How Fruitful is Too Fruitful?
Humanity and the Earth in *Halakhah* and Modernity

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Digest

Judaism has a complicated relationship with the land. On the one hand, its agrarian roots emphasize responsible use of resources and punctuate that emphasis with a sophisticated theology of reward and punishment. Indeed, Jewish tradition seeks to find evidence of the divine in weather patterns, animal behavior, and agricultural bounty. It asserts that God is present in every aspect of the created world – from the largest mountain to the tiniest insect – and that the wisdom of the natural world demands appreciation, conservation, and an overpowering sense of awe. Yet the same tradition holds tightly to the notion that human beings are separate from the other creations, and thus commanded to fill the earth through procreation, utilize natural resources for human purposes, and change the face of the planet for the good of their civilization.

This thesis explores the relationship between human beings and the earth in classical and modern *halakhic* literature, with an eye toward exploring the potential inconsistency between the value placed on human procreation and the command to care for the earth. These two values exist side by side in the literature of Rabbinic Judaism, with little sense of conflict. In modernity, however, there is profound tension between them, both because of the emerging environmental crisis and because the demographics of the Jewish community have been so deeply affected by events of the last century.

The project is divided between Classical and Modern *Halakhah*. The first two chapters analyze the legal and philosophical expression of each value among the *Rishonim*. Chapter 3 is a comparison of those notions with the realities of the modern world. The fourth chapter is a text study, wherein we investigate the way that modern *halakhic* thinkers – Orthodox and Reform – have dealt with these issues.

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דע מאין באת ולאן אתה הולך ולפני מי אתה עתיד לתן דין וחשבון.
"Know from where you came, where you are going,
and before whom you are destined to give reckoning."
Avot 3:1

I am thankful to those who have guided me, to those who continue do so, and to the One who gives life to all.

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Introduction: The Juxtaposition of Values

Law is often considered an expression of societal values. As such, historians, lawyers, anthropologists, and other social scientists use legal material as a tool for determining what a people hold most dear. Yet it is inevitable that certain values within a society will come into conflict with one another, and that this divergence will manifest itself in the legal material. The *Halakhah*, the religious and social law of the Jewish people, is no exception to this rule. Its values, which can be seen in its laws, are many and diverse, sometimes to the point of apparent contradiction. An excellent example of this phenomenon can be found in the *halakhic* attitude toward the earth. Rabbinic law views humanity as commanded to fill the earth and to utilize natural resources for human good, as based on the first commandment in the Torah: פרו ורבו ומלאו את הארץ וכבשה.[1] Yet simultaneously there exists in *halakhic* literature a concern for the earth itself, which man is to "till and tend,"[2] and which is understood as the perfect result of God's inerrant and ineffable wisdom. פריה ורביה is a statement of anthropocentrism, of human centrality to and superiority over the natural world, while שמירת האדמה[3] speaks to the seemingly contradictory idea that the wisdom of Creation transcends human understanding and purpose. Yet these they exist side by side in the same vast body of literature.

It is useful to couch this juxtaposition of values in terms of responsibility. The emphasis placed on procreation relates to man's responsibility toward the human race –

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[1] Gn 1:28. All Bible translations are from *JPS Hebrew English Tanakh* unless otherwise indicated.
[2] Gn 2:15.
[3] Our use of the Hebrew term *Shemirat Ha-Adamah* should not be taken to convey the idea of a unified ecological theology and halakhah. In fact, we shall see later on that the many earth-related mitzvot and concepts have little to do with one another in Rabbinic thought. Rather, we use the term here as a kind of Hebrew equivalent to the English "Environmentalism," which is meant in this project to serve as a foil to פריה ורביה. See introduction to chapter 2 for further discussion.

to enlarge and propagate it, and enable it to make full use of the earth's resources. The Jewish attitude toward the earth, however, bespeaks a responsibility toward Creation itself; humans are to preserve and appreciate it, and avoid making any major changes in the natural order. Thus the potential for conflict between the values is clear: it may not be possible to preserve the natural order while making significant use of natural resources. At a certain point, it becomes very difficult to serve both human and natural interests.

Yet the assumption that these two values are at odds with one another in practice, which is apparent in modern concerns about human overpopulation, is not immediately present in the texts. Indeed, the presence of certain values in the texts does not automatically entail their applicability to modern circumstances, nor does it necessarily imply that modern Jews hold these values as a direct result of Jewish tradition. It is worth investigating the source of both the values and the conflict between them in the minds of modern Jews. We shall see that such events as the Holocaust, the establishment of the state of Israel, and Jewish assimilation play as important a role in contemporary views of Jewish procreation and population policy as does the traditional mitzvah, even for the Orthodox. Similarly, the modern Environmental crisis – global climate change, exponential human population growth, increasingly destructive technology – looms as large as (if not larger than) the Rabbis' ecological ideas found in the Talmud, midrash, and codes. In exploring Jewish values, it is necessary to investigate the role played in their formation by history and modernity, as well as texts and tradition.

The goal of this project is, then, to examine the intersection between these two important and potentially conflicting Jewish values – human procreation and concern for the earth – in Jewish tradition and in modernity. The first step will be to look at the legal

and philosophical material surrounding each value in the Jewish sources, with the purpose of determining its expression in the tradition, the worldview of which it is a part, its limitations and interactions with other values and commandments, and the various potential viewpoints within Jewish tradition. The second half of the project involves the application of that study to the modern situation. Through comparison of Jewish and modern ideas, and through analysis of modern responsa on the subjects in question, we will seek to understand the way that Rabbinic texts have been, and might be, used to address the environmental crisis and population issues of modernity.

The methodology for our analysis is a close, critical reading of ancient and modern texts. This is a project in Rabbinics, not sociology, history, or anthropology, but we enter into the texts with a modern consciousness that is attuned to these disciplines. We may attribute differences of opinion to the people who composed the texts and/or the circumstances in which they were written, rather than attempting to resolve all contradictions. Similary, we recognize the importance of genre and language – that philosophical treatises, post-Talmudic codes, editions of the Mishnah, and resolutions passed by the CCAR are intended to play very different roles. Along those same lines, a Hebrew/Aramaic *teshuvah* composed by an Ultra-Orthodox rabbi functions differently than an English *teshuvah* released by the Reform Movement's Responsa Committee. Though we refer to both as "responsa," they are intended for different types of constituencies, and their perceived binding force upon those constituencies is quite dissimilar.

Thus, although the historical lens is not central to the project, our study is dependent on the idea that texts may contain opposing opinions or play different roles

depending on their background, language, or genre. We seek, through our analysis, to determine what beliefs and practices various *Rishonim* and modern thinkers have understood Jewish law to prescribe regarding procreation and ecology, and to begin a discussion about what beliefs and practices the *Halakhah* should prescribe in postmodernity.

The nature of the project dictates the types of texts used therein. Because the ultimate goal of the study is to attempt understanding of how these issues are expressed in normative Judaism, the scope of Part 1 is limited to those materials written between the early Rabbinic period and the codification of the *Shulḥan Arukh*. Pre-Tannaitic materials, including the Torah itself, are deemed outside of the mainstream of Rabbinic Judaism. Indeed, the worldview described herein does not belong to the Torah, even though it is based in large measure upon that text. Rather, it is gleaned from medieval sources that react to and work from the Bible. Within that period, we will deal with texts either halakhic or philosophical in nature, as well as some – like *Sefer Ha-Ḥinukh* and the medieval Torah commentaries – that straddle the divide. The responsa of Part 2 are intended to cover the gamut of normative Jewish thinking in the Twentieth and Twenty First Centuries, from Ultra-Orthodoxy to Reform. Because they are viewed as authoritative *halakhic* scholarship by their own constituencies, they are eminently useful as examples of the various approaches to text.

We will find, in our study of these many and disparate Jewish sources, that there is no single answer to the dilemma. Indeed, the texts themselves are involved in conversation with one another. Not only do they espouse differing ideas, but they often lend themselves to diverse interpretations depending on the circumstances in which they

are read. Through careful analysis of many geographically, temporally, and philosophically disparate sources, we will attempt to define a continuum of legitimate Jewish thinking on population, ecology, and the intersection between the two. Our assertion is that such a continuum existed in premodernity, is evident in the sources, and continues to exist in modern Jewish thinking.

This attitude legitimizes the legal creativity of all of the major Jewish movements – whether "*halakhic*" in their self-perceptions or not – as authentic recipients and continuations of the Jewish legal tradition. Indeed, the validity of a project like this one, which attempts to determine the way ancient texts have been and may be used to address a modern problem, is bolstered by the fact that Jewish responses to life's quandaries have always been formulated with one eye toward tradition and the other toward the conditions of a given time and place. The texts *assume* this type of process, and they are thus capable of supporting multiple valid approaches to the same problem. With regard to both procreation and ecology, we shall see that the "Jewish response" is a moving target that depends heavily on the needs, circumstances, and worldview of the Jew who enters into the sources.

Chapter 1: Be Fruitful and Multiply

The lower creatures were made only for mankind,

that he might govern them as a wise king.

Rabbi David Kimhi, Commentary to Genesis 1:26 (s.v. וירדו בדגת הים)

Procreation is perhaps one of humanity's most animal behaviors: it is bodily, dirty, and thoroughly physical. Yet the ability to raise a family, to pass on culture and values to the next generation, is a hallmark of the human experience. Rabbinic tradition has always looked upon childbirth and family life as an important obligation that aids in Jewish continuity, and as a gift presented to human beings by virtue of their unique status among earth's living things. Legally, the Rabbis tie that the Jewish responsibility to have children to the Sinaitic legislation,[1] but the Jewish understanding of human destiny, and of the role that procreation plays in that destiny, is rooted in the primordial blessing given to the first man and woman, "Be fruitful and multiply, and fill the earth, and subdue it."[2]

Throughout Jewish and Western history, this verse and the context surrounding it have been understood as a central statement about humankind. The ideas in the first chapter of Genesis chapter regarding marriage, family, relationships between men and women, and childbirth have defined the way human society is organized at every level. Furthermore, the verse underpins human supremacy over the natural world, by proclaiming that the earth exists for man's purposes and giving people blanket permission to procreate. Finally, it has long stood at the center of traditional Jewish and Christian

[1] B. *Sanhedrin* 59b. The Jewish procreative commandment is linked here with Deuteronomy 5:27, the call to resume sexual relations post-Revelation.
[2] Gn 1:28.

opposition to birth control practices, family planning, abortion, and population control policies.

Indeed, "Be fruitful and multiply" is a pillar of the Jewish worldview, connected intimately with the idea that a divine spark sets humanity apart from animals. Yet it is a very long road from the Bible's פרו ורבו to the Rabbinic mitzvah known as פריה ורביה. As we will see, the *halakhic* sources have very different interests and goals, some connected only cursorily with Genesis. Where the Torah speaks to all of humanity, the Talmud is concerned only with Jewish practice; where the Torah seems to give a blessing, the Rabbis clearly understand a commandment. The goal of this study is to trace the ideas connected with procreation in various legal and philosophical sources. We have three specific goals within that context: [1] to describe the worldview that arises from Genesis 1 as it is delineated in Jewish texts; [2] to document the disparity between that universalistic worldview and the legal requirements of the mitzvah, and to attempt a partial explanation of this phenomenon; and [3] to explore the legal material itself, with an eye toward isolating important questions, debates, and evolutions. In their many, disparate texts, the *Rishonim* have taken a variety of approaches to these issues – some reconcilable, other irrevocably conflicting, but all part of the *halakhic* discourse. The ultimate the goal of the chapter is the to attempt a broad and honest understanding of how these issues are expressed in normative Judaism, by describing and comparing these approaches.

A Philosophy of Human Purpose

A. שכל as Man's Defining Feature

The Biblical tale of creation, the myth in which God creates the world through speech in seven days, is understood by Jewish thinkers as an indication that man is intentionally set apart from, and placed above, other forms of life on earth. For the Rabbis, Genesis chapter1 – and in particular the story of man's creation – lies at the center of worldview that regards humanity as unique in heaven and earth. A glance through the Rabbinic commentaries gives a sense of the values that medieval Jewry gleaned from this *parashah*.

The commentators carefully point out the significance of the fact that man is created last, and that his creation is executed differently than that of the universe's other elements "Everything was created by speech," writes Rashi, "but he was created by hand."[3] This difference is given existential content by other commentators, who characterize man as occupying a place between the lower creatures (תחתונים) and the celestial beings (עליונים), possessing characteristics of both. Ibn Ezra asserts that man's body is earthly and his soul is heavenly;[4] the Radak points out that while angels never die and animals never truly live, man does both.[5] A related midrash goes further, delineating the specific characteristics that man shares with each class of creations:

> R. Joshua b. R. Nehemiah said in the name of R. Hanina b. R. Isaac, and the Rabbis in the name of R. Leazar said: He created him with four attributes of the higher beings and four attributes of the lower beings. [The four attributes of] the higher beings are: he stands upright, like the ministering angels; he speaks, like

[3] Rashi on Gn 1:27, s.v. ויברא אלהים את האדם בצלמו.
[4] Ibn Ezra on Gn 1:26, s.v. נעשה אדם.
[5] Kimhi to Gn 1:26, s.v. ובכל הארץ.

> the ministering angels; he understands, like the ministering angels; and he sees, like the ministering angels. Yet does not a dumb animals see? But this one [man] can also see from the side. He has four attributes of the lower beings: he eats and drinks, like an animal; procreates, like an animal; excretes, like an animal; and dies, like an animal.[6]

The passage portrays man's animal side as relating to his basic physical drives, and his celestial side as due mainly to the cognitive abilities of speech, sight, and understanding. This is in concert with the *parshanim*, who nearly unanimously pinpoint man's שכל as his unique defining feature. Various commentators label this cognitive capacity differently: Rashi, Rashbam, and Sforno point to the human capacity for wisdom (חכמה), while the Metzudat David highlights the power of speech. Yet all agree that that this is what sets humanity apart from the animals and gives people the ability to be aware of, and have a relationship with, the Divine. In this sense, man serves as a bridge between the upper and lower realms, though his physical existence is entirely earthly.

By highlighting intelligence as an important feature, the Rabbis are pointing to the centrality of human autonomy. Despite the traits they share with both realms, people are ultimately unique because unlike both the angels and the animals, they are capable of unpredictability.[7] Rather than living by naturally implanted instinct like the animals or by divinely ordered decree like the celestial beings, humans may choose their own

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[6] Genesis *Rabbah* 8:11.

[7] In *Meta-Halakhah*, Moshe Koppel defines autonomy as the capability for "nonmodelable behavior" (25), behavior that follows certain patterns, but cannot be predicted mechanically using a formula or model. In the case of man, his rational capacity provides him with patterns, but he is capable at all moments of choosing his own behavior, either in concert with or against the divine will. In religious terms, this is what is known as "free will."

actions – for better and for worse. This is significant because in the Rabbinic understanding, the only other being in the universe capable of such behavior is God. Thus the ability to choose behaviors makes humans Godlike.[8] In fact, Rabbi David Kimhi even asserts that use of the rational faculties is the very definition of the divine image.[9] It is intelligence and the ability to choose that place humans on top of the animal kingdom. Indeed, the Rabbis have outlined a kind of parallel universe, in which man stands on top of the lower realm just as God presides over the upper realm.

This dual conception of the world is intimately related to the medieval, neo-Platonic worldview known as the *Scala Natura*, the Ladder of Nature or Great Chain of Being. Premodern thinkers generally understood the universe to function as a hierarchy, in which each existing thing was superior to the thing immediately below it. Moving up the scale – minerals, plants, animals, humans, and into the noncorporal realm – one finds more and more perfect beings until reaching God, who is its apex and ultimate perfection. Without necessarily fully adopting the neo-Platonic philosophy behind the Ladder, the medieval Jewish world accepted the generalities of the theory. A number of the philosophers offered conceptions of the universe based upon this model, the latest of which comes from Joseph Albo's *Sefer Ha-Ikkarim*.[10] Albo describes a similar ladder – mineral, plant, animal, man, with intermediates in between such as sponge between plant and animal and ape between animal and man – and a process by which matter moves up the scale over time, becoming continually more sophisticated. As expected, humanity

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[8] Sforno to Gn 1:26, *s.v.* כדמותנו.

[9] Gn 1:26. Commenting on כדמותינו, the Radak writes that it means that man should use his שכל, presumably for governance of his behavior.

[10] In his introduction to Albo's *Sefer Ha-Ikkarim* translator Issac Husik writes, "being virtually the last of the mediaeval Jewish philosophers... Albo has nothing new to contribute to genuine philosophic thought. On the other hand, he was familiar with the world of his predecessors, Saadia, Judah Halevi, Maimonides, Gersonides, Crescas, and summed up their ideas in the "Ikarim" in a very popular and attractive style" (Husik I, xviii).

stands at the top of this ladder of the physical world. In describing man's station on earth, the author goes into great detail on the unique human cognitive abilities:

> ... man who is the end of all the lower existences, and in whom are combined all the particular perfections of the other animals is endowed with general comprehension and intelligence. He comprehends all that the other animals do, and besides understands the general and not merely a particular thing.[11]

For Albo, man's cognitive uniqueness is defined by the ability to glean generalities from what he sees around him, to decipher rules from evidence.[12] Even though animals are generally better adapted to their particular settings, man's combination of generalized, flexible anatomy and intelligence helps him adapt to the needs of a given moment. This is the essence of human superiority.

This superiority is not merely an existential trophy. Man's status on the Ladder of Being gives him certain rights and responsibilities, as Albo asserts in the same chapter:

> It follows necessarily, therefore that man, who is the end of all lower creatures, is nobler and more perfect than all.... Therefore he is greater than all of the others, and subdues (כובש) all the animals and rules (רודה) them, because he has the

[11] Ibid, III, 6.

[12] Because he sees this as the central cognitive ability that places man over the animals, Albo spends the second half of the chapter discussing *Perek Shirah*, an anonymous medieval poem that expresses the wisdom that can be gained by observing various elements of nature. Although this is a narrow interpretation, the author's statement about formation of generalities can be taken in a wider sense to discuss man's general ability to use reason in forming conclusions and solving problems.

> power of comprehending the general, whereas the lower animals perceive only the particular, having no power to comprehend the universal.[13]

By using the language of כבישה and רדייה, identical to Genesis chapter 1, Albo confirms intelligence or שכל as the basis of humanity's accepted right to dominate and govern the created world.

B. Man's Precarious Hold on Nature: the Theology of Reward and Punishment

The role of שכל as the root of human authority deserves further clarification. There are, in fact, hints in the sources that humanity's status may be contingent on the manner in which people function on earth, that שכל underpins superiority only insofar as people exercise it. At the level of commentary, this is expressed by Rashi who juxtaposes the similar roots ירד and רדה: "If [man] is meritorious, he will rule over (רודה) the wild and domesticated animals; if he is not meritorious, he will fall (ירוד) before them and the wild animal will govern over him"[14] The underlying assumption upon which Rashi's idea is based is one of active divine providence: man's fate is reflective of God's will, and comes as a result of human behavior. This Reward and Punishment theology is common in Rabbinic Judaism, and is based largely on the Deuteronomist and on Biblical passages such as this one from Leviticus:

> And if you remain hostile toward Me and refuse to obey Me, I will go on smiting you sevenfold for your sins. I will loose wild beasts against you, and they shall

[13] Ibid, ibid, 5.
[14] Rashi to Gn 1:26, *s.v.* וירדו. Rashi's comment is based on Genesis *Rabbah* 8:12.

bereave you of your children and wipe out your cattle. They shall decimate you, and your roads shall be deserted.[15]

The deity's threat to "loose wild beasts against you" constitutes a loss of man's control over the animals as a response to humanity's refusal to live by divine law. There are also Rabbinic sources that also make reference to such an event. While these sources fail to agree precisely on a sin or set of sins for which man is punished in this way, there is general agreement that idolatry is in that set. [16]

The connection between idolatry and attack by wild beasts may initially seem unrelated to Genesis chapter 1, but the ideas are relevant because of the particular way that they are understood by Maimonides. In the *Guide of the Perplexed,* the Rambam devotes a rather lengthy chapter to what he terms "Laws concerning idolatry." [17] Like other halakhic *Poskim*, he forbids the practice of foreign worship, but the innovation in his treatment is that he understands idolatry as being inextricably linked with "belief in soothsayers, enchanters, sorcerers, charmers..." and other forms of magical and irrational behavior. As a rationalist, Maimonides believes Jewish practices can be shown to have a basis in reason (שכל). Thus the prohibition against idolatry exists because its basic beliefs and practices are irrational:

[15] Lv 26:21-25. Translatino from Jewish Publication Society *Tanakh.*
[16] A *p'shat* reading of the Torah links these punishments with failure to follow the laws of idolatry and Sabbath. The Rabbis, in a *baraita* on B. Shabbat 33a, expand this to include forbidden sexual liaisons, idolatry, and cessation of the Sabbatical and Jubilee observances. The *Sifra* (Lev. 19:12) on the other hand, connects such punishment with profanation of the divine name.
[17] *Guide of the Perplexed* III:37.

> For [these practices] are branches of magical practices, inasmuch as they are things not required by reasoning concerning nature and lead to magical practices that of necessity seek support in astrological notions. Accordingly the matter is turned into a glorification and a worship of stars.[18]

Most of the chapter is used to show that the observances of idolatry – particularly the agricultural practices – are irrational in nature, whereas the Jewish agricultural laws – particularly refraining from fruit for the first three years[19] and the prohibition against grafting[20] - are based in reason and provide an optimal agricultural methodology.

It would be an overstatement to claim that Maimonides is making an environmentalist argument here. Even though he discusses the issue in terms of agriculture, his primary concern is with the occult nature of the foreign rituals, not the best way to preserve the land's fertility. Furthermore, not all Jewish thinkers would go so far as to claim that idolatry is synonymous with irrational magic. What is agreed, however, is that humans are to govern themselves and the world around them based on their intelligence: their knowledge of God's will, their gift for discerning the workings of the world, and their ability to choose the right path based on that data. The commentators understand שכל as the defining feature of humankind, the basis of human dominion over the earth, and the very definition of צלם אלהים; when human beings begin to live a life rooted in fear rather than reason, their humanity is diminished. Thus when the *Merkavat Ha-Mishnah* writes that "evil animals only rule over man when he is separated from the

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[18] Pines 543.
[19] 'After three years...produce of most of the trees in Syria... attains its perfect state" (Ibid 548).
[20] Among the Sabeans, "this was done when a certain star is in the ascendant... [and] the bough ought to be held in the hand of a beautiful girl and of a man who has come into her in a disgraceful manner..." as part of a fertility ritual (Ibid).

divine image that is engraved upon him,"[21] he joins with other Jewish philosophers in making intelligent behavior a contingency for humanity's continued reign on earth.

C. The Benefits of Humanity's Station

The worldview of the medieval rabbis is thus one in which man is entitled, on the basis of his superior cognitive abilities and his continued good behavior, to use the world and its resources for his own good. Nahmanides' commentary gives a somewhat more detailed description of the permission given to mankind:

> [God] gave them strength and governance on earth, in order to do as they will with the beasts and the crawling things and all that creeps in the dirt; and to build and uproot what is planted; and from her [the earth's] hills to mine copper, etc.[22]

The Ramban's comment divides "dominion" into three categories: use of animals for human gain,[23] the ability to change the face of the earth to further society, and permission to extract resources from the earth for man's purposes.

Implicit in these texts is a powerful existential statement about the earth: it is intended for human habitation and is better off being cultivated and shaped than left to grow naturally. Thus a planted field is inherently superior to grassland; a stone house is

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[21] *Merkavat Ha-Mishnah* to *Avot* 4:5.
[22] Ramban on Gn 1:28.
[23] There is disagreement in the sources over the precise nature of man's permission to "use" the animals. The commentators (see especially Kimhi to Gn 1:26) point toward hunting and fishing as a way of ruling over those animals that have abilities beyond those of man, such as swimming and flying. But the Talmud (B. *Sanhedrin* 59b) and settles on "labor" as the definition of ורדו, even going to outrageous lengths to show that a fish or a bird can be used for agricultural work. Rabbi Shlomo Luria, as quoted by his student Rabbi Isaiah Horowitz in *Siddur Shelah* (*Birkhot Hashahar* 162-3), emphasizes that humans assert their dominion over the beasts by using them as resources, particularly by wearing leather shoes. Either way, the message of the passage is clear: animals are to be viewed as a means toward accomplishing man's ends.

better than a pile of rocks. By using the earth's resources to fulfill their own needs, human beings also improve Creation. This idea is stated explicitly in the Talmud,[24] where the words of Isaiah, "He created it [the earth] not a waste; He has formed it to be inhabited (לשבת יצרה)."[25] are understood to imply that the earth is meant to be settled and tamed. Humans are entitled, and even commanded, to fill the world with their own kind, transforming it from a wasteland into a hospitable climate through their creative labor.

For obvious reasons, the issue of procreation is key here. Humans must have children in order to fulfill this destiny. In fact, the Isaiah verse *is* used in *Yevamot* specifically as justification for Hillel's position that a Jew must have at least one son and one daughter. In this context, the commandment to "be fruitful and multiply" has taken on an important, universal connotation: it is the means by which human beings are to subdue the earth, as well as their permission to do so.

A Commandment for Whom?

A. The Ideal and Reality of Humanity

This universal understanding of "Be fruitful and multiply" is the one that is most apparent in the Torah's *p'shat* reading. The blessing of Genesis 1:28 sounds like the deity's permission to human beings to procreate so that they may effectively utilize natural resources to build their society. Indeed, the core value that Jewish tradition has taken from this passage is the universal worth of humanity, its creativity, and its society. Procreation is intimately linked with the man's divine nature and with the inherent value

[24] B. *Yevamot* 62a.
[25] Is 45:18.

of human life. These principles are not left behind with the advent of Rabbinic Judaism; they are evident in the Tannaitic statement that one who fails to procreate is responsible for spilling blood and destroying the divine image.[26]

Yet this concern for humanity is not the only value found in the texts. In fact, in dealing with questions of procreation, many Jewish legal sources make little reference at all to the divine image, the universal worth of man, or the importance of filling the earth with people. Their concern, rather, is with the creation of Jewish children and with determining how a Jew goes about fulfilling the procreative commandment as part of the *halakhic* system. An analysis of the sources reveals the presence of two different values, a universal and a particular, each of which is connected in different ways and at different times, with פריה ורביה.

The presence of the particular Jewish concern in the *halakhic* literature does not nullify the fact that Genesis chapter 1 is connected with the importance of creating and maintaining human life. Nonetheless, there are serious questions about whether a non-Jewish life is deemed equivalent to a Jewish life in this context. For example, *pikuaḥ nefesh* (saving a life) is understood to nullify nearly all legal stringencies, including the Sabbath, dietary laws, and even fasting on Yom Kippur. Yet in discussing the relationship between *pikuaḥ nefesh* and the laws of Shabbat, the Talmud implies that those laws may be broken only if the injured person is, or at least might be, a Jew.[27] Furthermore, Mishnaic legislation prohibits Jewish women from acting as a nursemaid or midwife to a gentile woman, due to the fact that she will be "raising [the baby] up to

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[26] T. *Yevamot* 8:7.

[27] B. *Yoma* 83a-85b. The Rabbis go as far as to allow the desecration of Shabbat in a case where it is extremely unlikely that the injured person is Jewish, but there still must be a possibility. The implication is that it is Jewish life that overrides Shabbat.

idolatry."[28] This reference is telling, for it reveals that dislike of *avodah zarah* (as opposed to outright racial or ethnic discrimination) is a central feature of Jewish discomfort with aiding in gentile procreation. In this sense, the phenomenon can be elucidated by Maimonides' comments linking idolatry with irrationalism. The idea that idolatrous practices were contrary to the high intellectual and behavioral standards that set humanity apart may have fueled the Jewish hatred of such ritual, as well as the sense that its adherents were not living up to their full potential as human beings.

There is, then a very real sense in the texts that the reality of humanity does not match the ideal characterized by "*b'tzalmeinu kidmuteinu.*" The Rabbis and early *Rishonim* clearly believed in the centrality of humanity on earth and the ultimate worth of human life, but they also believed the folkways of many gentiles to be problematic for this conception. These philosophical ideas, coupled with such historical factors as persecution and the loss of Jews to conversion and slaughter, seem to be behind a shift in which the mitzvah of פריה ורביה is largely divorced from its universal milieu and comes to be understood in terms of particularistic values present in Jewish tradition.

B. The Shift Toward the Particular

The shift can be traced through a case study: the question of the proselyte. In working out how one fulfills the mitzvah of procreation, the Talmud inquires as to the following hypothetical situation:

> It was stated: If a man had children while he was an idolater and then he became a proselyte, he has fulfilled, R. Johanan said, the duty of propagation of the race;

[28] M. *Avodah* Zarah 2:1.

> and Resh Lakish said: He has not fulfilled the duty of propagation of the race. 'R. Johanan said: He has fulfilled the duty of propagation', since he had children. 'And Resh Lakish said: He has not fulfilled the duty of propagation' because one who became a proselyte is like a child newly born.[29]

This question cuts to the heart of the universal-particular debate by asking two questions. First, can one perform the mitzvah by creating *any* children, or is it specifically intended to produce *Jewish* children? Second, does the mitzvah legally compel all human beings (as it seems to do in Genesis and Noah) or only Jews. That the opinions are recorded as a *maḥloket*, with no obvious solution reached in the Gemara, indicates that both views were considered respectable at one point. The fact that the *Halakahah* follows Rabbi Yoḥanan[30] may even demonstrate the importance of the universalistic element in early Jewish legal discourse surrounding this mitzvah. Even Reish Lakish, who claims that the convert has not yet fulfilled his obligation, does so based on the individual's personal status as a "child newly born," not based on the religion of his previous children.

However, the universalistic view is problematic for later thinkers, for whom the pendulum has already begun to shift in the other direction. At some point, it became difficult to regard non-Jewish children as fulfilling the obligation and equally difficult to view gentiles as taking part in the commandment. Since the *Halakhah* is according to Rabbi Yoḥanan, however, subsequent *halakhists* are required to reinterpret his statement in concert with their own understanding of the law. The Tosafists, for example, must deal

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[29] B. *Yevamot* 62a.
[30] Alfassi *Yevamot* 22b.

with a Talmudic statement[31] that the proselyte in question was already subject to the law of procreation (מעקרא בני פריה ורביה נינהו). This is problematic because Jewish law accepts the idea (from B. *Sanhedrin* 59b) that Noahides are not commanded to procreate. The Tosafists' answer is to creatively redefine the idiom "בני פריה ורביה" as a reference to lineage, rather than legal obligation: "[gentiles'] children are called after their names." Thus they are able to solve the contradiction in favor of the particularistic view, doing away with the notion of a gentile obligation to procreate.

The question of whether one's children must be Jewish is addressed in an equally inventive way by Maimonides. In *Hilkhot P'riah Urviah*,[32] he rules in concert with Rabbi Yohanan that the גר has fulfilled his obligation. However, the Rambam makes an assumption not present in the Talmud: that the proselyte's children have converted with him to Judaism. The *Maggid Mishneh*, the fourteenth century commentator to the *Mishneh Torah*, explains the reason that the Rambam must do what he does:

> It is known that the Halakhah is according to Rabbi Yohanan, and [therefore] our teacher [Maimonides] interpreted that the children also converted. This is correct, for [the convert] was required to marry in order to have Israelite children; Rabbi Yohanan would not say that idolatrous children are sufficient for him.[33]

Rabbi Yohanan may indeed have intended to say just that, but the Rambam must make this change because the established *Halakhah* flies in the face of his intuitive understanding of the mitzvah's purpose. Where the Talmud granted the proselyte his

[31] B. *Yevamot* 62a, later on the page.
[32] *Hilkhot P'riah Urviah* 15:6.
[33] *Maggid Mishneh* to ibid.

fulfilled mitzvah simply by virtue of the fact that he had brought children into the world, Maimonides requires that those children increase the Jewish population. This reading is codified in the *Shulḥan Arukh*,[34] and is therefore the normative understanding of the mitzvah in late medieval and modern Judaism. By the time of the late Rishonim, there is no question that *P'riah Urviah* is a commandment for Jews, whose intention have more to do with Jewish continuity than with any universal sense of human worth.

פריה ורביה as a Mitzvah

The shift from universal to particular is only half of the story. As *P'riah Urviah* is incorporated into the Jewish legal system, it is transformed simultaneously from a statement of permission (as it seems to be in the Torah) into a commandment. This second part of the shift is evident in the Mishnah, whose single paragraph on this issue begins, "A man should not desist from procreation unless he has children."[35] Such an introduction is an answer to those who would read Genesis 1:28 as mere permission. Rather, procreation is an *obligation* and one is not permitted to discontinue efforts until he has succeeded.

As a blessing, the words "פרו ורבו" are sufficient to fulfill a complete idea, but they lack the nuance necessary to be a full-fledged mitzvah and guide Jewish life. The halakhic texts therefore go about trying to answer questions of who must fulfill the mitzvah, how it must be done, and its status vis-à-vis other mitzvot. The Mishnah begins this process by asking three questions: 1. Who is commanded to perform this mitzvah? 2.

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[34] *Even Ha-Ezer, Hilkhot P'riah Urviah* 1:7.
[35] M. *Yevamot* 6:6.

At what point has a person fulfilled his legal obligation? 3.What is the relationship between procreation and marriage? These three questions also form the major categories of discussion regarding this mitzvah in later legal texts.

A. Who is commanded?

The Mishnah's answer to the first question is simple: only men are commanded to fulfill the commandment. Although the dissenting opinion of Rabbi Yohanan b. Beroka is recorded,[36] the *Halakhah* is clearly not in dispute; this answer is universally accepted in *halakhic* literature. The Gemara brings scriptural[37] and Amoraic material to corroborate this opinion, including an explicit statement by Rabbi Hiyya that that women are not bound by this commandment.[38] The redactors must also deal with various apparent contradictions, stories and statements that might imply that women are also bound by the procreative mitzvah. One is an incident in which a half-slave woman was granted freedom in order to marry; the Gemara makes clear that this was in order to protect her from rape, not because she was entitled to procreate. There is also the question of why a woman may receive a *ketubah* in a infertility-related divorce, since the receipt of the *ketubah* implies her innocence in causing the divorce, which in turn implies that she has some crime of which to be innocent. Yet the Gemara clarifies that in fact, individual rabbis may grant the *ketubah* in such cases because of the special financial circumstancesthat childless divorce create in a women's life, not because of any

[36] Rabbi Yohanan ben Beroka says, "Both are obligated, as it says, 'He blessed *them*...' (Gn 1:28)." (M. *Yevamot* 6:6).
[37] There is a singular statement of פרה ורבה in Gen 35:11, but the accepted scriptural basis for the limiting of this commandment to men is the word וכבשה, which is viewed simply as relating to men and not to women. "It is the way of men to subdue," relates Rabbi Ila'i, "and not the way of women" Furthermore, the Rabbis point out, the word is written *haser* and thus may be read in the singular, applying only to Adam and not to his wife. (B. Yevamot 65b).
[38] B. *Yevamot* 65b.

procreative mitzvah that she might be able or unable to fulfill. Although these passages might be understood to indicate a female obligation to procreate, the Gemara refrains from reading them in this way. By explaining away each incident based on circumstances, the ruling is thus decisively upheld. There is relatively little discussion about it in the subsequent sources.[39]

In a way, this is a continuation of the universal-particular discussion, since the effect is to further limit the applicability of the commandment to Jewish men only. The question of commandedness is crucial because in addition to creating a legal category of people who are required to do a certain thing, it also plays an important social role. Jewish society decides status based largely on what a person is and is not commanded to do, since that determines a person's ability to fulfill others' legal obligations as well.[40] Certainly women are permitted to take in part in (and biologically necessary for) the act of procreation, but by restricting the commandedness to men, the Rabbis have made a statement about Jewish familial and social hierarchy.

B. How does one fulfill?

Just as the question of commandedness is settled early on, so too are the requirements for fulfilling the mitzvah of procreation. Such a statute is crucial in the transformation of פריה ורביה from permission to commandment. If the mitzvah is to be a

[39] The only further developments in this category are the stipulation of an age of majority (17) at which a man becomes commanded and an age at which one has transgressed if he has not had children (20), as well as the creation of an exemption for lifelong Torah students who choose to postpone marriage. The Rambam discusses all three of these questions in *Hilkhot Ishut* 15:2-3, and they also appear in *Sefer Mitzvot Gadol*. The age of transgression is based on B. *Kiddushin* 29b, while the exemption for students is based on the actions of the *Tanna* Ben Azzai (T. Yevamot 8:7), who refrained from marrying in order to allow him to study Torah, and on the principle that "One who is fulfilling a commandment is exempt from another commandment."

[40] See extended discussion in chapter 4 conclusion.

governing force in the lives of Jewish people, it must be clear exactly how one goes about following it. The accepted *halakhah*, as indicated in the Mishnah,[41] follows Beit Hillel in ruling that one son and one daughter constitute the minimum for sufficient fulfillment. Yet even with the establishment of such a minimum, there are a number of gray areas that must be worked out in the Gemara, one of which is the question of a person whose offspring die before they themselves procreate. the Talmud's dealings with this question constitute an attempt to determine the exact requirements and parameters of the mitzvah, since such a person has procreated but has not left a lasting procreative contribution to the human race. Thus, in questioning whether such a person has fulfilled his requirement, the redactors are attempting to identity the commandment's root purpose: is פריה ורביה about the actions of a human being in fulfilling a mitzvah, or does it serve the practical purpose of bringing more Jews into the world? In other words, does one have a change of status (become "*yotzei*") simply by fathering children or is that change effected by the person's lasting contribution to the Jewish people?

There are sages who take the former opinion. For example, Rav Assi states, "The Son of David will not come before all the souls in *Guf* [the holding-place of unborn souls] have been brought out."[42] His understanding of the mitzvah is that its purpose is not to being living, viable human beings into the world (as might be the most obvious explanation), but to bring the Messiah emptying the mythical *Guf* of souls. Children who die fall into this category, and hence he holds that such an individual has fulfilled the obligation. However, the *Gemara* comes down clearly against this interpretation,

[41] M. Yevamot 6:6.
[42] B. *Yevamot* 62a.

establishing its opinion on the principle of לשבת יצרה – that the world was created for inhabitation - and on the following *baraita*:

> Grandchildren are like children [i.e. they may be counted as one's children in fulfilling the mitzvah of פריה ורביה]. If one of them died or was found to be a eunuch the father has not fulfilled his obligation.[43]

This *baraita* establishes the principle that one must have grandchildren to have fulfilled the commandment. There must exist the possibility of the family line continuing, even if the immediate offspring have died. The fact that a eunuch grandchild invalidates the fulfillment shows that this applies for as long as a person is living and able to procreate, even if he lives to see a third generation. The clear message is that unlike some other mitzvot, which are explained in terms of personal moral training or building awareness of God's will, the mitzvah of פריה ורביה serves the utilitarian purpose of propagating the community. One fulfills it by making a lasting contribution to the gene pool.

But this is not the end of the story. Although the quantitative minimum requirement of the procreative mitzvah – one son and one daughter – is established as early as the *Mishnah*, the *Gemara* it challenges it by juxtaposing a stricter statement by Rabbi Joshua. The great *Tanna*, apparently unsatisfied with the Beit Hillel requirement, demands continued procreation even beyond that minimum:

> R. Joshua said, If a man married in his youth, he should marry again in old age; if he had children in his youth, he should also have children in his old age, for it is

[43] Ibid 62b. The *baraita* is also found at T. *Yevamot* 7.

said, *In the morning, sow thy seed and in the evening withhold not thine hand; for thou knowest not which shall prosper, whether this or that, or whether they shall both be alike good.*[44]

This is in clear contradiction to the *Mishnah's* claim that one is allowed to desist after fathering a boy and a girl, apparently representing an opposing strain of thought regarding family life. At its core, this *maḥloket* is between two opposing ways of understanding procreation as a priority. The more conservative, represented by Beit Hillel and the Mishnah, establishes a minimum requirement because its adherents believe in the importance of having children. But it also recognizes that for various economic and social reasons not everyone will want to have a large family, and allows for cessation of procreation after the minimum has been attained. The position of Rabbi Joshua, on the other hand, values פריה ורביה above other aspects of life, thus requiring that it be continued as long as possible. Both opinions hold that procreation is integral to Jewish life, but they differ in their prioritization of family life vis-à-vis other concerns. In modern language, this may be termed a debate over family planning.

For the *halakhists*, however, the contradiction must be resolved. Alfassi solves it by claiming that the Mishnah's minimum is the Torahitic requirement, while the Rabbis require that one continue procreating throughout life.[45] In a sense this solution, which is carried forward by Maimonides and *Sefer Mitzvot Gadol*, is the enshrinement of Rabbi Joshua's opinion over the *Mishnah*. The Rabbinic level of a commandment is no less authoritative than the Torahitic level; so practically speaking, Alfassi requires all Jews to

[44] B. *Yevamot* 62b. Biblical quotation is Eccl 11:6.
[45] Alfassi *Yevamot* 23a.

continue procreation throughout their lifetime, barring special dispensation from a sage who is willing to peel back the Rabbinic requirements. The pendulum swings back in a later period when, when halakhists begin to balk at the requirement that every Jew – regardless of age and economic status – go to great measures to father more and more children. This is evident in discussions over whether a man who already has children is required to sell a Torah scroll so that he can afford to marry a fertile woman, and whether he must divorce a second or third wife who is found to be infertile. In fact, some post-Alfassi Rishonim reject his *teirutz* outright, asserting instead that although it is best to continue procreating beyond the minimum, one need not go to extraordinary measures to do so.[46] The Rabbi Joshua opinion does not appear at all in the Shulhan Arukh, indicating that this most important of all Jewish codes does not see fit to label it a binding statute.[47]

C. Procreation and Marriage

Marriage is an important issue here because it is – at least in the traditional world - the setting is which פריה ורביה takes place. Yet the Rabbis view as an obligation in itself separate from procreation.[48] It is therefore necessary for the sources to establish the boundaries of the relationship between these two mitzvot. The discussion centers on divorce law, stemming from a statute in the Mishnah that requires a man either to take a second wife or to divorce after ten years of failure to conceive.[49]

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[46] Asheri *Yevamot* 63.

[47] It is worth noting that in the modern period, Orthodox Jewry has moved again toward the idea of having as many children as possible. The shift, fueled by such events as the Holocaust, the demographic crisis in Israel, and the radicalization of Orthodoxy, has resurrected the opinion of Rabbi Joshua, making large families a central value within that segment of the Jewish community.

[48] B. *Yevamot* 61b. In the course of discussion on the requirements of פריה ורביה, the Gemara establishes that a Jewish man is required to be married, even if he has already fulfilled the obligation to procreate.

[49] B. *Yevamot* 64a.The Mishnah actually says, "he is not permitted to abstain [any longer]." It is Rashi's explanation that provides the two possibilities of divorce or taking a second wife.

The stipulation of forced divorce is often understood as sexist or contrary to a woman's rights, since it is linguistically addressed toward the man and since women are not permitted to grant divorce under Jewish law. By the time of the Talmud, though, it does not appear to be so construed. The polygamous option all but disappears from the discussion, and instead the Rabbis go into great detail regarding divorce law: How many marriages are allowed? What kind of evidence may be used in proving infertility in men and women? Precisely how are the ten years to be counted? The Gemara is quick to point out that the wife is not automatically considered barren. She is entitled to receive the money specified in her *ketubah*, "lest he did not merit to have children by her,"[50] and she is permitted to remarry and try again to have children. This is recognition that infertility can occur in both men and women. The fact that women are not able to grant a divorce under Jewish law may in fact be the reason that the Mishnah *requires* the separation, foregoing the question of intent altogether and allowing both parties a second chance at having children.

The force of the law is that an infertile couple is not permitted to continue cohabitation beyond ten years, apparently even against their wishes. The implication is that procreation is the central and most important purpose of marriage; the necessity of having children outweighs love, friendship, comfort, convenience, and any other reason that the couple might choose to remain in a childless marriage.[51] This is upheld by some of the later legalists, including Asheri,[52] the *Or Zarua*, and *Sefer Mitzvot Gadol*. The

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[50] B. Yevamot 64b.
[51] The force of this law becomes even more clear considering that the *takanah* of Rabbeinu Gershom outlawed polygamy for a significant portion of Jewry.
[52] Asheri Yevamot 64b. The Rosh understands from Alfassi's word *yotzie* that a husband is forced out of a childless marriage after the requisite period of time.

latter even holds that he should be "forced with reeds" – i.e. whipped – to divorce his wife!

This law would effectively separate any couple that is unable to conceive. In doing so, it makes procreation the central purpose of marriage, ignoring other assumed goals such as companionship, comfort, and protection. It is perhaps for this reason that it was not universally applied. In fact, Rabbi Moshe Isserlis codified his community's noncompliance in his gloss to the *Shulhan Arukh* on the issue of forced marriage:

> Here and now, it is our practice not to force the matter [of marriage by age 20 in order to fulfill the procreative obligation]. Similarly with one who has not fulfilled פריה ורביה but wants to marry a woman who cannot bear children... because he desires or because of her money. Even though according to the law it is required to prevent him [from marrying a barren woman], it has not been our practice for several generations to enforce the exactitudes of the law in matters of couplings. Even in the case of one who married a woman and lived with her for ten years, it has not been our practice to force him to divorce her, even though he has not fulfilled פריה ורביה. Similarly in other matters of couplings.[53]

This comment has wide implications, reaching to the very heart of the relationship between marriage and procreation. Isserlis does not claim that the content of the law has changed, but he does admit that his community is not inclined to enforce it strictly in order to break up happy marriages or produce unhappy ones. Yet there are other communities that continued to do so, and the presence of these laws in the Caro text

[53] *Shulhan Arukh, Even Ha-Ezer, Hilkhot P'riah Urviah* 1:3.

indicates that the older attitude, which prioritizes procreation above a loving marriage, is still present within the Jewish community.

Conclusion

If there is a central value that can be pulled from these many and varied sources, it is the importance of procreation and childrearing in the tradition. Despite disagreements in many areas, there is no voice in Jewish discourse that would deemphasize family life as a central value in Judaism. Beyond this, however, there is very little else that is universally agreed. In fact, the discussion surrounding פריה ורביה indicates a number of values in flux, in particular the issue of the mitzvah's scope of applicability – the universal and particular debate – but also the questions of family planning, forced divorce, the place of women vis-à-vis the mitzvah, and others. All of these exist as continua within the sources: the legal responses have shifted over time but the debates remain in the literature, sometimes actively raging and other times as vestiges of opinions that have faded away.

That *Halakhah* is multivalent is universally accepted and well documented. The variety of opinions and values are the result of many factors, one of which is surely the historical situation in which the rulings were made. Because *Halakhah*, like any other system of law, is developed by human beings living in history, and there can be no doubt that *posek's* intuitive sense of the purpose of a given law is shaped by history, changes in the Halakhah of procreation can be explained in part as the result of changing factors in

Jewish life.[54] It may therefore be proposed that Hillel and Shammai, who lived in a time when the Jewish population was between 4 and 8 million, or up to a tenth of the Roman empire,[55] would not have seen it necessary for every Jew to have as many children as possible. Indeed, despite their *mahloket*, they agree on a relatively moderate minimum requirement. Yet Rabbi Joshua, living after the fall of Jerusalem, approached the mitzvah of procreation with very different goals. Similary, Rabbi Yohanan's very universal understanding of the applicability of the mitzvah to non-Jews may be the result of his time-place – the early Amoraic period in which Jewish scholarship was flourishing in both *Eretz Yisrael* and Babylonia and Jews lived in relative harmony with their gentile neighbors. Yet Alfassi, who saw the fall of the Babylonian center, effectively nullified the more lenient Beit Hillel ruling. And Maimonides, in whose time the Jewish population had shrunk to around a million, decisively particularized the commandment by requiring that the offspring be Jews.

If these legal responses are linked to historical circumstances, as they seem to be to an extent, then the very presence of such a shift allows for the possibility of further shift in the future. The pendulum may continue its swing, or it may swing back in the direction from whence it came. And the Jewish propensity for recording minority opinions means that no defunct belief disappears completely; an idea need only be present on the continuum to be considered authentically Jewish. This is important as one considers the current debate over procreation and population. Such ideas as universalism

[54] Koppel argues convincingly that *Halakhah* is comparable to the mathematical concept of a "nonmodelable system," meaning that its rulings cannot be computed by any equation or model. The unpredictable factor in the system, he asserts, is the intuition of the rabbis who create it (*viz.* Koppel 34-35). Koppel holds that these "intuitive faculties" are the result of the fact that the rabbi spends his life living and working within the Halakhic system, so that the internal dynamics of the system contribute to its authentic further development. He does not mention the effect of historical factors, but we hold that the time-place in which a given person lives must necessarily contribute to his or her view of anything, including law.
[55] Gordis 23, quoting Harnack and Baron.

and family planning need not be discounted as modern concepts being forced onto Jewish discourse. Rather, they are present in the sources, available to be brought back into Halakhic discussion as the winds of change bring about changes in Jews' intuitive understandings of the mitzvot.

Yet the historical argument is not sufficient to explain the variety of approaches found in the texts. The rulings are not related closely enough to the historical trends – at the time of the Shulhan Arukh, the Jewish population had dipped below a million due to the Spanish expulsion and forced conversions, yet Caro mentions only the lenient Beit Hillel ruling. Furthermore, some of the most universalistic material, including Albo's *Sefer Ha-Ikkarim*, was created at the height of the Middle Ages when Jews were constantly subject to persecutions, exiles, and massacres across Europe.

Indeed, there is something beyond the historical trend that is producing these seemingly contradictory yet concurrent traditions, and it can be noted in the differences between legal and philosophical literature. The shift toward the particular is pronounced in the Talmud codes, but it is hardly discernable in the philosophy. Even as the medieval rabbis particularize the mitzvah, its "official" reason – according to *Sefer Ha-Hinukh*[56] and even to the Rambam himself[57] - continues to be קיום המין, continuance of the human race. The *Hinukh* even cites the Isaian principle of לשבת יצרה as corroborating evidence for the universal principle behind the commandment. Yet while maintaining these high notions, none of these thinkers would have accepted non-Jewish children as valid fulfillment of the mitzvah.

[56] *Sefer Ha-Hinukh* 1.
[57] *Sefer Ha-Mitzvot*, positive commandment 212.

Maimonides represents a perfect case study, since he is the author of both types of literature. His writings on idolatry in the *Guide*, though they serve to separate and elevate Jewish practice above Gentile rituals, do so ultimately based on the universal concept of human reason. The logical extreme of Maimonides' assertions in that chapter is that any human is capable of living his life based on שכל, and Judaism represents a tradition that has chosen to do so. This notion feeds perfectly into the fact that in *Sefer Ha-Mitzvot* he cites קיום המין – continuance of the human race – as the reason for פריה ורביה. Yet in delineating the details of that commandment in the *Mishneh Torah*, Maimonides seems not at all concerned with the human race as a whole, but only with the requirements that fall on Jews.

This distinction between philosophical works that maintain the universal notions and legal codes that *posken* as though the mitzvah were intended only for Jews may in part go back to the question of ideal and reality. The philosophy of human creation represents a theoretical, idealized world of grand ideas such as צלם אלהים and שכל, but the legal material reflects the world in which medieval Jews lived: persecution, a shrinking Jewish population, the triumph of a seemingly immoral gentile leadership. The cherished belief of the divine spark in all humanity is a beautiful theoretical statement, but it is difficult to maintain when Jews are fighting for their own existence. In other words, in the view of the *Rishonim* it was Jews who needed to procreate; the gentiles were surviving quite well on their own.

Perhaps more importantly, though, the differences are reflected in the very nature of the two genres. The project of philosophy – to ask questions about the universe – is by definition universal. *Halakhah*, on the other hand, is intended to govern Jewish life. It is

neither possible nor desirable for *Halakhah* to address non-Jewish norms, since that would undermine the very categories that gave rise to Jewish law. Jews may have universal ideas, but their legal system – like any such system – is concerned mainly with the norms, needs, and values of those who adhere to it. Thus the lack of universalism in the legal texts, and the preponderance of detail upon detail, is due to the fact that question of ultimate interest to the Halakhist is, "What does God want me to do?" The Rabbis' goal was to follow the divine will as perfectly as possible, and they did so by attempting to explicate it through study of the sources and expansion of the legal system. Since study and *pilpul* were understood as forms of worship, the act of challenging the law with questions, difficulties, and scenarios of a theoretical and concrete nature, was a method of finding the best way to carry out God's legislation.

The *maḥlokot* over family size, women's role, and the worth of a childless marriage may thus be understood in two contexts: they are determined by the halakhic project, the attempt to discern God's voice in text and tradition; and they are determined (though perhaps not overtly) by history and the way a given time and place affect a halakhist's intuitions and decisions. In both contexts, the legal tradition remains an open process. Whether evolving or unfolding, it will not look tomorrow precisely as it looks today.

Chapter 2: *Halakhah* and the Earth

Why was man created on the Eve of the Sabbath? So that if he becomes too arrogant one might say to him, "Even the gnat preceded you in Creation."

Sanhedrin 38a

The laws of procreation, explored in the previous chapter, are an expression of concern with human society and needs, of anthropocentrism that sees the earth as a place for humans to live and thrive. Yet this is not the only Jewish attitude toward the natural world. Rabbinic law and literature also look to Creation as evidence if the splendor of the Creator, and thus put emphasis on appreciating, protecting, and preserving the natural world. This chapter will provide a look at the earth through a Rabbinic lens, by exploring three key *halakhic* concepts that express the Jewish view of the relationship between humanity and the world. They are:

- *Hineh Tov M'od*: the notion that the world is God's wise creation
- *Tza'ar Ba'alei Hayyim*: the concern with animals' physical and psychological suffering
- *Bal Tash-hit*: the prohibition against destroying useful things.

It is important to note before beginning the study that these entities do not traditionally bear a direct relationship to one another. Indeed, the recipient of the action is different in each case. In the first, it is Creation as a whole and God by extension; in the second it is

animals as individuals; and in the third it is all useful things, and by extension human society. Nor do the Rabbis or *Rishonim* view them as pieces of an "Environmental ethic," since the three are not born out of a common goal. We believe nonetheless that these entities express a common theme, because they all deal with the Jewish attitude toward the created world. The organization of this chapter is therefore modern, based around concepts that are considered part of Environmentalism today, specifically conservation, appreciate of nature, and animal rights. For that reason, the chapter is essentially a compilation of three separate essays, each of which explores the legal and philosophical side of one of the concepts. The goal of the study is to extract their values and functions in order to determine whether an authentic Jewish environmental ethic may be built on them.

הנה טוב מאד ... And it was Very Good

A. Hineh Tov M'od as a Value

If there is a single most basic attitude in Jewish tradition toward the earth, it is encapsulated in Genesis 1:31, "God saw all that He had made, and it was very good." This climax to the story of Creation underlines the pervasive Jewish belief that the universe exists as it was intended, that this is the "best of all possible worlds," as least as regards nature. It contests both the Gnostic belief that the physical world is the work of an evil demiurge and the scientific notion that the universe is morally neutral, asserting instead that the created world is both morally and compositionally "good." Like every Biblical verse, the precise meaning of this statement is theoretically open to

interpretation. It might, for example, be understood as a statement of the ethical system implicit in the universe or as praise of God's works or confirmation of man's place among the creations. Indeed, these ideas are present in Jewish literature. However, the primary Rabbinic understanding of the world's "goodness" speaks instead to the perfection of the natural world. It is an assumption that the species, ecosystems, and biodiversity of the planet are a reflection of God's will.

Since the Biblical and Rabbinic traditions predated by centuries any conception of the evolution of species they understandably assume that each type of animal on earth was created by God exactly as it is. Since God's nature is understood as infallible, this implies that the world's species and ecosystems were created with infallible wisdom and designed to coexist and work together. In modern terms, then, the meaning of טוב מאד is "ecologically perfect." This is not to say that the Rabbis believed that they lived in a perfect world. Like every other generation, they saw natural disasters, famine, crime, and tyranny around them. But Jewish theology has always explained these occurrences as a result of human fallibility, reward and punishment, or a world left purposefully incomplete so that it might be perfected. This theology of imperfection applies only to the human world, and has never extended into nature. Indeed, the created universe is perfect in every way save for those pieces having to do with humanity.

As it is developed in Rabbinic aggadah, this perfection implies that each object, created "according to its own kind (למינהו)," has an intended role to play in a smoothly functioning universe.[1] Consider the following *petihta* from Exodus *Rabbah*:

[1] For further examples, see Genesis *Rabbah* chapter 10 and B. *Hullin* 127a.

> Our Rabbis explained the words '*But the profit of a land every way is*'[2] thus: Even those creatures you deem redundant in the world, like flies, bugs and gnats, nevertheless have their allotted task in the scheme of creation, as it says, '*And God saw everything that He had made, and, behold, it was very good.*' R. Aḥa b. Ḥanina explained thus: Even those creatures deemed by you superfluous in the world, like serpents and scorpions, still have their definite place in the scheme of creation. For God said to His prophets: 'Do you think that if you refuse to fulfill My message I have none else to send? Oh no; "*The superfluity of a land every way is*"[3] means that my message will be fulfilled even by a serpent, scorpion , or frog.' The proof is this: had it not been for the hornet, how would God have exacted retribution from the Amorites? Had it not been for the frog, how would He have punished the Egyptians? Hence it says: *Behold, I will smite all thy borders with frogs.*[4]

At first glance, this midrash is not really about nature at all. Indeed, it declares that each of these misunderstood creatures has a role to play in Jewish history, as harbingers of God's will to various enemies. But since the *petiḥta* is by definition a composite literature, it is important to look at each piece separately. If one separates out the statements of R. Aḥa and the Rabbis from the *darshan's* homiletical usage of them, there is no specific explanation given for the nature of the "allotted task" of each creature. Very likely these were originally intended to discuss everyday roles that these animals play in

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[2] Eccl 5:8.
[3] Ibid. The Hebrew יתרון may be translated as either "profit" or "superfluity."
[4] Ex 7:27. The *petiḥta* is found in Exodus *Rabbah* 10 :1.

the world. The following Talmudic *memra* might give an idea of what these rabbis had in mind:

> Rab Judah said in Rab's name: Of all that the Holy One, blessed by He, created in His world, He did not create a single thing without purpose. [Thus] He created the snail as a remedy for a scab; the fly as an antidote to the hornet['s sting]; the mosquito [crushed] for a serpent['s bite]; a serpent as a remedy for an eruption, and a [crushed] spider as a remedy for a scorpion['s bite].[5]

Here again, the animals' purposes are decidedly anthropocentric; their intended roles are only expressed in terms of human dealings with animals. But this text does describe a purposefully designed system of interaction between the species (even if it is only in terms of bites and antidotes). This is not exactly Environmentalism, since the animals and their ecosystem do not exist for their own sake, but it may be as close as an anthropocentric ancient Western could have come.

B. Ritual and Halakhic Implications of Hineh Tov M'od: Appreciation and Conservation

Thus the working value in the Jewish approach to the earth is that Creation is perfect the way it was created, and that each component of the universe plays an intended and necessary role. Thus the world's current state is the way God intended it to be, and they way God intends it to remain. For Jews, there are two implied human reactions to this state of affairs: appreciation and careful conservation. Each of these is addressed in *aggadic* and *halakhic* literatures.

[5] B. *Shabbat* 77b.

The institution designed to enable appreciation of the world's resources is the *berakhah* or blessing. The Talmudic tractate *Berakhot* contains blessings that extol God as the Creator of wonderful things: "Blessed is He who has such in his world!"[6] Even objects or people that are frightening, strange, ill, or in some way aberrational are not deemed divine mistakes. Indeed, they are part of God's plan and are greeted with such blessings as "Blessed be the true judge" or "Blessed is He who makes strange creatures."[7] In this way, Jews acknowledge the wisdom of Creation and of the Creator. But strange and wonderful things are not the only ones that are to be met with blessings. Even the most mundane daily activities – eating, smelling fragrances, washing one's hands, relieving oneself – are accompanied by a *berakhah*. These *birkhot hana-ah* or blessings of benefit, serve to heighten awareness that the processes of human life are a result of divine planning. Furthermore, they are a way of requesting and receiving permission to eat, behold, or otherwise partake of God's creations. Not to do so, say the Rabbis, would be tantamount to *ma'al*, unsanctioned use of consecrated objects.[8]

The identification of eating or acting without a blessing with *ma'al* creates a metaphorical paradigm in which everything on earth is compared to *hekdesh*, items that are set apart for divine service in the Temple. These items are forbidden from personal use according to Jewih law, thus the *berakhah* becomes a metaphor for "reclaiming" them for human consumption. According to the paradigm, the earth belongs ultimately to God. Although humans use language of ownership and mastery, they must continue to ask permission for every little piece of the world that they use, down to an "olive's worth" of bread.

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[6] B. *Berakhot* 58b.
[7] Ibid.
[8] B. *Berakhot* 35a.

It is precisely this theological paradox - the earth belongs to humans, but it really belongs to God - that gives rise to the need for blessings: This is expressed in a Talmudic midrash:

> Rabbi Levi contrasted two texts. It is written, '*The earth is the Lord's and the fullness thereof*' and it is also written, '*The heavens are the heavens of the Lord, but the earth hath He given to the children of men.*' There is no contradiction: in the one case it is before a blessing has been, in the other case after.[9]

The verse from Psalm 115 is usually understood to mean that God created the earth and then handed it over to human beings to develop and safeguard. But this contradicts the notion that the earth is God's property. Rabbi Levi's midrashic solution is that people are "given" the earth one piece at a time through the recitation of blessings. Despite God's ultimate ownership, human beings do have permission to use the earth and its resources, provided they use the process that has been created for this purpose. Far from advocating abstinence from natural resources, Jewish tradition asserts that humans have permission to use the earth. Nonetheless, the *berakhah*, one of the most basic and constant components of religious Jewish life, stands as a reminder that people are merely stewards.[10]

The second human response to the world's goodness is conservation. This is embodied in a number of mitzvot that prohibit changing components of God's work. One such example may be the mitzvah of *Shiluah Ha-Ken* - the commandment to send

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[9] Ibid. Biblical quotes Ps 24:1 and Ps 115:16.
[10] From the above quoted midrash, Ibn Ezra draws the lesson that man is a *p'kid elohim*, or a steward of God.

away the mother bird before taking its young[11] - which the Ramban and *Sefer Ha-Hinukh* connect with species continuity. They claim that slaughtering both a baby bird and its mother puts the species in danger of extinction.[12] This is consistent with Nahmanides' claim that in proclaiming each creation "good" at the beginning of time, God, "decreed that there should be a force which grows and bears seed so that the species should exist forever."[13] In other words, since the natural world was created perfect, it should continue forever to exist as it does, with each species playing the role it has always played. The *Hinukh* goes as far as to assert that "no species among all the kinds of creatures will ever become extinct, for under the watchful care of the One who lives and endures forever about the matter, it will find enduring existence through Him."[14]

In truth, The arguments connecting *Shiluah Ha-Ken* with conservation of God's handiwork are quite weak. The Ramban prefaces his with "maybe" and the *Hinukh* uses his only as a bridge to a more serious theological essay. (We will see that this mitzvah is more closely associated with *Tza'ar Ba'alei Hayyim.*) But the notion of collective providence, that God acts on behalf of, and desires the continuance of, each plant and animal species – though not each individual plant and animal – is present elsewhere in Jewish law as well. The human role in preserving this balance is more highly developed in the laws of *kilayim*, the various prohibitions against combining "diverse species" - mixing of crops and grapes, cross breeding of animals, grafting, and *sha'atnez.*[15] Though the *halakhic* literature on this subject is far too vast to allow for a thorough study here, it

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[11] Based on Deut 22:6.
[12] Ramban to Deut 22:6 and Hinukh 545.
[13] Ramban to Gen 1:11.
[14] *Sefer Ha-Hinukh* 545. Clearly the author of the code was as unaware that extinction plays an important role in the evolution of species as he was that humans of the Twentieth and Twenty First Centuries would destroy thousands of species. His statement is of a theological nature, indicating his view that God acts providentially to preserve every type of living thing.
[15] These details are in M. *Kilayim.*

is worth mentioning that for many of the commentators and *halakhists*, these mitzvot are directly descended from the concept of *Hineh Tov M'od.* Ibn Ezra asserts, for example, that cross-breeding of animal species is tantamount to "changing God's work,"[16] and the author of *Sefer Ha-Hinukh* actually quotes Genesis 1:31, providing a perfect link between that value and this mitzvah.[17]

The fact that these commandments are tied to agriculture is telling. Although the Israelites' descendants largely departed from their agrarian lifestyle, agriculture remained the primary paradigm for human mastery over nature through the Middle Ages. Before modern times, it was the most important way that humans manipulated the earth in order to extract resources. The regulations of *kilayim* are an important limitation on that sense of control. A similar role is played by the laws of the Sabbatical and Jubilee years, which, according to the Hinukh, are a reminder that "the earth does not grow food on its own, but through God's strength." Maimonides points out that the *shemmitah* has a stewardship function as well; it "makes the earth more fertile and stronger through letting it fallow."[18]

This kind of active management and maintenance of the earth is an important aspect of Jewish agricultural policy, and comes out of the idea that humanity's role on earth is "לשמרה ולעבדה," i.e. to extract food and resources from it and to preserve its nature. Indeed, an agricultural society is bound to develop a sense of responsibility toward the land that provides its sustenance, and in this sense the existence of the *shemittah* year is not surprising, nor are the limitations on grazing rights found in *Baba*

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[16] Ibn Ezra to Lv 19:19.
[17] *Sefer Ha-Hinukh* 244, on the prohibition against mating two animal species. The author calls upon the same explanation in 245 with regard to the sowing of different seeds together.
[18] *Guide of the Perplexed* 3:39..

Kama 7:7 or the laws that require various forms of pollution to be removed from fields and vineyards.[19] But *Kilayim* is unique in that it has no obvious benefit to people. On the contrary, humans in modernity have met with a great deal of success by mixing species of plants and animals to create bigger, better species that can feed a growing population. Thus the fact that Jewish law prohibits this type of behavior cannot be construed as self-serving. Rather, it is purely the *halakhic* expression of the idea that the divine wisdom behind the created world is far beyond what people can fathom, and human behavior ought to reflect this.

צער בעלי חיים ... For Animals Feel Great Pain

A. Concern for Animal Suffering

It is evident from the laws of *kilayim* that the Rabbis believed in collective divine providence for animals, that God acts on behalf of a species but not an individual. This is in opposition to their view of the relationship between the deity and humans, which is composed of aspects of national and individual providence. Although animals are living beings, and often beloved members of families and societies, they clearly do not have the same status and rights as human beings in Jewish thought. For example, Albo's articulation of *Scala Natura*, the philosophical Ladder of Nature, describes three life forces or *nefashot*[20] present in animals: nutritive, vital, and sensitive. These three forces respectively enable the animal to process food, maintain its natural internal circulations,

[19] *Baba Kama* chapter 2.

[20] The Hebrew word *nefesh* can at times be translated "soul," and this is indeed the term chosen by Husik in his rendering. However, it is clear from context that Albo is referring to a kind of "life force," and not a soul in the sense of an individual's non-corporeal essence.

and interact with the outside world through senses and thought. They do not, however, give it the faculty of reason, which "is present in man alone" and gives human beings their ability to relate to the universe and to God as individuals.[21] Thus, each human being, is unique and holy, whereas animals are merely representatives of their species.

At the same time, however, the texts contain indications of a sense of concern for animals as individuals who feel pain and have rights. Maimonides asserts that animals possess a "moving soul" and therefore "[resemble] in a way those who possess the rational soul (i.e. human beings)."[22] In fact, Rabbinic tradition generally understands the eating of meat as a departure from the pre-Noahide ideal state in which no living being was authorized to harm another for any reason.[23] Even more striking is Maimonides' explanation of the mitzvah of refraining from slaughtering an animal and its young on the same day, in which he asserts that animals have feelings much like humans:

> [The prohibition is] a precautionary measure to avoid slaughtering the young animal in front of its mother. For in these cases animals feel very great pain, there being no difference regarding this pain between man and the other animals. For the love and the tenderness of a mother for her child is not consequent upon reason, but upon the activity of the imaginative faculty, which is found in most animals just as it is found in man.[24]

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[21] *Sefer Ha-Ikkarim* II:31 (Husik 209). See *Ikkarim* book III for a more complete discussion of the Ladder of Nature.
[22] Ramban commentary to Gen 1:29.
[23] *Sefer Ha-Ikkarim* II:37.
[24] *Guide of the Perplexed* 444:48 (Pines 599).

By separating the ability to love from the rational faculty, Maimonides is able to claim that animals can experience pain – both emotional and physical – despite being inferior to humans. This assertion, coupled with the idea that one *ought not* cause such pain to animals, is known in Rabbinic terminology as *Tza'ar Ba'alei Hayyim*.[25]

At the root of this discussion are core questions about animals: their rights, their purpose on earth, and their cognitive and emotional abilities. Rabbinic tradition holds on the one hand that animals are a resource for human beings, and on the other that they are living, independent beings with their own identities, feelings, families, and souls. *Tza'ar Ba'alei Hayyim* is a compromise between those two positions that allows for human consumption and usage of animals within limits that protect their rights as living beings. But the compromise is an uneasy one and it fails to fully resolve the tension between the two values. In fact, out of discomfort with the idea that other living beings are intended for human purposes, certain Messianic scenarios envision a return to pre-Noahide vegetarianism.[26] This implies that if man's violent impulse were to be quashed, there would be no more need for animals to serve human needs. In this scenario, animals are viewed as a consolation prize, given hesitantly as God's attempt to appease the base human need for violence. More importantly, the idea that the messianic world will be vegetarian implies that eating of meat and sacrifice are imperfect solutions to this problem, since they infringe on the rights of living beings. They must therefore be treated gingerly, with a constant awareness of their potential for misuse.

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[25] The words literally mean "pain [caused to] animals." In their usage, there is always an understanding that whatever action causes such pain is a transgression of a value and possibly of a commandment.

[26] This is, of course, limited to a certain type of Messianic vision, like that found in Isaiah. Other Jewish Messianic scenarios envision a world that continues to function by the same basic laws of nature, in which human nature will not change but the Jews' political situation will be transformed.

B. Tza'ar Ba'alei Hayyim as a Halakhic Category

Tza'ar Ba'alei Hayyim is not a mitzvah in the sense of an action prescribed or proscribed by the Torah and/or the Rabbis. In fact, it is not a single action at all, but a *halakhic* category whose component mitzvot are understood to exist for a common reason: to prevent animals undue suffering. Although the reasons for the commandments are not always universally agreed-upon, this category is associated with a number of mitzvot of both an ethical and ritual nature. Among them are the prohibition against plowing a donkey and ox together,[27] the obligation to help unload a suffering donkey on the side of the road,[28] the law against muzzling an ox during its threshing,[29] and the ban on cutting a limb from a live animal to eat.[30] In addition to these ethical commandments,[31] the ritual commandments of *shehitah*, and *kisui dam*, covering the blood of the sacrifice, also have a place in this category.

This division of the category into ethical and ritual commandments is artificial. We are imposing it in this study, rather than gleaning it from the Rabbis' discussions. Nonetheless it is helpful in categorizing and explaining the concepts involved. The connection of the "ethical" commandments to *Tza'ar Ba'alei Hayyim* is obvious: starving an ox and cutting off a live animal's leg are plain cruelty. But *shehitah* and *kisui dam* are different, because slaughter and sacrifice are permitted activities, and it is not considered cruel to kill an animal for purposes of eating or offering up. Instead, these restrictions

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[27] Dt 22:10..
[28] Ex 23:25, Dt 22:4.
[29] Dt 25:4; so that it will not eat as it works.
[30] Gn 9.
[31] The category of ethical mitzvot is traditionally construed as "commandments between a man and his fellow." The action of the commandment must effect a relationship between to human beings for it to rightfully be ethical within this system. For that reason, it is not entirely clear that the mitzvot described here fall squarely into this category, unless the animal is understood as the "fellow." Nonetheless, these are clearly closer to the category of ethical than they are to ritual.

come out of the idea that blood is the soul or life force of the body and, as Nahmanides asserts, "It is improper for a *nefesh* to eat a *nefesh*."[32] In other words, there is a sense that all forms of animate life have some kind of basic natural rights, by virtue of having been given life. It is simply not proper to violate a creature's most basic self, which is present in its blood.

Although it is relatively easy to list off many of its components, the Rabbinic uneasiness surrounding *Tza'ar Ba'alei Hayyim* is reflected in the sources as an inability to fully resolve the nature, function, and makeup of the category. There is no question that it exists and that it plays some kind of role in the *halakhic* system; this can be seen simply from the many mentions of it in the Talmud. But various Talmudic and post-Talmudic sages have different assumptions about what entails *Tza'ar Ba'alei Hayyim* and about its force vis-à-vis other *halakhic* categories. These disagreements extend to the deepest levels; tractate *Baba Metzia* records the following discussion over whether the Torah prohibits cruelty to animals at all, or whether the entire idea is a Rabbinic construct.[33] The *mahloket* is over the mitzvot of unloading and loading a stranger's beast of burden on the side of the road, found in Exodus 23:5 and Deuteronomy 22:4. It unfolds as follows: The Mishnah rules that only unloading (and not loading) is a Torahitic commandment, but Rabbi Shimon dissents, stating that both are from the Torah. Of course the anonymous Mishna wins out, but in the course of its discussion, the Gemara reinterprets the disagreement, so that it becomes about a different question. In the reinterpreted *mahloket,* the Mishnah and Rabbi Shimon actually disagree over whether one may accept payment for unloading, not whether the commandment exists in the

[32] Ramban commentary to Genesis.
[33] *Baba Metzia* 30b-33a, especially 32b.

Torah at all. Therefore the force of the Mishnah is that both loading and unloading are Torahitic commandments, but payment may only be requested for loading. From there, the Gemara questions why both commandments needed to have been written, asking whether the unloading could have been inferred from the loading by means of *kal vaḥomer*: since unloading involves the relieving of animals' suffering while loading does not, the existence of a mitzvah to load an animal implies a similar mitzvah to unload. And since the Gemara has shown previously that Exodus 23:5 exists to teach about payment, and not actually about the commandment to unload, the assumption is correct. Unloading is indeed inferred from loading, on the basis of *Tza'ar Ba'alei Ḥayyim*.

The conclusion of this convoluted legal passage is that relieving the animal's suffering is in fact the reason for the mitzvah of *P'rikah* or unloading. The redactors augment this using the requirement to unload an animal *even without its owner's help*, which shows again that the commandment is about the animal's suffering and not about business practices, Jewish-gentile relations, or some other human matter. Alfassi's code upholds and codifies the opinion that צער בעלי חיים דאורייתא, and it is generally the working assumption in Jewish law. Yet the very existence of such a debate shows that this idea is not universally accepted. The Rashba is quick to point out that even the Mishna does not represent a monolithic opinion. In addition to Tana Kama and Rabbi Shimon, for whom צער בעלי חיים is from the Torah, it records the opinion of Rabbi Yossi that one is only required to unload an animal bearing a reasonable burden, but not one that is suffering under too much weight. The Rashba reasons from this statement that Rabbi Yossi does not accept צער בעלי חיים as the basis for the mitzvah,[34] and he follows that opinion, denying the value a Torahitic source and thus relegating it to a lower

[34] *Ḥiddush* to Bava Metzia 32b.

halakhic status. This is not to say that the Rashba denies the existence of the value of צער בעלי חיים; he simply labels it Rabbinic and not from the Torah. Of course, this does not change the binding nature of the law. Even if *Tza'ar Ba'alei Hayyim* were considered purely Rabbinic, it would still be incumbent upon religious Jews. But there is an important philosophical question at issue here of whether the value comes from God or from humanity.

C. *Tza'ar Ba'alei Hayyim in Interaction with other Mitzvot*

The question of whether *Tza'ar Ba'alei Hayyim* is Torahitic or Rabbinic also has a bearing on how its component commandments function vis-à-vis other *halakhic* entities. Since the value is generally understood to have a Torahitic basis, its import is potentially equal to that of other *D'oraita* commandments and may in fact override them in a case of conflict. The Talmud and post-Talmudic *halakhic* literature are filled with such instances, many of which involve the laws of Shabbat. *Tza'ar Ba'alei Hayyim* does not have the same weight as *Pikuah Nefesh*, for which the laws of the Sabbath may be set aside altogether – the life of an animal is not worth the same as a human life – but it does have enough import to be pitted against the laws of *muktzeh*, a somewhat more peripheral aspect of Shabbat.

The *muktzeh* issue arises on B. *Shabbat* 128b, in which the *Mishnah* asserts that one may push an escaped hen (which is *muktzeh*) back to her nest on the Sabbath, presumably so that she will not suffer by going without shelter. The force of this law is to teach that צער בעלי חיים overrides this aspect of Sabbath law – one may touch a forbidden item on Shabbat in order to prevent an animal from suffering. But the relationship is not

so simple; constraints must be placed on it. The Gemara accomplishes by comparing two seemingly contradictory Rabbinic teachings on a related subject. One reads:

> Rav Yehuda said in the name of Rav: [In the case of] an animal that fell into a stream of water [on Shabbat, one may] bring pillows and cushions and place them underneath her; and if she comes up, she comes up.[35]

As above, the animal itself is *muktzeh*. Here, however, the sage does not permit touching the animal (as in the case of the hen), but rather permits one to act indirectly so that the animal may free itself. This is a less lenient opinion than in the Mishnah, but the Gemara brings a *baraita* that is even more stringent:

> [In the case of] an animal that fell into a stream of water [on Shabbat], one provides her with nourishment where she lies, so that she will not die.

The *Tanna* who composed this *baraita* does not even allow the Jew to help the animal escape indirectly, as does Rav. But the Gemara, unable to suffer the apparent contradiction, reconciles the teachings by claiming that that Rav's opinion reflects a situation in which "it is not possible [to prevent the animal from suffering] through nourishment," whereas the *baraita* reflects a situation in which it is possible. In so doing, the redactors have provided parameters for the law that originally emanated from the Mishnah: one is permitted to set aside the laws of *muktzeh* in order to prevent an animal

[35] Translation mine.

from suffering, but only to a point. If the same goal can be achieved within the bounds of the *muktzeh* regulations, they must be kept.

This compromise sets up a working relationship between the two sets of laws. It places צער בעלי חיים as the higher priority, but maintains the importance of *muktzeh* and indicates a boundary at which the prioritization changes. This *teirutz* works from a Talmudic and Jewish legal standpoint. It probably does not, however, reflect the original intentions of the sages. In fact, Rav probably meant for his opinion to apply more widely, as did the anonymous Tana. And both of their approaches differ from the lenient one found in the Mishnah.[36] The existence of a number of disparate and apparently contradictory opinions shows once more that there is no universally agreed approach to the relationship between Shabbat and צער בעלי חיים, even within a community that agrees on the value's Torahitic status. What all three opinions agree on, however, is that צער בעלי חיים takes precedence over the ordinances of *muktzeh*, and one must make some effort to relieve the animal's suffering in such a case. This is also the case with the prohibition against מבטל כלי מהיכנו – "removing a vessel from its readiness (i.e. causing an object to become *muktzeh*) – which is a Rabbinic fence around the law. The Gemara challenges the above situation, raises the issue that by placing pillows underneath the animal in the ravine, one renders them unfit for Shabbat, which is itself a transgression. Here, however,

[36] There is another attempt to deal with these issues elsewhere in the Talmud. In a related discussion on B. *Shabbat* 117b, Rabbi Eliezer and Rabbi Joshua debate how to deal with an animal and its young who fall into a pit on Yom Tov. According to the laws of festivals, one may haul up an animal only if it is to be slaughtered and eaten that day, but in this case the two animals may not be slaughtered on the same day because of the law of "an animal and her young." Rabbi Joshua permits the Jew to "evade the law" by hauling up one animal, and then deciding that he would prefer to slaughter the other one and hauling it up as well. The Gemara claims that צער בעלי חיים is the reason for his decision. This is an interesting case, because it shows how animals are considered both living creatures and resources for humans at the same time: one saves the animal from suffering – and saves himself from financial loss - by slaughtering it.

there is no difficulty at all. Since צער בעלי חיים is Torahitic and מבטל כלי מהיכנו is Rabbinic, the former simply overrides the latter.

Yet even the best attempts at reconciling the many disparate attitudes in the tradition cannot smooth out all of the bumps. Elsewhere in the tractate[37] it is reported that "R. Gamaliel's ass was laden with honey, but he would not unload it until the termination of the Sabbath. On the termination of the Sabbath it died." This baraita confounds the dialecticians of the Gemara precisely because Rabban Gamliel's refusal to unload the donkey contradicts the rulings established throughout the chapter, which attempt to find ways to reduce animals' suffering by working within, and occasionally setting aside, the laws of Shabbat. The situation is particularly interesting from a critical standpoint because it involves *P'rikah* –the quintessential mitzvah of צער בעלי חיים – pitted directly against both *muktzeh*[38] and the possibility of financial loss. In a sense the basic question being asked here is: is an animal's suffering more important than ritual law, and is it more important than human finances? As the issue is presented, Rabban Gamliel has four options, each of which involves a transgression or loss of some sort:

1. *Unload the animal.* In doing so, the Jew would touch a *muktzeh* item.
2. *Loosen the ropes and allow the honey to drop to the ground.* This would save the animal from suffering, but cause the containers to burst. The cargo to be lost, creating a large financial loss (*hefsed gadol*).
3. Allow the honey to drop onto pillows. This would save the cargo and the animal, but cause the pillows to be made *mukzeh*, transgressing *m'vatel k'li m'haikhano.*

[37] B. *Shabbat* 154b.
[38] Since the honey was intended to be used as salve and not eaten, rendering it unfit for touching on Shabbat.

4. *Leave the cargo untouched.* This causes the animal to suffer, and risks its death.

The first option, unloading the cargo by hand, is not a real possibility since there are other ways to accomplish the desired end without physically touching the honey. Options two and three involve prioritizing צער בעלי חיים over a Rabbinic ordinance – either מבטל כלי מהיכנו or הפסד גדול, the notion that major financial loss can override other regulations.[39] If one believes that צער בעלי חיים is Torahitic, then only options two and three are available. The fact that Rabban Gamliel chose to leave the donkey loaded and ultimately to let it die from the burden leaves the Talmud with only one explanation: "He believed צער בעלי חיים to be Rabbinic." The Talmudic and redactors and *Rishonim* do not attempt to reconcile Rabban Gamliel with the accepted *Halakhah*. They simply admit that he disagrees with it, and they chastise him for his erroneous opinion and his transgression.

Although these later sources cannot quite admit it, Rabban Gamliel seems to have lived before the discussion was settled. In his time, his opinion was equally valud; only centuries later did the *Halakhah* crystallize into a commonly accepted form that gave the category Torahitic status. Nonetheless, later sages lambaste Rabban Gamliel for his course of action, since Jewish law came to prioritize animals' rights over Rabbinic ritual (or at least *this* Rabbinic ritual) and even over financial loss. Even if it was not universally followed, this prioritization of animal life over human comfort and financial success is worth pointing out as a viable Jewish attitude.

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[39] Options two and three reveal a disagreement over the prioritization of these two Rabbinic ordinances. Is one permitted to make an item *muktzeh* in order to prevent financial loss? The Maggid Mishneh (*Hilkhot Shabbat* 21:10) and others argue that the Rabbis allowed this, while the Ramban (*Hiddushei Ha-Ramban* Shabbat 154b, *s.v.* הא דעסקינן) and the Ritva (*Hiddushei Ha-Ritva* Shabbat 154b) argue very strongly that it is preferable to take the loss. What is important for our purposes, however, is that both of these regulations are Rabbinic.

D. For Animals or for Humans?

If צער בעלי חיים is in fact a Torahitic category of mitzvot, then its purpose seems evident: to prevent animals from suffering. There are indications, however, that in addition to this obvious goal it may also be designed to help humans prioritize their needs and urges and pursue them in an acceptable way. This argument over purpose – does צער בעלי חיים exist for human reasons or for animals? – rages in the philosophical literature and codes. On the one hand, the prohibitions against muzzling, plowing species together, and *Ever Min Ha-Ḥai* are clearly aimed at preventing animals' pain. Maimonides argues that *sheḥita* also belongs in this category, since it is the kindest way to kill, and he passionately describes the emotional anguish of a mother bird that sees her young taken away. He argues that humans should have pity and show kindness in not allowing lower creatures to suffer needlessly, and that this is the reasonable explanation for these commandments. Yet for others in Jewish discourse it is unthinkable that God would legislate out of the earthly qualities of pity and kindness. These characteristics apply to humans, but it is blasphemous to attempt to apply them to ineffable deity. This sentiment is indicated in a statement by the *Mishnah* that, "If a man said [in his prayer], 'To a bird's nest do thy mercies extend,' ... they put him to silence."[40] According to this way of thinking, humans simply cannot know the reasons behind the commandments, if there are reasons at all.

Maimonides condemns those who think this way for asserting that the mitzvot "are consequent... upon the will alone without being intended toward any end at all."[41]

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[40] M. *Berakhot* 5:3.
[41] *Guide of the Perplexed* III:26.

He calls them "people of weak intellects" who suffer from a "sickness...in their souls" and believe themselves superior to God, since they hold that the divine decrees serve no rational purpose.[42] For the rationalist philosopher, the fact that humans are capable of rational thought means that God must also be. To assert that the commandments – the expressions of God's will – do not come from Reason is to claim that human cognitive ability is superior to God's. *Tza'ar Ba'alei Hayyim* obviously has a purpose, and that purpose is what it reasonably seems to be. Yet those opposed to Maimonides do not exactly deny that these commandments exists for a reason, though they disagree profoundly about the nature of the reason.[43] For Nahmanides, the commandments "have been given only to refine men."[44] *Sefer Ha-Hinukh* similarly claims that "the purpose is not compassion but only to make us meritorious."[45] Hence the mitzvot of צער בעלי חיים are not actually intended to prevent animals from suffering. This is a worthy side effect, but the purpose is to train human beings to be more compassionate and less cruel. This is not technically a denial that the commandments have reasons, but it is a non-rational approach to the issue. For both Nahmanides and *Sefer Ha-Hinukh*, "there is a useful benefit available to us [in the mitzvot], but not to the One who ordained about them."[46] In other words, the benefit that derives from the commandment is not related to its nature; the mitzvot are not intended to allow humans to function optimally in the world, but rather as a didactic tool for bettering human nature. So the mitzvot might as well be irrational or random, since any benefit that society and human nature seem to derive from

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[42] Ibid III:31.
[43] We do not wish to enter here into a comprehensive discussion of *Ta'amei HaMitzvot*. This discussion is limited to the texts of the Ramban, Hinukh, and Albo on *Tza'ar Ba'alei Hayyim*. We do not even begin to attempt to describe in full the arguments of those opposed to Maimonides on the larger issue.
[44] Ramban to Dt 22:6.
[45] *Sefer Ha-Hinukh* 515.
[46] Ibid.

them is purely coincidental. This is the source of Maimonides' angst over this argument. It denies one of the principles that he holds most dear: that a Jewish lifestyle is inherently and rationally beneficial for the individual, for human society, and for the world.

E. Natural Law in a Positive System

By dichotomizing themselves, the sages ignore a third possibility: that *Tza'ar Ba'alei Hayyim* is intended for both human *and* animal benefit. Certainly it acts as a training mechanism, aiding Jews in making tough decisions that involve animals, but at the same time it undeniably benefits animals. Both of these are authentic Jewish approaches to the mitzvot, asserted by reputable sages throughout Jewish history. In fact, the *Halakhah* functions according to a combination of these two theories. The Rabbis of the Talmud seem to believe that mitzvot like *P'rikah* and *Ever Min Ha-Hai* come out of a sense of compassion and of the rights of animals as living beings. And although they are not quite as sure about the reason for *Shehitah,* it is still a binding and normative part of Jewish law.

In a way, the problem of צער בעלי חיים is the problem of Natural Law in a revelatory system. Because it is a value and not a statute, its function in the legal system is not as clear as it would be if the Torah commanded, "You shall be kind to animals." Indeed, the debate over the status of the value is warranted by a critical look at the Bible, because it is not entirely clear that the Torah is concerned with animals' suffering. The laws of *P'rikah, Shiluah Ha-Ken, Shehitah,* and even *Ever Min Ha-Hai* can all be explained as resulting from other goals or values such as gentile-Jewish relations, species conservation, and ritual purity. The fact that the Rabbis explain them using צער בעלי חיים

says as much about their own lives as it does about the Torah. Abhorring animal suffering is a universal value that comes to Judaism not by way of Revelation, but rather from human experience with animals in the real world. The *D'rabbanan/D'oraita* debate and the disagreement over the purpose of the mitzvot are indicative of the Rabbis' struggle to find a formal and philosophical place for this value in their Revealed system. There is no debate over whether the value exists at all; surely Rabban Gamliel would not have denied that being kind to animals is a good and proper thing to do, even though he rejected the notion that it held a legal status comparable to that of the divinely revealed Sabbath laws.

In this sense, the problems of צער בעלי חיים in *Halakhah* are the problems of integrating something that everyone knows but no one can quite explain. This category is an excellent example of the manner in which universal or outside values find their way into Jewish law. The place of such a notion can only be clarified over time, as the *halakhic* process labels and prioritizes, turning intuition into precedent and fluid into *fixed*. The uncertainty over the proper role of the category has never fully disappeared, but there is no question by the time of the *Rishonim* that this is now a Jewish value.

בל תשחית ... You Must Not Destroy...

A. The Tree Mitzvah

The confusion surrounding *Tza'ar Ba'alei Hayyim* stems in part from the fact that it has *halakhic* status but it is not exactly a mitzvah. This is also a problem with issues connected to הנה טוב מאד since the linkage of the categories with specific mitzvot is

secondary to their status as values. It is not the case, however, with the mitzvah of בל תשחית, "Do not destroy." Unlike the ideas discussed heretofore, *Bal Tash-ḥit* is a bona-fide Biblical commandment and its story is like that of any mitzvah: stated in the Torah, expanded by the Rabbis, codified in the post-Talmudic literature. What is most interesting in the case of this particular commandment is the way that it is handled in Rabbinic literature; the Rabbis and *Rishonim* come to *Bal Tash-ḥit* with an agenda. By divorcing it from its original context and purpose, they create what is arguably a truly conservationist commandment.

The source of the mitzvah is Dueteronomy 20, where the context is one of siege in the midst of warfare:

> When in your war against a city you have to besiege it a long time in order to capture it, you must not destroy its trees, wielding the ax against them. You may eat of them, but you must not cut them down. Are trees of the field human to withdraw before you into the besieged city (כי האדם עץ השדה לבא לפניך במצור)? Only trees that you know do not yield food may be destroyed; you may cut them down for constructing seigeworks against the city that is waging war on you, until it has been reduced.

At first glance, there are a number of possible reasons for the prohibition. It may be forbidden to cut down the trees because of their usefulness to you, or because doing so would be unfair to your enemy, or simply because it is inappropriate to destroy trees. Each of these opinions is discussed in the commentaries, with the disagreement being

based on the unclear final phrase of verse 19, כי האדם עץ השדה לבא לפניך במצור. Rashi reads the clause, "Are trees of a field human to withdraw before you into the besieged city?" And he explains this to mean that since trees are defenseless against human advances, "Why should you destroy them?!" In other words, trees are not the enemy and they have no recourse against human actions, so the prohibition exists in order to protect and preserve them. In a way, this is a truly Environmentalist explanation, since it prohibits destruction of the trees based purely on the trees' defenselessness and right to exist.

For other commentators, however, it is the utility of the trees that brings about the prohibition. Ibn Ezra reads it to say, "you must not cut them down, *for man is a tree of them field*," which he explains further, "the life of man depends on the trees of the field." In this understanding, the prohibition exists to prevent short-sighted human beings from destroying a natural resource in order to win a war. Even in a case where the enemy is surviving off of the trees, "you are forbidden to destroy them in order that the city will surrender" Ibn Ezra's explanation is anthropocentric and universal, since it forbids cutting down trees because they are a resource for humanity in general.

The Ramban, standing on Ibn Ezra's shoulders, particularizes the explanation further by allowing for destruction of the trees if the enemy is living off of them. For Nahmanides, then, the law is not concerned with resources available to all humanity, but rather aims at avoiding the destruction of things that are useful to the attacking army. In other words, the needs of the Jews (to whom the law is directed) are the central issue.

B. Beyond Trees of the Field

Each of these readings is plausible given the particularly difficult grammar of the Biblical phrase. But the comments of Rashi, Ibn Ezra, and Nahmanides reveal that they come to the issue with three different attitudes or approaches. These may be termed Natural, Anthropocentric, and Judeo-centric, since they aim respectively at preserving fruit trees for the trees' own sake, for human purposes, and for Jewish purposes. In the *halakhic* literature, much of this tension falls away and it is the intermediate, human-centered approach that comes to characterize the mitzvah of בל תשחית. This is largely a result of the fact that the Rabbinic mitzvah is expanded beyond war (so that there is no longer a question of specific Jewish needs vis-à-vis an enemy) and beyond fruit trees (so that a defenseless living thing is no longer the immediate concern). In fact, as it is understood in the medieval codes, *Bal Tash-ḥit* is largely about the needless destruction of any beneficial resources, anything that is useful to people.

Though the understanding present in the codes is gleaned from the Talmud, it is in the post-Talmudic *halakhic* literature and not in the Bavli that this mitzvah is largely defined. The most obvious development is that the mitzvah is understood to apply far the immediate situation described by the Torah. Maimonides, for example, acknowledges that "[this prohibition applies] not only to trees."[47] Rabbi Eliezer of Metz, in his *Sefer Yere'im*, gives two a *midrashic* and a *halakhic* proof for this expansion. The midrash:

> [From the Torah's text] I know only [that the prohibition against destroying applies to cutting down a tree with an] axe. From whence do I learn to expand it

[47] *Mishneh Torah, Hilkhot M'lakhim Umilḥamoteihem* 6:10.

to all things? The Torah teaches, "You shall not destroy her [the city's] trees" and from this we have learned not to destroy or cause the loss of anything.[48]

The *Yere'im* thus finds midrashic evidence in the Biblical verse itself that the mitzvah is intended to apply more widely. To this he adds the following incident recorded in the Talmud, in which בל תשחית is applied to various non-tree items:

R. Eliezer was asked: How far does the honor of parents [extend]? Said he: Should [one's father] take a purse and throw it in his presence into the sea, [the son should] not shame him.... [A related incident:] R. Huna tore up silk in the presence of his son Rabbah, saying, 'I will go and see whether he flies into a temper or not'.... But he [Rav Huna] violated, *Thou shalt not destroy.* – [He did not, because] he [ripped] it in the seam.[49]

The primary focus of this passage is not *Bal Tash-hit* but rather *Kibbud Av*. In fact, the Gemara judges that Rav Huna's act *does not* constitute a transgression of *Bal Tash-hit* at all, since a torn seam can be repaired. But from the very fact that it is raised as a possibility, the *Sefer Yere'im* learns that the prohibition against destruction applies to silk. In other Talmudic passages, questions of בל תשחית are raised regarding destruction of clothing[50] and furniture,[51] wasting heating oil,[52] killing animals,[53] and even consumption

[48] *Sefer Yere'im* Siman 382.
[49] *Kiddushin* 32a.
[50] *Shabbat* 105b, *Berakhot* 62b, *Baba Kama* 91b.
[51] *Shabbat* 129a.
[52] *Shabbat* 67b.
[53] *Hullin* 7b. In the passage, *Bal Tash-hit* is differentiated from *Tza'ar Ba'alei Hayyim* in that mutilating the animals would cause pain, whereas killing them would be wasteful destruction.

of expensive foods.[54] There is also an extensive literature regarding *Hash-ḥatat Zera*, destruction of sperm, which places restrictions – though not an outright ban – on non-procreative sexual relations, various birth-control practices, and the activities of women immediately following sex.[55]

The Talmud's references to *Bal Tash-ḥit* indicate that the Rabbis understand the mitzvah to apply to a large number of objects. There is some debate over whether this extension is actually part of the Torahitic mitzvah, as *Sefer Yere'im* seems to hold,[56] or a matter of Rabbinic decree, as in the opinion of the Rambam.[57] Either way, *Bal Tash-ḥit* applies far beyond trees.

C. Defining the Expanded Mitzvah

There is no official listing in the Bavli of items that fall under the prohibition. (It would not be the Talmud's style to be so straightforward!) However, the codes, based on the Talmud, discern two main criteria: the object of the destruction is one that provides benefit to humans, and the destruction is wasteful and without purpose. The idea of benefit is rooted in the Torah, which forbids cutting down fruit trees, but permits

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[54] Shabbat 140b.

[55] A passage from B. *Ketubot* (71b) allows a woman to refuse if her husband demands that she do a forbidden thing, such as "Fill and pour out on the rubbish heap." The Gemara, and later Alfassi, understand this cryptic passage to refer to strenuous activity immediately following sex, which would cause the seed to "scatter" and thereby prevent pregnancy. Talmudic law does allow birth control under limited circumstances (viz. *Yevamot* 12b and *Ketubot* 39a, which permit it to women who are pregnant, nursing, or minors), and it also permits a man to marry and have relations with a woman who cannot conceive (*Yevamot* 61a - the circumstances are very limited and disputed). Nonetheless, the Ritva explains that active destruction of seed that might have led to pregnancy – i.e. it was implanted into a fertile woman – is forbidden (see Ritva *Ḥiddush* to *Ketubot* 39a). This also applies to masturbation, and by extension any activity that could lead to spilled seed (*Niddah* 13a, *Shulḥan Arukh, Even Ha-Ezer* 23:6).

[56] The midrash quoted above indicates that Rabbi Eliezer understands the verse itself to contain the expansion.

[57] *Mishneh Torah, Hilkhot M'lakhim Umilḥamoteihem* 6. The Rambam holds that the Torah only forbids destruction of fruit trees, while other types of destruction are a Rabbinic prohibition and entail a different punishment.

destroying "trees you know do not yield food."[58] In the expanded version of the mitzvah, this comes to mean that the prohibition applies to any useful object. The *Sefer Yere'im* provides the principle for determining what is "useful": "any object whose loss is greater than its benefit."[59] In other words, it is forbidden to destroy something if one could derive greater benefit by keeping it intact.

This definition points to the second component: forbidden destruction is only that which does not serve some purpose. בל תשחית is not a blanket prohibition against breaking or discarding things; it forbids destruction performed *derekh hash-ḥatah*, for purely destructive purposes. If by destroying an object one can gain benefit that outweighs the loss, then the action is permitted. Thus if a tree is endangering human life or withholding resources from other trees, or if one can receive a higher payment for its wood than its fruit, it may be permitted to cut it down or trim it back.[60] It is in this context that the laws of *Bal Tash-ḥit* come into play vis-à-vis other mitzvot in the Talmudic literature. Since the fulfillment of a commandment is considered a benefit, this raises the possibility that some forms of destruction might be permitted if they are necessary for a mitzvah. This is specifically the case with *Keriyah* (rending the clothing in honor of the dead) and *Kisui Dam* (covering the blood of a slaughtered animal with ashes). *Keriyah* is a quintessential example, because although it is a mitzvah, it is also is an act of destruction. Since the act is a recognized religious obligation, there cannot be a question of gratuitous waste. However, the Mishnah, Gemara, and later *halakhists* work

[58] Dueteronomy 20:20. The Talmud and codes give an exact definition for "fruit bearing": the tree must yield a minimum of a *kav* of dates or a quarter *kav* of olives. See B. Baba Kama 91b and Mishneh Torah, *Hilkhot M'lakhim Umilḥamoteihem* 6:9.
[59] *Sefer Yere'im* ibid.
[60] These issues are discussed at length in M. *Baba Batra* chapter 2, along with laws requiring distance between potentially harmful operations and human settlement areas.

to limit the behavior since its destructive nature can so easily lead to transgression of בל תשחית. For example, the mishna on Moed Katan 24b insists that one may only tear his clothing for a close relative. The Ritva, looking at this ruling, understands that when *Keriyah* is carried out properly it does not constitute *Bal Tash-ḥit* because the mitzvah of *Kibbud Av Va'em* overrides the prohibition, whereas if one tears his clothing for someone of inappropriate distance (a friend or more distant relative), he has indeed transgressed.[61] All of this regulation reveals a mild discomfort with the destructive nature of the action, a need to control it so that it will not get out of hand.[62]

There are other examples of permitted destruction. The Talmud relates that it is acceptable to break an object in order to instill fear in one's household and produce *Shalom Bayit*.[63] Not surprisingly, the Rabbis find that *Pikuaḥ Nefesh* largely overrides the prohibition of *Bal Tash-ḥit*. They permit destroying a chair to light a fire (even on Shabbat) for someone who is ill,[64] a ruling that is held up in all of the commentaries and *Ḥiddushim*. In fact, when the Gemara[65] raises a question of whether Rabbah has transgressed *Bal Tash-ḥit* by having a footstool broken up for a fire, the Ritva assumes that Rabbah must not have been sick. So confident is he that *Pikuaḥ Nefesh* takes precedence, that he assumes from the very accusation that there was no imminent danger to Rabbah's life.

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[61] *Ḥiddushei Ha-Ritva* to *Moed Katan* 24b-25a.
[62] There is a similar discussion surrounding *Kisui Dam*, since the ashes needed for the mitzvah might necessitate something to be burned. The Talmud (*Ḥullin* 88b) and later *halakhists* (see especially *Beit Yosef* and *Siftei Cohen* to *Yoreh De'ah* 28:21) debate which items may be burned, whether there is an alternative to ashes, whether the worth of a shirt is equivalent to that of a chicken. Although they fail to agree on a solution, it is apparent that while such destruction may be permitted in some cases, there cannot be blanket permission to burn any object for this mitzvah.
[63] B. *Shabbat 105b*. Actually, the lesson of the *sugiya* is that breaking something to instill fear is prohibited on Shabbat, because it has a constructive purpose. From this, the *Yere'im* learns that it is not *Bal Tash-ḥit*, since it does not fit the category of *derekh Hash-ḥatah*.
[64] B. *Shabbat* 129a.
[65] Ibid.

This passage involving Rabbah and the footstool is exceedingly interesting, because it explores the relationship between *Bal Tash-ḥit* and human health/comfort, beyond the strict confines of the category of *Pikuaḥ Nefesh*. When accused of transgressing בל תשחית, Rabbah responds "בל תשחית דגופא עדיף לי" or "*Bal Tash-ḥit* with regard to my body is more important to me [than *Bal Tash-ḥit*]." In the Talmudic text, he may in fact be employing *Pikuaḥ Nefesh* to explain the destruction of the chair. However, in the Ritva's reading, Rabbah was not ill. Thus the scenario introduces a new category called *Bal Tash-ḥit D'Gufa*, inferior in force to *Pikuaḥ Nefesh* since there is no immediate danger to human life, but which may still outweigh בל תשחית. The exact circumstances are impossible to know; perhaps it was an extremely cold night, or perhaps Rabbah had a minor illness. Either way, he believes that human life, health, and comfort almost always take precedence over the prohibition against destruction.

D. A Human Mitzvah

This attitude is not surprising, since the entire category of "benefit" is based on the needs of humans. There is a prevailing sense in the literature that the mitzvah exists for human reasons, that it is intended to aid people in preserving now what they might need later. Therefore, human needs can override it when necessary. The mitzvah thus straddles the tension between satisfaction of immediate needs and preservation of resources. All of the Talmudic and post-Talmudic citations above are examples of halakhists' attempts to find the boundary, the point at which the benefits outweigh the losses and vice versa. This is the purpose of the regulation, and it is driven by a sense that humans are responsible for maintaining the gifts that they have been given on earth. The

behavioral assumption behind the *Halakhah* is, then, that people will act destructively by nature, that they are prone to acting out of anger, greed, impatience, and selfishness. Thus the commandment acts to control the influence of such on human behavior, substituting law and regulation as the controlling factors in a person's action. In fact, the Hinukh understands this entire enterprise as a way of "train[ing] our spirits to love what is good and beneficial and to cling to it."[66] Certainly the *Sefer Ha-Hinukh* has his own spiritualist agenda, but to the extent that this mitzvah is intended to help humans overcome their impulse to waste, use and destroy, it is exceedingly farsighted and perhaps even ecological at its core.

It would be simplistic, however, to claim that the Rabbis' aim is the preservation of nature. Rather, their goal is the preservation of resources – both natural and artificial. Just as the mitzvah departs from fruit trees to enter the realm of man-made objects, so does the reasoning behind the mitzvah lean heavily toward protection of those things that are beneficial to humans. Rashi's aggadic explanation, which asserts that one should preserve the trees simply because they have a right to exist and no way to defend themselves, finds no mention in the *Halakhah*. What is most interesting about the mitzvah, however, is the fact that it is a conscious Rabbinic creation; *Bal Tash-hit* is a radical departure from the context and intent of Deuteronomy 20, an attempt to create a larger good from a scriptural passage intended to deal with a very specific time and place. The fact that the framers of the *Halakhah* chose to construct it as such reveals that conservation and fair apportionment of resources are priorities in their eyes.

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[66] *Sefer Ha-Hinkuh* 529.

Conclusion

The three concepts studied herein suggest that the Jewish attitude toward nature and the earth involves such notions as conservation, appreciation, and protection, within a framework of protection human interests. It is tempting to proclaim that conservation, biodiversity, and kindness to animals pervade all of Jewish thinking, but it is important to point out that this is only one viewpoint in the tradition. Our first chapter revealed strong anthropocentric leanings in the same literature, ideas that enthrone man as the ruler of the created universe. Other texts, point to a deep distrust or antagonism toward nature because it distracts from human affairs:

> R. Jacob says, "He who is walking by the way and studying, and breaks from his study to say, 'How beautiful is that tree; how beautiful is that field,' Scripture regards him as if he has forfeited his life."[67]

Indeed, as Judaism developed in the late Middle Ages and into modernity, it generally became an "indoor religion;"[68] stressing study and prayer within the confines of the synagogue or the *beit midrash.* In fact, if one were to ask whether Judaism is an environmentalist religion, basing the answer only on the three concepts in this study, the response would still have to be negative. Rabbinic tradition has no unified system of

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[67] Avot 3:7. In some manuscripts the saying is attributed to Rabbi Shimon.

[68] Obvious exceptions abound, such as the naturalistic writings of Rabbi Nahman of Bratzlav. Ultimately, though, these only serve to highlight the indoor nature of mainstream Rabbinic Judaism in the late medieval and early modern eras, a phenomenon that undoubtedly contributed to the naturalistic leanings of the Zionist movement as a reaction.

goals or commandments that have to do with the environment and the earth. In fact, the three concepts examined in this chapter, often touted as proof of Judaism's "Environmental ethic," have little to do with one another in form, scope, or purpose. They are very different entities from start to finish: *Hineh Tov M'od* is a Torahitic value connected cursorily with some mitzvot, *Tza'ar Ba'alei Ḥayyim* is a universal value that has been read into the Torah and achieved *halakhic* status as a fairly powerful category of commandments, and *Bal Tash-ḥit* is itself a mitzvah. Nor can it said that the three are linked together philosophically or born out of the same value. There is some connection between *Hineh Tov M'od* and *Bal Tash-ḥit* in that both deal with the question of the human place vis-à-vis the earth's resources. But the concepts come from different places – the former from the value of the earth itself and the latter from the question of human need. Furthermore, *Tza'ar Ba'alei Ḥayyim* is not a resource issue at all, but relates rather to the intrinsic rights of living things. In a way, then, these three concepts embody tension between the contradictory principles of human centrality, animal rights, and dominance of God's wisdom over all else. There is no unifying legal theory of the earth in the Rabbinic sources, just as there is no מסכת האדמה in the Talmud or הלכות כדור-הארץ in the *Mishneh Torah*. Environmentalism as it exists today is a thoroughly modern ethic and worldview, and it is not surprising that premodern rabbis failed to think in its terms.

Nonetheless, the *Halakhah* examined here does contain a number of principles that are conducive to an ecological outlook, and it is even possible to isolate a pervasive attitude toward the earth from the texts. The most important and useful concept is the form of stewardship[69] represented by the concept of הנה טוב מאד: that the universe is God's perfect creation and possession, bequeathed one piece at a time to human beings

[69] We use the term not in its Christian sense, but rather to signify the Jewish notion discussed here

by means of the recitation of blessings. In fact, stewardship is a much better term for Jewish tradition than Environmentalism, because the Rabbis have no concept of a pristine, pre-human natural world. They do not view the existence of human society as a parasite or cancer on nature, but as part of God's plan for the world. There is, however, an idea in Judaism that human society *as it exists today* is an aberration from the perfection of the Garden of Eden, in which everything was provided and needs were filled without work. The world of Genesis chapters 1 and 2 lacks death, pain, slaughter/consumption of meat, agriculture, and manufacture of goods – the precise issues that are regulated by the laws studied in this chapter. It seems, then, that the theology behind the law is that creative human enterprise is necessary because of man's imperfections, since it allows man to function in a world in which his needs are not automatically provided for.[70]

When understood in conjunction with this stewardship conception, the other principles do begin to lend themselves to a kind of unified Jewish ecological thinking. The laws are intended to encourage human function in the world that is reasonable and beneficial. It is quite clear from the literature that although the Rabbis know nothing of Global Warming, they recognize that human activity can cause strain on animal and plant ecosystems and on human lifestyles. This is evident in the laws of Baba Batra regarding various kinds of "pollution,"[71] in Rashi's statement that urban living is "difficult" because "everyone lives there, crowded together, and the houses and close to one another

[70] The fact that these enterprises are absent from some Jewish messianic scenarios suggests that the absolute ideal of human life – beyond the hardships created by history and by human nature - may involve a kind of naturalism not really indicated in the Rabbinic sources. This is worthy of further study.
[71] Chapter 2 of *Baba Batra*..

and there is no air,"[72] in the ban against destroying and mixing species, and in the the prohibition against causing pain. While the Rabbis do not have a concept of human activity causing irreparable damage to the earth, they do attempt to regulate activities that cause damage to God's creations and to people's health and property. Just because we can do something, they tell us, does not mean that we should.

The common thread between the three concepts is control of human impulses in order to prevent needless pain, destruction, and change. Unstated behind all of this is the recognition that humans are very powerful. By virtue of their faculty of reason and their opposable thumbs, they have the ability to destroy and exploit: to cut down trees, and by extension whole forests; to mix or change species, and also to destroy them through hunting and habitat change; to cause pain to animals, and to exploit them for labor and food. In contrast to that vast power, the earth's other inhabitants are defenseless. In that sense, the fruit trees of Deuteronomy chapter 20 might serve as a paradigm, and Rashi's exhortation to spare them because they have no recourse might be applied to anything over which humans beings have power: animals, natural resources, species and ecosystems of the world, even the planet itself.

The existence of these laws betrays the assumption that humans are destructive and selfish by nature, that they are often led by their *Yetzer Ha-Ra* or evil impulse.[73] It is this combination of יצר הרע and immense power that makes people particularly dangerous to the world around them and necessitates the amount of regulation seen here. For example, the only reason for impassioned tearing of clothing to be viewed as dangerous

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[72] Rashi to Ketubot 110, *s.v.* ישיבת כרכין קשה.

[73] This is not the Christian concept of Original Sin, in which humanity is sinful by virtue of the Fall of Adam. Rather it is the notion that, as part of their divinely given Free Will, humans must constantly battle the internal evil impulse in their decision-making. For Jews, people are not sinful by nature, but are subject to the powerful sway of their normal human impulses.

behavior is that it might feed into the destructive impulse. Many of the actions regulated here, including mixing plant and animal species to create better ones and destroying things for monetary or other gain, come out of a selfish place that sets human needs over God's will or prioritizes current needs over future necessities. The Torah, with its controls on these behaviors, is the antidote to the very dangerous equation created by the combination of human nature and human cognitive ability. The goal of this antidote appears to be twofold. First, it is to regulate behavior by demanding adherence to the law. Beyond that, it is to change the emotions in the equation, replacing haughtiness and selfishness with a sense of awe for God's perfect creation, and substituting respect for animals and things in place of the impulse to destroy and exploit. This, in turn, ought to lead to the desired behaviors: honor, protection, conservation, and preservation.

Thus the "Environmental" *halakhot* are at once both prescriptive and didactic. They govern behavior, and they also encourage people to look upon the world as a product of God's wisdom and upon its resources as gifts to be used with care and managed wisely. As described here, the human role on earth is like that of middle management in a corporate model: people are empowered to direct, utilize and manage resources within a predetermined framework that will allow them to continue operation, but they are not entitled to make major changes to the operational model or usurp resources earmarked for other projects. The most useful Jewish paradigm for describing this is established by Genesis 2:15, "The Lord God took the man and placed him in the Garden of Eden לעבדה ולשמרה." The verse describes humanity's relationship with the earth as based on the best interests of both parties. People are entitled לעבוד, to develop the earth through agriculture, mining, and manufacture in order to build and maintain

society; but they are also charged לשמור, to conserve the land and its resources for others and for the future. Balancing these two tasks is the assignment of humanity on earth, and human society departs from its intended role whenever it desists from either one. Failure to care take notice of the environmental crisis is a sin against שמירה, while hunger and poverty are sins against עבודה. It may often be impossible to achieve both aims, but that should be the goal.

This sense of balance is, then, a guiding principle in questions of population. The Rabbis, with their anthropocentric worldview, do not believe in minimizing or eliminating the human footprint on earth. They assert, rather, that society must be able to sustain itself without changing God's handiwork or depleting all available resources. Ultimately, it is the responsibility of human beings to determine the point at which society can no longer maintain both itself and the planet.

Chapter 3: Ancient and Modern Concerns

Irreconcilable Worldviews?

By looking directly at Jewish philosophy and law, we have seen that the tradition includes a mix of universal anthropocentrism, particularistic concern for Jewish continuity, and principles that might be termed ecological or at least conservationist. It would therefore be simplistic and dishonest to claim complete that Jewish thought speaks clearly with any one of these three distinct voices.

Along these, lines, it is tempting for liberal Jews to assert complete harmony between Jewish thought and the modern Environmental movement by promoting the notions explored in our second chapter. In reality, though, there has traditionally been a deep divide between these two systems of thought, on both the philosophical and political levels. The philosophical divide revolves around basic attitudes toward the human station on earth. The Jewish outlook, based upon conceptions of the Ladder of Nature and colored by the Creation narrative of Genesis, separates humanity out from the rest of the created world. This "hierarchical" approach,[1] which we analyzed in some depth in our first chapter, emphasizes that humans are other than – indeed superior to – nature. The *Tzelem Elohim* so prized in Jewish philosophy is precisely the feature that elevates humanity out of the natural world, since it gives people the ability to make moral choices while nature is largely amoral and lacking in free will. This sense of superiority, coupled with the Biblical dictum to "subdue" the earth, stands in contradistinction to the modern,

[1] We are utilizing the terminology of Eilon Schwartz, who terms the two worldviews "hierarchical" and "egalitarian."

secular notion that human beings are wholly part of nature. Taking an "egalitarian" approach,[1] scientists have argued that humans are connected to the natural world at even the most basic levels. This means not only that they are evolutionarily related to animals, but also that their social and cognitive functions are related to those of other life forms. For example, the work of biologist E. O. Wilson, which asserts that human behavior is influenced by genetics and instinct and not only by cultural learning, has chipped away at the notion of Free Will.[2] By implication, the Egalitarian approach asserts that human lifestyle and health are organically connected to that of the planet, that that humanity can only survive by recognizing its niche on earth and living within it. It rejects completely any notion of a human destiny apart from that of the natural world or of a divine role granted by God to the human race.

Indeed, Environmentalism has traditionally been the domain of the Secular Humanist. Recognizing the above dichotomy, many of its adherents have maintained a deep animosity toward traditional religion and its assumptions. In his article "The Historical Roots of Our Ecological Crisis," Lynne White, Jr., calls Christianity "the most anthropocentric religion the world has seen" [3] and blames it for Western civilization's "implicit faith in perpetual progress"[4] and preoccupation with technological advance. He goes as far as to assert that medieval Christian thought "insisted that it is God's will that man exploit nature for his proper ends."[5] A discussion of Christian theology is outside of the scope of this paper, but White's biting accusations might also be applied to Judaism. Though his critiques are exaggerated and ignore any positive ecological ideas in religious

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[2] Wilson's notion of the "genetic leash" is expounded in his 1998 work *Consilience: The Unity of Knowledge.*
[3] White 4.
[4] Ibid 3.
[5] Ibid 4.

literature, the assertion that Western religious assumptions often place human needs above animal life and the natural world, and that those assumptions are deeply embedded in Western society even today, is deserving of contemplation by serious Jews and Christians in the twenty first century. Surely the anthropocentrism of Christianity and Judaism have contributed to the self-serving notions responsible for the current ecological crisis. Indeed, the call for reassessment of values has begun to resonate in religious communities, even if they cannot fully accept a point of view that paints human beings as merely one more animal species.

Yet for White the religious worldview is "in absolute contrast" to the pagan tradition, which in his romanticized version asserts that man is merely a part of nature. E. O. Wilson, for his part, has called Scientific Humanism "the only worldview compatible with science's growing knowledge of the real world and the laws of nature."[6] Ultimately, the deep divide between the religious and humanistic traditions, based upon their differing conceptions of the human role and destiny, may not be bridgeable. Indeed, it is not clear to what extent it is possible to reconcile the traditional Jewish worldview with an Egalitarian model that views humans as wholly inside nature. The concepts of divine will, morality, and free choice are so powerful and so necessary – even for the most liberal of Jewish thinkers – that Judaism cannot stomach the assertion that they are figments of religious imagination.

Connections between Judaism and Environmentalism

[6] Wilson, *Harvard* 33.

In a sense, then, Judaism can never be fully squared with a Humanistic Environmental point of view, since it cannot accept a philosophy that regards civilization as an aberration from the intended human niche or views humans as wholly animal.[7] It can, however, be reconciled to the pragmatic reality of the Environmental movement, which accepts humanity as a lasting and unique presence on earth and works from the assumption that human beings are capable of living in the world, even in relatively large numbers, without destroying it. This is something of a compromise between the hierarchical and the egalitarian: the idea that humans are separate from nature gives sanction to society's continued existence, but the assertion that people are inextricably tied up with their environment gives rise to the conclusion that humans can only thrive by maintaining the health of the earth. Therefore, working to save the environment is partly an act of human self-interest, since people are only healthy in a healthy world. This compromise view known as Sustainability, which seeks to protect both human and natural interests at the same time, is central to Environmentalism.

In its simplest form, sustainability is the notion that human consumption of renewable resources should be less than nature's ability to replenish, so that sufficient resources will always be available. The results of this way of thinking have been such familiar policies as emissions reduction, land management, and efforts to avoid overfishing and depopulation of species. In a sense, this is deeply anthropocentric, since a loss to the environment is a loss to humanity's ultimate quality of life. Indeed, the United Nations policy of Sustainable Development is intended to "meet the needs of the present generation without compromising the ability of future generations to meet their own

[7] We do not intend to imply that White and Wilson hold these views. Rather, these are extreme examples of an "egalitarian" worldview, just as callous disregard for the planet's health represents an extreme "hierarchical" worldview.

needs."[8] But there is also a sense of responsibility to the planet – its species, habitats and ecosystems – independent of any specific human need. There is thus a tension between conservation of resources for human needs and preservation of the world for its own purposes, between the anthropocentric and the ecological, in both Environmentalism and in Jewish tradition. Both traditions show attempts to maintain equilibrium between human and natural needs. This is embodied in the Jewish paradigm of *L'shomrah Ul'ovdah*,[9] and it is the very definition of Sustainable Development.

The potential connections go much deeper, warranting a more detailed study of the Environmental movement's specific concerns. Within the overarching worldview of Sustainability reside a number of familiar issues and problems, including hunger and farming practices, Global Warming, pollution, energy policy, and many others. These very modern questions might be divided loosely into three categories: [10]

1. Natural health
2. Human health
3. Resource management

As we will attempt to demonstrate, the concerns of each category are present in Judaism to some extent, despite great differences of worldview and situation.

1. Natural Health

[8] *Our Common* Future (Report of the Brundtland Commission).
[9] See our analysis in the conclusion to chapter 2.
[10] We have attempted, for purposes of our argument, to boil down the Environmental movement into its categories of concern. We recognize that this description is simplistic and that interconnections exist between the categories, but we maintain that these three categories suffice to describe the major concerns of Environmentalism.

The category of natural health includes such issues as conservation of natural features, preservation of biodiversity, and prevention of deforestation and Global Warming. These concerns are driven in modernity by the idea that nature is beautiful, good, and valuable in and of itself, that geological and evolutionary within nature cause it to continually improve itself. Science, then, asserts that species and ecosystems have designed themselves to work together in certain ways, just as the Rabbis believed that God created a wisely functioning universe. Particularly for the liberal Jew, who reads the creation story as metaphor and is open to scientific theory, there is an undeniable correlation here: both traditions believe that the world is טוב מאד and that people should be extremely careful about changing the workings of the natural world.

It is crucial, however, to note the difference between "perfect" and "very good." For the Rabbis, the world's perfection is a result of God's perfection, but this cannot be so in a secular system. Evolutionary thinking implies a potential for additional natural improvement as well as room for humans to make non-invasive changes, but הנה טוב מאד says that the world is already perfect the way it is. In other words, while secular Environmentalism calls on humans not to destroy a species or feature of the natural world, Jewish philosophy also prohibits the creation of new ones. Thus the processes of grafting and engineering that are often viewed in modernity as successful ways to fill human needs while safeguarding nature might be condemned in Judaism as changing God's creation. This is an important distinction, which informs each system's understanding of the universe's nature as well as its view of people's role in the universe. Implicit in modernity, and absent from Judaism, is a sense of the importance of human progress. With all of its reservations about the detriment that human activity causes,

modernity still holds fast to the idea that technology – be it sustainable farming or renewable energy – can aid in alleviating the current environmental crisis. Indeed, those voices calling for an end to technological advance have been consistently overshadowed by those that seek to use science and technology to allow people to live in greater harmony with the earth. On the other hand, Judaism is by its very nature wary of human attempts to harness and change nature, both because God's wisdom is inherent in the perfect natural world and because people are prone to error and evil intent.[11]

What is clearly shared, however, is a sense that humans are responsible for preserving the state of the natural world. It is out of this notion that Jewish law prohibits changing any species, wasting resources or destroying anything useful. It is from this idea that Environmentalism was born – as a late nineteenth century push to conserve nature by establishing parks, nature refuges, and national monuments – and from which it has developed a sophisticated understanding of the need to protect nature from human activity, and a great awareness of the importance of the environment on human health.

2. Human Health

If conservation of nature were the end of Environmentalism, there would be no place for any human activity on earth. Instead, the needs of humans serve as a kind of foil to natural health. Judaism, too, unabashedly maintains the belief that that humans have divine permission to farm, build, and otherwise use the earth's resources in order to create a healthy, thriving society. Indeed, the needs of people are central to both Jewish

[11] In fact the Rabbinic mindset is one of ירידת הדורות, in which each succeeding generation, moving further and further from the Sinaitic revelation, is inferior to the generation before it.

and Environmentalist thinking regarding the planet. In modernity, this is apparent in the concern over pollution, which is an issue of human health as much as it is of natural health, as well as questions of nutrition and hunger. At first glance, the latter are merely human issues, but society's ability (or inability) to feed large numbers of people in a sustainable way impacts greatly on the environment as well. Thus one focus of Sustainable Development policy has been in finding high-yield, low-impact farming techniques capable of feeding a country's population without depleting its resources. In a more primitive way, Jewish tradition attempts to safeguard human health and needs by regulating the locations of business that cause pollutants,[12] by mandating programs that feed the poor, and by distinguishing הפסד גדול, major financial loss, as an important category in *halakhic* decision making.

Recognition of the conflict between human economic needs and caring for the earth is important in both systems. It goes without saying that the needs of the planet very often clash with people's ability to make a living. In the twenty-first century this is obvious in small issues like as the higher price of hybrid-technology cars and large areas like the conflict over "slash and burn" farming practices in developing countries. Both of these issues pit people's pocketbooks against responsible ecological choices, and *Halakhah* also tackles the issue: the second chapter of *Bava Batra* regulates the point at which a tree may be chopped down in order to save a farmer's crops; *Shabbat* 154b discusses Rabban Gamliel's choice to kill a donkey in order save his dry goods. Economic realities are front and center in Jewish legal decision making. Indeed, while the majority of commentators argue that Gamliel should have somehow set aside Shabbat to save the donkey, they do not condemn him for trying to protect his economic interests.

[12] B. *Bava Batra* chapter 2.

The financial angle is important because human economic success ultimately means human survival. Every question of הפסד גדול, in the Talmud and in modernity, is really about a person's continued ability to feed his family. *Halakhic* regulation of human agricultural and economic activity – *Shiluah He-Ken*, the Sabbatic year, and others – is about balancing the drive to provide food with the health of the planet. This is also a central feature of Sustainable Development.

3. Resource Management

Balance is the key concept in all of these issues. For all of the attempts to reduce the human footprint on earth, implicit in Sustainability is the recognition that consumption of energy, food, plastics, and other materials is as crucial to human society as it is detrimental to the planet. Therefore, only by successfully conserving, reusing, and recycling various resources, can people potentially fill their own needs without stripping the planet of its ability to sustain life. In a way, resource management is the key to all of the environmental issues discussed here, to maintaining natural health and human health at the same time. This is why it is so important that בל תשחית, the prohibition against wanton destruction, is present in Jewish law. Resource management is, in both traditions, a crucial way of achieving the necessary balance. Even though the Rabbis do not possess a true environmental ethic – indeed they fail to draw any real connection between the act of conserving (בל תשחית) and the existential "goodness" of the world (הנה טוב מאד) – their dismay at the idea of needless waste is an important point of connection with the Environmental movement.

The Stakes Have Changed

Yet בל תשחית is not true Environmentalism. Although the Rabbis abhor waste, they have never called for recycling programs or demanded that one use as little oil as possible in the Hanukkah candles.[13] In fact, a close look reveals no mention of saving for future generations, no concern with finite resources. The absence of these issues reflects the Rabbis' concerns, which are clearly very different from those of modern society. In the previous chapter, we introduced an equation that describes the Jewish view of the danger that people pose to themselves, others, and the world: *Power + Yetzer Ha-Ra.* The "power" described here is the cognitive ability that allows people to build and harness nature, and also to make moral decisions rather than living by instinct. *Yetzer Ha-Ra*, the evil impulse, is what leads them toward the kind of behavior that can be a detriment. Jewish law, we have said, is intended to control behavior so as to neutralize this equation.

A similar equation, designed to describe the dangers that humans pose to the planet, exists in the discourse of Environmentalism. It combines human lifestyle choices (with an unstated assumption that people have great power to affect the earth) with the sheer number of human beings on the planet: *[Power +] Population + Lifestyle Choices.* A comparison of the two equations will reveal major differences between the premodern

[13] The one Rabbinic call for conservation occurs in B. *Shabbat* 140a, wherein consumption of expensive food is deemed a transgression of *Bal Tash-ḥit*. However, this applies only to the poor, showing that it is related to human economic realities and not to ecological awareness.

and modern situations, and shed light on the usefulness of applying Jewish texts to the current environmental crisis.

1. Power

The "power" of the second equation is similar to that of the first. It is the human intelligence that allows people to harness, and change aspects of nature. In fact, every life form, even those very low on the evolutionary scale, can change its surroundings to suit its own needs.[14] People, too, have always left behind a significant mark on the planet. Yet in the modern world this power is of a very different nature and has a very different effect. The consequences of human activity in the modern world are exponentially more detrimental than those of any other species or era. Lynn White, Jr., describes it as follows:

> When the first cannons were fired, in the early 14th century, they affected ecology by sending workers scrambling to the forests or mountains for more potash, sulphur, iron ore, and charcoal, with some resulting erosion and deforestation. Hydrogen bombs are of a different order: a war fought with them might alter the genetics of all life on this planet. By 1285 London had a smog problem arising from the burning of soft coal, but our present combination of fossil fuels threatens to change the chemistry of the globe's atmosphere as a whole, with consequences which we are only beginning to guess.[15]

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[14] Lynne White, Jr., uses the example of coral, which unintentionally creates "a vast undersea world favorable to thousands of other kinds of animals and plants" by "serving its own needs" (1).
[15] White 2.

White explains the difference as a result of the mid-nineteenth century "marriage between science and technology"[16] that changed to focus of science from understanding nature to controlling nature through technology. By applying scientific knowledge to its attempts to harness natural resources, humanity created the Industrial Revolution, automation, and computers, not to mention bigger and better weapons. Thus the ability of the human race to affect its environment – natural features, ecological characteristics, even genetic and chemical makeup – is today greater than Rabban Gamliel or Maimonides could ever have imagined.

2. Population

An equally important effect of nineteenth and twentieth century technological advance is larger numbers of people on the planet. By virtue of our ability to provide adequate resources, the human population has grown exponentially, which in turn creates more consumption. This factor creates a sense of urgency surrounding resource management that is not found in the Talmud or the codes.

Indeed, the Jewish tradition knows of no overpopulation crisis. If anything, *Halakhah* is designed to encourage *increased* population growth, at least among Jews. There has always been a concern that Jewish numbers were too small, owing to persecution and forced conversion. In modernity, though, this has been exacerbated by unprecedented threats to Jewish continuity. At the same time that human numbers have begun to put pressure on the environment, major events of the past century have catapulted the issue of *underpopulation* to center stage for the Jewish community. The Holocaust, assimilation of the Jewish population in America, and the ongoing threat to

[16] Ibid 1.

Israel's existence have brought out new particularistic concerns to counter the universal concerns of overpopulation in modernity. This yields among some Jews the confusing and self-contradictory belief that while the planet needs fewer people, it needs more Jewish people. This is indeed a family-planning conundrum for those who are both environmentally and Jewishly attuned.

3. Lifestyle Choices/Yetzer Ha-Ra

The final factor in the equation may be the most important. While issues of power and population play an important role, both Jewish tradition and modern Environmentalism assert that humanity's choices determine its impact on itself and on the environment. They also recognize that people cannot always be trusted to make responsible choices. Whether this is due to *Yetzer Ha-Ra* and selfishness is a matter of terminology; ultimately these are many words for the same phenomenon. Indeed, of the three components of the equation, this one – human nature – is the only one that has not changed with the dawn of modernity. People have always been stubborn, slow to change, and prone to irresponsible choices. At the same time, this factor is also the largest variable in that it can be affected greatly by alteration of attitudes and by regulation of behavior. Jewish law and the Environmental movement thus share a common goal: to change people's choices through education and legislation.

Conclusion

There can be no doubt that the modern situation presents new and greater concerns to the environment. Indeed, with the exception of human nature itself, all of the various human factors that endanger the environmental have been exacerbated as a result of technological advance. A similar exacerbation exists regarding Jewish population concerns, particularly because of the Holocaust. The ancient fears about Jewish continuity, which are present in each generation, have been greatly heightened by the enormity of Jewish loss in the twentieth century. The result of these events is that we can now speak of an environmental *crisis* and a Jewish continuity *crisis*, where previously there was only concern or danger.

An additional intensifying factor is the global nature of modern social awareness. Today every issue is larger than it has ever been before, because people are able to see a bigger picture both statistically and anecdotally. Rabban Gamliel worried about a donkey, but a twenty first century person worries about rainforests, the atmosphere, and the planet. Medieval Jews were concerned with the survival of a town or community, but the modern Jewish community speaks in terms of global Jewish continuity and the potential disappearance of Judaism altogether. The fact that the world has become smaller and less mysterious gives it a greater sense of fragility, whether real or perceived.

Understanding the major scientific, political, and philosophical changes of modernity may aid in explaining the difference in worldview between the two systems in question. The Rabbis are not ecologically attuned because they do not live with an ecological crisis. They view human beings as separate and above other forms of life because their scientific knowledge is insufficient to tell them otherwise. The Rabbis were not modern people, and cannot be expected to have embraced modern ideas. At the same

time, the tradition that they created contains many of the values necessary to approach the modern situation. This is precisely what the Jewish religious movements of the contemporary period must do.

It is impossible to know how thinkers of the second, sixth, or even fifteenth centuries might have reacted to the circumstances of modernity, whether they would have clung to old notions or embraced new ones. However, Jews of the most recent centuries were indeed faced with these dilemmas, and they reacted to modernity with varying amounts of openness. In fact, the extent to which one allows outside concerns to color his religious beliefs and practices is a central determining factor in one's place on the Jewish religious continuum in modernity. It is possible, then, to use the juxtaposition of these values of population and ecology as a test case for discussing the quantity and type of influence that non-Jewish (historical, scientific, universal) concerns might have on the formulation of *Halakhah*. Because the various Jewish movements have such differing approaches to the development and application of Jewish law, however, such a study must look seriously at both Orthodox and liberal *halakhic* works.

Chapter 4: Modern Responsa

The focus of the study has begun to shift from premodern ideas to modern realities. In the first two chapters, we attempted to describe the ideas, theologies, and legal devices present in Jewish *halakhic* and philosophical literature vis-à-vis two very different values. In the third chapter, those ideas came directly up against the vastly altered landscape of modernity, raising the question of whether the Rabbinic sources can fully address a modern situation entailing realities unknown to the Rabbis.

This mismatch creates a challenge. How can a modern Jew who wishes to take Jewish law seriously best apply ancient texts to new situations? In exploring this question, it is worthwhile to look in depth at the manner in which Jewish scholars in modernity have addressed the issues of procreation and the environment in their *halakhic* writings. This chapter will consist of analyses of four different *teshuvot* and articles dealing *halakhic*ally with these issues, each of which was composed by a central figure of Ultra-Orthodox, Modern Orthodox, or Reform Judaism. In looking at each text, we have attempted to analyze it on the basis of several methodological criteria: its attitude toward and usage of *halakhic* source and extra *halakhic* (i.e. historical, scientific) information, the way its author deals with difference of opinion between *halakhic* sources, and whether the *teshuvah* entails – or should entail – some prescription for Jewish life.

These particular articles are interesting because they represent diverging official responses to similar issues. Each reflects the values of its form of Judaism, as well as the role played by Jewish law and modern values in its decision-making process. In fact, in moving down the spectrum from Ultra-Orthodoxy toward Reform, one finds increasing

openness to modernity with its science, its history, and its liberal values of equality and interconnectedness. In each of the responsa from the Reform movement, the issues and questions of modernity play some central role – sometimes as defining values and other times simply as the impetus for the raising of the question. In fact, we will see that both Lauterbach and the author of the Environmentalism *teshuvah* attempt to ground their notions in the text, but at the same time they are operating from an assumption of the validity of such modern ideas as Birth Control and an environmental crisis. On the other hand, the Orthodox thinkers, though they may speak the language of modernity, begin from a place of suspicion toward it. Their worldview, articulated by Ovadiah Yosef in the *teshuvah* to be discussed below, places the people of Israel at the center of a social structure defined largely by the traditional Jewish understanding of God's will. From that vantage, it is very difficult to enter into a discussion of universal human interconnectedness or the notion of sacrificing for the human race.

Hence the differences of opinion and methodology in the responsa result largely from the place from which each enters the texts. Each of these authors has at his disposal the same *halakhic* tradition. In fact, Tendler and Lauterbach even make use of some of the same texts! Their conclusions reflect not only a diversity of values and worldviews, but also the perspective from which each author asks his questions and, accordingly, what he needs the tradition to do.

Ovadiah Yosef: Describing the Worldview of an Ultra-Orthodox Posek

Rabbi Ovadiah Yosef, the former Sephardic Chief Rabbi of Israel and spiritual leader of the conservative Shas movement, is considered one of the great *poskim* (Jewish legal decisors) of the current generation. For this reason we utilize him here as a central example of Ultra-Orthodox thinking. Certainly it would be unfair to claim that he speaks for anyone besides himself in his responsa, but his reputation for *halakhic* genius speaks to the fact that his worldview is shared by many others.

"Worldview" is a term of central importance here, because the Ultra-Orthodox way of looking at the world is part of what can be learned from this *teshuvah*. In fact, the responsum does not speak directly to the issues of procreation and ecology at all, but rather explores the law regarding reading *Parashat Zakhor* to women. At first glance, the subject of *Zakhor*, which recalls the actions of Amalek in the desert, has little in common with the issues in question, but the mitzvah of פריה ורביה plays a fairly important role in the responsum as a point of comparison to *Zekhirat Amalek*. This is likely because the issues of gender and Jewish continuity, which are so central to the responsum's main question, are also intimately linked with procreation. Yosef's numerous references to the applicability of פריה ורביה to women, Jewish slaves, and gentiles are infinitely useful in a study of the Ultra-Orthodox attitude toward the population issue.

Even more importantly, the *teshuvah* is a virtual manifesto of the way that the rabbi and those who share his values see the world. Yosef addresses a number of the underlying issues present in our study, including universalism and particularism, gender roles, land and ownership, and even the relationship between history and *Halakhah*. Through an analysis and close reading of a number of sections of the *teshuvah*, we shall find that his worldview is the very epitome of particuarlism. His tendency is to divide

groups of people – women and men, Jews and non-Jews –based on the responsibilities and the privileges that they possess.

A. נאמרה לישראל ולא לבני נח: Israel and the Nations

1. Confronting Universalism in Jewish Tradition

The issue of Amalek is not one that lends itself to universal thinking; at its core, it is about ethnic warfare. The fact that Yosef uses this as an entrée into a discussion of Jew and non-Jew is revealing of his *halakhic* conclusions and his particularism. Yet Jewish tradition is not devoid of universal sentiment, and the rabbi is forced to deal with that strain of thought also. He does so particularly in reference to a passage from the *Tosafot* which, in discussing whether slaves are required to procreate, makes the provocative statement that, "פרו ורבו is written regarding all *B'nei Noah*, including the Canaanite."[1] Following is Yosef's response:

> The Maharsha wondered about the *Tosafot*'s words, because of [the belief] that the mitzvah of פרו ורבו was said to Israel and not the *B'nei Noah*, as it says in *Sanhedrin* (59b).... These words [in the *Tosafot*] were not said mindfully, since it is known that any mitzvah that was said to *B'nei Noah* and not repeated at Sinai was intended for Israel and not for *B'nei Noah*, that is to say from Sinai onward. For when they arrived at Sinai, Israel who had emerged to holiness maintained their prohibition, but as for the non-Jews, [God] removed it from them. It is

[1] *Tosafot* to Hagigah 2b, *s.v.* לא תהו בראה..

explained in Rashi's commentary (*Sanhedrin* 59b). And if so, it is obvious that before Sinai the mitzvah of פרו ורבו was incumbent on all of the *B'nei Noah* [but afterwards it applied only to Israel]. [2]

It is not clear what the Tosafists intended to convey by their statement, but we have seen that there is a universalist philosophical strain that ascribes to all human beings a right and/or responsibility to populate the world through procreation. Yet the normative *Halakhah* has taken a very different direction, and Yosef's reaction to this statement on a Talmudic page is, like that of the Maharsha, bewilderment.

The discussion in tractate Sanhedrin, to which Yosef alludes in the above paragraph, is central to this argument, since it provides both a *halakhic* principle and a narrative to explain why Jews and non-Jews are not subject to the same religious law. The principle established there reads, "Any mitzvah that was commanded to *B'nei Noah* and repeated at Sinai was commanded to both [Israel and the nations. But any mitzvah that was] commanded to *B'nei Noah* and not repeated at Sinai was commanded [only] to Israel." Thus the mitzvah to procreate applies only to Jews, since it was commanded to Adam and Eve and to Noah and his sons, but then commanded again at Sinai. Rashi explains further:

All that was not repeated at Sinai was said [commanded] to Israel and not to *B'nei Noah* from Sinai onward – even though until Sinai they were commanded regarding it – since it was not taught again at Sinai, as were idolatry and sexual perversions for which we have found gentiles being punished. We learn from this

[2] All Yosef translations are mine.

> that Israel who emerged to holiness maintained their prohibition, but as for the gentiles [God] removed theirs from them. And the above refutes [the contradictory theory] that those [prohibitions] that were not repeated are prohibited to *B'nei Noah* and not Israel, for there cannot be anything that is permitted to Israel but prohibited to the gentiles. When Israel emerged out of the descendants of Noah, they emerged to be made holy and not to leniency.[3]

The Gemara points out that Israel's laws are necessarily more stringent than the Noahide laws,[4] but it is Rashi who overlays this point with the powerful image of Israel emerging out of the nations into holiness. According to his *aggadic* tradition, there is an existential difference between the Jewish people and the nations of the world: Israel is *more holy*, and that level of holiness automatically entails added legal stringency. Thus a legal distinction becomes a question of the people's status in God's eyes.

2. No Common Destiny

This distinction colors not only Ovadiah Yosef's attitude toward the laws of procreation but his entire worldview. He rejects the notion – so important in modern thought, including Environmentalism – that all people all on earth share a destiny and thus are responsible to one another. Instead, he views Israel as possessing a destiny separate and disconnected from that of the other nations. This he makes clear in section 18 of the *teshuvah*, which discusses whether the mitzvah of *M'hiyat Amalek*, erasing or destroying Amalek, is applicable today or only in Messianic times. This section centers

[3] Rashi on B. *Sanhedrin* 59a, *s.v.* לזה ולזה נאמרה.
[4] B. *Sanhedrin* 59a, further down the page.

around a passage from Sanhedrin that prioritizes crowning a king over destroying Amalek. This prioritization, according to the *Sefer Yere'im*, automatically places the Amalek mitzvah in Messianic times:

> *Sefer Mitzvot Gadol* (negative commandment 226) wrote, "This commandment [erasing the memory of Amalek] applies in the Messianic time and after the conquering of the land, as it is written, *When Hashem your God has placed you [in the land]... erase the memory of Amelek.*" And it seems that he believes similarly to what the *Sefer Yere'im* wrote (mitzvah 299). [The *Yere'im*] brought, in discussing this mitzvah, what was said in *Sanhedrin* (20b), "Three mitzvot were commanded to Israel when they entered the land: to establish themselves a king, to cut off the descendants of Amalek, and to build the chosen house [Temple]. I do not know which of these [is to be carried out] first; when Scripture says *Hand upon the throne of Yah, [YHVH will be at eternal war with Amalek]*[5] it says to establish themselves a king first. For 'throne' can only refer to a human king, as it is written, *Solomon sat on the throne of YHVH.*"[6] And the *Yere'im* concluded thus, "We have learned from here that the commandment to erase Amalek is incumbent upon the king, and not on the rest of the men. For scripture makes clear *Hand upon the throne of Yah*, meaning, When you have fulfilled 'on the throne of Yah' – that is to say [established] a kingdom – then carry out Hashem's war on Amalek. And according to this, since in our time Israel has no king, this commandment does not apply until the Messianic times."

[5] Ex 17:16
[6] I Ch 29:23.

Read in context, the *baraita* on *Sanhedrin* 20b, actually refers back to the moment in which the Biblical Israelites stood ready to conquer the land.[7] Yet the composers of the codes, and Ovadiah Yosef after them, choose to read it as referring to a future reconquering of the land, thus connecting the killing of Amalek with an eschatological scenario involving the Jews' reemergence from the nations and return to their own land. This kind of messianism is a kind of reenactment of Rashi's יצאו לקדושה, in which the Jews separate themselves out from the nations and "emerge to holiness" once again.

3. Israel: The People of Mitzvah

By rejecting the universal, by defining what Israel is *not*, Yosef has also revealed a great deal about what he believes Israel *is*. The texts translated above define the Jews as a holy people connected to a land, separated out from the other nations of the world by virtue chiefly of mitzvah. It is the commandments – received at Sinai and binding at least until the coming of the Messiah – that define the Jewish people and the Jewish relationship with God. Just as God is infallible and beyond history, so are the mitzvot affected little by events in the world. Yosef uses this reasoning to reject the notion that *M'hiyat Amalek* should be tied exclusively to the messianic future. Quoting Rambam near the end of section 18:

> "Would you think that when Hashem (Be He praised) destroys the seed of Amalek and exterminates them to the very last – as it will be quickly in our days,

[7] Rashi (B. *Sanhedrin* 20b, *s.v.* בכניסתם לארץ) connects the words "when they entered the land" with the events of Deuteronomy chapters 17 and 25.

> as he promised us 'I will surely erase the seed of Amalek' – that it is not for all generations?! This we surely would not say. Rather it applies in every generation. As long as there exists a descendant of Amalek it is a mitzvah to destroy him and exterminate him."[8] He [Rambam] proves that the mitzvah of erasing the memory of Amalek applies to all generations [and not merely to the past], even though Sannacherib already mixed up all of the nations. For if Elijah comes and says "This man is from the seed of Amalek," it is a mitzvah to kill him and exterminate him from the world.

The mixing of the nations is the quintessential universalizing event, for it erases ethnic distinctions. In fact, this event makes it impossible to carry out a mitzvah such as *M'ḥiyat Amalek*. But Yosef's notion is that the mitzvah maintains validity because the coming of the Messiah will reestablish those distinctions. All at once he indicates the immutability of the mitzvah system and rejects any modern concept of history as moving forward and away from the past.

B. אותו ולא אותה: Gender Roles and Social Status

1. "Commandedness" as an Operative Category

The centrality of mitzvah is a crucial point in understanding not only Ovadiah Yosef's worldview, but the whole of Rabbinic Judaism. That the commandment is the basic unit of Jewish life is an obvious statement; the purpose of Jewish life is to fulfill the

[8] *Sefer Ha-Mitzvot*, positive commandment 187.

wishes of the Creator, which manifest themselves through the mitzvot. The narratives in Yosef's *teshuvah*, particularly Rashi's account of Israel relieving the gentiles of their religious obligations, define the Jews as the people of mitzvah, the nation to whom God's will was made known to Israel first hand. Even more importantly, it defines Israel as the nation to whom God's will primarily applies, since the vast majority of the commandments are no longer intended for the gentiles. Thus the most important operative category in Rabbinic Judaism is *commandedness*. The Jews' special status vis-à-vis the gentile nations comes from the obligation – what Rabbinic tradition calls the burden – of the commandments, which was placed upon them at Sinai and simultaneously removed from all other people.

This reasoning applies within the community as well. The concept of commandedness is used to create social distinctions between various segments of the Jewish population. This is based on a principle from the following *mishnah*:

> A deaf-mute, a lunatic, and a minor cannot fulfill the community's religious obligation. This is the general rule: anyone who is not [*halakhic*ally] required to do something cannot fulfill the public's religious obligation [with regard to that thing].[9]

Ths process of יציאת ידי חובה, fulfilling an obligation (literally "exiting the hands of an obligation") is a crucial tool in a system built upon commandments. In Rabbinic thinking, every mitzvah is an obligation from which the Jew must be released – either once in his life or perhaps daily, weekly, or annually. Communal mitzvot, which are performed as a

[9] B. *Rosh Hashanah* 29a.

group and often involve only a single person reciting the blessing or performing the necessary action, must include some mechanism for vicarious fulfillment. A prayer leader "releases" the congregation through his recitation of the liturgy; a father "releases" his household by reading the *haggadah* on Pesah. But as the above *mishnah* makes clear, this vicarious fulfillment can only be performed by someone who is himself commanded to execute the mitzvah.

This principle thus gives instruction on who may be called upon to lead a prayer service or a seder, recite the Kiddush, or blow the shofar. And since these rituals and mitzvot form the core of Jewish living, the concept of commandedness plays an important social role as well. Someone who is not commanded, who is unable to fulfill another's obligation, is by definition not permitted to take a leadership role in the activities that define Jewish life. Thus when the Rabbis attempt, as they do countless times in the Talmud, to ascertain whether women, slaves, children, or the blind are commanded to carry out a certain action, they are actually asking about the person's social role and status with regard to the given situation.

2. Women and Procreation

The significance of this discussion to the question of gender equality is obvious. The strictly defined social roles played by men and women in traditional Judaism are tied to the *Halakhah* and to the systemic exemption of women from broad swaths of the mitzvah system. This *teshuvah's* concern with women's obligation and/or permission to take part in the ritual of *Parashat Zakhor* is precisely this type of question. Yosef ultimately determines that women do have an obligation (if a lesser one than men's) to

hear the Amalek passage read, but he is clearly uncomfortable with this blurring of gender roles.

The problem for the author is that he is caught between a desire to uphold strict gender roles and apparent evidence that women are permitted to participate in a mitzvah-related war.[10] His solution to this problem is borrowed from a compromise proposed by Rabbeinu Nissim to the question of women's involvement in procreation:

> [To the Amalek question] we may apply what the *Ran* wrote[11] ... that it is a mitzvah for women to aid men in פריה ורביה. This is because their exemption from פריה ורביה is due to the fact that the Torah says "and subdue it" and it is not the way of women to subdue.[12] Either way women help in a *milhemet mitzvah*. Here also because we do not see a restriction, [women] aid in פריה ורביה.

The *Ran's* predicament is that Jewish law makes two apparently contradictory statements. It states that women are not commanded in the mitzvah of procreation,[13] and elsewhere implies that women are, in fact, fulfilling a mitzvah by getting married. The obvious question is, what mitzvah are they fulfilling? The Ran solves the problem with the mitzvah of *siyua*. This might be considered an attempt at greater equalization between the exes, since it attributes a procreation-related mitzvah to women. Yosef uses of the concept, however, to place greater distance between women and obligation. The creation

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[10] Yosef cites the Rambam, "And it is known that women do not judge, and they do not serve as witnesses, and they do not offer a sacrifice with their own hands, and they do not fight in a voluntary war" (*Sefer Ha-Mitzvot, shoresh* 14). He concludes, "It sounds from this as though they do fight in a *milhemet mitzvah*"
[11] Alfassi *Kiddushin* chapter 2.
[12] i.e. the exemption is scripturally based and specific to this mitzvah, rather than being based on some larger principle and applicable to other situations.
[13] B. *Yevamot* 63b..

of a secondary mitzvah explains away women's participation in the activity and ensures that the obligation in the real mitzvah rests solidly on male shoulders.

3. Positive, Time-bound Commandments

Related to this is the discussion regarding מצוות עשה שהזמן גרמא, positive time-bound commandments. Women are exempted from these based on a *mishnah* found in *Kiddushin* 29a that reads in part, "Regarding all positive time-bound commandments, men are obligated and women are exempt. Regarding all positive non-time-bound commandments, men and women are obligated." The traditional explanation for this blanket exemption is that women's household obligations might interfere with their ability to fulfill commandments that must be executed at a specific time. In determining whether or not women are rightfully part of the Amalek commandment, Yosef must deal with the assertion that *M'hiyat Amalek* is time-bound, since "it is forbidden to kill on Shabbat."[14] Yosef disagrees and brings a passage from the *Tosafot* to show that a prohibition against performing a certain action on Shabbat does not make it time-bound:

> In my humble opinion it must be raised that the prohibition against performing it on Shabbat does not make it time-bound. This is proven by what the *Tosafot* wrote (Kiddushin 29a) in *s.v.* אותו ולא אותה: "One might say, 'Why do I have a scriptural passage [to show that women are exempt from circumcision]? The exemption is derived from the fact that circumcision is a positive time-bound commandment, since [a baby must be] circumcised on the eighth day after its birth…' [To this challenge] it must be said that since from the eighth day and

[14] *Avnei Nezer Orah Hayyim* 509.

> onward [the mitzvah] does not cease [to be in force] it is not time-bound. And if you say that it is still a positive time-bound commandment since one only circumcises during the day then it must be said that it is derived from where it says 'Circumcision not in its time [i.e. not performed on the eight day] may be performed either during the day or at night" (*Yevamot* 72b).

After quoting the *Tosafot*, the author continues:

> This is difficult, because this 'circumcision not in its time' still does not override the Sabbath, so it should be a positive time-bound commandment. But since this is due to the prohibition of Shabbat that rests upon it and not due to the commandment itself, it is better to think of it as a positive non-time-bound mitzvah. And because of this the scripture "Him and not her" is needed.

This explanation requires some elucidating. Yosef calls here upon a very miniscule but legally significant distinction between an action that cannot be performed on Shabbat because it is applicable only to weekdays and one that cannot be performed on Shabbat simply because it is prohibited by the laws of *melakhah*. The latter category, into which he places war and killing, is not made time-bound by the Shabbat prohibition. The litmus test for the distinction is whether or not a person who performs the action, in violation of the Sabbath, is considered to have fulfilled the commandment:

> Similarly wrote the genius *Mahari Najar* in *Sefer Limmudei Hashem* (limmud 109, *s.v. U'mah*)... "Certainly *tefillin* is a positive time-bound commandment because it does not apply on Shabbat at all. But regarding circumcision on Shabbat and Yom Tov it is a prohibition of the *melakhah* that rests on it. But if one transgressed and circumcised on Shabbat he has done the mitzvah, as it says in B. Shabbat (137a), 'If one forgot and circumcised on Shabbat one who should have been circumcised on Erev Shabbat, he is exempt.' Because of this is it not thought of as a positive time-bound commandment from which women are exempt."

The person who violates Shabbat by putting on *tefillin* has not fulfilled any obligation, since the commandment simply does not apply on Shabbat. But the person who circumcises, regardless of the fact that he has broken Shabbat, has nonetheless performed the mitzvah of *milah*. The same reasoning, according to Yosef, applies to killing and war on Shabbat, proving that *Milhemet Amalek* is not a time-bound commandment from which women are automatically exempt. Interestingly, he also applies this reasoning to procreation in order to demonstrate that the prohibition against sexual relations on Yom Kippur does not make פריה ורביה time-bound.

A second proposal in the sources is that *Z'khirat Amalek* is time-bound because of the fact that the Torah may be read only during the day, or because Parashat Zakhor is read on a particular Shabbat. Yosef debunks this theory by following a *halakhist*, who separates the central, Torahitic part of the commandment – the remembering itself – from the established Rabbinic practices surrounding it:

> In the responsa of *Maharil Diskin* (*siman* 102) he wrote… that it seems to him that for one who says that Parashat Zakhor is a positive commandment from the Torah, women are also liable for it from the Torah. For the essence of remembering is not time-bound, though the Rabbis set it to this particular Shabbat.

Diskin asserts that remembering the deeds of Amalek, which is the Torahitic mitzvah, is not limited to a specific time of day or a particular Shabbat, even though the *parashah* must be read on a specific Shabbat. Therefore it is not a מצות עשה שהזמן גרמא. Since Yosef has demonstrated that the mitzvot of *Milḥemet Amalek* and פריה וריביה are not time-bound, women's exemption from both must come from some specific scriptural source and not from this convenient generalization.

4. אותו הנס: Women as Part of – and Apart from – the Community of Israel

In his comments regarding the time-bound issue, Yosef raises an additional argument for including women in the recitation of the scroll. "Women," he writes, "were also included in Amalek's desire to destroy Israel." In arguing that women are included in the mitzvah because they were participants in the historical event that led to its creation, Yosef has hit upon a major issue of women's role in the Jewish community. This is reminiscent of a statement made in tractate *Pesaḥim* regarding the seder, in which women are said to be commanded regarding the Four Cups – a time-bound mitzvah from

which they otherwise would have been exempt - because "they too were present for that miracle."[15]

On the surface, this is perhaps the most egalitarian of all attitudes toward the mitzvah, because it argues that commandedness results not from a person's gender or status in society today, but rather from participation in Israel's history. Anyone who was part of the experience that the mitzvah is intended to recall – particularly if the experience was one of endangerment[16] - is included of the mitzvah. Yet the traditional commentators do not choose to read the verse inclusively. Rather, both Rashi and Rashbam understand it as an assertion that the miracle of Pesah occurred *because of* righteous women, and for that reason women are bound by the mitzvah. Certainly this reading does not indicate a negative attitude toward women; if anything it holds them up as more praiseworthy than the men. Nonetheless it succeeds in placing women outside the ordinary, commanded mainstream of Israelite society. According to this line of reasoning, women are included in mitzvot for which they are *responsible* as women, but not those in which they are *participants* as Jews. This excludes *Z'khirat Amalek*, as Yosef points out:

> The Rashbam and *Tosafot* wrote there that "They too were present for that miracle" [means] that the miracle happened mainly on their account, that because of righteous women we were redeemed from Egypt, and Purim because of Esther, and Hanukah because of Judith. According to this the reasoning does not apply to

[15] B. *Pesahim* 108b.
[16] The *Tosafot* point out that the *Yerushalmi* reads instead, "They too were present for the danger."

the reading of *Parashat Zakhor*, because they did not take an active part in the war against Amalek.

Thus women are excluded from the mitzvah not because it is time-bound, but on the basis of a generalization that says that they may be included only if they are immediately responsible for the historical event. Women are separated out from the mainstream of Israel, as a category within a category.

5. The Slave as an Archetype

The only section of the *teshuvah* that deals directly and primarily with procreation is section 12, which is not about any of these categories of people. In fact, in an effort to determine some information about women's obligations and rights, he concentrates closely on the question of whether slaves are obligated to procreate. Since the *halakhic* obligations of slaves and women are often closely related to one another, it is worthwhile, for our purposes, to take a close look at this piece of the *teshuvah*.

Yosef begins with the *Tosafot*, who make use of Isaiah 45:18, "He did not create it a waste, but formed it to be inhabited,"[7] to show that slaves are not commanded to "Be Fruitful and Multiply":

> I can elucidate from what the *Tosafot* wrote (Gittin 41b, *s.v. Lo Tohu Bar'ah Lashevet yatzrah*), that "The scripture [Isaiah 45:18] is not referring to פרו ורבו, because if [one] were able to fulfill '*to be inhabited*' in some way then it would not have compelled him regarding the commandment 'Be fruitful and multiply.'"

The *Tosafot* have thus made a distinction between the procreation mitzvah indicated by Genesis 1:28, "Be fruitful and multiply," and another, more nebulous obligation to fill the world, as indicated by the Isaiah verse. They will go on to argue that only free Jewish men are truly obligated by Genesis 1:28; slaves do have an obligation to fill the world with progeny, but it is a secondary obligation and not a developed part of the *halakhic* system. The *Tosafot* continue:

> "R. Yitzhak son of R. Mordecai explains that "*lashevet yatzrah*" indicates [a procreative mitzvah that] applies to slaves, whereas פרו ורבו [the true mitzvah] only applies to free people. And so it seems also in the *Yerushalmi* in the first chapter of *Moed Katan*: 'They posed the question before Rav Assi, 'Regarding the slave, what is the ruling as to whether he may take a wife on an [intermediate] festival day?' And he said to them, 'We can learn it from this: 'Shall he postpone? Was not the world created only so that [people might] be fruitful and multiply? (M. *Gittin* 4:5)' Rabbi Yohanan said: anyone who is commanded regarding procreation is forbidden to marry on a festival day.' And the meaning [of Rabbi Yohanan's words] is, 'anyone who is commanded regarding procreation by means of *Lashevet Yatzrah*,' that is to say a slave. But for פרו ורבו [the true commandment of Genesis 1:28] he is surely not culpable."

Yosef then summarizes, "It is thus explained that he [Rabbi Yohanan] believes that a slave is exempt from the mitzvah of procreation." This opinion that the *Tosafot* attribute

to Rabbi Yohanan takes a potentially universalizing verse and uses it to draw a line between slaves and free people by creating a *different* category of procreation. In fact, if one reads the *Yerushalmi* without the lens of the *Tosafot*, Rabbi Yohanan seems to learn from the Isaiah verse that slaves *are* obligated in "Be fruitful and multiply." But the *Tosafot* reinterpret him to say something very different.

Odaviah Yosef, however, is not convinced. There is other evidence that slaves may be commanded to procreate, which also comes, strangely, from the *Tosafot*:

> See the *Tosafot* in *Hagigah* (2b) *s.v.* "*Lo Tohu Bar'ah*" who wrote, "This [Isaiah verse] is more powerful than *Be fruitful and multiply*, as it says in *Megillah*, (27a). There are those who explain that a slave is not responsible for procreation, for it says in *Yevamot* (62a), 'If one had children as a slave and then was freed, he has not fulfilled the obligation to procreate.' But this is not correct, for we have seen in the *Yerushalmi*, 'Regarding the slave, what is the ruling as to whether he may take a wife on an [intermediate] festival day?' And he said to them, "We can learn from this: *Shall he postpone? Was not the world created only so that [people might] be fruitful and multiply?* (M. *Gittin* 4:5) Rabbi Yohanan said: anyone who is commanded regarding procreation is forbidden to marry on a festival day.' And where it says (*Yevamot* 62a) that the [freed] slave [who had children while a slave] has not fulfilled his obligation to procreate, the reason is that we require that his seed [descendants] be genealogically traceable to him. And a Jew who has a son from a maidservant has also not fulfilled the commandment by this

reasoning. And furthermore, פרו ורבו is written regarding all *B'nei Noah*, including the Canaanite."

The author summarizes:

It is clear from this that the opinion of the *Tosafot* is that the slave is obligated in פרו ורבו.

This passage indicates a desire on the part of the Tosafists to read the texts more universally. By explaining the slave's (B. *Yevamot* 62a) failure to have fulfilled the mitzvah as a matter of ייחוס – legal genealogical lines[17] – the Tosafists imply that slaves are indeed commanded to procreate.

What is most startling about the passage is that utilizes the same texts as the previous *Tosafot* comment – the Isaiah verse and the passage from J. *Moed Katan* – and comes up with precisely the opposite answer! Here the Rabbi Yohanan quotation stands as it does in the *Yerushalmi*, without the reinterpretation that the slave's obligation is somehow different from that of the free Jew. In truth, this usage of the text is probably more faithful to the original intention, since there is no mention in the Yerushalmi Gemara of this dichotomy between different procreative obligations. In fact, one can imagine the possibility of the opposite. The verse could feasibly be extended even further

[17] The B. *Yevamot* 62a passage centers on the Talmud's claim that a slave who has children and is subsequently freed has not fulfilled his obligation. There are two possible reasons for this. The first possibility is that he was not commanded to procreate as a slave. Since one cannot fulfill a mitzvah that does not apply to him, the children he fathered as a slave do not count toward this end once he is freed and takes on the mitzvah of procreation. The second possibility has to do with *yichus*, genealogical relations, and the fact that a slave may not legally have a family line. So although he can biologically father children, they are not considered his descendants for purposes of fulfilling the mitzvah.

in a universal direction by attributing the obligation to "inhabit" the earth even to non-Jews, though none of the sources choose to take it in this direction. The *halakhic* utilization of Isaiah 45:18 shows the existence of both universalizing and particularizing trends in Jewish law. The verse is open to be interpreted in many ways; the direction in which the *Halakhah* takes it is a matter of the opinions, needs, and intuition of the scholars who direct that legal process.

C. Creating a Continuum

In the slave debate, Ovadiah Yosef ultimately sides with the more liberal of the Tosafistic passages, ruling that Jewish slaves have an obligation to procreate. Yet he refrains from taking that principles to its universal extreme regarding women and non Jews. Yosef rejects the Tosafists' notion that "פרו ורבו is written regarding all *B'nei Noah*," and rules similarly that the liberal view regarding slaves cannot be transferred to Jewish women.[18] This unwillingness to extend the liberal view may have something to do with that fact that Jewish slaves are a non-entity in the modern world, while women and gentiles are alive and well. Thus Yosef shows that he is willing to apply such inclusive reasoning in a hypothetical situation, but when it comes to breaking down distinctions between sets of people that actually have members, he sticks to his very conservative roots.

All of this is related only cursorily to procreation, and even more cursorily to ecology. But by quoting and explaining texts Yosef has established a worldview that consists of a series of concentric circles: the set of Israelite men, followed by the set of

[18] The *gezerah shavah* that might allow for this does not apply in this case.

Israelite women, and followed finally by gentiles. Each successive set has fewer God-given obligations, and thus a reduced social status as determined by the *Halakhah*. This stands in contradistinction to the modern view of society and of the world in two important respects. The first is that while modernity considers human beings to be bound by the same natural and societal laws irrespective of ethnicity, religion, and gender, Yosef sees these dividing lines as being intimately related to the segments of divine law that one must follow. Second, modern values assert that all human beings – and indeed, all living things – are socially and biologically interconnected and dependant upon one another, while for Yosef the Jews are a גוי אחד, without a shared destiny.

Yosef's *teshuvah* creates an appropriate background against which to discuss other Orthodox and liberal *halakhic* compositions. His extreme particularism – his rejection of all things universal and his strict separation of groups even within the Jewish people – occupies one extreme of Jewish responses to modernity. The other extreme need not be taken up here, since it consists of full acceptance of modernity and universalism with rejection of Jewish content. Between those two extremes is a vast spectrum in which issues of science, equality and egalitarianism compete contend with matters of tradition, text, and Jewish continuity. Each *halakhic* thinker, regardless of denominational affiliation, must contend with each of these issues in the course of his or her work.

An Orthodox Response to the "Population Problem"

For all that it expresses about worldview, Yosef's *teshuvah* does not deal directly with the question of population. But with that issue becoming ever more pressing and

ever more widely discussed, it was inevitable that it would be addressed from a Jewish perspective. The technological advances of the last centuries, which have allowed for longer living human beings and also for greater human control over fertility and childbirth, challenge many of Judaism's traditional assumptions and call for a modern *halakhic* look at the issue. Rabbi Moses Tendler, now Rosh Yeshiva of the Rabbi Issac Elchanan Theological Seminary at the Yeshiva University, attempted to provide this with his 1966 article, "Population Control – the Jewish View."

It must be pointed out that this article is not exactly a *halakhic* work. It is not a responsum and does not attempt to make extended legal arguments or exact judgment in a specific case. In fact, Tendler begins with a disclaimer: "Let no one read into my words the language of *Pesak Din* – a language reserved for the eyes and ears of the individual questioner on this complex, intimately personal problem."[19] He does, however, attempt to explain what he calls "the philosophy of the *Halakhah*" on the issue, and to back up his statements with legal sources. Thus the article can be said to represent an Orthodox *halakhic* response to the general issue of population control, even though it is not composed in the language of *She'elah Ut'shuvah* and is not legally binding in any way.

A. What Population Problem?

Interestingly, the article, composed as a "Jewish view" of the overpopulation problem, begins by questioning whether such a problem even exists, from both a scientific and philosophical direction. The scientific approach is to calls the data into question by quoting more recent statistics implying that the "Malthusian nightmare" is in fact not coming to pass. Yet the author's His scientific handling of the issue is simplistic

[19] Tendler 118.

at best. What he actually rejects is not the population issue in its entirety, but Thomas Malthus' centuries-old projections of the human population surpassing the food supply, which are generally rejected by the scientific community as well. The author is correct that the world is not being forced to choose between birth control and famine, but this does not make the question of human overpopulation moot. By making the issue black and white, Tendler ignores the dangers of Global Climate Change, pollution, and the very real affects that human activity have on the planet and on people's health.

From the philosophical angle, the basis of Tendler's rejection of the problem is his claim that in Judaism, "the management of the world's population is relegated unto God." More broadly, though, the problem is that extra-Torahitic (scientific) knowledge is being used to describe a problem not found in the religious literatures. For Tendler, to imply that there is such a problem, that knowledge of it comes from somewhere other than Torah and that its solution is human and not divine, is a "theology of blasphemy." To back up this statement he cites Psalms 145:16, "You open Your hands and satisfy every living thing," which implies that God creates sufficient food for every plant, animal and human on earth, that there is always enough to satisfy all life. Tendler is correct that Jewish tradition tends to attribute creation and disbursement of resources to God. In fact, in the *Mekhilta D'Rabbi Ishmael*, this verse is used to justify the statement that "At any time there is enough food for everything in the world according to its need...; not only for the upright and righteous human beings, but also the evil idol worshippers."[20] Elsewhere it is said explicitly, also in connection with the same verse, that "sustenance is in God's charge."[21]

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[20] *Mekhilta D'Rabbi Ishmael*, Yitro 1 *s.v. V'yavo Aharon.*
[21] *Bereishit Rabbah* 20, *s.v. B'etzbon Tokhalna.*

Yet a statement that God does a certain thing does not necessarily translate directly into a prohibition against human involvement in the same endeavor. We have seen in the Ramban the idea that God will never allow a species to cease to exist,[22] coupled seamlessly with a prohibition against people destroying a species.[23] By Tendler's logic, it would be blasphemous to imply that people should act to preserve animal species, since God has already decreed that none will disappear. Yet apparently the Ramban and *Sefer Ha-Hinukh* are not averse to "hedging God's bets" by determining that there is a mitzvah for people to do exactly what they believe God will do. Hence the idea that God is in charge of resource management need not imply automatically that people are not required to behave responsibly to preserve the resources that are given them. Indeed, another human role in the process – distributing food to the poor through *tzedakah* – is mandated by Jewish law. Tendler may have a problem with birth control, but to single out the population issue as proof that humans are not involved in resource management is unconvincing. Judaism does not argue that the world's resources are entirely in Gods hands; rather it looks to God as generous and forgiving, and expects Jews to be the same.

By using this language, Tendler makes clear the position from which he approaches the population issue. The Orthodox world holds a deep discomfort with the very idea of birth control, seeing it as averse to the values of traditional Judaism. By positioning Judaism as a tradition that leaves issues of population and resources in God's

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[22] Ramban on Gn 1:11 "God ... decreed that there should be a force which grows and bears seed so that the species should exist forever." See extensive discussion above in chapter 2.
[23] Ramban on Dt 22:6, "...it may be that Scripture does not permit us to destroy a species altogether.... Now, he who kills the dam and the young in one day... is regarded as though he cut off that species." See also *Hinukh* 545.

hands, he paints population control in all of its forms as existing entirely in the realm of the secular.

B. Birth Control as a Last Resort

Because Tendler denies the existence of any real problem, the article is couched in the language of the theoretical. He does deal with overpopulation, birth control, and family planning, but only as part of a hypothetical scenario (which he clearly believes will never occur) in which by the year 1980 the world is not able to produce enough food for all people. Within this scenario, the author attempts to prioritize and clarify Jewish responses, guided by the overall principle that the "philosophy of the *Halakhah* is clearly opposed to any limitation of family size."

Here again, it is not clear that this statement accurately characterizes the entirety of the *halakhic* system. Indeed, as we have seen, there is disagreement over whether a man may purposefully cease to procreate, either by marrying a barren woman or continuing a fruitless marriage, after he has fulfilled his minimum obligation to father one son and one daughter.[24] It is, however, accurate that there are significant strains within *Halakhah* opposed to limitation of family size, and that this has been the dominant position of Orthodoxy in recent centuries.

From this principle, Tendler determines that population control should be the last resort in a resource emergency, preceded by technological attempts to increase production. Only in the (again, hypothetical) event of "worldwide food shortages

[24] See discussion above in chapter 1.

uncompensated by our best utilization of the latest technological advances in food production"[25] may the use of birth control be considered as a possibility.

C. At the Family Level

Yet after entering into this hypothetical-within-a-hypothetical, Tendler rejects it out of hand as a justification for Jewish family limitation. He cites the immense destruction of the Holocaust as justification for removing Jewish families entirely from the macro-level population problem. After 1945, he says, "reduction of (Jewish) family size must be justified only on a personal, familial basis, not as part of the demographical problem."[26] This is interesting because it represents a departure from strict *halakhic* thinking. By utilizing a historical event – even one as catastrophic as the Shoah – to determine Jewish behavior, Tendler shows that he is open to the possibility that *halakhic* rulings may be influenced by their historical milieu, particularly by the fate of the Jews in a given time and place.[27]

The only valid justifications for Jewish family planning, then, are personal. The author provides a series of questions that may help determine when a rabbi may be able to give such a *heter* to a family. Tendler has brought the question down to the micro level: an individual family's decisions in conjunction with its rabbi. Here is where it is most clear that the article does not even approach the task of making binding decisions. It merely gives a framework in which individual rabbis can function. The author's five factors are worth quoting in their entirety:

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[25] Tendler 120.
[26] Ibid 122.
[27] This might be said to contradict, on a philosophical level, his earlier assertion that the Torah (i.e. *Halakhah*) is the only source of knowledge by bringing in historical information and making a statement that it should affect Jewish behavior.

(a) What are the true motivations of husband and wife that induced them to seek *halakhic* permission?

(b) Has there been minimum compliance with the commandment, "to be fruitful"?

(c) What specific contraceptive technique is being considered?

(d) What is the medical status of husband and wife? Psychological as well as physiological factors are most significant.

(e) What is the financial status of the family?

As the author elucidates these factors, it is clear that obtaining such a *heter* is intended to be very difficult. Tendler rejects such motivations as "get[ting] to know each other" or "rais[ing] our standard of living" as contrary to a "Torah personality," and refrains from indicating what the proper motivations might be. The only hint given is the nebulous phrase "poverty that threatens a family's physical and spiritual welfare," but even this Tendler defines so narrowly as to exclude nearly every American family.[28] In fact, his stringency in defining "physiological poverty" far exceeds that of the Rambam, whom he quotes as justification for his reasoning:

> It is the way of intelligent people that a man should establish a profession and sustain himself first, and afterwards he should buy a home, and afterwards he should marry a wife, as it is written "Is there any man who has planted a vineyard

[28] Top of 121. "The psychological povery if the $15,000 income family surrounded by families with $50,000 yearly incomes must be clearly differentiated from the physiological poverty of the protein-starved Peruvian or Indian."

> but never harvested it...? Is there any man who has built a house but never dedicated it...? Is there any man who has become engaged to a woman but has not married her..." (Dt 20:5-7). But the fool starts by marrying a woman, and then... he buys a house, and then at the end of his days he returns to find profession or sustains himself from *tzedakah*, as it says "In curse you shall become engaged to a woman, you shall buy a house, you shall plant a vineyard" That is to say, your deeds shall be backwards so that your way will not be successful.[29]

Tendler's intended use of this source is to demonstrate that extreme poverty can be justification for the use of birth control. But in fact, the Rambam seems to be advocating delaying procreation in order to "raise [one's] standard of living," which is a kind of family planning. This is the furthest thing from leaving sustenance in God's hands. The source actually works against the author's claims.

Ultimately, Tendler's view does represent the mainstream of Orthodox thinking, but it is only one of several possible *halakhic* approaches to the issue. He is able to bring sources to justify his position that family planning is contrary to the spirit of Jewish law, but other positions are evident in precisely the same sources. Though Tendler claims to speak for "the philosophy of the *Halakhah*," and he certainly does speak for the majority of Orthodox Jewry, he has not exhausted all possible Jewish responses to birth control and family planning.

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[29] *Mishneh Torah*, *Hilkhot Deot* 5:11.

The Reform Movement on Birth Control

The Reform Movement's 1927 responsum on Birth Control provides an interesting foil to the Tender article, because it addresses many of the same questions and sources but arrives at a very different answer. The *teshuvah*, composed by Rabbi Jacob Z. Lauterbach, actually predates the Birth Control pill and the "Sexual Revolution" of the late Twentieth Century. In fact, Lauterbach enters into the question from the standpoint of a fairly traditional view of marriage and sexual relations, attempting to show the legitimacy of contraceptive devices used by a husband and wife. He faces the challenge of knowing that Jewish tradition, as evidenced by Tendler, has often taken a negative attitude toward family planning. For this reason, the author must employ some *halakhic* creativity in order to arrive at his desired conclusion.

A. Redefining the Question

Lauterbach's first act is to separate the issue of birth control from other non-traditional sexual practices, claiming that they have too often been lumped together. He does this in order to be able to assert that the negative connotations of sexual perversion belong to "the evil practices of self-abuse and sexual perversions" and not to birth control itself. The purified question of the *teshuvah* is:

> Does the Talmudic-Rabbinic law permit cohabitation between husband and wife in such a manner or under such conditions as would make conception impossible; and if so, what are the conditions under which such cohabitation is permitted?[30]

This very narrow definition of "birth control" allows the author to distance it from the despised ערוות or sexual perversions, and equate it with something that is present in Jewish tradition: non-procreative sexual relations.

The thrust of Lauterbach's first argument is that such cohabitation is indeed permitted in Jewish law. He employs several texts to illustrate this point. The first is the assertion from Rabbi Moshe Isserlis, which we have cited previously in this study, that "it has not been our practice for several generations to enforce the exactitudes of the law [in a case when a man wishes to delay procreation or marry a sterile woman],"[31] and the similar statement that it is permissible to have sexual relations with a woman who is incapable of procreation.[32] These texts do indicate possible acceptance of non-procreative choices, but there are two problems with their use. The first, is that Isserlis' statement in *Even Ha-Ezer* 1:3 is one of *minhag*, not law. In fact, the *Rama* is open about the fact that the law forbids such marriages between a non-procreative woman and a childless man, and that his community chooses to ignore that law. Lauterbach does not sufficiently acknowledge the non-legal status of this statement before he uses it as legal precedent for proving his own point.

The second problem, which the author himself points out, is that these are cases of physical disability whereas birth control involves people who are physically able to

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[30] Lauterbach 486.
[31] *Shulhan Arukh, Even Ha-Ezer* 1:3.
[32] Ibid. 23:5.

conceive making an active choice not to do so. Lauterbach therefore brings a Talmudic text that applies more closely to that situation:

> R. Johanan b. Dahabai said: The Ministering Angels told me four things: People are born lame because they [*sc.* Their parents] overturned the table [i.e. practiced unnatural cohabitation]; dumb, because they kiss 'that place'; deaf, because they converse during cohabitation; blind, because they look at 'that place'.... R. Johanan said: The above is the view of R. Johanan b. Dahabai; but our Sages said: The *halachah* is not as R. Johanan b. Dahabai but a man may do whatever he pleases with his wife [at intercourse]....[33]

This text serves the author's purposes because it establishes a high level of autonomy between husband and wife in their marital relations, refraining from close regulation of sexual activity. More importantly, according to the author, this autonomy includes sexual practices that the rabbis believed could not lead to conception, such as *Hafihat Ha-Shulhan,* or "Overturning the Table," which Rashi defines alternatively as "she is on top and he is on bottom" or "the face is toward the back of the neck, so that they come upon their women as is not their custom (*she'lo k'darkan*)." According to Lauterbach, the fact that the Rabbis believed that these sexual positions could not lead to conception indicates that they permitted a person to make decisions about the procreative ability of his sexual relations.

The operative category here is שלא כדרכה, or "unusual sexual practices." The exact definition of this term, however, is not clear. Most of the texts seem to understand it as

[33] B. *Nedarim* 20a-b.

referring to sodomy, which by definition cannot lead to procreation. For Lauterbach, however, it seems to refer to some undefined, vaginal sexual practices that are somewhat out of the ordinary. (He never gives an exact definition, but perhaps he has the Missionary Position in mind when defining what is ordinary.) Regardless of the exact definition, the problem for Lauterbach is that the later *halakhic* sages tend to step back from what seems in *Nedarim* to be absolute autonomy in marital relations. The Rambam, for example, permits a man to do "what he wants to do with his woman... [both] כדרכה and שלא כדרכה, provided he does not emit seed wastefully." [34] This condition, over which Lauterbach glosses without dealing with it, actually works against the author's conclusion, since birth control practices generally involve emission of sperm. And while Isserlis points out in the Shulhan Arukh that some authorities do permit such practices, even when resulting in an emission of seed, he is clear that this is only "if [a man] does so accidentally and is not accustomed to this."[35] Thus birth control, which habitually and purposefully brings about an emission of seed that cannot lead to conception, seems to be outside of this definition. The argument's saving grace is that Lauterbach has determined earlier that:

> ... the discharge of sperm through sexual intercourse, even though it does not effect impregnation of the woman, is not considered an act of 'wasteful discharge of semen,' which is so strongly condemned by the Agadic sayings of the Talmud. For while – as regards procreation – such a discharge is without results and

[34] *Hilkhot Issurei Biah* 21:9.
[35] Even Ha-ezer 25:2.

> purposeless, yet since it results from legitimate gratification of a normal natural desire, it has fulfilled a legitimate function and is not to be considered as in vain.[36]

Thus, by being very specific about definitions of certain terms, the author is able to show the possibility of a *halakhically*-sanctioned decision to engage in non-procreative sexual relations. In the process, he willingly ignores the trends in post-Talmudic *halakhic* scholarship, though the strain of thinking onto which he grasps is clearly present in *Nedarim*. It is worth asking, however, whether it is simply too big a jump to go from allowing sex in positions that cannot yield fruit to permitting active, purposeful cancellation of procreative ability.

B. The "Three Women" Baraita

Having established the permissibility of some contraceptive practices in Jewish law, the author now sets out to show that in certain circumstances birth control is *required.* By means of this argument, he also hopes to strengthen his assertion that birth control is *permitted* in most other cases. The central text is a *baraita* that appears four times in the Babylonian Talmud and reads as follows:

> Three [categories of] women use an absorbent in their marital intercourse: a minor, an expectant mother, and a nursing mother. The minor, because otherwise she might become pregnant and die. An expectant mother, because otherwise she

[36] Lauterbach 487.

might cause her fetus to degenerate into a sandal.[37] A nursing mother, because otherwise she might have to wean her child prematurely and this would result in his death. And what is the age of such a minor? From the age of eleven years and one day to the age of twelve years and one day. One who is under or over this age carries on her marital intercourse in a normal manner; so R. Meir. But the Sages said: The one as well as the other [i.e. the 11-12 year old and the one not in this category] carries on her marital intercourse in a normal manner, and mercy will be vouchsafed from Heaven, for it is said in the Scriptures, *The Lord preserves the simple.*[38]

Even at first glance, this *baraita* establishes that under some circumstances, as determined by danger to either the mother or a child, contraception can be used to prevent conception. But beyond this general principle, the Rabbis raise two questions about the passage, asking how exactly this *mokh* or absorbent is used, and whether its use in the named situations is required or merely permitted.

On the nature of the *mokh* there are two different answers. Rashi opines that it is "placed...in the location of sex [i.e. in the vagina] *during* sexual relations so that they will not become pregnant." Rabbeinu Tam, on the other hand, puts forth that Rashi's definition describes a transgression of wasted seed, and that in reality the absorbent is used after cohabitation to remove any semen.[39] Regarding the permitted or required question there is also disagreement. Rashi asserts that these three categories of women

[37] i.e. cause it to be harmed by the conception of a second fetus. This betrays an erroneous belief that women could conceive while already pregnant.
[38] B. *Ketubot* 39a; translation adapted from Soncino. The Biblical verse is from Ps 66:6.
[39] See B. *Yevamot* 12b for both opinions.

are permitted to use the device, and Rabbeinu Tam holds that they must use it in order to prevent danger.[40] This is important because Rashi's answer implies that the *mokh* is forbidden to all women except these three, while Rabbienu Tam's opinion implies that it is permitted to all, but only required of these women.

For Lauterbach, then, there is a clear opening to show that the *Halakhah* grants permission to all women to utilize a contraceptive device. He does so using the writings of Rabbi Solomon Lurya, who conveniently accepts Rashi's reading of the nature of the device and Rabbeinu Tam's assertion that it is required in these three situations and permitted to all other women:

> It seems to me... that Rashi's explanation is correct, for he said that that one uses a *mokh* before cohabitation. And it is not "pouring out [seed] upon the trees" because in the end [its use constitutes] the way of sexual relations, for one body enjoys another.... And furthermore it seems that Rabbeinu Tam's opinion is correct, that all other women are permitted [to use a *mokh*]. Women have no prohibition because they are not commanded regarding procreation.[41]

Lurya's reading of the *baraita* is shaky, especially considering that Rabbeinu Tam's opinion that the *mokh* is a requirement for the three women is closely related to his assertion that it is used after sexual relations and not before (which, he holds, would constitute wasting seed). Yet the Lurya reading, which is the most permissive of all

[40] Rashi's reading is found on *Yevamot* 12b; Rabbeinu Tam's on *Ketubot* 39a
[41] Lurya, *Yam Shel Shelomo. Yevamot* 1:8. Translation mine.

possible readings, allows Lauterbach to say that the *mokh* is the same as a modern contraceptive device (a diaphragm or condom) and that all women are permitted to use it.

From this reading, the author can express what he believes to be the principle behind the *baraita:* "when there is danger of harm resulting to the unborn child or the child already born," or to the mother, a contraceptive must be used during sexual relations. Using this, he can assert that in modernity, contraceptives may be used in a case where pregnancy might harm a woman, or where "harm... might come [to already born children] due to the competition of a larger number of brothers or sisters." In other words, Lauterbach greatly expands the definition to "harm" to include not only malnourishment, but competition for parents' attention and the potential unhappiness of a family that is too big. In essence, he uses this *baraita* to justify family planning.

In a sense, this is similar to Tendler's opinion in that both view poverty as a potential justification for limiting family size. The difference, of course, is that where Tendler limited his definition of "poor" so as to make it nearly impossible for an American family to fit it, Lauterbach expands the definition so that nearly any family can consider itself unable to support – monetarily or emotionally – another child. This is similar to the Reform *halakhic* thinking on abortion, which expand the concept of *rodef* to permit abortion in a case of potential psychological danger to the mother.[42] In both cases, the technique used is to establish principles from *halakhic* examples and expand them so as to be in concert with societal values.

C. Commandedness

[42] See "When is Abortion Permitted?" in *Contemporary American Reform Responsa.*

Up to this point, Lauterbach has dealt with contraception primarily in terms of the permissibility of certain sexual practices. His third major argument, however, deals with the mitzvah of procreation itself. Using this, the author can create additional circumstances under which birth control is legitimate in Jewish law.

The impetus for the discussion is Lurya's statement, quoted above, that "Women have no prohibition [against the use of a *mokh*] because they are not commanded regarding procreation."[43] In other words, for Lurya and Lauterbach, the fact that the Talmud places פריה ורביה solely on male shoulders gives women license to refrain from procreation entirely. This is in stark contrast to Ovadiah Yosef who, quoting Rabbeinu Nissim, cited a women's mitzvah to "aid men in פריה ורביה." As we noted earlier, this device allows the *Ran* and Yosef to obligate women in the procreative process without granting them the status that comes along with commandedness. The lack of such a commandment here allows Lurya and Lauterbach to exempt women from the requirement to procreate, freeing them from any obligation to refrain from contraception. Lauterbach notes, as supporting evidence, that women are apparently permitted by the Tosefta[44] to sterilize themselves, and that the wife of the great Rabbi Hiyya is reported to have done just this after learning that the mitzvah did not apply to her.[45] The author is correct that Rabbi Hiyya's wife is not condemned in the Talmud for her actions, though her husband expresses great remorse at the loss of future progeny. Despite the fact that the vast majority of *halakhists* would look down upon women self-sterilizing and refraining from procreation, Lurya and Lauterbach's reading is clearly legitimate based on *Yevamot* 65b. It is worth pointing out, however, that only a few editions of the Tosefta

[43] Lurya, *Yam Shel Shelomo. Yevamot* 1:8.
[44] T. *Yevamot* 8:4.
[45] B. *Yevamot* 65b.

permit women to self-sterilize, while many others contain the word *ein*, indicating that the action is forbidden, and it is impossible to know which was the original formulation of the passage.

This does not, however, give men the same opportunity to refrain from procreation. Lauterbach is unable to grant males such extensive leeway due to their commandedness. He can, however, make two points about the mitzvah to help his cause. The first is that failure to father children is what he calls a "sin of omission but not of commission; for the practice as such is not immoral or against the law." He points out furthermore that an unmarried man is guilty of the same sin, since he also fails to fulfill פרו ורבו. The author makes an excellent point about unmarried men, hinting at the hypocrisy of a community that would quietly accept a bachelor while condemning the use of birth control. Yet in using the term "sin of omission" he may be missing the point. Contraception is precisely not an act of refraining or a failure to do something. Rather it is a purposeful, positive action taken to prevent the occurrence of that thing. In that sense, it is not the same as merely abstaining from sexual relations. Furthermore, it is not at all clear that the terms "omission" and "commission" are meaningful to Jewish tradition, which does not differentiate in terms of severity between transgressing an *aseh* and a *lo ta'aseh*. Particularly because the *halakhic* process has established an age at which one is guilty of having failed to procreate,[46] there is a clear sense in the sources that such failure is indeed a transgression.

The author's second point regarding the mitzvah, however, is somewhat more convincing. Following on the earliest sources, which established that one fulfills the commandment by fathering one son and one daughter, he writes:

[46] The age of 20. See *Hilkhot Ishut* 15:2-3.

> If, however, a man has fulfilled the duty of propagation of the race, as when he already has two children, and is no longer obliged by law to beget more children, there can be no objection at all to the practice of birth control.

In making this statement, Lauterbach places himself at the feet of a long line of *halakhic* scholars who considered the minimum sufficient to fulfill the obligation. We have discussed, at length, the continuing debate over whether one is required to continue procreating all his life.[47] Lauterbach simply takes the liberal side in that debate, claiming that once a man has done his duty he is no longer required to continue. In doing so, he relegates Rabbi Joshua's statement that a man "should also have children in his old age,"[48] a *baraita* considered by some to embody the *Halakhah mid'rabbanan* on the matter, to mere Rabbinic advice. There is much textual basis for this opinion, including the statement in the *Shulhan Arukh* that when a man has a male and female [child], he has fulfilled פריה ורביה and the decision in Asheri *Yevamot* 62b that a man need not sell a Torah scroll to marry if he has already had children. It is not clear that earlier sages would have taken the argument to this extreme – allowing a man to actively prevent his wife from conceiving – but Lauterbach does seem to be following a legitimate liberal *halakhic* view.

D. Reform Halakhah: A Matter of Choice

[47] See chapter 1.
[48] B. *Yevamot* 62b.

The author makes no pretensions about the fact that he has chosen the desired view – that of Rabbi Solomon Lurya - from among many *halakhic* viewpoints. He is open about this part of his process:

> We do not expect absolute agreement on questions of Rabbinic law.... We have the right to judge for ourselves which view is sounder and which authorities are more correct.... With all our respect for those authorities [with whom we disagree], we may ignore their opinions, just as they in turn have ignored the opinions of other authorities (including those of R. Solomon Lurya) on our question.[49]

This may be the central difference between liberal *Halakhah* and its Orthodox counterpart. While the traditional view is that a "right answer" exists and all seeming discrepancies must be reconciled to the prevailing decision, Reform Judaism holds that the legal decisor is empowered to choose between many existing valid opinions in the literature. Neither is a completely honest approach to Jewish law – it is clear that the sages did not share a single "philosophy of the *Halakhah*," and equally clear that they did not espouse modern values. Rather, each reflects the values of the type of Judaism that utilizes it.

The Environment: A Jewish Issue?

[49] Lauterbach 499. Brackets are mine; parentheses are the author's.

Thus far we have examined the population issue from both Orthdox and liberal perspectives, noting that they often come to opposite conclusions based on similar sources. We have also seen in Tendler what might be termed an Orthodox response to the modern environmental crisis: denial that humans have the ability to make a lasting impact on God's plan. What remains is the question of the Reform attitude toward the environment, which is addressed in a responsum entitled "Judaism and the Environment."

A. Laying out Judaism's "Environmental Credentials"

The *teshuvah*, composed in 1984 by the CCAR Responsa Committee, aims to answer the following question:

> What is the attitude of Judaism toward the environmental concerns expressed now by so many political groups? Is this an issue for Judaism? Or as we have been an urban people for such a long time, is this of relatively little concern for us?

From the outset, this document defines the environmental problem as not only modern, but "political." Far from seeking to portray Judaism as a source of modern Jews' environmental ethic, the central aim is to find evidence of whether Jewish tradition shares this contemporary value that many Jews hold based on their liberal ethic.

In expounding Judaism's environmental credentials, the author calls primarily on the mitzvah of בל תשחית, which he mentions in both its pure form and with regard to habitated areas. In fact, though, his explanation of the concept is convoluted. He claims that that Rabbis understood it to forbid "any purposeless destruction during siege," when

in fact the concept of בל תשחית is extended far beyond situations of siege in the *halakhic* literature. His prooftext, from *Hilkhot Melakhim*, does mention that the injunction applies "not only in a siege,"[50] but is restricted to fruit trees and the land immediately around a city. It is not clear that the author is fully unaware of the scope of בל תשחית in its Rabbinic incarnation. This is unfortunate because the Rabbis' concept of "destructive intent" is infinitely useful in creating an ecological ethic, while the image of protecting fruit trees can only be stretched so far.

The reason that the author is apparently so concerned with *Bal Tashiḥit* as applying to trees and land is that he seems to be defining "environment" in the strictest possible sense, as the area of land in and around which people are living. The additional sources that he quotes are about the regulations on land use and business placement in habitated areas: the prohibition against threshing in city limits,[51] the limitations on grazing rights of small cattle in the land of Israel. These are in fact important environmental texts, though they are not often used in this way, because they at their core indicate recognition in the sources that human activity has an effect on the environment in which human living occurs. Yet their use here indicates a very old fashioned kind of environmental thinking, one that is concerned with the cleanliness of a contained, urban area rather than the health of the natural world itself.[52]

Beyond the question of cleanliness and healthfulness of habitated areas, which occupies the majority of the article, the author mentions two more proofs. The first is the

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[50] *Hilkhot Melakhim* 6:5.
[51] B. *Baba Batra* 24b.
[52] What is really not useful in this article is the author's description of "specific concern about the environment of Jerusalem," particularly the prohibitions against creation of dunghills and scattering the sacrificial ashes in the wind. In the sources, these laws have much more to do with the city's ritual purity than its physical healthfulness or cleanliness. The issue of *tohorah* is separate from the environmental question, motivated by different values and concerns, and the two should not be blurred.

prohibition against hunting in Jewish law, which the *teshuvah* connects (without using the traditional terminology) to both בל תשחית and *Tza'ar Ba'alei Hayyim*. He is able to show that the sources connect ritual slaughter with preventing cruelty to animals, quoting Maimonides, who says so outright. Furthermore the Mishnah's list of the 39 *avot melakhot* lists "trapping" as forbidden on Shabbat, indicating that it is permitted at other times because it does not involve the cruelty of hunting. The *teshuvah* is less successful in proving its claim that hunting was "considered wasteful," since this is not stated in either of the above sources. Nonetheless, his assertion that *Halakhah* is concerned with animals' inherent rights is a correct one.

The author's final point is what he call's Judaism's "appreciation for nature," indicated by the many blessings intended to "instill a feeling of reverence for the natural world and for its maintenance." His source for these is the Hertz siddur, which is of course only one of many prayerbooks to list the *Birkhot Hana-ah*. He does not, however, attempt in any way to describe the theology of stewardship behind this liturgical phenomenon. In doing so, he would find something much more powerful than mere reverence.

B. Not Far Enough?

In terms of its organization, this *teshuvah* describes essentially the same three categories of thought that we outlined at the beginning of this study. They are בל תשחית, the prohibition against wanton destruction, צער בעלי חיים, the concern for animals' suffering, and הנה טוב מאד, the idea that God's creation is Very Good. Although the description of each is both insufficient and at times even erroneous, the author's

contribution is that he has outlined the very cursory basics of the Jewish attitude toward the environment.

Yet at the same time he has failed to answer his own question, which asks about the *modern* environmental concerns being addressed in the political forum today. Indeed, the author has given a largely premodern answer, merely describing *halakhic* and liturgical principles. He does not take note of the fact that the modern situation is very different than that which was known to the Rabbis, failing to follow the cherished Reform principle that truth can be learned both from Torah and from science. If he had done so, the urgency of the environmental crisis in modernity might have called for a stronger, more focused, and more highly prescriptive Jewish response.

Conclusion

It would be unfair to describe Reform and Orthodox attitudes based solely on these four *teshuvot*. These responsa, like all such compositions, represent only the opinions of those who composed them. Yet in a sense, they can be considered official positions, since the two Orthodox responsa were authored by very central leaders and the two Reform opinions were created as part of the movement's official Responsa Committee. It is not unwarranted, then, to attempt to glean some generalizations about each movement's thinking from these works. Since the central focus of this project has been a comparison of the Jewish attitudes toward two values – human procreation and caring for the earth - it is worth noting the differences of approach to these topics in the

responsa. From here, larger philosophical and *halakhic* patterns can be addressed, particularly with regard to universality and modernity.

Procreation

Both movements clearly recognize the great significance that Jewish tradition places on children. There is no question in any of the responsa that family is, and should continue to be, the norm in Jewish life. In fact the assumption that every Jew will procreate is at the root of our most central question. Were there no such presupposition in Jewish law, there would be no issue with Birth Control or population policy, and indeed no conflict with the environmental crisis. Therefore, any serious *halakhic* process, no matter its leanings, must concede that Jewish law places a high value on children, both for purposes of population growth and because of its social and familial norms. It is evident from the responsa of Tendler and Lauterbach that both the Reform and Orthodox traditions acknowledge this fact and take it seriously in their deliberations.

Although neither tradition contests the importance of procreation in Judaism, they certainly do differ in many other ways. Partly because they are intent on arriving at different answers, and partly due to their views on the binding nature of Jewish law, they are able to glean opposite answers from the sources. Lauterbach, who argues that *Halakhah* permits birth control, does so largely on the basis of the concept of "personal choice" (though he couches his argument in traditional texts). By employing what we have called the "liberal opinion" from the texts – that one is permitted to cease procreation after fathering a son and a daughter – it leaves the ultimate size of one's family up to the individual. The purpose of *Halakhah*, then, is to guide autonomous

decision making. For the Orthodox, however, the matter is governed tightly by Jewish law, which "is clearly opposed to any limitation of family size."

It can be argued that each man imposes his opinion and his principles onto the text. We have demonstrated previously that certain strains in Jewish law are very permissive toward family planning, in contrast to Tendler's claim. Similary, Lauterbach's assertion that *Halakhah* permits birth control in wide variety of situations goes against the main streams of *halakhic* thought. Each man, arguing his own point, is able to portray the *Halakhah* as doing what he needs it to do in his own context. For Lauterbach it establishes a point at which one is permitted to stop having children and provides in Ben Azzai a model of a childless person. For Tendler it mandates continued procreation throughout a man's life, serves as a filter for illegitimate reasons to postpone or cease, and establishes the roles – both gender and national – that govern the issue.

The question of national roles is important, because the issue of population policy cannot be limited to Jews. Tendler's principle that *Halakhah* opposes family planning applies across the board - he disdains the use of birth control both Jews and non-Jews, calling for prioritization of resource management over population policy. Ultimately, though, Jewish law can only be applied to Jews, and is thus a particularist undertaking. It is in this context that it is important to note Tendler's assertion that in the post-Holocaust world, procreation is a matter of national responsibility. His argument links the individual Jew's personal responsibility to create and educate the next generation to the national decimation that occurred under Hitler. It is impossible to know whether Lauterbach would be so permissive regarding birth control had he written his responsum twenty

years later, but there is no doubt that the Shoah would have played some role in the decision.

It seems, then, that Jewish continuity acts as a kind of trump card in the population question, particularly in light of the Holocaust. This sheds light on the paradoxical ability of today's Jews to maintain a particularistic apprehension regarding their own continuity even as they share in the universal concern for the planet's health: world Jewry is not large enough for its continued growth to have any measurable effect on the planet, but it is small enough to make the danger of disappearance real. Indeed, the concern that the Jewish community has expressed with its own continuity in recent years indicates that this danger of disappearance is a top priority. It is noteworthy that there are no Jewish voices calling for Jews to limit their numbers for environmental reasons. Even as the movements continue to disagree on the force of Jewish procreative law and the permissibility of birth control, there is no disagreement on the demographic dangers presented by the events of the last hundred years.

The Environment

Where the liberal and Orthodox traditions differ on procreation, similar differences can be found regarding the question of human responsibility to the earth. Tendler puts forth a theology in which the claim that people ought to control their own population is considered "blasphemy." Yet he does not take his own theology to the extreme, which might entail outlawing any steps toward more responsible human stewardship. In fact, his denouncement of this "theology of blasphemy" seems to have more to do with a discomfort for population control than with any coherent attitude

toward environmentalism. Had the article been written thirty to forty years later, the author may have toned down this rhetoric and, without advocating any kind of population control, called for changes in behavior that might avert the hypothetical crisis he describes. A more recent resolution from the Rabbinical Council of America does indeed call for reduced oil consumption because "continued dependence on fossil fuels is going to bring climate change that will affect the delicate ecological balance of God's creation."[53] This indicates that Orthodoxy is more and more attuned to the environmental crisis as a fact and as a mandate for Jew's behavior.

Tendler's article must therefore be seen as a condemnation of population control policy, and not as a *halakhic* response to the environment. Yet as we pointed out earlier, he does reveal distaste for the use of science to mandate human behavior that is not commanded in *Halakhah*. This is indicative of the traditional belief that only ideas found in Torah are "Jewishly authentic," which continues to permeate Jewish thought even today. Indeed, it is not only the Orthodox who look to the sources to justify the find indications of their values; Reform Judaism similarly stakes it authenticity on the ability to ground its identity and its beliefs in Jewish law.

This is exactly the goal of the Reform movement's responsum on Environmentalism. We have pointed out that the documents consists of a kind of "presentation of credentials" to prove that the tradition is consistent with the liberal value shared by most Reform Jews. The responsum begins from an assumption that the modern value – the "environmental concerns expressed no by so many political groups – is inherently correct. Apparantly, the for the author, the source of that value's truth is not

[53] "RCA Advocates Steps to Reduce Oil Consumption." Resolution passed by the Rabbinical Council of America on May 18, 2006.

Jewish tradition, though clearly it can be found in the sources, but rather modernity or liberalism. Jews are to act on their environmental beliefs because of what science has proven about Global Climate Change and the dangers of pollution. Indeed, this responsum is not prescriptive because it cannot be. The nature of the question asked and the answer given therein do not indicate that its author understands Jewish law to prescribe behavior. Rather, it plays the role of endorsing and supporting what the author already knows to be true.

The Role of Jewish Law

The question of the sources of values is extremely important, and must be applied to all of these authors and the traditions they represent. We have demonstrated that outside influences – whether liberal values, catastrophic demographic events, or political mindsets – play a role in the *halakhic* thinking of every major movement. Each *halakhist* reads the texts on the basis of his own situation, so that they may function in modernity - *his* version of modernity. In a sense, then each of these authors' readings constitutes a reaction to the modern world, even that of a rabbi who purposefully shuts out everything connected with that world. For Ovadiah Yosef, the *Halakhah* fulfills the necessary function of providing a strong foil to the licentiousness of the outside world, while in Lauterbach's writings it corroborates the values of modernity. For each author the tradition provides justification and force to the behaviors that his values prescribe.

Our purpose is not to minimize or make light of the role that *Halakhah* plays in Jewish life. Clearly, it remains central in the development and application of Jewish values on all levels. Yet no Jewish sect can claim that its behavior and norms are

stipulated only by the tradition, without any influence from outside information, events, or situations. Each author reads the texts on the basis of his own worldview and needs, adding his perspective to documents that are already reflective of their authors' perspectives and beliefs. Particularly since *Halakhah* is capable of stipulating many disparate and contradictory norms, the differences of opinion between Yosef, Tendler, Lauterbach, and others are a continuation of the *halakhic* discussion that has always characterized Jewish tradition.

Conclusion: Defining a Continuum of Jewish Thought

Any closing reflection on this project must begin with the admission that its central question is largely absent from *halakhic* thinking. The expression of "how fruitful is too fruitful" initially framed the study as an analysis of the point of intersection between two potentially contradictory values. We set out to find whether one or the other – procreation or ecology – might take precedence in various situations, whether there might be some "Jewish answer" to the challenges posed by proponents of limiting human numbers in modernity. Yet there is no such answer, because there is no such question in Jewish discourse. There are two reasons for this reality. First is that from Talmudic times into modernity, *Halakhah* has continued to view the issue of procreation in a particularly Jewish sense – i.e. Jewish continuity – and to look at the earth and the law surrounding it universally. The second reason that the Jewish population is only a tiny fraction of humanity, so that its population policies will have an effect only on itself, and not on the world population. There is, thus, a sense that the two issues are only cursorily related to one another. There do not seem to be any voices – certainly among the *Rishonim* but even in modernity – calling for the Jewish community to examine its demographic patterns in light of universal values.

What can be said, however, is that there are a number of philosophical issues that impact on both values, and that Jewish law deals with these issues thoroughly and in varied ways. We believe that it is appropriate and realistic to speak of a continuum of philosophical and legal thinking on such issues as the relationship between Jewish, human, and natural interests, the authority of the individual in determining family size,

and the role of human activity vis-à-vis divine providence. As a result, thinking regarding procreation and ecology may be described along a similar continuum.

What is shared?

Even within this framework of continua, certain values and opinions are shared by all points of view. For example, although the relationship between particular and universal interests varies depending on one's worldview and time-place, all Jewish thinking maintains the importance of Jewish survival. Even those that reject any chosen status maintain that the Jewish tradition is worthy of maintaining and strengthening vis-à-vis the larger humanity. In a way this is tautological, since not to do so would automatically put one outside the pale of serious Jewish responses. Yet the point is important because it accounts for the unanimous concern of the Jewish community – in antiquity, medieval times, and modernity – for Jewish continuity, and thus impacts significantly on the procreation issue.

A second area of unanimity is in the philosophy of humanity. With few exceptions,[1] Jewish thinking holds fast to such ideas as צלם אלהים and free will, though these may be defined alternatively in different systems of thought. It acknowledges important differences between humans and animals and generally defines these – whether literally or metaphorically – with some form of reference to the divine. Far from accepting the notion that humans are merely another animal species that has accidentally

[1] Spinoza is an obvious exception to our generality about free will, but there are few true determinists in Jewish philosophy.

outgrown its own niche, Jewish thinkers of all backgrounds attribute to humans a unique station among the life forms, and specific responsibilities along with it.

On Procreation

These shared notions impact greatly on Jewish thinking regarding procreation, yet it is still possible to identify widely varying ideas – both philosophical and practical – with regard to this issue. We have seen, for example, that there are clearly two opinions in the texts on family planning, and that this debate continues in modern discourse as well. At one end of the spectrum are those who require continued procreation throughout life, such as the *tanna* Rabbi Joshua, Rabbi Yitzhak Alfassi, who considered Rabbi Joshua's statement as *Halakhah*, and the thinkers of Orthodoxy in recent centuries. At the other end are those who allow cessation after the Beit Hillel minimum – the *Mishnah*, the *Shulhan Arukh*, and Rabbi Lauterbach of the Reform movement.

The debate can properly be called a continuum, as opposed to a *mahloket*, because there is such a range of thinking in between the two extremes. For example, Rabbi Moses Tendler, who clearly falls toward the stringent end of the scale, indicates that in some rare circumstances, most likely those of extreme poverty, an Orthodox rabbi might grant a *heter* allowing a couple to cease procreation. At the other end of the spectrum, Lauterbach acknowledges the Beit Hillel ruling as a minimum but recognizes even the rare possibility of legitimate childlessness. Between the two, we have seen a great deal of debate in the sources over the lengths to which one must go to continue to procreate:

Must he sell a Torah scroll? Must he divorce his infertile wife if he already has children? Must he be forced to divorce her if he does not have children?

Outside of the normative scale are those who would call for negative Jewish population growth for philosophical reasons. This is a theoretical possibility,[2] but it is not an option discussed by even the most left-wing Jewish thinking. The reason is likely that this area is most often shaped by particularistic demographic concerns – i.e. the question of Jewish continuity –

with the Holocaust representing the latest and most devastating of such factors.

On the Earth

Jewish thinking on the earth is rather more convoluted, particularly because, as we have acknowledged previously, Environmentalism is a modern system. Certainly no one would disagree that it is nice to live in a clean place, but various systems differ greatly on whether caring for the planet is a religious dictum. Take, for example, the Talmudic story of Rabban Gamliel and the donkey:[3] surely the great rabbi would have preferred not to kill his donkey, but he did not view caring for it as a greater religious priority than upholding the laws of Shabbat. In modernity, the left is rapidly coming to see caring for the earth as an expression of *Halakhic* prescription, while other segments of the Jewish population prioritize it quite differently.

[2] Hypothetically, a Jewish point of view concerned deeply with human overpopulation might call upon the Jews to decrease their own numbers and thereby encourage other nations to do the same. The plan is flawed, but would fit with the theology of "light unto the nations."
[3] B. Shabbat 154b. *Supra* discussion in chapter 2.

There seem to be two core issues in this continuum. One is the question of human action vis-à-vis divine providence: do human beings need to worry about an issue (such as the environmental crisis) if that issue is in God's domain? Rabbi Tendler asserts that it is unnecessary – even blasphemous – to do so, while other voices in Jewish tradition have understood *Halakhah* to prescribe such actions. Along this continuum are Jews who believe that God acts in history, others who hold that God acts only by mandating human behavior, and still others who believe that God is capable of acting at some times and not others. Varying conceptions of divine nature and of the character of providence impact greatly on one's view of the human role in such cases.

The second issue is the place of extra-Torahitic information in the *halakhic* system. Judaism often functions on the principle that the tradition can inform every situation. The Torah tells us, for example, about Jewish-gentile relations, and it tells us about such crises as exile and persecution. As a result, there is an existing Jewish framework for dealing with these issues, even though the individual responses may vary. Yet the tradition is silent on the subject of ecological crisis, both scientifically and philosophically. Not only did the Rabbis did not have access to the science that has fed into modern Environmentalism, they have the sense that human beings are not really capable of destroying the earth, that our actions are only really dangerous to ourselves.[4] Hence the realities of the environmental crisis, as presented by the science and politics of the contemporary world, are at the least outside of and potentially even contradictory to the thinking of Jewish tradition. As a result, Jewish conceptions of the human

[4] Examples include the statement in *Sefer Ha-Hinukh* that God will not allow any species to cease to exist, regardless of human activity. The Rishonim worry about needless destruction, but can they truly believe that humans are capable of deeply affecting the handiwork of the all-powerful God.

responsibility to the earth vary wildly in modernity, depending on one's understanding of divine providence and one's openness to modern science.

Indeed, because the *Rishonim* generally share a human-centered conception of the mitzvah of בל תשחית, it may not even be possible to speak of an earth-related continuum of thought in premodernity. It is however, possible to set that ethnocentrism as one end of the spectrum. The other end is the increasingly common notion that the prohibition against destruction is somehow connected to ecology or to an injunction to preserve God's Creation. This represents an interesting case in which the thinking surrounding a commandment has begin to shift, even for the Orthodox,[5] in view of philosophical changes in society.

Why a Continuum?

This shift is evidence of the effect that outside ideas can have on Jewish thinking. Indeed, *Halakhah* has always been affected by the beliefs and interests of those creating it, whether of a historical, social, or scientific nature. In our second chapter, we identified such a process with regard to the incorporation of צער בעלי חיים, an ostensibly universal value, into Talmudic law. The shift in modernity toward an ecological view of בל תשחית represents a similar development.

There is, then a legitimate role for extra-*halakhic* values and information in the development of Jewish law. Historical events, scientific knowledge, and social intellectual trends can serve as catalysts for Jews to seek certain values in their own

[5] Witness the RCA resolution referenced in chapter four, which calls upon Orthodox rabbis to decrease their fossil fuel consumption.

tradition. Indeed, the presence of an outside reason for a value – i.e. the Holocaust vis-à-vis procreation concerns or Global Climate Change as regards ecology – need not negate the Jewishness of the value. Rather, such factors can be viewed as spurring Jews to seek the traditional expression of such values so that they may enter into the discourse in an authentic, Jewish way.

There are, thus, any number of factors that may go into an attitude toward an issue. A given thinker's place on the continuum of legitimate Jewish opinions may be affected by his time and place, the social and intellectual currents around him, the fate of the Jewish people in his generation, and as his understanding of the binding and prescriptive nature of Jewish law. This fact is clear and documented in modernity, with its myriad forms of Jewish philosophy and thought, but it is also evident among the *Rishonim* and in the Talmud. Even when the *Halakhah* is crystallized according to one opinion or another, the philosophical differences behind varying points of view often remain active in the law.

Rarely is there a single Jewish answer to a complicated ethical question. The beginning point in making such decisions is to allow for the possibility of many approaches, but at the same time to delineate the boundaries of legitimate Jewish thinking based on the lines that *halakhic* discourse has drawn over many centuries. By framing Jewish law in this way, we make the debate broader and more honest. It is an acknowledgement of, and a tribute to, the fact that *Halakhah* is built upon a rich history of debate that is intelligent, informed, socially aware, and sometimes even self-contradictory.

A Prescription for Jewish Life

This type of framework asserts that *Halakhah* can effectively guide Jewish life in disparate eras or communities because it is formulated in response to the needs and challenges of each community. This does not mean that Jewish law is a construct, that *halakhic* practice reflects only transient realities. Rather it implies that the tradition provides a framework – precedents, trends of thought, paradigms, lines in the sand – into which Jews can bring their needs and realities and attempt to resolve issues.

This implies that *Halakhah* can be both multivalent and prescriptive at the same time, which exceedingly important for liberal Judaism. It allows for the possibility – indeed, the necessity – that Jewish law will prescribe different courses of action in different eras. In this context it is crucial to ask what it prescribes regarding Jewish procreation and the environment, in the Twenty First Century. The question might be best stated thus: What values do the realities of contemporary life elicit from Jewish tradition, and in that context does the *Halakhah* stipulate any specific courses of action?

There could be, depending on worldviews and values, many such prescriptions coming out of the *Halakhah*, yet it seems clear that in recent decades a general consensus has begun to amalgamate regarding both the environment and Jewish survival. Thus, as modernity spurs Jews to be increasingly conscious of the human impact on the earth and to act out of that consciousness, Jewish tradition can provide them with a framework for doing so. For example, it supplies, in the concept of הנה טוב מאד, a religious Jewish motive for the notion of conserving nature. Similarly, it teaches humans to be mindful of

their superior intellect and their unique station on earth in making decisions that impact on other forms of life. The Jewish conception of stewardship, which is marked by the recitation of blessings as well as positive actions to preserve God's handiwork, is a powerful and unique notion that could add an important spiritual dimension to Environmentalism. Perhaps it is time for Reform Jews to reconsider the practice of reciting *berakhot* throughout the day, and to consider it in ecological terms.

At the same time, any authentic Jewish environmental conception must take into account the centrality of human health and wellbeing vis-à-vis the earth and the animal kingdom in Jewish law. Yet this has a new significance in the modern world, because it is known that such destructive actions as burning fossil fuels and polluting the planet impact on human health as the affect the environment. Thus the ethnocentricity of *Halakhah* can be a guiding force in creating a Jewish environmental ethic that speaks honestly out of the tradition. In that framework, the principle established in the codes with regard to בל תשחית – that it is permitted to destroy something only if the benefits outweigh the losses – might serve as a guide to human beings as they begin to rethink their lifestyle. In spite of the fact that there are many definitions of "benefit," and that it is impossible to create a universal formula to prioritize economic need, natural health, human welfare, and the many other factors involved in these difficult decisions, the principle in itself provides the beginnings of a Jewish approach to environmental decision-making.

On the procreative side, the value of continuity is strongly evident in Jewish society today, particularly in light of the Holocaust and the current demographic situation in both Jewish centers. With this as a background, the tradition's emphasis on procreation

seems to provide a prescription for modern Jews to redouble their efforts at maintaining the size and strength of the Jewish people. This might be accomplished through procreation, and perhaps liberal Jews ought to look again at the idea of larger families. Yet there are ways of addressing this issue without contradicting the environmental ethic described above. For example, adoption and conversion might provide ways of growing the Jewish people without growing the human population. Similarly, it can be argued that education, strengthening the commitment of already living Jews to the Jewish future, is the most important assurance of continuity. It also, interestingly, corresponds in a completely compatible way with the injunction to care for the earth.

Ultimately, though, it is less important whether the values are contradictory; they arguably are. The real key is the fact that Jewish law can prescribe actions, even in a liberal Jewish context, through a dynamic of ongoing engagement of changing values buoyed by a robust and self-aware tradition that can healthfully maintain multiplicity. In that sense, the most important prescription is the implicit command that emanates from the diversity and gravity of Jewish law: to be part of the ongoing *halakhic* discourse. Only by continuing to engage the texts can Jews shape the voice and import of Jewish law in their own time and place. They may find different solutions to the same problems, but it is by being part of the discussion, by placing oneself on the continuum, that Jewish responses are formulated.

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