Are we then to understand the use of darchei noam in this context as suggesting that it is the intention of Jewish Law to circumvent such disconcerting events wherever possible? Steinsaltz holds that this is not the reason that the principle was applied in this instance:

The intention is not to state that all the laws of the Torah, in every matter, are pleasant and comfortable, for there are surely aspects of levirate marriage that are made burdensome for the yavam. Rather, it [darchei noam] should be explained according to the system of the Tosafot (Yevamot 2a 'Ve'achot Ishto') that the Torah makes no differentiation between women that are released from levirate marriage, [thereby preventing the possibility] that one is completely released while the other is required to return and perform chalitza after a period of time. And hence we should

understand 'ways of pleasantness' in the sense of ways that are equal for all, that contain within them no discrimination between one woman and another. (107)

Steinsaltz, therefore, comprehends darchei noam as being utilized more as a principle of equity, to preserve the halacha's even-handed treatment of all yevamot, rather than a regulation which intrinsically tries to defend any basic understanding of "pleasantness" within halacha. This position is supported by the Tosafot, who discern that the gemara makes the blanket statement that any woman who is not eligible to be called on to fulfill the obligations of levirate marriage at the time of her husband's death, is perpetually considered as if she had children, since it would not be in line with darchei noam to later obligate her after she had first been exempt. Thus, by way of example, in cases where the yevama's sister is married to the yavam, the yevama is prohibited from both levirate marriage and chalitza by virtue of her sister's relationship to the yavam. But even should her sister subsequently die, she does not again become obligated, for reasons of darchei noam. (108)

The entire spirit of darchei noam is not, however, wholly subsumed by its ability to act for equity. Elon posits that the weight of a non-debased kal vechomer argument is substantial, and that the strength of darchei noam to act as the "trump card" and overcome the kal vechomer construction, derives principally from the fear that the slightest shame might be cast upon the woman in the eyes of her husband. (109) While not dismissing Steinsaltz's stance, Elon's position does

appear to give the kal vechomer challenge of R. Yehuda far more meaning. For if equality between cases was indeed an accepted premise for those seeking release from the conditions of levirate marriage, then Yehuda's kal vechomer interjection takes on something of the nature of an intellectual exercise.

Elon buttresses his position, and, to a certain extent that of Steinsaltz as well, by quoting R. Shlomo Luria's (MaHaRSHaL) Hochmat Shlomo. The MaHaRSHaL, in commenting on this particular usage of darchei noam, observes that "the words of Torah should all be in accordance with pleasantness and the nature of equality, so that the matter should not be unfair, that one should be found to be [in a situation of] joy, while the other is in trouble." (110) Analyzing this position, Elon makes a strong case for the ethical dimension of the principle by pointing out that the yevama who has not remarried really would have no particular problems going through chalitza, whereas the yevama who has remarried would be placed in a precarious position in relation to her new marriage. (111) Releasing these yevamot from levirate obligations represented such a broad reading of the Torah's injunctions, that demonstrated moral deficiency, rather than just a need for uniformity of approach, was needed to sanction such a wide interpretation of the Torah's intent. Steinsaltz, then, is surely correct in isolating the equality between yevamot as being a latent reason for not requiring chalitza in such cases, and indeed we might see this aspiration toward equity as a significant component of the darchei noam principle. It seems

clear, however, that the ethical issue of the potential damage to be effected was the cause which ensured that the death of offspring would not necessitate retroactive release from levirate marriage.

There are, furthermore, other issues involving yevamot in which darchei noam played a decisive role. One of the most striking examples of the vigor of darchei noam is exhibited in its ability to overturn a potential compromise between Beit Hillel and Beit Shammai, because of clear ethical reservations.

According to Beit Shammai, an associate wife (tzara) may marry the deceased husband's brothers, but is not permitted to anyone else without performing chalitza. Beit Hillel's view, on the other hand, permits the associate to marry everybody except the brothers, and does not require chalitza. This led to a situation in which if the law followed Beit Shammai, then bastards were produced in the eyes of Beit Hillel, whereas if the law followed Beit Hillel, then tainted children (unqualified for the priesthood--if, indeed they were eligible--because of the transgression of a negative precept) were produced in the eyes of Beit Shammai. Consequently, R. Yochanan b. Nuri proposed a takkana that would require all associates to perform chalitza, and would disallow marriage to any of the brothers, thereby creating uniformity in the law. The Talmud records that "they had hardly had time to conclude the matter before confusion set in." Rabban Shimon b. Gamaliel immediately inquired what was to be done with those who had

previously married others, according to the rulings of Beit Hillel, without the benefit of chalitza? "Should they be asked to perform the chalitza, they would become despised by their husbands; and should you say 'Let them be despised,' [it could be retorted], 'deracheiha darchei noam, vechol netivoteiha shalom.'"(112) In the words of Israel Slotki, "The ways of the law must lead to no unpleasantness for the innocent."(113) According to Elon, one would not, therefore, conceive of enacting a takkana that such women should be required to seek release, if this caused the women to be disgraced before their husbands.(114) The halacha is, as a result, left to follow Beit Hillel. Consideration of the needs of a minority to preserve their marital harmony, as expressed through darchei noam, is able to overcome the desire for legal compromise between the two great schools of Israel. Beyond concerns over equality, we here clearly see the "priority of the ethical" at work.

The gemara, however, did not always utilize darchei noam to release a woman even in cases where consistency might have lead one to expect that it would do so. The Tosafot provide three examples where darchei noam might have been anticipated, and--with a spirit that seeks to justify the gemara--they explain why it does not appear.

According to the gemara, if the husband had no brother at the time of his death, but a brother was born after he died, the widow is not in need of release from levirate marriage by

the new-born brother.(115) The Tosafot seek to understand why the gemara derives this prohibition of marrying a brother, who was not a contemporary of the late husband, from the Torah reference to brothers that "dwell together" (Deut. 25:5), rather than by applying darchei noam. Echoing the Talmud Yerushalmi in this regard, they infer from the use of "dwell together" that the gemara is attempting to protect the yevama whose husband dies while his mother is pregnant.(116) In such an instance, the woman need not postpone remarriage until her mother-in-law gives birth, or, should a male be born, endure further delays until he is old enough for release.(117)

R. Asher b. Yechiel (ROSH) explains that were this not the case, the woman would be required to wait until the death of her father-in-law (since "brotherly status" is passed on through the father) before she could be certain that she was free to marry again.(118) Darchei noam, however--in the view of the rishonim--was not employed in this context lest it be understood to imply that the ways of pleasantness dictate that she should wait until her mother-in-law gives birth. The "dwell together" text leaves no room for equivocation that in cases where the mother-in-law is pregnant, the woman is not prevented from immediately remarrying. It should be noted that the use of "dwell together," while it displaces darchei noam in this context, was plainly inspired by the spirit of pleasantness inherent within darchei noam. In this particular instance though, "dwell together" displayed an extra needed degree of precision. The RaSHBA and the RiTBA suggest an

alternative reason that the Torah specifically mentions brothers who "dwell together:" lest the deceased husband have other brothers, such that the woman is not free to remarry, it should be clear that release from levirate marriage is not required of a newly-born brother as well. (119)

The Tosafot remind us, however, that not in every case where the yavam was not immediately available for yivum upon the husband's death, was darchei noam uniformly applied to release the woman. In the cases of both the nida, and the yavam who is yet too young to be eligible for yivum, the Tosafot observe that though darchei noam could have been used to release the woman, such was not the case. In the matter of the nida, the waiting is not relieved since the woman would in any case have to wait until she was purified, and hence permitted for sexual relations if her husband was still alive, and so such waiting was nothing out of the ordinary. In the case of the young levir, even though it does not seem to be in accord with darchei noam to make the woman wait until he matures, still she was required to do so. Given that the brothers were contemporaries, it was proper to wait until the young yavam was of a suitable age for yivum, in much the same way that that the woman would have had to wait were some eligible yavam detained in some distant land. (120) Clearly, later commentators felt restricted to the cases of amoraic application of darchei noam, and were reticent to use the principle for innovation in situations where the Talmud had already spoken.

Even after Talmudic discourse had come to a close however, darchei noam remained an active principle in the shaping, tuning and understanding of halacha. Menachem Elon has directed our attention to several outstanding examples of the continued application of darchei noam in later halachic literature. Remaining within the area of yevamot, R. Shmuel Edels (MaHaRSHA), an Eastern European teacher of the late sixteenth to early seventeenth century, liberally employed darchei noam in an enlightening commentary on the nature of halachic change. Masechet Yevamot concludes with the words: "R. Eleazar said in the name of R. Chanina: Scholars increase peace in the world, for it is said in the Scriptures, (Is. 54:13) 'And all thy children shall be taught of the Lord; and great shall be the peace of thy children'"{121} In explaining why the masechet concludes with these words, the MaHaRSHA examines many of the passages we have cited above, maintaining that "there are matters in this masechet which are, at first sight, astonishing, and [appear] as if they uproot thing[s] from the Torah."{122} And, according to the MaHaRSHA, the masechet ends with the poetic reference to the scholars increasing peace in the world because this concluding statement informs us

...that this [i.e. the elements of Yevamot detailed supra] is not uprooting from the Torah, but that these matters influence the measure of peace... . They [the rabbis] did not arrive at chalitza and levirate marriage, [in order that these should] bring about quarrel[s], since perhaps he will not release, or she will not desire him, and she will become a deserted wife, and this is not peace... And it is said 'Great shall be the peace of those who love your Torah'--and this is not uprooting, but rather [out of concern for] the characteristic of peace, that she [the woman] should not

become a deserted wife, and it is written 'Her ways are ways of pleasantness... .' And it concludes (Ps. 29:11): 'The Lord will give strength unto his People,' and this is not uprooting something from the Torah, for the Holy One Blessed be He gave strength and authority to His People, a People of wise scholars [in regard to] being lenient [in respect of] such matter[s], for 'The Lord will bless His People with peace.' As it is written 'And all her paths are peace,' and there is here no peace if she becomes a deserted wife. In this way should the text (Num. 6:26) 'The Lord lift up His countenance upon you,' be interpreted: even to the point of uprooting something from the Torah, [in such a way] that the Lord will grant you peace. (123)

There could perhaps be no more eloquent statement of the role of darchei noam and darchei shalom in representing superior ethical values than this. Aware of the revolutionary provisions created with the use of darchei noam, the MaHaRSHA is plainly anxious to establish that the Talmudic rabbis did not seek to change the Torah within Masechet Yevamot, but sought rather to apply its highest ideals of pleasantness and peace. Only to the untrained eye might this appear to be "uprooting from the Torah;" those with discernment would realize that such apparent "uprooting" was in fact the fulfilment of the Torah's supreme principles, sanctioned by God.

A generation before and a continent away from the MaHaRSHA lived R. David ibn Zimra (RaDBaZ), chief rabbi of Egypt, who made far-reaching use of darchei noam in issues altogether divergent from the problems of yevamot. The question, for instance, was asked of the RaDBaZ as to whether it is proper to accede to a government's demand that one yield a limb for amputation in order to save the life of another Jew. The questioner reasons by means of a kal vachomer construction from

the laws of Shabbat in the following way: One may not operate on a limb on Shabbat, because the Shabbat takes precedence. However the saving of a life takes precedence over Shabbat. If then the Shabbat may be set aside to save a life, kal vechomer that one may perform any sort of operation on a limb to save a life as well. The RaDBaZ is asked to comment on the appropriateness of this reasoning process. (124)

In his answer, the RaDBaZ exhibits staunch opposition to such a practice, as well as to the reasoning which seeks to justify it. His primary concern stems from the fear that the dangers of amputation might lead to further loss of life, even if one were sure that one could thereby save one's friend. Moreover, the RaDBaZ observes, if punishments may not be inferred from a kal vechomer proposition, how much the less may amputation be adduced from such a construction. The RaDBaZ's clinching argument is, however, couched in terms which are even stronger:

And further, it is written 'Her ways are ways of pleasantness,' and it is necessary that the laws of our Torah will be in accordance with wisdom (sechel) and reasoning (sevara), and how could it occur to us that a man would allow his eye to be blinded, or his hand or leg to be amputated, in order that his friend should not be killed? Therefore I see no reason for this ruling, except [insofar as it represents] a measure of saintliness. And blessed is the lot of he who could endure such a thing, but if there is doubt that a life will be saved, then he is a foolish saint... (125)

The RaDBaZ here clearly invokes darchei noam as representing that which is in keeping with rationality, logic and the specific contemporaneous circumstances of the situation (i.e., particular concerns over the state of medical practice, etc.).

More than this, he appears to connect darchei noam to sechel and sevara in constructing the ultimate halachic rejection of a practice which he found distasteful in the extreme. Other halachic precedents seem to be of lesser moment to the RaDBaZ in this instance; darchei noam sufficed to express his inner sensitivity that such a practice ought to be rejected. The intent, according to Menachem Elon, of using darchei noam in this context, was to lend rational support to the "natural moral feeling that objects to [the idea] that a person should be obligated to offer a limb for amputation in order to save his friend from death." (126) Though halachic deliberation is obviously fundamental to the RaDBaZ, the "right path" is so patent to him here that the simple application of darchei noam seems to render further halachic debate superfluous. Also worthy of note is Elon's observation that although darchei noam is basically an ethical principle, it is here used to undergird, rather than to redefine or go beyond, the shurat hadin. Moral praise is reserved for those saintly enough to lose a limb in the spirit of self-sacrifice, though this path is not designated the most ethically desirable, since it runs the substantial risk of rapidly deteriorating into inane heroics in a hopeless situation. (127)

The RaDBaZ, however, also applied darchei noam in its more conventional sense of denoting the way to the highest rectitude. In the case of witnesses who give testimony against a certain person to the effect that he owes money, and are later found to have testified falsely, the RaDBaZ is asked why

the sum, which they are subsequently fined for their misdemeanor, is paid to the person against whom they testified, and not to the beit din for appropriate distribution. As part of his examination of the inquiry, the RaDBaZ asserts, "We regret that they testified falsely against him [in effect] causing him to owe money, and had their testimony not been found to be false, he would have had to pay, and therefore Torah awards him the compensation, for all her ways are ways of pleasantness... "(128) Again, we find here the implicit assumption that the intention of the halacha should never be at odds with the ethically proper, and this constitutes at least partial substantiation for the ruling being as it stands.

One more representative of the early achronim, a contemporary of the MaHaRSHA, made noteworthy use of darchei noam in an halachic context. R. Yoel Sirkes, in his Bayit Chadash (commentary to the Tur), comments on an aspect of inheritance procedure which R. Yosef Karo included in the Shulchan Aruch, on the authority of an earlier responsum of the ROSH.(129) The opinion of the ROSH is sought in the case of a convert who dies without leaving Jewish heirs (born after his conversion). The ROSH is asked as to whether those Jews who subsequently divide-up the convert's property amongst themselves are obligated to provide for his burial. In response, the ROSH explains that following his death the property of the convert is considered ownerless (hefker), and that a lien is not placed on the property of a person for his own burial. Since, then, these people received the property

not via the laws of inheritance, but rather via the laws of ownerlessness, and just as creditors of a deceased person, who become the receivers of his property, are no more obligated to provide for his burial than is anyone else, neither are these people.

Commenting on this ruling, Sirkes takes issue with the decisive majority of respondents who endorsed this stance. The culmination of other objections is couched in these terms:

And further, can there really be strong arguments here that, if they distribute his property, others should be obligated to bury him? The Torah said: 'Her ways are ways of pleasantness, and all her paths are peace:' Hence, according to my humble opinion, the shurat hadin is that they bury him first, and afterwards they distribute, and if they distributed beforehand, those who were recipients of the distribution bury him, each one in proportion to the amount that was distributed to him. (130)

Sirkes' final argument indicates that he deems it only proper to expect that those who have--through no particular right of relationship--benefitted from the estate, should be required to defray the community's burial expenses by using the proceeds which had come into their hands. In this regard, he seems to view the accepted halacha as being based in a questionable understanding of the Torah's intent. It is, of course, interesting to consider why, if the need to apply darchei noam in these circumstances was so clear for Sirkes, it was not so lucid for the other respondents. Perhaps this is revealing of the flexibility, and maybe even the subjectivity, with which darchei noam was used to alter halachic perceptions, in the light of differing views of what was acceptable under the

circumstances. Elon describes the application of the principle in this situation with the words:

Here, the moral sentiment in the principle deracheiha darchei noam serves as a strong support (and perhaps as the essential reason in the consciousness of opposition to the accepted halacha) in the fixing of a law that will be in harmony with this internal moral feeling. {131}

Again, though other halachic justifications are here advanced, it is the simple power of darchei noam which, in the final analysis, is invoked to crown the argument.

Saul Berman has written that darchei noam "operated in a negative fashion only, to preclude any particular juridical alternative which contravened the moral qualities of 'pleasantness.'" {132} This appears to be generally true, and is probably best explained by observing that, unlike darchei shalom, which wielded considerable legislative power through its use in the tannaitic period, darchei noam--originally an amoraic tool--was used extensively in an interpretative role, and less in the enacting of substantial tikkun. On the other hand, the effect of darchei noam was often to positively alter the letter of the law, and--as we have seen--darchei noam demonstrated marked adaptability in the range of its various applications. As Menachem Elon summarized it:

Without a shadow of a doubt, the nature of the use of this principle is not given to clear definition, in a circumscribed fashion; further, the use of this principle, as for the use of many other fixing principles in halacha, requires and necessitates an inclusive and encompassing vision of the world of halacha, and an understanding and perception of her ways and her paths. {133}

Indeed, such "an understanding of her ways and her paths" makes the tacit strength of the principle even more perceptible.

This is attested to by Aryeh Karlin who avows that one may not comprehend darchei noam as "liberty from law and religion--which would be comfortable for every person who wishes to throw off the yoke--but rather [as] a moral foundation, built-in during the creation of the laws, which sometimes becomes emphasized in a practical way..."(134)

This formulation, while being convincing, begs the question as to whether such "practical ways" of expressing this "moral foundation" still exist today. Could an "encompassing vision of the world of halacha" make use of a contemporary emphasis upon darchei noam in acting for pleasantness in our own era? We have seen that the amoraim and some rishonim and early acharonim were prepared to go to reasonably dramatic lengths (hence the need for the MaHaRSHA's protestations that no actual "uprooting" took place) to utilize darchei noam as a basis for positions they found ethically desirable. Positing a situation wherein halachists did not feel solely bound by the categories of the past, is it conceivable that darchei noam might again become a factor in the alleviation of any uncongenial juridical alternatives? How might we delineate the boundaries of proper application of this principle within a twentieth century context? Do our present perceptions of halachic operation allow for appreciable utilization of darchei noam within the modern context? How would the principle be applied so as not to undermine the contemporary halachic system? These questions will require serious treatment if the principle of pleasantness is to be anything more than the object of scholarly interest.

Darchei noam, then, was an interpretative, practical principle applied in heterogeneous situations to cause the halacha to bring to the fore its inherent intention toward achieving the morally best state of affairs. This pursuit was conducted to the exclusion of less morally sound options, however legally cogent they might have appeared. Clearly, there were also instances where it acted as the cutting-edge for substantive ethical alteration which went well beyond modest interpretative change. Though it was most often employed to transcend or redefine the din, at times it acted to preserve it. And while, to be sure, it could not operate without halachic justification supporting its intent, it must nevertheless be maintained that without the power of darchei noam to invoke a higher ethical principle, a potentially less desirable path might have been followed.

Though our examples are isolated, the evidence seems to suggest that the rabbis adapted and honed certain legal elements which caused them ethical disquiet, with the use of darchei noam. At times, extraneous legal impediments might have stood in their way, but, in general, where wisdom, fairness or rectitude could be affirmed, they were prepared to use the interpretative darchei noam corrective to ensure that the halacha continued to follow the highest moral path. And, by the time the harvest of their work had been gathered in, some fairly impressive ethical refinements would appear to have been the result.

CHAPTER 4

Letakken Olam BeMalchut

Shaddai

R. Yochanan b. Zakkai, the youngest of the disciples of Hillel, once wrote of his master, "if all the heavens were parchments, and all the trees were quills, and all the seas were ink, it would still be impossible for me to write down even a small part of all that I learned from my teacher." (135) Such was the greatness of Hillel the Elder that his wisdom and his deeds became legendary in the history of halacha. Small wonder then that the prosbul--perhaps the most well known of all the takkanot--concerning which, oceans of ink have indeed been expended, was originally enacted by Hillel. Small wonder too that this man, whose life exemplified "patience, gentleness and a liberal approach to the Law," should become associated with a reform, the reasoning for which was stated to be "nipnei tikkun haolam," "for the sake of the correction of the world." (136) For, in an ultimate sense, it was repairing the world and bringing order to society which lay at the very heart of the rabbinic enterprise of tikkun.

Far more extensively employed than was darchei noam, and used within categories even more diverse than was darchei

shalom, tikkun ha'olam found application in "an entire codex of statutes," particularly within the early perakim of Mishna Gittin. The urge to act for the sake of society was in fact so prevalent in the initial chapters of this masechet that some have even seen fit to subsume the takkanot created mipnei darchei shalom under the general rubric of "takkanot mipnei tikkun ha'olam." (137) To be sure, there were important differences between the two terms. One scholar has characterized these differences with the observation,

Mipnei darchei shalom is a Takkanah whose purpose is to establish peace among peoples, to cut down on disputes and arguments. Mipnei tikkun ha'olam is a Takkanah of Rabbinic origins [established] in order that a matter not bring on dismay or trouble. (138)

Nevertheless, their similarity of purpose makes the suggestion of their close alliance highly credible, and may go some way to explaining how such a varied collection of mishnavot came to be gathered together within Mishna Gittin. (139)

Saul Berman has discerned that whenever the rabbis called upon tikkun ha'olam, the minimum requirement for its use was that the circumstances should reflect

the presence of a moral interest being translated into an enforceable legal norm... . The unique character of the situations governed "for the benefit of society" was that the moral interest involved, while produced by an existing or incipient legal relationship, affected primarily persons outside the relationship itself. The legislation affecting this relationship was thus primarily designed to have general [Jewish] communal benefit. (140)

Tikkun ha'olam was not specifically invoked, then, in settings which sought to assure peace or pleasantness, but rather in surroundings which attempted to rectify legal

conditions that were leading to unacceptable societal behavior, and hence to the denigration of halacha. As R. Travers Herford observed, "in regard to social relations, the principle of tikkun 'olam was applied in mitigating the severity which would be caused by the literal adherence to the written word of the Torah." (141) So numerous were the cases of such application, however, that it would prove beyond the range of our present study to review each of them individually. For the two principles already examined, the rabbis appear to have viewed the majority of their applications as being within an ethical context, though practical and political motives were, of course, also influential spurs. Whether or not this same trend was a feature of our final principle as well, we will allow selected examples of the functioning of tikkun haolam to demonstrate.

When Hillel ordained the prosbul, the reasoning provided by the Mishna was absolutely lucid. The Torah had specifically stated that "every seventh year you shall practice remission of debts. This shall be the nature of the remission: every creditor shall remit the due that he claims from his neighbor." (Deut. 15:1-2) But the Mishna described the practical result of such remission, recalling that

when he [Hillel] saw that the people refrained from giving loans one to another and transgressed what is written in the Law, 'Beware that there be not a base thought in thine heart...so that you are mean to your needy kinsman and give him nothing' (Deut. 15:9), Hillel ordained the prosbul. (142)

The prosbul operated as a type of legal fiction whereby creditors assigned their claims to batei din prior to the Sabbatical year. In this way Hillel preserved the letter of the biblical law regarding the remission of debts, since the law of Deutereonomy had been addressed in the singular to individuals. It was thus no violation of the Deuteronomic ruling for the debts to be made viable by referring them to public courts. As Eliezer Berkovits explained, "...in a sense, in this way, private debts were turned into public ones [since] the Beth Din did have the right to demand payment." (143) Consequently, debts remained collectable throughout the Sabbatical year, and after it had concluded as well.

As stated by the Mishna, then, Hillel's chief concern was that people were not fulfilling a mitzva of the Torah, and from this it might be concluded that the actual empirical behavior of human beings was the cause that called forth Hillel's takkana. Though the initial intent of the Toraitic commandment had been to help the poor by releasing them of their debts, the practical effect in Hillel's day was that it hurt them since they could not obtain loans. Hence, as a consequence of the observation that the "pragmatic, economic" intent of the mitzva was no longer being actualized, Hillel enacted his takkana, because it was preferable to create a prosbul which neutralized the remitting power of the seventh year rather than to leave the poor without available sources of credit. (144)

This is, of course, credible provided only that we accept the Mishna's version of events as stated. The Mishna's description, however, raises several questions. Given the length of time between the Deuteronomic law and Hillel, how had the poor coped in the interim? Was the lack of lending a sudden new problem which arose in Hillel's time and demanded immediate response? And could not Hillel's act be regarded as nullifying the more "liberal" legislation of Deuteronomy? The answers to such questions reside, of course, in the realm of speculation only. But a cogent explanation of these problems is perhaps to be found in the suggestion that the Mishna does not draw for us the full picture. It is possible that the law regarding the remission of debts in the Sabbatical year had, by Hillel's time, fallen into disuse. According to this scenario, Hillel, hoping to revive the mitzva, realized that renewal would only be practicable if he simultaneously initiated the prosbul. (145)

Whatever the facts of the matter though, given that the mitzva of release in the Sabbatical year was to be operative, it seems fair to maintain that "the prosbol was, indeed, a measure 'for the improvement of the social order,' (tikkun ha-'olam), ...for it benefited both rich and poor. It protected the wealthy against loss and aided the needy in obtaining loans." (146) Indeed, R. Hisda in the gemara interpreted the term "prosbul" in just this way, understanding it to mean 'Pruz buli ubuti,' a takkana for the rich (buli) and the poor (buti). As Rashi explained, "the rich so that they do

not lose [their money], and the poor so that they [the creditors] do not lock the door [to loans] before them." (147)

The amoraim, however, were plainly uneasy about the prosbul. Shmuel, an amora of the third century, declared the prosbul an "ulbana" (unwarranted assumption) on the part of the judges, which Rashi understood to imply a display of chutzpa by the judges in collecting and holding money improperly. Alternatively, Rashi opined, "ulbana" might suggest that Shmuel saw the prosbul as a quest for judicial convenience, with the judges seeking not to be pressured to secure payments prior to the seventh year. This explanation provides evidence that there may indeed have been heavy demands on the judges to coerce payment from the poor as the mitzva of remission approached. Shmuel, however, without sympathy for the judges, threatened that if he were ever in the position to do so, he would abolish the prosbul. R. Nachman, on the other hand, in a position wholly supportive of the prosbul, averred that if the matter was in his hands, he would go even further than Hillel and regard a prosbul as being in effect for a loan even if it was not written. (148) Nevertheless, R. Nachman's enthusiastic endorsement was by no means echoed by the majority, and the rabbis sought--in a variety of ways--to diminish the sense of "legal radicalism" which appeared to permeate the enactment of the prosbul.

Simon Greenberg has pointed to a number of techniques by which reconciliation with the traditional context of the Law

was attempted. (149) The Sifre tied the prosbul to a biblical text, and thereby sought to provide the takkana with Toraitic foundation: "'Thy hand will release thy brother,' [Deut. 15:3] but not he who transmits his bills to the beit din. From this, they said, Hillel ordained the prosbul, mipnei tikkun haolam." (150) In the Talmud Yerushalmi (Shevi'it 10:2), however, this connection was called into question by the gemara's inquiry "Do you mean to imply that the prosbul is a biblical injunction?" and the answer, "After Hillel ordained it, they associated it with a Toraitic verse."

In the Bavli, however, far greater concern was exhibited over how Hillel could apparently uproot a matter from the Torah: "But is it possible that where according to the Torah the seventh year releases, Hillel should ordain that it should not release?" (151) To this, Abaye supplied two answers. Firstly he suggested that since the Jubilee year was not observed in Hillel's time, neither was the remission of debts considered "biblically obligatory" and hence the prosbul could be instituted as a rabbinic ordinance. (152) Maimonides (Shmita 9:16) agreed that the prosbul could be rabbinically applied, except at a time when the laws of the seventh year were considered to have Toraitic sanction. This opinion, though, was balanced by the amora, Rava, who held that Hillel's takkana was based on the principle "hekfer beit din hefker," "the rabbis have power to expropriate," and hence was applicable for all times. Subsequently, Abaye further suggested that perhaps Hillel's prosbul was an example of the rabbinic principle,

"shev v'al ta'asei," "sit still and refrain from action," which, according to Rashi, was a legitimate means by which to uproot a matter from the Torah. (153)

The amoraim, then, aware of the radical nature of the prosbul, were at pains to demonstrate that Hillel's innovation lay within the purview of the interpretative procedures of the rabbis. In seeking to understand the prosbul, they strove to have it accord with the techniques of rabbinic scriptural exegesis. It is, therefore, eminently possible to comprehend the enactment of the prosbul through the eyes of the Mishna--as a response to changed societal conditions--or through the eyes of the amoraim--as a new interpretative understanding of the Torah's intent. In either case though, the invoking of tikkun haolam had a similar purpose: to ensure that the observance of the law should not be a source of serious economic dislocation, and that the highest ethical intent of the halacha should prevail. As Greenberg summarized the matter:

It was he [Hillel] who had said that the essence of the Torah is contained in the commandment, 'Do not do unto others what you would not have others do unto you.' Hence, when he saw that in the changed times and conditions of his day, the observance of the ethically motivated biblical law would result in the violation of the biblical ethic, he did not hesitate to set the ethical above the legal. (154)

Where Hillel the Elder acted decisively--and controversially--to safeguard ethical economic interchange, Rabban Gamaliel the Elder, a highly respected head of the first century Sanhedrin, took a similarly courageous step in the area of divorce law. Moreover, his takkana too was inspired by the

paramount consideration of tikkun haolam. The opening mishna of the fourth perek of Mishna Gittin records the following legal development:

If a man after dispatching a get (bill of divorce) to his wife meets the bearer, or sends a messenger after him, [saying] the get which I have given to you is cancelled, then it is cancelled. If the husband meets the wife before [the bearer] or sends a messenger to her and says, the get I have sent to you is cancelled, then it is cancelled. Once, however, the get has reached her hand, he cannot cancel it. In former times a man was allowed to bring together a beth din wherever he was and cancel the get. Rabban Gamaliel the Elder, however, laid down a rule that this should not be done, mipnei tikkun haolam. (155)

It had been the practice for a man who wished to cancel a get to bring his request before a beit din--in a locale convenient to him--and to have the beit din cancel the get before the messenger reached her with it. This practice was, of course, the potential cause of disastrous consequences. For if neither the messenger nor the wife knew that the get had been cancelled, she--without knowing that she was still a married woman--might enter into a new marriage, with all the adulterous implications and potential for the creation of mamzerim (bastards) that this entailed. (156) As a result, Rabban Gamaliel ordained that one may not cancel a get without the knowledge of one's messenger or one's wife, mipnei tikkun haolam.

Here too, the actual circumstances which called forth the takkana are unclear. If the cancellation before a Beit Din was so problematic, why did the takkana have to wait until the time of Rabban Gamaliel to be enacted? Is it conceivable that there was a sudden rise in what had hitherto been a seldom practice

of cancellation before batei din? Again, we can but speculate as to what actually called forth the takkana, but whatever did so, plainly ethical issues were at stake.

The amoraim, however, differed over the meaning of tikkun haolam in this context. R. Yochanan understood it to mean "mipnei takkanat mamzerim," "to prevent illegitimacy," while Resh Lakish understood it as "mipnei takkanot agunot," "to prevent wife-desertion." R. Yochanan's opinion became associated with the contention of R. Nachman that--prior to the takkana--a get could be cancelled before a beit din numbering two, and that since "the proceedings of two are not generally known, she, not having heard and not knowing [that the get was cancelled] might go and marry again, and bear illegitimate children." The opinion of Resh Lakish, on the other hand, became associated with the view of R. Sheshet that--prior to the takkana--a get had to be cancelled before a beit din of three. "The proceedings of three are generally known, so she, hearing and knowing [that the get was cancelled], would remain unmarried, and we have therefore to save her from being a deserted wife." (157)

It is instructive to observe that tikkun haolam was--in this context--directly connected with an activity which, in the rabbis' view, was aimed at precluding the creation of further mamzerim or agunot. Bold action for "the sake of mending the world" was seen to be synonymous with enactments that served to limit these two highly undesirable outcomes. Rabban Gamaliel's

takkana was perceived as one means to avert a person becoming part of a status-group (mamzerim, agunot) from which he/she could not escape of his/her own volition and which severely curtailed relationship possibilities. This endeavor, it might be posited, was one of both human compassion and ethical intent.

Already amongst the later tannaim, however, dispute had arisen concerning the viability of Gamaliel's takkana. In the opinion of Rabbi (Yehuda HaNasi), the cancellation of a get before a beit din, even though contrary to the takkana, nevertheless had the effect of bediavad (ex post facto) cancelling the get. In other words, one should not cancel a get in this fashion, but if it was done nevertheless, then the cancellation commanded force. Rabban Shimon b. Gamaliel, on the other hand, maintained that a husband could neither cancel the get nor add additional stipulations to it, since, if he were permitted to do so, "what would become of the authority of the Beth Din [of Rabban Gamaliel the Elder]?" (158) Shimon b. Gamaliel's position, then, was that such a cancellation before a beit din was null and void under any circumstances, and had no force. Shimon b. Gamaliel was plainly not only concerned with the potential dangers of remote get cancellation, but was also vitally interested in the authority of the beit din to issue demanding enactments; he therefore argued for a stringent, maximal interpretation of the takkana. As a result, he was firm in maintaining that the get remained unimpaired, and the woman was permitted to remarry. (159)

In regard to the position of Rabban Shimon b. Gamaliel, however, the Babylonian amoraim, concerned over the stringency of his stance, raised the following consideration: "And is it possible then that where a get is, according to the Written Law, cancelled, we should, to save the authority of the Beth din, [declare it valid and] so allow a married woman to marry another?" The right of the rabbis to cancel a get which is valid according to the Torah, is hereby called into question. In response, an unambiguous affirmation was provided: "Yes. When a man betroths a woman, he does so under the conditions laid down by the Rabbis, and in this case the Rabbis annul his betrothal." (160) Rashi explained this declaration by averring:

All marriages are performed [by the formula] '[Be thou sanctified unto me] by the laws of Moses and Israel,' according to the practice of the rabbis. It is they who ordained that marriages shall be terminated by such a get [that is, by a get carried by a messenger, even though the husband withdrew it before the messenger reached the wife, but neither the wife nor the messenger knew of the husband's reversal of his intention]. Therefore, the marriage is terminated, for it was on this condition that he married her. (161)

Through the annulment of marriage (hafka'at kiddushin) then, the amoraim provided a legal interpretation which circumvented the appearance that Gamaliel's takkana involved "uprooting from the Torah." Since the marriage had been brought about according to the laws and agreement of the rabbis, it was in their power to annul the marriage. In this way, Gamaliel's takkana was not viewed as validating a get which was invalid in the Torah. Rather, it was seen as applying the legal right of the rabbis to enforce a condition

under which marriages were performed. Hence, if Shimon b. Gamaliel's position--that the cancellation was null and void under any circumstances--was correct, this was not a contravention of the Torah, but an affirmation of the rabbis' right to establish the conditions of marriage. (162)

The logical implication of all this, of course, was that the Babylonian amoraim appeared to relate the rabbinic annulment of marriage to tikkun haolam. The principle of annulment itself became associated with allowing the woman the possibility of remarriage, for the benefit of society. It should furthermore be noted that such an ability to call for retroactive marital dissolution has, on several occasions since, been used by rabbis to act for the ethical in freeing one partner or the other from halachic constraints which would otherwise have bound them.

Menachem Elon, however, has discerned that the Talmud Yerushalmi had few qualms about accepting Rabban Shimon b. Gamaliel's maximal interpretation of the takkana at its face-value. (163) By analogy to a matter concerning teruma (heave-offering), the Yerushalmi appears to imply that--if it became necessary--it was indeed within the power of the rabbis to uproot from the Torah. In Elon's words,

...this meant that the chachamin had the authority under certain circumstances to enact a takkana, even if there was [inherent] in this a suggestion of the uprooting of a matter from the Torah... . According to this reasoning, the marriage was henceforth annulled--and not retroactively--on the basis of the get provided by the husband, since the chachamin enacted that it was forbidden for the husband to cancel the get if not [done] in the presence of the wife,

'because of tikkun haolam;' and it was under their authority to determine that if [a husband] contravened their takkana and cancelled the get, the cancellation had no force, the get was valid, and the woman could--on its basis--marry another man. (164)

If Elon is right, then the spectre of appearing to depart from the intention of the Torah was not so worrying for the rabbis of Eretz Visrael as it was for their Babylonian colleagues. They accepted the right of the rabbis to engage in substantive, overt retuning, and saw no need to reinterpret this process through hafka'at kiddushin. According to this view, the Palestinian rabbis "openly acknowledged that these decisions annulled biblical law and that decision-makers had the authority to invalidate biblically valid marriages." (165)

No matter, though, whether one prefers the Bavli's application of hafka'at kiddushin to ground the takkana, or the Verushalmi's more literal understanding of the nature of the enactment, there can be little doubt that each represented a "far-reaching exercise of authority." In upholding the primary intent of Rabban Gamaliel's takkana that a woman could not be unknowingly obligated to a marriage from which she thought she was free, decisive action was envisaged, thereby supporting the outlook that the halacha should not be deemed to be antithetical to the ethical.

Indeed we might discern--in reference to a wholly different type of case--that support of the ethical was even evident in the Talmud's treatment of the slave. Here too, tikkun haolam

appears to have been utilized to denote the primary intent of the legislation. Mishna Gittin records:

If a man makes his slave an ipotiki [specified lien] [for a debt] to another man and he emancipates him, in strict justice, the slave is not liable for anything, but minnei tikkun haolam his master is compelled to emancipate him, and he gives a bond for his purchase price. Rabban Shimon b. Gamaliel says that he does not give a bond but he emancipates him. (166)

An ipotiki was a special type of lien on a debtor's property which restricted the prerogative of the creditor to particular assets. In other words, the creditor was entitled to his payment out of one particular asset only, such as a piece of land or a dwelling, or a slave. Jewish law knew of both the simple (setam) and express (mefurash) ipotiki. The former allowed the creditor to "recover payment out of the debtor's other assets" if the particular mortgaged asset should not suffice or should become inaccessible, while the latter--in an expressly written form--did not allow the creditor to "recover payment out of the debtor's free property," even if the specified asset was unavailable. (167) In this case, as expressly stated by the Meiri, the slave under discussion represented an ipotiki mefurash. (168) This meant that the debt was limited to the slave, and the implication of the slave's emancipation was that the creditor became unable to collect on the debt.

This being clear, however, the mishna nevertheless remained unclear to the amoraim, since it contained several pronouns of uncertain object. Who was the "he" who emancipated? Who was the "man" who compelled? Who was the "he" who gave the bond?

A difference of opinion arose amongst the amoraim in reply to these questions.

In the view of Rav, it was the first man who emancipated, and the slave was no longer obligated to the second man (the owner of the lien) in any legal regard. This was in line with Rava's decree concerning the ipotiki mefurash which included the ruling that the emancipation of a mortgaged slave served to "release from a creditor's lien." (169) But why then was the second man also compelled to go through the act of emancipation if the slave was not technically liable to him in any case? "Mipnei tikkun haolam--[that is to say, for fear] lest he should find him in the street and say to him 'you are my slave,'" with the result--in Rashi's opinion--that he causes the [ex-] slave's children to be defamed. (170) It is apparent from the RaMBaM's explication of the mishna that technically the slave was not in need of emancipation from the second man, but emancipation was nevertheless sought in order to ensure the clarity of the cessation of all claims, and in order to prevent any potential harassment of the former slave. (171) In the words of Menachem Elon, "this was in accordance with the fundamental doctrine of human liberty that 'a slave, once liberated, does not return to servitude.'" (172)

In the view of the Palestinian amora Ulla, on the other hand, it was the second man--to whom the debt was owed--who emancipated the slave, and the first was then compelled to liberate him. Ulla then interpreted the mishna's words "the

slave is not liable for anything," as meaning the slave is not liable for the performance of mitzvot, which were "incumbent on [completely] free men only." However, since people had begun to regard him as a free man, "his first master is compelled to liberate him," "mipnei tikkun haolam." (173) In his notes to tractate Gittin, Maurice Simon suggests that tikkun haolam was applied here "lest he should marry a Jewess while in this state." (174) The issues inherent in this declaration were spelled out even more clearly in the subsequent mishna:

One who is half a slave and half free... . It is impossible for him to marry a female slave because he is already half free. It is impossible for him to marry a free woman because he is half a slave. Shall he then remain unmarried? But was not the world only made to be populated, as it says, 'He created it not a waste, He formed it to be inhabited'? (Isaiah 45:18) Mipnei tikkun haolam, therefore, his master is compelled to liberate him... . (175)

The slave was, after a fashion, subject to both men. If he was emancipated by the second, word of his release would get about, and he might begin to consider himself a free man, and attempt to marry a Jewess. In actual fact, however, he was only half free, and was therefore prohibited from contracting a marriage with either a female slave or a free woman. As a result, the first man was compelled to liberate him, mipnei tikkun haolam.

The rishonim appear to have favored the more plausible view of Rav over that of Ulla. (176) No matter which view one preferred, though, the results were positive for the slave. He either gained protection from a deal of embarrassment and unpleasantness on behalf of a creditor, or obtained the legal permission to marry and have children without the suspicion of

increasing manzerut. These were the substantial apparent benefits which accrued from this takkana. It would seem reasonable to maintain, then, that a central motivation for the takkana was the aspiration to treat the [ex-] slave fairly and with generosity. In this case again, tikkun haolam was applied in circumstances which sought to uphold personal dignity and maximize personal options. More than this, by forcing manumission, it advocated an effective end to the practice of making slaves into liens for debts. It can be observed, then, that where the principle was invoked in supporting even the rights of a slave, the moral sense inspiring the legal determination was indeed strongly signified.

But tikkun haolam was also applied to situations in which the ethical intent was not quite so discernible. In a subsequent mishna in Gittin the rabbis enacted that

Captives should not be ransomed for more than their value mipnei tikkun haolam. Captives should not be helped to escape mipnei tikkun haolam. Rabban Shimon b. Gamaliel says: As a precaution for the good of the captives. And none should buy scrolls [of the Law], phylacteries, or mezuzot from gentiles for more than their value, mipnei tikkun haolam. {177}

In regard to the redemption of captives, the gemara further inquired "Does tikkun haolam relate to the burden which may be imposed on the community or to the possibility that the activities [of the bandits] may be stimulated?" {178} The case was then cited of Levi b. Darga who ransomed his daughter at the price of thirteen thousand denarii of gold. From this, Rashi concluded that tikkun haolam in this context related to the potential burden on the community. Captives should not be

redeemed for more than a certain value, lest bandits so inflate the price of captive redemption that the community becomes impoverished or is simply unable to redeem them. It was, however, permitted for a rich father or other relative to redeem the captive, where this did not impinge on the community, and hence the latter misgiving--relating to the stimulation of bandit activity--did not seem to be of overwhelming concern.(179) The Meiri went one step further in this direction, declaring that if there were rich relatives involved, then they should be entirely responsible for the redemption, and the community should not be involved at all. Further, he interpreted the price beyond which the community--if involved--should not go, as being that of the market-value of a slave. While acknowledging other views, the Meiri appeared to hold with the RaMBaM that one should not index the value according to a person's worth or importance, but should pay according to a fixed market standard.(180)

In the matter of aiding captives to escape, the gemara asked what "practical difference" it made as to which reasoning was given for the ruling. To this the answer supplied was, "the difference arises when there is only one captive." If there was only one captive, Rabban Shimon b. Gamaliel's interpretation was not relevant, and hence, in his estimation, the captive's flight--under such circumstances--might indeed be aided.(181) The difference between the two outlooks, as explained by Rashi, was that the tanna who gave his reason as tikkun haolam was also concerned with potential future

captives, and the possibility that they might be treated more harshly if a single present captive was helped to escape. This, however, only worried Shimon b. Gamaliel if there were other captives simultaneously in captivity. (182) The Meiri reported that the halacha went according to the first tanna, and that the intention of tikkun haolam in this light was to point to the potential abuse of future captives. (183)

Counsel--utilizing tikkun haolam--against the purchase of ritual items for more than their value, was also understood by Rashi to refer either to the financial burden which the sums required for recoupment might place on the community, or to the possibility that such buying could serve to encourage theft. (184) In either case, tikkun haolam was probably activated to suggest a pragmatic caution which could preempt potential future communal upset. Though the amoraim allowed for some flexibility in minimally inflating this amount, it was plainly a matter of common sense to hold firm in such cases in order to discourage robbery and outrageous redemption prices. Moreover, the experience of Abaye also hinted that offering substantially less than the value of the item could also produce unfortunate results.

An Arab woman brought a bag of phylacteries to Abaye. Let me have them, he said, at a couple of dates for a pair. She became furious and took them and threw them into the river. Said Abaye: I should not have made them look so cheap to her as all that. (185)

In dealing with captive Jewish persons and objects then, tikkun haolam was used within takkanot which indicated the most effective strategy for the community to follow in situations

which presented difficult dilemmas. Plainly, ethical issues were involved in trying to weigh matters such as the risk incurred by one present captive against that of potential future captives. However, in modern terms, we might consider such questions to be "ethically soft," and bordering on the pragmatic. This is because these issues were more concerned with ploys and limits, rather than the proper and the improper. As we have noted previously, however, the rabbis saw things differently. Since these matters involved the performance of religious mitzvot, they were issues of ethical force to the rabbinic mind. The mitzvot of redeeming captives and ritual objects were commandments to be preserved, and the use of tikkun haolam within these takkanot indicated the strengthening of the religious commandment effected by each takkana.

Another example of tikkun haolam being invoked to highlight a shared communal interest came in the last mishna of Gittin's fourth perak. In this mishna the rabbis ordained the reversal of a takkana concerning the obligation of bikkurim (first fruits) brought from a field that had been sold to a non-Jew. The mishna stated that "if a man sells his field to a heathen, he has to buy [yearly] the firstfruits from him and bring them to Jerusalem, mipnei tikkun haolam." (186) Eliezer Berkovits explained Rashi's rationale for this as being that "since the vendor had to annually pay the purchaser of the field high amounts, the Jews would not make a habit of selling their land in Eretz Yisrael to non-Jews." (187)

The Talmudic discussion on the mishna, however, focused on the question of whether a gentile could be considered to own land in Eretz Yisrael to the extent that such ownership would release the land from its state of holiness, and nullify the obligations of tithing and bikkurim. In this regard, the halacha seems to have followed Rava, who was of the opinion that such ownership did not release, and that hence the original owners were required to fulfill the Toraitic obligation of bringing bikkurim.

But if this was a ruling from the Torah, then why was there a need to associate it with the rabbinic reasoning of minnei tikkun haolam? The gemara explained this explicitly. Apparently, originally a person who sold his land would purchase the first fruits from the gentile and complete the mitzva by bringing them to Jerusalem. But the possibility for this procedure implied that more and more Jews were prepared to sell their land to non-Jews, thinking that so long as they brought bikkurim from these fields, this was enough to maintain "Jewish holiness," even if the land was no longer under Jewish sovereignty. As a result, in order to transmit the message that it was not desirable to sell the fields of Israel to non-Jews, the chachanim enacted a takkana to the effect that bikkurim should no longer be brought by a person who had sold his field to a gentile. The results of this first takkana, however, were not effective; the Jews continued to sell. Hence, a second takkana--which subsequently appeared in our present mishna--was enacted, reobligating Jews to bring

bikkurim from fields they had sold, minnei tikkun haolam.

According to Rashi, whereas the first takkana had been designed as a fence (siyag)--presumably to protect the intent of the Law--the second was devised in order to reinvigorate concern amongst Jews for the redemption of their holy land. (188)

The Torah's commandment was reactivated, then, as a rabbinic takkana, propelled by Jewish proprietary interests over Eretz Yisrael. As Berkovits expressed it in regard to the first takkana,

Hence it is demonstrated that out of a concern to ensure that the land of Eretz Yisrael was not removed from Jewish ownership, the rabbis ordained their 'first takkana' and cancelled the commandment of bikkurim in order to teach the Jews that by their behavior they were harming vital interests of the [Jewish] People. (189)

Similar reasoning might be provided for the institution of the second takkana, and it was precisely these "vital interests" which tikkun haolam was intended to recall. In present-day ethical terms, one might feel constrained to call into question the rectitude of regarding land that had been legitimately sold to non-Jews as still being subject to the holiness provisions or sovereignty rights of one's own People. But this was plainly not the concern of the rabbis in this usage of tikkun haolam; the mitzva of yishuv Eretz Yisrael (the settlement of the land of Israel) was their primary interest, and tikkun haolam served to underscore the ethical significance to them of the upholding of this commandment. While, again, one might find cause to question whether or not the dual-takkanot

sequence was actual, tikkun haolam nevertheless represented the rabbis determination to enhance the mitzva.

Finally, we return to one further more recognizably ethical utilization of tikkun haolam. This occurrence is worthy of note both because its source is non-Talmudic, and because it exhibited a more stringent attitude than the Torah, as opposed to the number of cases which tended to liberalize Toraitic rulings. In Tosefta Gittin we read,

He who causes uncleanness to the clean things of someone else, and he who mixes heave-offering in the produce of someone else...[and] he who mixes wine used for idolatrous purposes [in acceptable wine of his fellow]--if he did so inadvertently (heshogeg), he is exempt. If he did so deliberately (bemeizid), he is liable, mipnei tikkun haolam. (190)

Though strictly forbidden by the Torah, the law contained no sanctions against someone who brought about damage or transgression--be it wilful or non-wilful--where the damage or transgression was not recognizably visible. An example of this would be causing somebody to become ritually impure. (191) Apparently though, this leniency must have become problematic and so this takkana--inter alia--was enacted. Within the Torah's terms, since none of these transgressions effected patent damage, the transgressor, though guilty, was not liable for punishment. The rabbis determined, however, that if the damage was deliberate then the transgressor was indeed to be penalized, mipnei tikkun haolam. Elon found the most cogent explanation for the rabbinic takkana in R. Yochanan's elucidation: "Why then did the Rabbis ordain that [one who acts] maliciously is liable? So that it should not become a

common thing for a man to go and render unclean the foodstuffs of his neighbour and say, I have no liability."(192) In order to prevent wanton, capricious transgressions of this nature,(193) the rabbis acted to deter such offenses. This must have provided for both increased societal stability, and redress for those who had been wilfully wronged. A sense of justice, based on a perception of what was ethically proper, seemed then to have inspired the rabbis' desire to reinforce the law in this matter.

Many other examples of the employment of tikkun haolam could be cited. Moreover, there were numbers of takkanot which, though they may have utilized different terminologies--without specifying the formula "tikkun haolam"--were nevertheless thought to have been promulgated with aspirations toward our principle in mind.(194) Were all these takkanot motivated by purely ethical causes? Clearly we must answer this question in the negative. From a modern ethical stance, while many of the most far-reaching takkanot to be justified by the notion of tikkun haolam did have discernible ethical impetus behind them--such as those of Hillel and Gamaliel--this was not universally true. There were also takkanot which acted for more pragmatic communal correction, without particular reference to ethical implications.

From the point of view of the rabbis, of course, the question of ethics is far more complex, given that they did not consider ethics as a separate category per se. As we have

seen, in the rabbinic view, ethics and religion were intermingled. We can certainly assert, however, that, as far as the rabbis were concerned, tikkun haolam did become an accepted part of the religious life and halacha of the People. As Eugene Lipman has perceived,

It is clear that it [tikkun haolam] was not a full-blown legal concept to be applied always when technically appropriate. It had some of that aura, but the cautious student will hesitate before assigning such a status definitely in the Talmud.

But on the other hand, the sages themselves were sufficiently acquainted with the implications of the phrase that they could use it with some frequency and with a degree of consistency while covering a rather wide range of subjects. It was certainly not limited to the 'moral,' as suggested by Tchernowitz. (195)

For the rabbis, then, while it was "not limited to the moral," it seems to have regularly served in the promotion and strengthening of a number of mitzvot which the sages regarded as pivotal to their society. Undoubtedly too, these takkanot were instrumental in communicating the responsiveness of Torah to changed conditions, and hence in preserving the halacha as an active force in Jewish life. While these goals may not always have accorded with the ethical as conceived by the twentieth century mind, they fulfilled a high religious duty for the rabbis, and thus, for them, served the greatest ethical purpose.

In the final analysis, therefore, we might say of tikkun haolam that it was a principle of somewhat equivocal nature. While it served to uphold the ethical within a number of takkanot, there were certainly those in which its basic

function appeared to be more what we might call strategic or pragmatic. This, however, is to impose a structure on the principle, of which the rabbis could never have conceived. In their mended world, tikkun haolam was the norm invoked when the primary intent of a religious mitzva had to be firmed and undergirded for the sake of the upbuilding of Jewish society. In some cases--such as that of the slave--it was invoked to advance the cause of the individual as well. In all its applications it sought social betterment, in a course charted toward a utopian vision.

We have seen, then, that the three principles we have analyzed may not be categorically defined in any unitary fashion. Clearly, they regularly inspired structured ethical considerations, which were often the cause of profound challenges to received laws. At the same time, however, we must acknowledge that there were numbers of instances in which our apparently "ethical norms" were actually utilized to substantiate practical aims. Yet it must nevertheless be asserted that the fact that these norms were deployed in situations that were unrelated to the ethical does not necessarily detract from their future ability to evoke and support the ethical, if called upon to do so. If halachic adjustment is determined to be a priority amongst those who view the halacha as the moreh derech (guide) for their lives, then no technical impediment would seem to obstruct the renewed application of these principles in again acting for the ethical.

After reviewing the rabbinic perspectives on each principle, we have--on each occasion--returned to essentially the same questions: Given that there did prevail amongst the rabbis who contributed to and compiled the wisdom of Gittin and Yevamot, an ethos which sought an ethical response to contentious, unpleasant or simply changed circumstances, is such an ethos extant today? If not, is it necessary today, and--if it is necessary--could it be rekindled in this age? Might we transcend some of the Talmudic categories, which have been our inheritance, in order to apply ethical principles in our own generation? Could we go beyond the interpretative in order to respond directly to the changed social conditions of our age? What are the areas in which takkanot would redound to the benefit of Jewish communities and of halachic vitality within our present milieu? There are many questions. Now we must begin to answer. Though the great wisdom of Hillel the Elder may be but history, the spirit in which he fashioned his takkanot may yet be found to endure.

CHAPTER 5

Surely This Great Nation Is A Wise And Discerning People

The upheaval experienced in Jewish life in the latter half of the twentieth century has made ours an unprecedented period in Jewish and halachic history. So perplexing is the complex of issues faced by contemporary generations, that many of us might well be prepared to go far beyond the thinker who quipped Talmudically, "if someone will be good enough to provide the answers I will gladly take his change of garments to the bathhouse for him." (196) Never before has the authority of halacha been subjected to such widespread challenge as it has within the last century. Never before has it had to respond to the deep moral issues raised by an unthinkable disaster, while simultaneously attempting to grapple with the ethical concerns raised by an exponential explosion in technological capability.

Our pervasive exposure to moral argumentation in non-Jewish contexts and our lack of instinctive comfort with the norms of halakhah make us unique in Jewish history. The enlightenment has forced us out of the intellectual and axiological ghetto to which even the most fervent isolationist cannot return. For many Jews, the extra-halakhic frame of reference has grown to be so dominant that we feel the attraction of ideal moral concepts more immediately than we do the demands of divine law. ...[Moreover] we now live in the post-holocaust era, on the heels of the time when brutal immorality reached its apex in human affairs... (197)

Daveinu. These factors alone would make our current halachic problems complicated enough. But to these, of course, we must add the knowledge that not since halachic development was in its infancy have we Jews commanded sovereignty over our own body-politic. Today though, in Eretz Yisrael, our modern nation state brings forth a plethora of unforeseen halachic puzzles.

It is within this extraordinary context that many Jews continue to face the challenge of leading halachic lives, albeit without sequestering themselves from the wider world. The options they confront in dealing with the ethical challenges of these new conditions will form the focus of our investigation of this era, so very far removed from its Talmudic antecedents.

How have Jews envisaged the position of halacha in the momentously changed circumstances of the twentieth century? An entire spectrum of responses may be discerned. A broad characterization, however, would denote that secular and Reform Jews, on the one hand, have largely chosen to deemphasize halacha. While secular Jews have tended to ignore it, Reform Jews have opted instead to maximize religious choice by calling on individuals to be autonomously self-disciplined, albeit within a communal framework. To be sure, some Reform Jews have advocated a modern systematization of the halacha on a communal basis, but this is yet to be effectively actualized in any coherent manner. (198) Ultra-traditional Jews, on the other

hand, have sought to defend--without acknowledged alteration--a halacha firmly identified with the teachings of previous centuries. In pursuit of this goal they have often found it necessary to seclude their communities from the impact of outside influences. In addition to these two divergent streams, we find a continuum of Conservative and modern (or neo-) Orthodox Jews who believe in the preservation of the halachic system, but at the same time stress the importance of being an integral part of the surrounding world as well.

We shall examine here a sampling of the currents of thought to be found within the last grouping. We do so because they share two essential similarities with the Talmudic rabbis which are critical for our purposes. The first is that they believe in the importance of maintaining a system of objective law within Judaism--i.e. some form of halacha. The second is that they feel that the halacha must, in some serious way, contend with the multiplicity of issues raised by our contemporary milieu. Both aspects--it seems reasonable to conclude from our preceding investigations--were also features of the rabbinic Weltanschauung, and remain particularly salient to a discussion of an ethical halachic ethos two thousand years later.

Orthodox Judaism, it has been asserted, "is an 'in' topic nowadays." (199) If this is true, it may well be due to the fascinating diversity of forms which the "modern impulse" within modern Orthodoxy has taken. While, therefore, a variety of Conservative thinkers, might equally fulfill our criteria,

we shall choose to focus upon neo-Orthodoxy in order to demonstrate the profoundly divergent views evident even within so-called "traditional" Judaism. Hence we note that each of the thinkers whose ideas we propose to probe, received a decidedly Orthodox education, and all of them still define themselves as being within the framework of Orthodoxy, as they individually understand the title. In ideological terms, we may state without equivocation that they are each faithful members of the Schechter/Gordis conception of "catholic Israel"--those committed to the halacha both intellectually and in their practical lives.(200) More than this we might further observe that each would perceive himself as "gesetzes-treu" (prepared to observe the law, regardless of personal feelings(201))--again, each according to his own particular understanding of the expression. This designation--it has been claimed--is an appropriate descriptive appellation for the "traditional" Jew.(202)

Of far greater interest than the similarities which bind them together, however, are the substantial differences which separate them. Their prescriptions for the ways in which halacha should respond to contentious, unpleasant or simply changed circumstances are remarkably varied, especially considering their common veneration for the Jewish legal system and its texts. It should be noted that we have selected these particular individuals not because they are unique in holding the views to which they subscribe, but because they represent a broad sweep of the positions held by the contemporary

'halachically faithful.' In assessing the possibilities for formulating a modern, ethical, halachic response, it is, then, to an analysis of the perspectives of Rabbis Louis Jacobs, Eliezer Berkovits, and Walter Wurzburger, that we now turn.

Louis Jacobs: A Halacha That Requires No Abnegation Of The
Intellect

Despite the fact that Louis Jacobs retains membership in the Conservative Rabbinical Assembly, and teaches at a Progressive rabbinic seminary, he chooses to identify himself with Anglo-Jewry's historical understanding of the term "Orthodox." (203) Though there would be many who would question this self-definition, Jacobs demonstrably fits within the ideological boundaries we have delineated, so we shall not. Since, as we shall see, Jacobs' "theoretical foundations" are quite removed from those generally understood to be "Orthodox," Jakob Petuchowski has applied the designation, "Orthoprax" to Jacobs: though "the outward practice has remained the same," the thinking behind it clearly has not. (204) Jacobs himself, however, calls this distinction into question when, in defense of his position as a traditional Jew, he maintains, "if the facts are so, then this interpretation is right and hence 'orthodox'." (205)

This having been said, it must nevertheless be acknowledged that Jacobs' ideas are, to say the least, rather unorthodox amongst present-day understandings of Orthodoxy. Jacobs

himself is well aware of this fact; indeed he is cognizant of exactly where the battle-lines are drawn.

The real difference, and one that cannot be ignored, between the traditional Halakhists and modernists [such as Jacobs]... is on the question of how the Halakhah came to be and how it developed. The basic question is the historical one, from which the practical questions all stem. Indeed, the very notion that there is a history of the Halakhah and that it developed is anathema to the traditional Halakhist who operates on the massive assumption that the Torah, both in its written form, the Pentateuch, and its oral form, as found in the Talmudic literature, was directly conveyed by God to Moses either at Sinai or during the forty years of wandering through the wilderness. Furthermore, the traditional Halakhists accept implicitly that the Talmudic literature contains the whole of the Oral Torah and that even those laws and ordinances called rabbinic are eternally binding and that...the Talmud is the final authority which can never be countermanded. (206)

In response to the "traditional halachists," Jacobs draws his "non-fundamentalist" approach to the origins of Jewish law from the wells of modern scholarship. This demands of him a striking "reinterpretation" of the notion of revelation:

On this view, it can no longer be denied that there is a human element in the Bible, that the whole record is colored by the human beings who put it down in writing, that it contains error as well as eternal truth... Revelation is now seen as a series of meetings or encounters between God and man... It is not the actual words of the Bible that were revealed. These belong rather to the faltering human attempts at putting down what it signified for men to have felt themselves very near to God... (207)

For a contemporary Reform Jew, of course, these tenets represent the sine qua non for the Reform rejection of the divine and authoritative nature of Jewish law. It is, however, a far different proposition to attempt to argue--as does Jacobs--for the revitalization of the halacha on the basis of such a credo. Jacobs' philosophy is so very unconventional in traditional circles precisely because it attempts to defend a

divinely-inspired system of halacha while operating within a totally revamped understanding of revelation.

The implications of Jacobs' "modern" theology--which he has spent a great deal of effort delineating and defending(208)--are indeed profound when it comes to his understanding of the Talmud's suitability to serve as the determining "source" of halacha. The major problem, according to Jacobs, in deriving halacha from the Talmud is that the Talmud is an academic work, compiled as a record of the parry and thrust of debate within the batei midrash (schools), and was not designed as a work of "practical guidance and prescription." Thus, theoretical material, largely composed in a context of intellectual sophistry, has been asked to serve as a fount for legislation effecting all details of the day-to-day lives of Jews.(209)

In this context, Jacobs has pointed to four factors stemming from the Talmud, which have, in his view, tended to stifle possibilities for "fluidity" in the halacha. Firstly, the amoraim were "chiefly concerned" with applying methods of interpretation which reflected their interests in abstract legal theory. They were concerned with a particular form of systematization of the tannaitic literature which, though of great legal moment, was "far removed from the concrete situations for which guidance is sought in the Halakha."(210)

Second, there is considerable debate as to whether the amoraim intended to accurately explain the mishna through their discussions, or whether all manner of homiletical and eisegetic

elements also became a part of their interpretation. The problem reflected in this aspect is that, according to the "fundamentalist" view, it has not been permissible--since the close of the Talmud--to explain the mishna in accordance with its peshat (plain meaning; i.e., without taking into account amoraic accretions) except for use as an intellectual commentary, but certainly not as a source of practical halacha. Halacha may only be derived from the Talmud's totality, taking into account all the ingredients of the amoraic exposition. As a result, halacha distilled from the Talmud's final understanding, is not really based on a pursuit of historical truth; rather it is drawn from the final version of the amoraic interpretative material, whatever its nature may be: "The final decision is, then, far more a matter of procedure than of absolute truth." (211)

Third, Jacobs invokes the famous Talmudic case of the "oven of Aknai" (Baba Metzia 59b) as illustration of the Talmud's support for the notion that the law is decided by procedure, and is hence "beyond criticism on grounds of accuracy or inaccuracy." For if indeed the law is "not in heaven," and the bat kol may not be relied upon, then the presumption must be that it is not so much absolute truth with which we should be concerned, as it is the processes of rabbinic argumentation. It is for just this reason that God--who is, of course, identified with absolute truth--laughingly declares "My sons have conquered Me." (B.H. 59b) The rules perceived to inhere in the Torah which empower the sages to interpret, empower them

also to incorporate any "errors" they may make within the halachic system. Indeed, though these may be errors when held up against the standard of absolute truth, in halachic terms they are perceived to be flawless, so long as their establishment accords with the rules which have been laid down. (212)

Fourth, it is patently clear to Jacobs that the Babylonian Talmud is not so much a collection of legal treatises as it is a composition of literature. Filled with "contrivance," "literary devices," and "academic exercises," the Talmudic genre may represent great artistry, but could hardly be claimed to be focused upon "the adjustment of law to life." An example of what Jacobs sees as an "academic exercise" is the Bavli's amoraic discussion of Hillel's proshul, wherein there is a deep interest evinced in the right of the rabbis to uproot a law, but scant attention paid to the issue of the law's substance. Moreover, in a literary vein, Jacobs has noted that proofs from a nishna always come in threes, never twos or fours, leading him to wonder whether form rather than content played a significant role in Talmudic expression. "In the light of this it is as precarious to derive principles and procedures for the dynamics of the Halakhah from the Talmud as it would be to try to obtain information about Danish Court life in the past from Hamlet." (213)

The consequence of these four factors, in Jacobs' view, is that

the Halakhah tends to operate apart from the actual life of the people, acquiring its own norms and methodology independently of the demands of the law in practice. Instead of life influencing the development of the law, the theoretical Halakhah tends to mold life in its own image. (214)

This being the case, these influences would seem to militate against a great deal of halachic flexibility. Yet Jacobs has ably shown that flexibility has by no means been absent from halachic deliberation. Despite the fact that the Talmud's structured nature might not make it particularly functional in relating to life's exigencies, still the breadth of its discussions has provided a degree of latitude for the halachic response. (215)

Nevertheless, the outlook of today's "fundamentalist" halachist, as depicted by Jacobs, still regards the Talmud as the ultimate authority in ascertaining any "practical" halachic ruling. In Jacobs view, the pervasiveness of this assumption has meant that

none of the traditional Halakhists ever dared...take issue with the basic doctrine ...[of] the infallibility of Scripture in its rabbinic interpretation and the infallibility of the Talmudic rabbis as the sole and final arbiters of the Halakhah. (216)

Jacobs, however, is prepared to take issue with these "basic doctrines." Indeed, one might aver that if there is a leading contemporary proponent for transcending Talmudic categories in order to apply ethical principles, it is Jacobs. For example, though Jacobs is fully aware of the various halachic suggestions for circumventing the problem of manzerut, he is completely unsatisfied with these efforts of alleviation:

What none of them ever thought of doing was consciously to pronounce that the Talmudic understanding of the Deuteronomic law, still less the Deuteronomic law itself, was based on an inferior notion of transmitted guilt or the taint of it and should be abolished. (217)

They never thought of it, of course, because though they may have desired such an outcome, "they" perceived the halacha as immutable. This persistent perception prevails in order both to assure legal stability and to keep unchanged the "Word of God," as communicated and portrayed through the Talmudic prism. Hence, according to Jacobs, the framers of halacha--even for today--are essentially the tannaim and amoraim, since "the traditional Halakhah is based on fundamentalism, if not of the Bible certainly of the Talmud." (218) As a result, no "acceptable" contemporary halachist could conceive of overturning Talmudic rulings on manzerut, no matter how much he might want to see the condition relieved, because to do so would be tantamount to denying the divine origin of the Oral Law.

Against this view, Jacobs maintains that the only intellectually viable position in the modern age, is to take a "non-fundamentalist" approach to halacha which, by its very nature, is "unacceptable" to the "traditional" halachist. Jacobs sees the result of the rise of modern scholarship as having changed the ground-rules for all Jews; prior to its emergence, "the doctrine of verbal inspiration...did not offend reason and did not call into compromise the intellectual integrity of the Halakhist." (219) Thus, while Jacobs stresses

that a non-fundamental halachic attitude might still accept the notion of Torah min hashamayim, he appeals to historical perspectives on the experiences of the Jewish people in order to ascertain what might be halachically sanctioned and what might require reevaluating. Just as the rabbis instituted blessings for the Chanuka lights, which were not commanded by God within the Sinaitic revelation (historically understood) so does the modern Jew need to invest "supreme value" in the halachic rejuvenation of our own age. (220)

There are many problems which urgently require serious confrontation:

of the rights of women; of dialogue and relationships with non-Jews; of life in a technological society; and, in the State of Israel, the needs of a modern democratic state in which religious coercion is neither possible nor desirable and for which the methods adopted by the great Halakhists are no longer applicable. (221)

If we are to seriously respond to these issues, opines Jacobs, we will need to return to that tendency within the tradition which viewed the halacha as containing dynamic and flexible features sufficient to allow "original contributions." More than this, we will need to transcend that "doctrine conceived of in completely static terms" which describes Talmudic categorization as representing the final word. In the same way that halachists of bygone eras refused to compromise their intellects, so must we refuse to compromise ours. We must try to emulate the very best of that coterie of halachic leadership which boldly reached for a correct response for their times, rather than subscribe simply to process.

They were creative thinkers, responding both intellectually and emotionally to the challenges and needs of the age in which they lived, with their quota of human temperament and failings, as well as being highly gifted leaders who tried to pursue the truth objectively as a divinely ordained task. (222)

In Jacobs' opinion, we must try to follow their example, albeit in the radically altered conditions which modern scholarship has created for our legal thinking.

Jacobs avoids offering glib solutions in any way resembling "blueprints for the future." Yet in regard to several points he is adamantly sure: that halacha attempts to account for ethical factors external to pure legal considerations; (223) that halacha in the modern age must utilize the tools of modern scholarship in going beyond a slavish adherence to Talmudic classifications, and in creating a halacha appropriate to the present-day Jewish historical experience; and that for the responsible halachist, "the Torah is a tree of life and Jewish law, the Halakhah, affords scope for diversity, flexibility and creativity." (224)

Clearly, Jacobs is convinced that there exists an urgent need for an ethos capable of formulating an ethical response to the contentious, unpleasant or changed. He does not, however, seem to harbor great hope for the promotion of such an ethos amongst twentieth-century halachists. More than part of the reason for this undoubtedly lies in the radicalism of his theological views on revelation. In seeing revelation as a "series of ongoing encounters between God and the people of Israel," Jacobs is able to be more open to profound halachic

change than the halachist who affirms an all-embracing Sinaitic revelation. Nevertheless, it remains possible, of course, to hold to a more traditional notion of revelation, while yet espousing the need for dramatic halachic rethinking. Perhaps nowhere is such a position more articulately presented than in the thought of Eliezer Berkovits.

Eliezer Berkovits: A Halacha Capable Of Ensuring The
"Humanization" Of The Word Of God

While some might claim that Eliezer Berkovits' conception of halachic development is too liberal, there would be few--if any--who would choose to cast aspersions on his "Orthodox" credentials. This is so despite the fact that Berkovits, over the years, has become identified as one of the most persistent critics of the halachic outlook of contemporary Orthodoxy, particularly in the State of Israel, of which he is a citizen. Hence, while Jacobs can be dismissed by the more "traditionalist" schools of thought as a maverick with patently unacceptable notions of revelation, Berkovits' charges are by no means so easily deflected.

Berkovits does not share Jacobs' sense that the halacha and our approach to it need to be newly apprehended in the light of modern scholarship. Quite the contrary, Berkovits seems to be firmly of the opinion that if only the halacha would be allowed to operate as it was supposed to, and would be permitted to fulfill its historic potential, overhaul would not be found to

be required. In this context, Berkovits quotes Rabbi Yosef Albo to the effect that

The Torah could not be complete in such a manner that it should be adequate for all times. New details are continually occurring in the affairs of men in customs and actions, too many to be included in a book. Therefore, God revealed to Moses orally some general principles, only briefly alluded to, so that, with their help, the sages in each generation may deduce the new particulars [i.e., the new particulars of the law appropriate for the new situation]. (225)

As a result, Berkovits understands even the Talmudic orientation of halacha as seeking to apply "divine truth" to the actualities of the human situation:

The divine truth had to be poured into human vessels; it had to be 'humanized.' Having left its heavenly abode, it had to be accommodated in the modest cottages of human uncertainty and inadequacy. This, in essence, is the task of the Halakha. The 'humanization' of the word of God requires that in applying the Torah to the human condition, one takes into consideration human nature and its needs, human character and its problems, the human condition in its forever-fluctuating dimension, the Jew and the Jewish people in their unique historical reality. (226)

Thus Berkovits is not inclined to accept the postulation that the Talmud should necessarily have led to any form of extremism: "It is obvious that Halakha in its essential nature is the most potent antidote for fundamentalism." (227) In Berkovits' view, if generations subsequent to the close of the Talmud came to regard its authority as binding, they did so voluntary and of their own volition, since Torah must be freely accepted, and the manner in which "halachic discipline" is to be defined is up to the sages of every age. (228) Moreover, it is for this reason that Berkovits is not predisposed to view the rise of modern scholarship as representing any decided watershed in the development of halacha. For if the halacha is

to be portrayed as "a system of teachings and norms" which ought to be responsive to the human needs of every age, then a simple return to its true root function, rather than the application of modern academic techniques, should be all that is required to make it responsive to the needs of the twentieth century.

Halakhah is not the Law but the Law applied--and by the manner of its application rendered meaningful--in a given situation. The purpose of the Halakhah is to render the Torah in a given situation a) practically feasible; b) economically viable; c) ethically significant; d) spiritually meaningful. (229)

Berkovits, then, understands the authenticity of the halacha in any particular generation to be dependent not upon its ability to be faithful to the explications of previous ages, but upon its commitment to the realization of these four standards within its own halachic environment. Hence, as far as Berkovits is concerned, it is eminently possible to live fully in accordance with the provisions of the Shulchan Aruch, and yet not to live a life which constitutes an "authentic Judaism" for the modern era. (230) A true halacha for Berkovits is one that must emerge from a "covenantal mutuality" based in human responsibility and responsiveness, and not one that is dictated. Here Berkovits clearly differs from Jacobs in seeing within the phenomenon of "halacha" realistic possibilities for seeking the correct response to a given age, rather than simply adhering to the derived outcome of a process.

Living in consonance with the Shulchan Aruch while yet remaining discordant in relation to "authentic Judaism" is,

however--according to Berkovits-- a malaise which is all too prevalent within contemporary Orthodoxy: "Orthodoxy in America and the State of Israel is anxiously bent on preserving Judaism. But, to use Samson Raphael Hirsch terminology, it is dangerously close to carrying Judaism on its hands as if Judaism were 'a sacred mummy.'"(231) Thus, within present-day Orthodoxy, halacha has yet to respond in any meaningful way to the challenges of the State of Israel, to the myriad of new technological developments, or to a whole variety of changed circumstances. Ever bound to textual precedents, contemporary halachists have been unable to make the halacha relevant to the radically altered lives of the people:

Because of the lack of opportunity for halakhic application to real-life situations of national existence, the art and wisdom of such application [has] dried up. Because of Halakha's exile into literature and codification, new authority barriers were erected that seem insurmountable. The old principle of the acceptance of personal responsibility for halakhic decisions, which demanded that the Dayan rule according to what his eyes see, has received a new meaning that reads: according to what he sees in some authoritative text.(232)

Of greatest significance for our present purposes, Berkovits views the inability of modern halachists to act for the ethical as perhaps their most singular failure. Sensitive to the human pain which regularly arises in relation to the current application of laws concerning the aguna, the yevama, the manzer, inter alia, Berkovits firmly holds that it is not the halacha but the halachists who must be called to account for ethical travesties.(233) Berkovits is particularly outspoken in identifying the present situation of the aguna as

being completely contradictory to his understanding of the call of basic Jewish principles.

The problem of the agunah is a critical problem of Jewish ethics. It challenges the entire concept of drakheha darkhei noam, that the ways of the Torah are ways of pleasantness... . The most serious aspect of the problem is that in the consciousness of our generation it represents a critical challenge to the ethical quality of Halakhic Judaism. In the consciousness of our generation the agunah problem has become a scandal. No matter what excuses or reasons are given for its continued existence, the scandal is a scandal and remains a scandal. The insistence that nothing can be done about it within the framework of the Halakhah is worse than a misrepresentation. It is a confession that the Torah cannot meaningfully cope with a given situation. It is non-authentic Judaism.

In the Talmud there are entire groups of hilkhot based on the principle of darkhei shalom. According to a Talmudic statement, kol ha-torah kula, the entire Torah was conceived for the sake of 'the ways of peace.' Yet it is the trend of the Halakhah which is motivated by the pursuit of darkhei shalom which seems to be most neglected by our contemporary devotion to an unauthentic adherence to the law.(234)

Clearly, Eliezer Berkovits is of the opinion that the principles which guided the thinking of the Talmudic sages should find expression in modern halachic application as well. Indeed, Berkovits charges the modern halachist with the mandate of seeking the "right and the good" which flow from the general principles, in the creation of an "authentic" contemporary Judaism which will do justice to the covenantal relationship.(235) The rejuvenation of the principles as catalysts for halachic creativity are, presumably, a part of Berkovits' call to let the halacha be the halacha, unshackled by the "word meant for yesterday."

For while Berkovits concurs with Jacobs' description of the impermissibility of dissent from Talmudic teachings subsequent

to the close of the Talmud, he is unprepared to accept this fact as an inevitability of halachic reality. Berkovits discerns in this narrowing of halachic possibilities a constriction of the Oral Torah which was contrary to its very nature. It was the galut (exile) into which Jewish civilization was thrust, which called forth these "protective measures." Hence, Berkovits speaks of "the twofold Galut of Halakha--its exile from reality and its exile into literature and codification" which "forced [halacha] into a straitjacket as we face the challenges of our time." (236) In the solidification of a malleable, unwritten halacha into set, inscribed formulae and structures, the halacha was essentially stripped of a great deal of its vigor. It is, then--Berkovits posits--to the renewal of a vigorous halacha that our present generation is challenged.

Berkovits does not explicitly call for the transcending of Talmudic categories, though if this were to be necessitated, he would clearly not be averse to such an occurrence. His main concern, however, is in enabling the halachic process to be unfrozen, and to be made capable of responding appropriately, based on its root principles:

The solution does not lie in Halakhic reforms, but in the authentic application of valid Halakhic principles to the radically new situation. ... What is needed is not reformed but functioning Halakhah. Not Halakhah has broken down, but our mastery of the technique of its application to the new conditions. (237)

The transcending of Talmudic categories is, therefore, somewhat of a moot question for Berkovits. The halachic problems with

which we are presently confronted are, in his estimation, amenable to solution within the halacha--originally and properly construed. Should these solutions require a different measured and carefully distilled response than that concluded by the Talmud, then so be it: it is our halachic mandate to enact such a response, as suitable to our situation.

Perhaps the controversy which surrounds Berkovits is not so stormy as that which swirls about Jacobs because the former sees no need to assail the traditional notion of revelation. Indeed, it is within the traditional notion that Berkovits espies warrant for making certain that the halacha is capable of being shaped to fit each age: "One can find the Word that has been waiting for this hour to be revealed only if one faces the challenge of each new situation in the history of the generations of Israel and attempts to deal with it in intellectual and ethical honesty." (238) For Berkovits, the "spiritual tragedy" inherent in contemporary halacha will only be overcome by cleaving to the vision of such a conception of revelation.

Berkovits, like Jacobs, is loath to provide specific answers to particular conundrums, principally because he perceives the need for a systematic and psychological transformation as the prerequisite for being able to deal with individual issues. He admits that his path is fraught with risks, especially for the "Orthodox" camp. But he concludes that if Judaism is to be a significant spiritual force in this

vastly changed world, then there is no alternative: "Any road along which one may really walk, any genuine way of life always involves intellectual, moral, and practical risks. He who wishes to live meaningfully has to take them."(239)

The need for radical halachic risk-taking in order to restore the halacha as a vibrant, living law for Jewish life, is, however, a hotly debated subject within modern Orthodoxy. A great many would strongly reject the evaluation that the halacha demands redemption from some form of codified, written galut in order to regulate modern Jewish lives in a just and ethical manner. This most traditional ideological viewpoint within modern Orthodoxy has long numbered Walter Wurzburger amongst its most able proponents.

Walter Wurzburger: A Halacha That Responds From Out Of The
Wellsprings Of Tradition

Walter Wurzburger's credentials as an orthodox expounder of modern Orthodox views are unimpeachable. Wurzburger, it would seem, would not be at all uncomfortable to be identified as a fundamentalist in his ideological attitude to both the halacha and the context of the revelation in which it was transmitted to humanity. This position has led him to staunchly defend "traditional" halachic notions in the face of criticism from less fundamentalist viewpoints.

Wurzburger firmly rejects any suggestion that a truly Orthodox halacha could be based on a "non-mechanical"

perception of revelation.(240) By this he means to imply that the content of the halacha, as well as its interpretative principles, had to have been revealed by God to Moses at Sinai. Any alternative view would hold up for question the divine "binding character" of the halacha, and would thereby make our obligation to continued allegiance to its tenets doubtful. As a result, Jacobs' claim to the effect that a halacha based in Talmudic argumentation processes rather than in the search for truth is a blunt instrument in the creation of a living law, finds no sympathetic hearing with Wurzburger. From Wurzburger's halachic world-view, there is no conceivable separation between the necessities of appropriate halachic process, and the pursuit of Godly intention:

Because Traditional Judaism is committed to the divinely revealed law in its totality, it must object to the cavalier treatment accorded to the minutiae of the law. ... Traditional Judaism cannot brook any departure from the divine will. Developments in the law are legitimate only if, down to the last detail, they conform to the canons of interpretation by which the law is applied to the ever changing historic realities.(241)

Moreover, Wurzburger is quite explicit in affirming the limitations which this perception placed on further halachic development, even following the close of the Mishna. In responding to an article dealing in part with the influence of surrounding culture on the halacha, Wurzburger complains that "there is no mention of the severe restrictions which were imposed upon Rabbinic authority at the end of the Tannaitic era. Even the Amoraim could no longer function with the same degree of independence and originality as did the Tannaim."(242) Thus, not only will Wurzburger not accept any

semblance of "progressive revelation," but appropriate halachic legislation must derive from carefully circumscribed roots: "For interpretations of the law we rely exclusively on the following two sources: 1) The content of the Sinaitic revelation as recorded in the Pentateuch and 2) the principles of interpretation of the Oral Torah." (243)

But is there, within the framework of this type of traditional perspective on the halacha, room for an ethos of ethical response to problems posed by generations long distant from the Talmudic milieu? According to Warzburger, there is. Within the halacha, he maintains, one finds considerable room for creativity. Such creativity, however, is not to be found in "adapting" or "adjusting" the law to deal with altered circumstances, but in "interpreting" and "applying" its provisions, in order to effectively confront the call of a new situation. Furthermore, there is always a certain amount of subjectivity in any halachic determination since external influences and "personal value judgments" cannot be wholly excluded. This, in and of itself, allows for a degree of maneuverability between suitable halachic alternatives. With or without subjectivity though, reliable halacha is produced provided that the conclusion is arrived at through the employment of suitable interpretative techniques. (244)

Berkovits' call for a systematic reappraisal of halachic application is, of course, inconceivable to Warzburger. However, it is certainly feasible for Warzburger to envisage

invoking different emphases from within the traditional understanding of the halacha, in order to give the law contemporary relevance,

...the Oral Law is not so much a set of ready-made propositions but, rather, a process in which subjective factors come to the fore most prominently because wide latitude is accorded to the individual rendering Halakhic decisions. ... We need but recall how Maimonides and, subsequently, the Hazon Ish, modified the Talmudic rulings regarding the heretic, or how Rabbi Jacob Ettlinger revolutionized the treatment of Jews who desecrate the Sabbath, in order to see how even a 'fundamentalist' conception of the Oral Law permits far-reaching adaptations to changing realities. (245)

Wurzbarger is, however, at pains to stress again that only such change as is reconcilable with the "halachic methodology" may be sanctioned in reacting to altered "socio-cultural conditions." To allow for the consideration of any other avenues of reform would threaten the basis of the entire halachic enterprise:

To suggest the legitimacy of innovations which are adopted without regard to the due process of halakhic decision-making is not an invitation to creative interpretation of the law, but an outright capitulation to the 'spirit of the age' which is bound to lead to anomie and, ultimately, to religious anarchy. (246)

Hence, Wurzbarger perceives the law as the "matrix" through which ethical conceptions are developed, because without a clear halachic basis, there could be no "imperativeness" about the Jewish ethical approach. (247) The implication of this outlook is that the law can only search within its own corpus for that most perfect understanding which will respond appropriately to the situation at hand. Thus,

whenever the meaning of a biblical ordinance or the range of its applicability is in question, the Talmud employs as a

hermeneutical device, for the purpose of eliciting the 'real' meaning of the text, the doctrine that 'the ways of pleasantness' and 'the ways of peace' are the hallmark of the entire Torah. (248)

Clearly, Wurzbarger does not apprehend the ethical principles as correctives designed to operate on the law in such a way as to establish a response reflecting the greatest societal and ethical good. Rather, he views them primarily as tools that function within the law in order to engineer the uncovering of the optimum response--i.e., that intended from Sinai--for the given situation. Though ostensibly representing reactions to real-life circumstances, the principles--in this light--actually become trigger-mechanisms for initiating inbuilt halachic legal retuning. The outcome of this "retuning," of course, may or may not completely respond to the conditions at hand. But, traditionally, the best halachic response, as evaluated by halachists using correct techniques, will be--by definition--the most perfect answer possible. Whether or not it is gauged as such by those involved in the instance under consideration is another matter altogether.

It goes without saying, of course, that this appreciation bears little resemblance to the way in which Berkovits posits that the principles should be applied. Berkovits (supra) held that "it is the trend of the Halakhah which is motivated by the pursuit of darkhei shalom which seems to be most neglected by our contemporary devotion to an unauthentic adherence to the law." (249) By this he appears to imply that the halacha should--assuming proper operation--display a compelling

tendency towards darchei shalom and other ethical desiderata if it is indeed authentic. Wurzbarger, on the other hand, denotes a strikingly different thought-pattern on the subject:

As we stressed previously, in a theocentric system, moral requirements ultimately must be regarded as possessing the property of being willed by God. This being the case, conscience can never supersede the law, which, because of its transcendent source, is regarded as the Will of God. All that conscience can do is to supplement the law by (1) discerning Divine requirements which are not explicitly formulated in the law and (2) help determine the meaning and range of applicability of laws when their formulation contains an element of ambiguity..(250)

For Wurzbarger, then, one's ethical conscience could never be the motivating factor in seeking to reevaluate the halacha in the "pursuit of darchei shalom." Berkovits decries the fact that "the practice of our time in the application of the marriage and divorce laws of the Torah often leads to grievous human suffering and causes a great deal of Hillul Hashem. It is ethically indefensible; but Halakha is not responsible for it."(251) But this is a point of view with which Wurzbarger could not conceivably concur. For Wurzbarger, halacha is responsible for it, and "Hillul Hashem" could not possibly be involved since the halacha is the nearest expression of the "Will of God" that we can perceive. The ethical principles do not provide some type of moving "spirit" inspiring halachic repair in the direction of a purported "authentic" Jewish law. For Wurzbarger, authentic Jewish law is embodied inside the halacha, and the principles can serve to do no more than describe the outer parameters of interpretation for ethical possibilities within the halacha. If these possibilities--since the close of the Talmud--seem too narrow to deal with the

problem of the manzer or the aguna to the satisfaction of the modern conscience, then there is little that a responsible halachist could or would do in transforming the permanent nature of the law simply in the name of amelioration of temporary understandings.

It comes as something of a surprise, then, that Wurzburger can nevertheless maintain that

...it is the function of the Halakhah to provide normative guidance for concrete life situations arising within a given cultural-social context. Since it seeks to spell out the meaning of the 'Torah of life' in the light of the specific conditions prevailing within a given age, the Halakhah must consider socio-cultural conditions, especially in view of the fact that a variety of halakhic provisions such as tikkun haolam, darkhei shalom, etc. mandate concern for factors varying with the vicissitudes of historic exigencies and changing value perceptions.(252)

Though some have held that he hereby 'surrenders his case,'(253) we would suggest that his presentation is rather a matter of over-statement. Wurzburger's further elucidation of this position clearly intimates that though 'historic exigencies' must be comprehended and acknowledged, the 'concern' that may be 'mandated' can extend--in practical terms--no further than traditional halachic methodology will allow.(254)

It is of interest to note that despite the fact that Wurzburger, in two of the pieces we have examined, replies to articles which--amongst other matters--inveigh against current treatment of a variety of halachic issues associated with marriage, he does not directly refer to these problems at all.(255) For Wurzburger, it is apparently sufficient to

explain the appropriate interpretative functioning of the halacha in order to provide an understanding of why modern halachists cannot move further in addressing such issues. This is so despite the fact that these problems are undeniably the cause of discernible contemporary anguish. However, such a response is not sufficient for Robert Gordis, who responds to Wurzbarger, observing that

Where the necessary changes can be introduced through the methods and procedures of Halakhic interpretation--and this is often, indeed, generally the case--this is surely preferable. But it is not always possible. In these circumstances, the categories of tagganot, 'positive enactments,' and gezerot, 'negative prohibitions,' were invoked by Rabbinic authorities through the ages, all representing innovations which could not, or could not easily, be validated by reinterpreting accepted texts. (256)

The difference between Gordis and Wurzbarger is that whereas Gordis might see the ethical principles as catalysts towards takkana in unprecedented social conditions, Wurzbarger, by calling them "hermeneutical devices" seems to ascribe mainly a midrashic ("exegetic: i.e., construing a biblical passage or other existing law" (257)) role to them. Eilu v'eilu--there is, of course, evidence for both positions. It could, for instance, be argued along with Steinsaltz that a basic function of the oral law

was to transmit the meaning of words. Some of these were easily understood, others were less clear. When the text of the Torah refers to 'the boughs of thick trees,' for example, the term could be applied, linguistically speaking, to a number of botanical species. Thus, it was necessary for the parent or teacher to explain to the student that the reference was to the myrtle tree. (258)

As we have seen, however, a great deal of stretching is required to mount a similar linguistic argument vis-a-vis the

prozbul, which would seem to be a case of the ethical principle providing a context for an innovative takkana. Hence, Gordis' description is arguably more complete than Wurzbürger's when applied to instances in which the principles were employed.

Does Wurzbürger envision a need for the revival of an ethos of active ethical response? Clearly the answer must be in the negative. Many hundreds of years after the Talmud was closed, our generation has little authority to transcend its categories in any appreciable way, according to Wurzbürger. Nor is there any necessity for profound halachic restructuring, or for a comprehensive program of new takkanot. Just as the halacha's internal interpretative flexibility served previous generations well, so it will suffice to set out the divinely ordained path in our generation as well. For Wurzbürger, then, the halachist needs to be sensitive to the highest ethical path, and should do his best within the boundaries of the halacha's established methodology to always seek out the highest possible good which remains acceptable to the tradition.

In the analyses of Jacobs, Berkovits and Wurzbürger, we are plainly presented with three wholly different constructions of the most acceptable path for the halacha to tread in the modern world. And while Jakob Petuchowski has cogently suggested the desirability of coexistent "plural models" within the halacha, (259) still, some evaluation of the options confronting contemporary Jews is warranted. It is, then, to a critique of aspects of the foregoing halachic conceptions, as well as to a

brief examination of their potential for impact on Jewish life, that we now proceed.

CONCLUSIONS: STRUGGLING BETWEEN CONTEMPORARY HALACHIC
WORLD-VIEWS

We have seen--in our own age--the production of a number of new takkanot, called forth by the motivation to work for darchei shalom, darchei noam and tikkun haolam. Menachem Elon's summary of the renewed activity of tikkun which greeted the rise of the State of Israel provides but one demonstration that these principles are still operative in the halachic consciousness:

Soon after the rise of the State, in 1950, on account of the large aliya (Jewish immigration) from all the lands of the dispersion, which brought with it different customs in the matters of marriage, yivum and chalitza, the Chief Rabbinate enacted a number of takkanot designed 'to renew the takkanot of our ancient rabbis (z"l), and to add more takkanot like these--which the age makes obligatory--mishei darchei shalom, and peaceful home relations in Israel.' These takkanot fixed the prohibition of marriage without chuppa or without ten [men], and the prohibition of the performance of a marriage by a person who was not ordained and appointed for such a role by the Chief Rabbinate in the cities of the land of Israel; [also] the prohibition of the taking of a second wife in addition to the first, unless given marriage permission confirmed by the signatures of the Chief Rabbis of Israel; [and] the prohibition of yivum and the obligation of chalitza. These provisions had long been the practice in the majority of the communities of Israel, but had not been accepted amongst a number of Oriental Jews; through the takkanot it was fixed that they would have force over all, 'mishei darchei shalom, and unity in the State of Israel, so that the Torah should not be like two Torahs.' (260)

The need to act--even today--for the enhancement of the "ways of peace" and the improvement of societal harmony is hereby tangibly acknowledged. However, the number of these takkanot were, of course, few, and they exhibited no radical alterations

of practices already inherent in the halacha. Even Elon--a relatively traditional Jew--observed that,

...since then there has been no further legislative activity on the part of the bearers of the halakhah in the State of Israel. This may be regarded as regrettable since there still remain diverse halakhic problems awaiting solution by means of the legal source of takkanah. There is particular need to give attention to a number of problems concerning the agunah and other cases involving hardship to women... . Solutions to these problems are capable of being found through the enactment of takkanot... .(261)

But if it is indeed possible and desirable to find such solutions, and if--at least according to Jacobs and Berkovits--there exist models of halachic conceptions wherein such tikkun might be feasible, then why are such enactments not being promulgated in any extensive way? And why are those who do advocate and do venture into the field of halachic reformulation in an ethical direction, made to appear as traitors to the cause of traditional Judaism?(262) The widespread spurning of non-fundamentalist approaches to the halacha could either lead us to the conclusion that there is indeed something faulty in the non-fundamentalist outlook, or that some alternative dynamic has discredited them (i.e., the non-fundamentalist outlooks).

That the "conservative tendency" of the halacha has been exacerbated in the twentieth century is an observation claiming few disputants. Even British Chief Orthodox Rabbi Jakobovits has estimated that there are no more than a "handful of Orthodox rabbis advocating halakhic innovations and religious dialogue with the world...around them, [and they] find themselves in splendid isolation and incur hostile

opposition."(263) Jakobovits' comprehension of the reasons for this phenomenon have been summarized as follows:

(1) The Holocaust: Here, he says, the Orthodox religious community suffered in far greater proportion than any other element of k'lal yisroel. Its resultant 'sense of insecurity [led to] an uncompromising determination to preserve, consolidate and expand the tiny remnants' of its religious community and integrity.

(2) Newton's Law that every action produces an equal and opposite reaction. Here Jakobovits asserts that the 'massive drift to the left...[and] rampant growth of secularism, religious indifference, assimilation and intermarriage' has yielded an 'equal and opposite reaction' of stridency and reactionary determination.

(3) Finally, Jakobovits cites the 'widespread disillusionment with the sham values of our contemporary society' as justifying this conservative tendency.(264)

While Jakobovits states that he "disagrees" with the conservative attitude, he nevertheless stresses that the halacha is "an organic process which cannot be hastened artificially, or through popular agitation and lobbying."(265) It is interesting to note, however, that though he could not conceivably concur with a Jacobs- or Berkovits-type non-fundamentalist approach, still he does not choose to explain their "isolation" as being connected to any errors in the fundamental understanding of Jewish law contained within their conceptions.

This observation is of fundamental importance. For, whether or not Jakobovits could agree with the contention, it would seem fully sound to claim that the adoption of one halachic model or another is not so much a quest for "the right way" amidst wrong alternatives, as it is a legitimate choice between different ways of conceiving the functioning of law in

society. By this we mean that although attitudes conforming to the Wurzburger understanding of halacha (or even more conservative views) are certainly the vogue amongst "halachic loyalists" today, this is principally a matter of choice, not logical necessity. The predominance of such conservative viewpoints does not reflect any greater mortgage that such approaches might have on "the correct path." The "isolation" of the non-fundamentalist halachists may be connected to issues of politics, sociology or fashion; it is not, however, a measure of the tenability of their arguments.

We maintain this conviction for the simple though powerful reason that the non-fundamentalist constructions of Jacobs and Berkovits appear to describe the actualities of halachic functioning at least as plausibly as more conservative views. While it is, of course, commonly accepted that a Wurzburger-type analysis--discerning in the principles mechanisms for the discovery of the divine meaning inherent in the halacha--presents a realistic explication of many instances under consideration, this is not the only trustworthy approach. It is, in our estimation, possible to view the ethical principles as Jacobs might, as flexible "expressions of ideas and ideals [of Judaism] other than that of mere obedience," (266) which come to have practical application. From the stand-point of modern scholarship, his analysis, while calling into question the eternal validity of Talmudic categories, certainly does justice to the spirit of flexibility within which the takkanot seem so often to have been applied.

And the prism through which Berkovits sees the principles--that of being active catalysts in bringing about halachic response to real-life situations--also shares elements of congruence with a highly credible perception of the intent of the rabbis. In sum, we might agree with David Hartman's characterization which holds that,

...the biblical and rabbinic traditions contain two contrasting themes: one that emphasizes the dignity of human responsibility, intellectual adequacy, self-confidence, and covenantal mutuality with God, and another that demands utter silence and resignation before the inscrutable will of God. The rabbinic tradition does not attempt any higher unity or integration of these opposing religious moods. It posits both and does not explain whether they complement each other. The respective weight that a Jew gives to either of them is not prescribed in advance. Which of the two elements will play a dominant role in one's spiritual appreciation of Judaism is not dictated by the texts themselves. Selection and emphasis remain the responsibility of the reader. (267)

In this regard, it would seem reasonable to assert that all three thinkers have made their selections and placed their emphases in an halachically responsible manner, within the strata subsumed by our multi-layered text. Though it may seem initially paradoxical, there appears to be no convincing reason to impugn any of the models we have described as lacking solid foundation, or to participate in the present penchant for ideological ostracism of the non-fundamentalist. In another context Shubert Spero has written,

The conclusion is inescapable that in regard to such philosophic questions there may be more than one 'correct' answer in the sense that both are consistent and coherent with Orthodox Judaism. This test of coherence and consistency is the only legitimation that a philosophical position within Orthodoxy can receive or requires. (268)

In evaluating coherence and consistency there is, then, no overwhelming evidence to summarily reject any of the models.

But while both fundamentalist and non-fundamentalist models might well be halachically acceptable, this does not mean that their potential effects upon modern Jewry are equivalent. What is essentially at stake between non-fundamentalist [Jacobs, Berkovits] and fundamentalist [Wurzbarger and others of more conservative bent] outlooks may be informed by analogy to the choices confronting contemporary lawyers and jurists. Jerry Frug, professor of law at Harvard Law School has maintained that, even in regard to law of recent origin,

Lawyers and judges have no magical way of reading statutes or legal opinions so as to prevent their own views on social questions from influencing what they think the law is. Given the uncertainty involved in interpreting any text, a reader's interpretation contributes to shaping the meaning of the texts he or she purports merely to be describing. These interpretations define what the law is.

Many lawyers resist this insistence on the openness of interpretative possibilities. There are good reasons why these lawyers want to deny the extent to which readers of law participate in its definition. Openness of interpretation is a threatening idea. Commenting on Oliver Wendell Holmes's famous work The Common Law, the Oxford legal scholar Patrick Atiyah notes that 'it is necessary for the law to retain some mystique, some mystery and some permanence, if it is to hold its persuasive power and emotive force over the public. Demystification of the law is all very well, but the power of the law over the minds of men will surely collapse if the process goes too far, and the public comes to see law as a purely man-made instrument.' If law necessarily involves the personality, politics and viewpoint of the reader, it cannot provide a neutral place outside of society to control conflict. Law becomes a product of and a contributor to social conflict, as well as its solution.(269)

Frug proceeds by outlining Henry James' short story, "The Birthplace." In the story, a certain Mr. Gedge prevaricates

when conducting tours of a famous poet's house, and cannot decide whether it is in the general best interest to inflate the truth about the poet's life, or to present the unromantic facts as he actually sees them. Frug continues,

James does not tell us whether Gedge's decision to subordinate his critical sense was a good one. Gedge says at one point that those who idealize the poet 'kill Him every day.' But undermining people's ideas about Him might kill Him just as well. Lawyers who would argue for critical legal studies can be no more confident about the result of demystifying law than Gedge can be about the result of demystifying Him. But they prefer the dangers involved in presenting law in terms of its controversial, political, creative nature to the dangers involved in its idealization. They emphasize law's openness in order to encourage us to be aware of, and take responsibility for, the ways in which law can transform our daily lives. (270)

This, then, is perhaps a useful encapsulation which might also be applied to the differences in the contemporary halachic world over the need for an ethos of ethical change. Berkovits and Jacobs cannot be confident about the result of "demystifying" halachic process and opening it up to the vicissitudes of real-life situations. If the Jewish people comes to view halacha as "purely man-made" its "persuasive power" as a force for Jewish living might collapse altogether. But, as Frug put it, non-fundamentalists "prefer the dangers involved in presenting law in terms of its controversial, political, creative nature to the dangers involved in its idealization." As far as these thinkers are concerned, it is the idealization of the halacha within a self-contained interpretative system which "kills it every day." The halacha, they emphasize, can be an instrument for

the transformation of Jewish life, if only we will allow it to live.

Of course, Wurzburger and other fundamentalists deem this an irresponsible risk. They believe that the halacha, as a transcendent expression of law, rises far above "personality, politics and viewpoint," though nuances of these may tint it somewhat. The halacha, for them, must continue to maintain its permanence, and to operate within the boundaries of its interpretative limits, or else the "undermining" of its essential nature might "kill it just as well." Though halacha might be reevaluated--on its own terms--as the result of social change, it must continue to be a "neutral place outside of society," if it is to be at all active in controlling conflict and promoting divine justice.

Charles Liebman has discerned a variety of sociological factors within modern Orthodoxy which have contributed to the ascendancy of the fundamentalist, "idealizing" position over the more "critical" approach. The post-enlightenment dissolution of corporate Jewish communities was, in his estimation, one of the central factors which inspired the conservative shift. No longer bound to legislate for an entire Jewish conglomerate from all parts of the spectrum, rabbinic authorities did not continue to feel "accountable to the more moderate elements." As a result, a pronounced tendency emerged to interpret the halacha ever more narrowly, in response to the

more extreme groups who still continued to choose such rabbis as their authorities. (271)

This is one of the reasons that the "splendid isolation" described by Jakobovits has become an almost inevitable feature of the life of the non-fundamental halachist. Practical halachic authority has been ascribed only to those prepared to view the halacha with the interpretative restrictions demanded by the community which was ready to remain loyal to its contents. While such halachic authority has been successfully portrayed as the only acceptable vehicle for the shaping of any halacha, we would contend that alternative models are not only viable, but necessary if we are to more effectively respond to the ethical quandaries of our day. If such models have been diminished in the eyes of those who would look to the halacha for instruction, then this speaks volumes for the "principles of [political] power" utilized to defend the "interpretative" understanding against attacks upon its preeminence. It tells us little, however, about the actual benefits which alternative models might potentially bring.

As we have seen, Jacobs and Berkovits advocate halachic perspectives which are markedly different from the general post-enlightenment tendency to halachic stringency. Theirs is a call for a return to a halacha sufficiently open and flexible to demonstrate a potential relevance in the lives of a broad sweep of modern Jews. It is, in essence, a move toward a

modern reformulation of the type of "responsive halacha" which was perhaps most evident in the tannaitic period.

A large segment of current halakhic problems possessing public and communal overtones, which arise every so often, should be dealt with according to the open-hearted approach found in talmudic and post-talmudic sources... This approach may be summed up by the words of R. Abraham Ha'Levy, the Chief Rabbi of Egypt during the eighteenth century, in his work Ginat Veradim:

If we were to investigate and examine the writings of the luminaries of the previous generations ... as practiced by us in all branches of Torah law ... in order to follow the majority opinion ... we would never be able to release an abandoned woman ... and the daughters of our father Abraham would remain widows living in bondage with nobody having compassion for them ... It is therefore our task to follow the path adopted by the early authorities, i.e. to tend towards a logical presumption even though it does not entirely agree with the opinions of the masters, whose teachings we imbibe. (272)

In the non-fundamentalist approach to halacha, of course, departures from accepted halacha might be taken much further than the Ginat Veradim ever envisaged. Though such an open halacha must still be fashioned by competent leaders possessing appropriate stature and knowledge, the litmus-test for its acceptability lies not so much in the authority of the decisor, as it does in the success of his/her "application of the law to life." The inevitable subjectivity involved in evaluating such "success" is deemed to be an acceptable risk if we are thereby enabled to open the law to the wider experiences of differing views. An example of this success is perhaps to be found in the ruling of some modern halachists who have advocated the initiation of a pre-nuptial agreement between couples. This agreement would ensure the capacity for a Jewish termination of a marriage, subsequent to civil dissolution,

even should the husband be unprepared to provide a gat, so as to allow the woman to remarry.(273) Such a critical legal approach "considers law not as separable from the rest of social life but as a product of, and a contributor to, the way we understand ourselves and society."(274) In many important respects such a perception--though radical today--recalls the far more pronounced overlap between law and morality, which was a feature of Talmudic times.(275)

The ethical principles of the Talmud were, of course, invoked in situations which potentially affected the entire community, not just segments of it. Furthermore, we would maintain that though there were instances in which the principles simply brought forth pragmatic conclusions or formed the basis for interpretative clarification, there were also significant changes wrought through their employment, in the direction of ethical improvements within real-life situations. Undoubtedly, the principles were successful in steering aspects of the halacha in an ethical direction, particularly within legislative contexts which sought to smooth inter-personal or inter-communal relationships. Indeed, it is probably fair to state that without these structured considerations the rabbis may well have been hard-pressed to locate suitable alternative justifications for a number of the rulings examined. These, then, were principles of power since they succeeded in giving articulation to the ethical impulse within Jewish law, and hence within Jewish life. If indeed it is correct that the "true criterion of a great nation is that it is governed by

just laws,"(276) then these principles were often invoked in pursuit of the grandest ends.

Can the twentieth century too produce a milieu of active ethical response to the challenges of peace, pleasantness and welfare in the Jewish lives of our age? The Israeli takkanot of 1950 showed that the ethical principles remain embedded in the soil of halachic creativity. But few would argue that these were more than practical adjustments of the halacha to the status quo. A more extensive ethos of ethical response to life conditions will require a reappraisal of halachic thought patterns of far more dramatic scope. This, we contend, is also possible, though it is yet to be actualized. The realization of this goal--it would seem appropriate to contend--will demand the adoption of a non-fundamentalist perspective on halacha.

In our view, the more far-reaching takkanot of the tannaim were indeed manifestations of "law in terms of its controversial, political, creative nature." They were daring responses which sought to use texts with bold imagination. If, then, the halacha is again to respond to the needs of our age in like fashion, it will need to do so with a similar attitude.

In an era of voluntary Jewish affiliation, the halacha will only speak with a compelling voice to the broader Jewish community if it is capable of demonstrating an openness and a willingness to confront controversy and change, beyond the "mystification" which is so much a part of its present interpretative functioning. Under such circumstances, though

Jews might well still choose to reject halachic paths, they would no longer do so out of a perception that the halacha is unprepared to wrestle seriously with the ethical issues on the agenda of the modern Jewish world. Such an outlook on halacha is best expressed by the non-fundamentalist schools of thought. The fundamentalists, in their fear of opening up the legal process to contemporary voices, and of moving beyond Talmudic categories, have arguably failed the aguna, the manzer, and the yevama, inter alia. Through a non-fundamentalist approach to halacha it might yet be possible to revitalize the process of ethical tikkun, in order to respond effectively to the great ethical issues of our day, and to enlarge and broaden the halachic vista to encompass a living, contemporary Jewry in its great diversity.

This vision is yet to be realized. Though rudimentary blueprints are in hand, construction still awaits builders who are prepared to take sizable risks. If, however, the halacha is truly to be a source of living law, we would maintain that a non-fundamental ethos of ethical response is vital. In taking responsibility for our contemporary perception of the divine mitzva, we will need to transcend some Talmudic categories in order to create a law of ethical relevance for Jews who live in a post-enlightenment, post-Holocaust, Israel-centered generation. Within such a system, the creative application of darchei shalom, darchei noam, and tikkun haolam, as the motivational components of judicious takkanot, might provide highly effective tools in the retuning of the halacha. The

ethical takkana, within such an ambience, could again take its place in formulating law which is reflective of "havashar vehatov" for the lives of Jews in this unprecedented epoch.

A modern midrash has put it this way:

Commenting on the verse in Psalms, 'I shall walk before the Lord in the lands of the living,' Rabbi Yehudah remarked: 'The lands of the living? These are the market places.' What is authentic Judaism? It is the application of Torah to 'the market places' of our existence, to the historic reality and uniqueness of our contemporary situation. This is the very essence of the Halakhah. There is no other way to walk before God in the lands of the living. (277)

Or, as the Torah states it, "VaChai Bahem;" we must ensure that we are able to "live by them," so that the law might always be for us a vibrant source of ethical guidance in every generation.

NOTES

T.B. = Talmud Bavli

Chapter 1 -- Realigning The Mirrors

1. Mishna Avot, 5:26. This translation from Reuven P. Bulka, As a Tree by the Waters (Jerusalem: Feldheim Publishers, 1980), p. 231.
2. Tikkun is literally defined as "repair, correction, reformation, reform, amendment, emendation, improvement, regulation." Takkana is literally defined as "remedy, regulation, rule, reform, improvement." Definitions from Reuben Alcalay, The Complete Hebrew-English Dictionary (Jerusalem, Massada Publishing Company, 1981 ed.), which is also used in obtaining definitions for all Hebrew translations throughout this work, unless otherwise stated.
3. This translation as quoted in Menachem Elon, "Takkanot," Menachem Elon (ed.), The Principles of Jewish Law (Jerusalem: Keter Publishing House Limited, 1975), p. 74.
4. Ibid.
5. Shubert Spero, Morality, Halakha and the Jewish Tradition (New York: Ktav Publishing House, Incorporated, 1983), p. 312.
6. Maimonides, Commentary on the Mishna, Introduction to Seder Zeraim, as quoted in Spero, Morality, Halakha and the Jewish Tradition, p. 312.
7. T.B., Baba Kamma 81a.
8. Elon, "Takkanot," p. 75.
9. Ibid., p. 76.
10. Boaz Cohen, "Law and Ethics in Light of Jewish Tradition," Boaz Cohen, Law and Tradition in Judaism (New York: Ktav Publishing House Incorporated, 1969), p. 185.

11. Jacob Z. Lauterbach, "The Ethics of the Halakhah," Jacob Z. Lauterbach, Rabbinic Essays (Cincinnati: Hebrew Union College Press, 1951), p. 270.
12. Cohen, "Law and Ethics," p. 185.
13. Eugene B. Korn, "Ethics and Jewish Law," Judaism, 24, Spring 1975, pp. 206-207. Unless otherwise stated, all English Tanach translations are from the new Jewish Publication Society translation (Philadelphia: 1985).
14. Korn, "Ethics and Jewish Law," p. 207.
15. Emil G. Hirsch, "Ethics," Isidore Singer (ed.), The Jewish Encyclopedia (New York: Funk and Wagnalls Company, 1903), Volume 5, p. 255.
16. Ibid.
17. Aharon Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of Halakha?," Marvin Fox (ed.), Modern Jewish Ethics - Theory and Practice (Columbus: Ohio State University Press, 1975), p. 67.
18. Ibid.
19. Korn, "Ethics and Jewish Law," pp. 207-208.
20. Elon, "Takkanot," p. 76.
21. Eugene J. Lipman, "Mipne Tikkun Ha'Olam in the Talmud: A Preliminary Exploration," Joseph A. Edelheit (ed.), The Life of Covenant (Chicago: Spertus College of Judaica Press, 1986), p. 102.
22. Louis Jacobs, A Tree of Life - Diversity, Flexibility and Creativity in Jewish Law (Oxford: Oxford University Press, 1984), p. 9.
23. Ibid. p. 182.
24. David Hartman, A Living Covenant - The Innovative Spirit in Traditional Judaism (New York: The Free Press, 1985) p. 101.

Chapter 2 -- VeHaEmet VeHaShalom Ehavu

25. T.B., Sanhedrin 25a. Unless otherwise stated, all Talmud translations are from the Soncino English Translation.
26. Rashi, Sanhedrin 24b.

27. Jacob Shachter, T.B., Sanhedrin 25a, n. c.12, Soncino English Translation.
28. Saul Berman, "Law and Morality," Elon, The Principles of Jewish Law, p. 154.
29. Mishna Gittin 5:8. Unless otherwise stated, all Mishna translations are from Herbert Danby, The Mishnah (Oxford: Oxford University Press, 1933).
30. T.B., Gittin 59b derives this from several proof-texts in which the cohen precedes the levite.
31. R. Moshe b. Maimon (RaMBaM) commentary to Mishna Gittin 5:8 in Meiri, Beit HaBechira, Gittin.
32. Rashi, Gittin 59b.
33. Meiri, Beit HaBechira, Gittin 5:8.
34. Tosafot, Gittin 59b.
35. T.B., Gittin 59b.
36. Walter S. Wurzburger, "Darkei Shalom," Gesher, 1977-1978, p. 81.
37. Eliezer Berkovits, Not in Heaven - The Nature and Function of Halakha (New York: Ktav Publishing House, Incorporated, 1983) p. 24.
38. T.B., Gittin 59b.
39. "Darkei Shalom," S. Y. Zevin (ed.) Encyclopaedia Talmudit (Jerusalem: Talmudic Encyclopedia Publ. Ltd., 1956), Volume 7, Columns 616-617.
40. Talmud Yerushalmi, Gittin 5:9, and Moshe Margolit, P'nei Moshe to Gittin 5:9. Our translation from the original Hebrew.
41. David Fraenkel, Korban Ha-Eida to Talmud Yerushalmi, Gittin 5:9. Our translation from the original Hebrew.
42. MaHaRiK, She'eilot Uteshuvot MaHaRiK, 9:para. 6. Our translation from the original Hebrew. Referred to in Encyclopaedia Talmudit, Volume 7, Column 617.
43. Mishna Shekalim 1:3, RaMBaM, Mishneh Torah, "Shekalim" 1:10.

44. Talmud Yerushalmi and Korban Ha-Eida to Talmud Yerushalmi, Shekalim, 1:3, Encyclopaedia Talmudit, Volume 7, Column 623.
45. Tosafot HaRiD to Talmud Yerushalmi, Shekalim, 1:3, Encyclopaedia Talmudit, Volume 7, Column 623.
46. Mishna Gittin 5:8. This translation from Soncino Talmud translation, T.B., Gittin 59b.
47. T.B., Gittin 60b.
48. Rashi, Gittin 60b.
49. Tosafot, Gittin 60b.
50. Encyclopaedia Talmudit, Volume 7, Column 618.
51. MaHaRiK, She'eilot Uteshuvot MaHaRiK, 113.
52. Encyclopaedia Talmudit, Volume 7, Column 619.
53. Mishna Gittin 5:8.
54. T.B., Gittin 60b.
55. Ibid.
56. RaBaD, Hasagot HaRaBaD to Mishneh Torah, Hilchot Shcheinim, 3:10.
57. Meiri, Beit HaBechira, Mishna Gittin 5:8, Gittin 60b.
58. See Tosafot, Gittin 60b for a view markedly different to that which the Meiri later expresses.
59. T.B., Sanhedrin 25a, Steinsaltz edition, p. 109.
60. Tosefta Chulin 10:13, Translation from Jacob Neusner, The Tosefta - Qodashim (New York: Ktav Publishing House, Incorporated, 1979), p. 98. See also T.B., Baba Metzia 102a for Beraita there.
61. Mishna Gittin 5:8. This translation from Soncino Talmud translation, T.B., Gittin 59b.
62. Maurice Simon, T.B., Gittin 61a, n. a.3, Soncino English Translation.
63. Eliezer Berkovits, Not in Heaven, p. 26.
64. T.B., Gittin 61a; Rashi, Gittin 59b, 61a; Meiri, Beit HaBechira, Gittin 5:8.

65. Mishna Gittin 5:8.
66. T.B., Gittin 61a.
67. Meiri, Beit HaBechira, Gittin 5:8.
68. Tosefta Peah 3:1.
69. RaMBaM, Chidushei HaRaMBaM, Gittin 61a.
70. RaSHBA, Chidushei HaRaSHBA, Gittin 61a.
71. Eliezer Berkovits, Not in Heaven, p. 26.
72. T.B., Gittin 61a, 62a.
73. Tosefta Gittin 3:13, 14, Translation from Jacob Neusner, The Tosefta - Nashim (New York: Ktav Publishing House, Incorporated, 1979), p. 224.
74. RaMBaM, Mishneh Torah, "Matenot Oni'im," 7:7, "Gezeila," 11:3.
75. See for example RiTBA Chidushei HaRiTBA, Gittin 61a. Other sources are cited in Encyclopaedia Talmudit, Volume 7, Column 623.
76. RaMBaM, Mishneh Torah, "Melachim", 10:12.
77. Wurzbarger, "Darkei Shalom," p. 84. The Maimonides citation is to be found in Avadim 9:8.
78. R. Yehuda Unterman, "Darchei Shalom Vehagdaratan," Or HaMizrach, Vol. 15, No. 4 (1966), pp. 227, 229. Our translation from the original Hebrew.
79. Wurzbarger, "Darkei Shalom," p. 86.
80. Mishna Gittin 5:9.
81. Meiri, Beit HaBechira, Gittin 5:9.
82. Mishna Gittin 5:9.
83. Rashi, Gittin 61a.
84. T.B., Gittin 61a.
85. T.B., Gittin 61a, as elucidated in Encyclopaedia Talmudit, Volume 7, Column 621.

86. R. Abraham Hirsch Rabinowitz, The Jewish Mind in its Halachic Talmudic Expression (Jerusalem: Hillel Press, 1978), pp. 66-67.
87. James E. Priest, Governmental and Judicial Ethics in the Bible and Rabbinic Literature (New York: Ktav Publishing House Incorporated, 1980), p. 209.
88. Talmud Yerushalmi, Eruvin, 7:9, as quoted in Ze'ev Falk, "Al HaShalom," in Levav Shaleim (Jerusalem: 1971), p. 64. Our translation from the original Hebrew.
89. Ze'ev Falk, "Al HaShalom," p. 64. Our translation from the original Hebrew.
90. Ibid., pp. 64-65.
91. Ibid.
92. Berman, "Law and Morality," p. 154.
93. Wurzbarger, "Darkei Shalom," p. 86.

Chapter 3 -- Deracheiha Darchei Noam

94. T.B., Nedarim 62a
95. Ibid.
96. Ibid.
97. T.B., Sukka 32a,b.
98. T.B., Sukka 32a.
99. T.B., Sukka 32b.
100. Menachem Elon, "Ekronot Musari'im Kenorma Hilchatit," Deot, 20, Summer 5722, p. 63, n. 2. All quotations from this article represent our translation from the original Hebrew.
101. T.B., Yevamot 87b.
102. A conclusion argued from a minor to a major instance.
103. Berkovits, Not in Heaven, p. 20.
104. T.B., Yevamot 87b, Steinsaltz edition, p. 386.
105. Meiri, Beit HaBechira, Yevamot 87b.

106. RaSHBA, Chidushei HaRaSHBA, Yevamot 17b, and RiTBA, Chidushei HaRiTBA Yevamot 87b.
107. Ibid., Our translation from the original Hebrew.
108. Tosafot, Yevamot 2a.
109. Elon, Ekronot Musari'im, p. 64.
110. Shlomo Luria, Hochmat Shlomo, Perek Tshi'i, "Veish Motrot," Daf 87, Our translation from the original Hebrew.
111. Elon, Ekronot Musari'im, p. 64.
112. T.B., Yevamot 14b - 15a.
113. Israel W. Slotki, T.B., Yevamot 15a, n. b(8), Soncino English Translation.
114. Elon, Ekronot Musari'im, p. 65.
115. T.B., Yevamot 17b.
116. Tosafot, Yevamot 17b.
117. Meiri, Beit HaBechira, Yevamot 17b.
118. ROSH, Tosafot HaROSH HaShalem -- Yevamot 17b.
119. Encyclopaedia Talmudit, "Darchei Noam," Volume 7, Column 614.
120. Tosafot, Yevamot 2a.
121. T.B., Yevamot 122b.
122. MaHaRSHA, Chidushei Halachot VeAggadot MaHaRSHA, as quoted in Menachem Elon, HaMishpat HaIvri (Jerusalem: Magnes Press, Hebrew University, 1973), Part II, p. 434, n. 153. All quotations from this work represent our translation from the original Hebrew.
123. MaHaRSHA in Elon, HaMishpat HaIvri, pp. 434-435, n. 153.
124. R. David ibn Zimra, Shut HaRaDBaZ, Siman 1052.
125. Ibid., Our translation from the original Hebrew/Aramaic.
126. Elon, "Ekronot Musari'im," p. 65.
127. Ibid.

128. R. David ibn Zimra, Shut HaRaDBaZ, Siman 1049. Our translation from the original Hebrew/Aramaic.
129. Yaakov ben Asher, Tur Choshen Mishpat, 275.
130. R. Yoel Sirkes, Bayit Chadash to Tur Choshen Mishpat, 275. Our translation from the original Hebrew.
131. Elon, "Ekronot Musari'im," p. 66.
132. Berman, "Law and Morality," p. 155.
133. Elon, "Ekronot Musari'im," p. 67.
134. Aryeh Karlin, "Darchei Noam Vedarchei Shalom," Divrei Sefer 5712, p. 125. Our translation from the original Hebrew.

Chapter 4 -- Letakken Olam BeMalchut Shaddai

135. Alfred J. Kolatch, Who's Who in the Talmud (New York: Jonathan David Publishers Incorporated, 1964), p. 114.
136. Mishna Gittin 4:3. A multitude of different translations are provided for mipnei tikkun haolam. Amongst others are to be found: "a precaution for the general good," (Danby - The Mishna); "to prevent abuses," (Simon - TB Gittin); "for the benefit of society," (Berman); "for the sake of the correction of the world," (Berkovits). Here we employ Berkovits' version of the principle, though later we also utilize the terms "repair" and "mend," which may represent better approximations to the rabbis' theological intent.
137. Orally from Dr. Ben Zion Wacholder. See also R. Travers Herford, Talmud and Apocrypha (New York: Ktav Publishing House Incorporated, 1971), pp. 118-120.
138. Joseph Schechter in Lipman, "Mipnei Tikkun Ha'Olam in the Talmud," p. 103.
139. Elon, HaMishpat HaIvri, Part III, p. 864.
140. Berman, "Law and Morality," p. 154.
141. R. Travers Herford, Talmud and Apocrypha, p. 118.
142. Mishna Shevi'it 10:3.
143. Berkovits, Not in Heaven, p. 14.

144. Eliezer Berkovits, HeHalacha Kocha Vetafkida (Jerusalem: Mossad Harav Kook, 1981), p. 60. All quotations from this work represent our translation from the original Hebrew.
145. Orally from Dr. Ben Zion Wacholder.
146. George Horowitz, The Spirit of Jewish Law (New York: Central Book Company, 1963), p. 497.
147. T.B., Gittin 37a and Rashi Gittin 37a.
148. T.B., Gittin 36b.
149. These examples stem from Simon Greenberg, The Ethical in the Jewish and American Heritage (New York: The Jewish Theological Seminary of America, 1977), pp. 201-203, together with readings of the texts he cites.
150. Sifre al Sefer Devarim, Eliezer Finklestein (ed.), New York, Beit HaMidrash LaRabbanim BaAmerika, 1969, Devarim 15:3, paragraph 113. Our translation from the original Hebrew.
151. T.B., Gittin 36a.
152. The notion that "the Jubilee year was not in force in Hillel's time," may lend credence to the suggestion that the remission of debts was, by Hillel's day, a practice which had also fallen into disuse.
153. Greenberg, The Ethical in the Jewish and American Heritage, pp. 201-203.
154. Ibid., p. 203.
155. Mishna Gittin 4:1,2. This translation from Soncino Talmud translation, T.B., Gittin 32a.
156. Elon, HaMishpat HaIvri, Part II, pp. 518-519.
157. T.B., Gittin 33a.
158. Ibid.
159. Elon, HaMishpat HaIvri, Part II, pp. 463-464.
160. T.B., Gittin 33a.
161. Rashi, Gittin 33a. This translation represents our recasting of the translation of Greenberg, The Ethical in the Jewish and American Heritage, pp. 180-181.
162. Elon, HaMishpat HaIvri, Part II, pp. 519-520.

163. Talmud Yerushalmi, Gittin 4:2.
164. Elon, HaMishpat HaIvri, Part II, p. 522.
165. Aaron M. Schreiber, Jewish Law and Decision-Making (Philadelphia: Temple University Press, 1979) pp. 223-224.
166. Mishna Gittin 4:4. This translation from Soncino Talmud translation, T.B., Gittin 40b.
167. Menachem Elon, "Lien," Elon, The Principles of Jewish Law, pp. 292-293.
168. Meiri, Beit HaBechira, Gittin 4:4.
169. "Changes in the condition of the property itself which had the effect of discharging the lien as a matter of law were of three kinds: if the subject property became res sacrae, i.e. devoted to the Temple; if the subject property became forbidden of enjoyment [heaven]; if a slave was mortgaged and then emancipated." See George Horowitz, The Spirit of Jewish Law, p. 439.
170. T.B., Gittin 40b-41a; Rashi, Gittin 41a.
171. RaMBaM commentary to Mishna Gittin 4:4 in Meiri, Beit HaBechira, Gittin.
172. Elon, "Lien," p. 292. Emphasis not in original.
173. T.B., Gittin 41a.
174. Maurice Simon, T.B., Gittin 41a, n. A10, Soncino English Translation.
175. Mishna Gittin 4:5. This translation from Soncino Talmud translation, T.B., Gittin 41a-41b.
176. Both the RaMBaM and the Meiri interpret the mishna according to Rav, without referring to the views of Ulla.
177. Mishna Gittin 4:6.
178. T.B., Gittin 45a.
179. Rashi, Gittin 45a.
180. Meiri, Beit HaBechira, Gittin 4:6.
181. T.B., Gittin 45a; See also Simon, T.B., Gittin 45a, n. C6, Soncino English Translation.
182. Rashi, Gittin 45a.

183. Meiri, Beit HaBechira, Gittin 4:6.
184. Rashi, Gittin 45b.
185. T.B., Gittin 45b.
186. Mishna Gittin 4:9. This translation from Soncino Talmud translation, T.B., Gittin 47a. The Talmud's version of the Mishna differs somewhat from a fuller version often found in Mishna texts. The fuller version reads, "if a man sold his field to a gentile, and an Israelite bought it back again, the buyer should bring the First-fruits from it as a precaution for the general good." (Danby translation) The Talmud, however, based its discussion on the text we have quoted.
187. Berkovits, HeHalacha Kocha Vetafkida, p. 63.
188. T.B. Gittin 47a-47b; Rashi Gittin 47a-47b; See also Berkovits, HeHalacha Kocha Vetafkida, p. 63. The RaMBaM had a slightly different view of this mishna from that of Rashi, but also acknowledged the uprooting of the Biblical commandment by the first takkana.
189. Berkovits, HeHalacha Kocha Vetafkida, p. 64.
190. Tosefta Gittin 3:7. Translation from Jacob Neusner, The Tosefta - Nashim p. 222. The same takkana is to be found in Mishna Gittin 5:4, lacking mipnei tikkun haolam. The position of the takkana in the Mishna, however, suggested that tikkun haolam was probably originally a part of the enactment.
191. Elon, HaMishpat HaIvri, Part II, p. 495.
192. T.B., Gittin 53a. Also quoted in Elon, HaMishpat HaIvri, Part II, p. 495.
193. The continuation of Tosefta Gittin (3:8-9) enumerates several further examples of this type of takkana, some of which are the cause of visible damage, and hence the same reasoning process is not to be extrapolated from the case we have examined. In Menachem Elon, "Abortion," Elon, The Principles of Jewish Law, p. 483, Elon explains the nature of a different case: "...it was determined with regard to damage caused by abortion, that 'he who with the leave of the beit din does injury - is absolved if he does so inadvertently, but is liable if he does so willfully - this being for the good order of the world' (Tosef. Git. 3:7), for 'if we do not absolve those who have acted inadvertently, they will refrain from carrying out the abortion and saving the mother' (Tashbetz, pt. 3, no. 82;

Minchat Bik., Tosef. Git. 3:7)." Clearly though, ethical pursuits were at work in this case as well.

194. The RaMBaM, for example, maintained that takkanot enacted mishum kedei chavay were also to be understood as takkanot mipnei tikkun haolam. See Elon, HaMishpat HaIvri, Part II, p. 481, n.175.
195. Lipman, "Mipnei Tikkun Ha'Olam in the Talmud," p. 109.

Chapter 5 -- Surely This Great Nation Is A Wise And Discerning People

196. Louis Jacobs, "The Talmud as the Final Authority," Judaism, 29, Winter 1980, p. 48.
197. Korn, "Ethics and Jewish Law," p. 210.
198. See for example Jakob J. Petuchowski, "Plural Models Within the Halakhah," Reuven P. Bulka, Dimensions of Orthodox Judaism (New York: Ktav Publishing House, Incorporated, 1983), pp. 149-161.
199. Norman Lamm, "Foreward," Zvi Kurzweil, The Modern Impulse of Traditional Judaism (Hoboken: Ktav Publishing House, Incorporated, 1985), p. ix.
200. Jacobs, "The Talmud as the Final Authority," p. 47.
201. This definition provided orally by Dr. David Ellenson. Ellenson avers that the term was coined in opposition to the Rosenzweig differentiation between gesetz (law) and gebot (commandment).
202. Walter S. Wurzburger, "Law as the Basis of a Moral Society," Tradition, 19, Spring 1981, p. 43.
203. Louis Jacobs, "For the Sake of Heaven," Jewish Chronicle, December 19, 1986, pp. 22-23.
204. Petuchowski, "Plural Models Within the Halakhah," p. 153.
205. Jacobs, A Tree of Life, p. 243.
206. Ibid., p. 238.
207. Ibid., p. 242.
208. See in this regard: Louis Jacobs, Principles of the Jewish Faith (London: Vallentine Mitchell, 1964), chapter 9, pp. 216-301, Louis Jacobs, A Jewish Theology (New York:

- Behrman House Incorporated, 1973), chapter 14, pp. 199-210.
209. Jacobs, A Tree of Life, pp. 23-25.
 210. Ibid., p. 25.
 211. Ibid., p. 26.
 212. Ibid., pp. 26-27.
 213. Jacobs, "The Talmud as the Final Authority," pp. 45-46, Jacobs, A Tree of Life, pp. 27-29.
 214. Jacobs, A Tree of Life, p. 29.
 215. The verity of this statement is the thesis which Jacobs endeavors to substantiate throughout A Tree of Life.
 216. Jacobs, A Tree of Life, p. 237.
 217. Jacobs, "The Talmud as the Final Authority," p. 46.
 218. Ibid., p. 47.
 219. Jacobs, A Tree of Life, p. 245.
 220. Jacobs, "For the Sake of Heaven," p. 22.
 221. Jacobs, A Tree of Life, p. 247.
 222. Ibid.
 223. Ibid., chapter 12, pp. 182-192.
 224. Ibid., p. 17.
 225. Yosef Albo, Sefer Ha'Ikkarim III, 23 as quoted in Berkovits, Not in Heaven, p. 71.
 226. Berkovits, Not in Heaven, p. 73.
 227. Ibid., p. 75.
 228. Ibid., pp. 116-117.
 229. Eliezer Berkovits, "Authentic Judaism and Halakhah," Judaism, 19, Winter 1970, p. 72.
 230. Ibid.
 231. Eliezer Berkovits, "Orthodox Judaism in a World of Revolutionary Transformations," Bulka, Dimensions of Orthodox Judaism, p. 352.

232. Berkovits, Not in Heaven, p. 91.
233. Ibid., pp. 100-106.
234. Berkovits, "Authentic Judaism and Halakhah," pp. 74-75.
235. Ibid., pp. 75-76.
236. Berkovits, Not in Heaven, p. 91.
237. Berkovits, "Orthodox Judaism in a World of Revolutionary Transformations," p. 356.
238. Berkovits, Not in Heaven, p. 118.
239. Berkovits, "Orthodox Judaism in a World of Revolutionary Transformations," p. 358.
240. Walter S. Wurzburger, "Plural Models and the Authority of Halakhah," Reuven P. Bulka, Dimensions of Orthodox Judaism (New York: Ktav Publishing House, Incorporated, 1983), p. 166.
241. Walter S. Wurzburger, "The Oral Law and the Conservative Dilemma," Norman Lamm and Walter S. Wurzburger (eds.) A Treasury of "Tradition" (New York: Hebrew Publishing Company, 1967), p. 441.
242. Walter S. Wurzburger, "Is Sociology Integral to the Halakhah?" Judaism, 29, Winter 1980, p. 29.
243. Walter S. Wurzburger, "Pluralism and the Halakhah," Lamm and Wurzburger (eds.) A Treasury of "Tradition" p. 180.
244. Wurzburger, "The Oral Law and the Conservative Dilemma," p. 440.
245. Wurzburger, "Plural Models and the Authority of Halakhah," p. 166.
246. Ibid., p. 29.
247. Walter S. Wurzburger, "Law as the Basis of a Moral Society," Tradition, 19, Spring 1981, pp. 42-44.
248. Ibid., p. 46.
249. Berkovits, "Authentic Judaism and Halakhah," p. 75.
250. Wurzburger, "Law as the Basis of a Moral Society," p. 51.
251. Berkovits, Not in Heaven, p. 106.

252. Wurzbarger, "Is Sociology Integral to the Halakhah?" pp. 26-27.
253. Robert Gordis, "The Halakhah, Past, Present and Future: A Reply to the Responses," Judaism, 29, Winter 1980, p. 91.
254. Wurzbarger, "Is Sociology Integral to the Halakhah?" pp. 27-29.
255. Wurzbarger, "Is Sociology Integral to the Halakhah?" is a response to Robert Gordis, "A Dynamic Halakhah: Principles and Procedures of Jewish Law," Judaism, 28, Summer 1979, and Wurzbarger, "Plural Models and the Authority of Halakhah," is a response to Jakob J. Petuchowski, "Plural Models Within the Halakhah."
256. Gordis, "A Reply to the Responses," pp. 91-92.
257. For the difference between the takkana and the midrash methods, see Elon, "Takkanot," p. 74.
258. Adin Steinsaltz, The Essential Talmud (New York: Basic Books, Incorporated, 1976), p. 11.
259. Jakob J. Petuchowski, "Plural Models Within the Halakhah," pp. 149-161.
260. Elon, HaMishpat HaIvri, Part II, p. 675.
261. Elon, "Takkanot," p. 90.
262. The truth of this statement seems axiomatic, but, in its support we quote Jacobs, A Tree of Life, p.237: "In any event, it is quite unknown for any of the traditional Halakhists, down to the present day, to quote unorthodox Halakhic theories except...for purposes of refutation." Instructional too are the words of Ben Zion Bokser, "The Struggle for Change," Judaism, 29, Winter 1980, p. 44, who notes the result of such treatment: "One of the factors which impedes the advocacy for change in our own time is the fact that many of the progressive elements who most keenly feel the need for change have seceded altogether from the halakhic community. ...The result has been that the custodians of Halakhah have come largely from the circles of extremists who are so rooted in the past that they persist in ignoring the claims of the present."
263. Immanuel Jakobovits, "Halakha in Modern Jewish Life," Judaism, 29, Winter 1980, p. 6.
264. Clifford E. Librach, "Judaism Beyond Autonomy: A Philosophy of Halakha for Liberal Jews" (unpublished

- Rabbinic Thesis) (Cincinnati: Hebrew Union College - Jewish Institute of Religion, 1986), p. 14.
265. Jakobovits, "Halakha in Modern Jewish Life," p. 7.
 266. Jacobs, A Tree of Life, p. 33.
 267. Hartman, A Living Covenant, p. 60.
 268. Shubert Spero, "Towards a Philosophy of Modern Orthodoxy," Modern Judaism, 6, February 1986, p. 80.
 269. Jerry Frug, "Henry James, Lee Marvin and the Law," The New York Times, February 16, 1986, "Book Review" p. 28.
 270. Ibid.
 271. Charles S. Liebman, "Extremism as a Religious Norm," Journal for the Scientific Study of Religion, 22, March 1983, pp. 80-85.
 272. Yitzchak D. Gilat, "The Halakhah and its Relationship to Social Reality," Tradition, 13 & 14, Spring-Summer 1973, pp. 82-83.
 273. See Isaac Klein, A Guide to Jewish Religious Practice (New York: The Jewish Theological Seminary of America, 1979), pp. 496-508.
 274. Frug, "Henry James, Lee Marvin and the Law," p. 28.
 275. Cohen, "Law and Ethics," pp. 185-197.
 276. Ibid., p. 189.
 277. Berkovits, "Authentic Judaism and Halakhah," p. 76.

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