

The Jewish Tradition and Civil Society

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There is no term for, much less a theory of, civil society in classical Jewish texts. Although the Jewish viewpoint on any given subject is no longer identical with the classical rabbinic viewpoint, until modernity, the latter provided the intellectual framework in which all Jewish thought was set. Any understanding of how Judaism views a topic must begin with the rabbinic tradition. This is still the case today because the rabbinic tradition provides the primary intellectual constraint on the adoption of any and all political theories represented in this volume. Rabbinic writers do not produce theories; they produce commentaries on a biblical or talmudic text, codes of law, and legal responsa. These sources, moreover, are extremely diverse, covering over two millennia of history, and for the most part generated in pre-modern exile, when Jews lacked a state of their own, lived in compact, internally autonomous and religiously homogenous communities scattered across continents, and were segregated from general society legally, politically, and socially. Rabbinic energy was directed at working out the divine scheme of justice for Jewish society. The civil domain was reserved for the non-Jewish world. Without a state of their own, and with little sense of belonging to the host states in which they live, rabbinic writers do not discuss the role of society in relation to the state. So, the Jewish tradition has little to contribute to the civil society/state debate. If one understands civil society, instead, as “an ethical vision of social life,”¹ concerned with the conditions for establishing bonds of social solidarity between diverse members of society, then Judaism has much to contribute to the discussion.

As an historical model, civil society is an outgrowth of and a corrective to the tradition of individualism and focuses on how the free individual possessed of rights locates himself in society, re-experiences connection and community, and establishes social trust with other citizens. The modern connotations of this idea are foreign to the Jewish tradition, which conceives of the individual as heteronomous, not autonomous, and located firmly in a particularist community. Thus, the problem that civil society seeks to solve, how to create a sense of community among free individuals liberated from primordial identities, does not arise in Judaism. Nevertheless, the topic of forging and maintaining overlapping bonds of social solidarity not only among the community of Jews but also between Jews and other groups appears throughout Jewish literature, beginning with the biblical portrayal of the terms and conditions of Israelite associational life, including with other groups living in the biblical polity. This discussion is continued in rabbinic sources that reconstruct Israel’s biblical past and messianic future, although without reference to any actually existing Jewish polity. The rabbinic tradition also developed a theory of what constitutes a civilized society with which Jews may associate, although its practical applications were limited primarily to the economic sphere. The Jewish tradition thus offers its own perspective on the criteria

¹ Adam B. Seligman, *The Idea of Civil Society* (Princeton: Princeton University Press, 1992), p. 10.

necessary to establish trust and bonds of social solidarity in a pluralistic society, which I shall describe in the first part of this chapter.

Whether this perspective can be applied meaningfully today is a difficult and pertinent question. Although the traditional rabbinic division of time views all history between the destruction of the Temple in the first century and its hoped for rebuilding in the messianic age as an undifferentiated time of exile, modernity fundamentally altered the background conditions to which the classical sources respond. Jews became eligible for participation as citizens in the life of the nation, not as a religio-national group, as they conceived of themselves, nor as an independent corporate body, the political status formerly granted to them, but, rather, as individual adherents to a religious faith. The extension of civil society to include Jews raises new questions about the terms of such inclusion. What rights of association do Jews require in order to thrive in a manner continuous with the Jewish tradition and what does the rabbinic tradition say about the participation of Jews in the pluralistic, associational life of the nation? Moreover, the changes wrought by the "Jewish emancipation and self-emancipation;"² the break-up of homogenous religious communities, the rise of secularism, and the consequent fragmentation of Jewish society raise new questions for the rabbinic tradition about intragroup associational life itself. The most dramatic change is the creation of the state of Israel. Several Jewish intellectuals view the construction of a "Jewish" theory of civil society, one capable of encompassing the diverse groups, both Jewish and non-Jewish, that constitute Israeli society, as an urgent need -- even though they are not at all sure how to connect such a theory to the rabbinic sources.

There are no developed answers to these questions. The rabbinic process is one of gradual adaptation, the search for legal responses to new problems through the slow accretion of consensus, using the traditional talmudic categories developed in the earliest centuries. With respect to Israel, in particular, historical events have far preceded rabbinic legal development. So, in addressing these questions in the second part of this chapter, I shall speculate as much as report.

The Ideal Jewish Social Order

Ingredients, Society

The Bible begins with the story of the creation of humans in God's image, endowing humanity with special worth and dignity. This idea embodies an ethical ideal of social harmony between humankind, one that the prophets envision as the goal of the end of days. Humanity is not intended to be a universal human order or

² Jacob Katz, *Jewish Emancipation and Self-Emancipation* (Philadelphia: Jewish Publication Society, 1986).'

“one fellowship and societie,” as Locke wrote.³ Nor are humans made a community by any common enjoyment of natural rights. The lesson of the biblical story of the Tower of Babel is that a universal human order is potentially dangerous. Instead, humanity is divided into unique collectivities, each with their own language and laws, and each capable of attaining independent moral significance.

The biblical election of Israel at Sinai creates an immediate division within humanity between Israel and the other nations of the world. The community or nation of Israel comes into being through the covenant, a historical social contract between God and Israel at Sinai (described in most rabbinic sources as grounded in consent), which establishes the Torah as the law of the Israelites. What gives Israelite society its identity, without which it would cease to be a society or become a different one, is the law. The Torah, the written and oral law given at Sinai, is the particular inheritance of Israel and only Israel is bound by the six hundred and thirteen commandments contained in it. The law is permanent and binding on all future generations of Jews, because God included in the covenant all who stood at Sinai and those who are “not here with us this day.” (Deut. 29:14). While non-Jews may choose to join the covenantal community, by accepting the authority of the law, no Jew may exit from it. As an original member of the covenant, each Jew continues to be obligated to perform the law even if he or she disassociates from the community. Although the concept of chosenness is sometimes linked, especially among mystical thinkers, to the idea of a distinctive Jewish soul, for most, chosenness is a societal concept, referring to the national community’s obligation to become a religious community by observing the law.

Jewish society includes all its constituent parts -- political organs, the family, and the individual -- which are formally linked by the law. The law spells out the obligations each member of the community owes to God and to his or her fellow, including family members. All aspects of life are governed by the law, including private individual conduct, private family relations, and market activity. The organs that wield coercive power (whether the monarchy, the elders, or the High Court) are similarly parts of the community that the law addresses. The monarch does not exemplify divine law. He is essentially a magistrate, who applies the law in concrete circumstances such as in conditions of war, just as the judges apply the law to concrete cases.

Judaism thus lacks the building blocks, drawn largely from Christian conceptions of society and the individual and the experience of European Christendom, that gave rise to the idea of civil society in the West.⁴ Given the comprehensiveness of the

³ John Locke, *The Second Treatise of Civil Government* in Peter Laslett, ed., *Locke’s Two Treatises of Government* (Cambridge: Cambridge University Press, 1967) p. 401

⁴ See Charles Taylor, “Modes of Civil Society,” *Public Culture* 3, 1 (Fall 1990), pp. 95-118. ‘

law, Judaism could not develop a picture of society as independent of its political organization, as did the Church, nor a concept of independent realms of experience, separate domains such as the household, the state, the economy, and society itself, each arranged according to its own logic or laws, nor even a sharp distinction between public and private spheres. The concept of public space serves primarily to intensify the seriousness of breaches of commandments that apply equally in the private domain.

Nor, in contrast to the liberal and Christian model, does Judaism view the individual as the first and fundamental unit of society, a free and equal moral agent who possesses rights that separate him from other individuals and even society as a whole. Covenantal obligations are imposed on the individual not as a singular human being, but, rather, as a member of the covenantal community. One cannot ignore one's obligations without endangering others. This is one meaning of the talmudic legal principle that "all Jews are responsible [literally, sureties] for one another." Sifra on Leviticus 26:37; Babylonian Talmud, Shevuot 39a.R Each Jew is held accountable for the preventable transgressions of another. The concept of mutual responsibility has more positive connotations, as well. A Jew can recite a blessing on behalf of another "because all Jews are responsible for one another's fulfillment of the commandments." (Rashi, Babylonian Talmud, Rosh Hashanah 29a.) Ritva glosses this further:

"All Jews are responsible for one another. They are like one body and like a guarantor who repays the debt of a friend." (Ritva, Babylonian Talmud, Rosh Hashanah 29a.)

Such a system may, and does, respect individual rights of personhood and property, but it cannot confer on its members the kind of freedom or autonomy presupposed by civil society. In the Jewish conception, the individual is neither sovereign over his or her own life and experience, nor a fully independent source of moral values. Freedom is not defined in terms of subjective rights or the choice of one's aims and desires. Freedom means individual accountability, the free will to obey or disobey the law.

The Jewish community is not the sole subject of the law, however. Prior to the election at Sinai, the Bible records, God stipulated to Noah and his descendants the terms of a new moral order. Later rabbinic tradition codifies this order as binding on all non-Jews and consisting of seven basic human obligations, to refrain from idolatry, blasphemy, homicide, incest and adultery, robbery, and eating the flesh of a live creature, and to establish a system of justice.⁵ One who obeys the Noahide laws is "a

⁵ On Noahide law, see David Novak, *The Image of the Non-Jew in Judaism: An Historical and Constructive Study of the Noahide Laws* (New York: Edwin Mellen Press, 1983); Suzanne Last Stone, "Sinaitic and Noahide Law: Legal Pluralism in Jewish Law," *Cardozo Law Review* 12 (1991), pp. 1157-1214.

righteous among the nations” and achieves salvation as do Jews. (Maimonides, Mishneh Torah, Hilkhoh Melachim 8:11). The nations of the world thus also potentially constitute societies of moral significance whose basic purpose is to establish justice in the social sphere; they are not merely aggregates of individuals. Only those who do not abide by the moral order of Noahide law are not members of true or civilized society because they live in a state of moral chaos.

So, there are other societies that overlap the covenantal one. The links between these societies are provided, again, by the law, which stipulates which kinds of associations are obligatory for Jews, which permissible, and which impermissible. Differing forms of associational activity and social obligations are owed to different members of the larger society contemplated by the law: covenantal fellows, Noahides, and idolators. The Jewish tradition provides then an alternative model, quite different from those proposed by other political traditions represented in this volume, for adjudicating which kinds of associations in a pluralist society should be supported or tolerated and which should not.

The liberal model of civil society is a realm of voluntary association. Covenantal fellowship, however, is not voluntary. The law imposes a duty to associate with other covenantal members. It is not only that many legal obligations, from the cultic to the mundane, can only be performed within a group setting. Rather, as Maimonides summarizes, “one who diverges from communal paths, even if he commits no transgression but merely separates himself from the congregation of Israel, and does not participate in their sorrows, loses his share in the world to come.” (Maimonides, Mishneh Torah, Hilkhoh Teshuvah 3:11.) The social solidarity that the law stipulates for covenantal fellows is regulated by two interrelated principles: to “love one’s neighbor as oneself” (Lev. 19:18) and to “hate” evil-doers (Psalms 139:21). The tradition is not concerned with the problem of commanding the emotions of love and hate but, rather, with concretizing these obligations in specific deeds, such as visiting the sick, comforting mourners, and assisting in burials, (Maimonides, Mishneh Torah, Hilkhoh Evel 14:1.) and with interpreting and restricting the proper object of love and hate.

Some acts of benevolence are so extraordinary that they are only obligatory among covenantal fellows: extending interest-free loans, redeeming captives, sabbatical cancellation of debts, just-pricing, rebuking fellows to prevent transgression, and special forms of charity. Certain objects of love cannot be subsumed under the general category of reciprocal love. It is not sufficient to love the unfortunate reciprocally, as one loves oneself; they require special protection.⁶ Similarly, specific provisions are made for those one may view with hostility. The biblical ideal of a social bond among all Israelites assumes that social relations are a site not only of natural amity and affection but also of personal jealousy and conflict. The concrete obligations of fellowship extend to personal enemies. It is forbidden to

⁶ This point is made by Lenn Evan Goodman, “Maimonides’ Philosophy of Law,” *Jewish Law Annual* 1 (1978) pp.88-89

extend aid and assistance to the undeserving, however, for, to do so, implies a failure to employ critical judgment. In a society defined by common allegiance to the law, the undeserving are rebellious sinners, heretics, and apostates, who show through their actions that they reject the authority of the law and desire to abdicate membership in the community. Included in this class are public desecrators of the Sabbath.⁷ Such rebellious sinners are no longer 'fellows' to whom mutual social obligations are owed and they no longer enjoy rights of association with covenantal members. Social contact with them is forbidden, they are neither mourned nor eulogized nor accepted as witnesses, and intermarriage with them is forbidden. Thus, one may be a Jew for purposes of incurring an obligation to God to observe the law, yet not a Jew for purposes of asserting rights of fellowship.⁸

The status of covenantal fellow turns on conduct, and not ascription, a concept that plays a critical role in defining who is included in Jewish society. Yet, the wish to preserve the historic community, which overlapped with the religious community, also accounted for increasingly narrow definitions of what constitutes deliberate defiance of the law and thus abdication of community membership. The halakhah developed a variety of excuses, which served to absolve many deviants of full responsibility for their conduct.⁹ An additional model of social solidarity overlapping the covenantal is provided by the biblical portrayal of the associational life that Israelites share with non-Israelites residing in the polity. The biblical concept of social solidarity among diverse ethnic members of the polity bears a resemblance to the fellowship of citizens in the modern nation. The Bible speaks of three types potentially within the polity: the heathen, the stranger, and the resident stranger. The heathen is an idolator who is not permitted to associate with Israelites. Idolatry is not only an absolute falsehood, it is associated with moral corruption. The Bible repeatedly commands the community to purge the territory of idolatry and idolators -- pagan and Israel alike.

In contrast to the heathen, Israelites are enjoined in the Bible to love the stranger as one self, to provide one law for the stranger and the Israelite alike, and to provide the stranger with food, clothing, and agricultural charity. In several biblical passages, the social solidarity that Israelites owe to the stranger is ascribed

⁷ For an analysis of these categories, see Samuel Morell, "The Halachic Status of Non-Halachic Jews," *Judaism* 18, 4 (Fall 1969), pp. 448-457."

⁸ For a fuller treatment of the topic, see Norman Lamm, "Loving and Hating Jews as Halakhic Categories" in Jacob J. Schacter, ed., *Jewish Tradition and the Nontraditional Jew* (New Jersey: Jason Aronson Inc., 1992), pp. 150-157.

⁹ See Aviezer Ravitzky, "The Question of Tolerance in the Jewish Religious Tradition," in Yaakov Elman and Jeffrey S. Gurock, eds., *Hazon Nahum: Studies in Jewish Law, Thought, and History* (New York: Yeshiva University Press, 1997), pp. 378-385.

to the stranger's political and material dependency on Israelites. The stranger is not only subject to Jewish authority, he does not have an allotted portion of the land and therefore is like the Levite, the widow, and the orphan, to whom special consideration must be shown. In others, the duty to love the stranger is elevated to an absolute ethical plane. The stranger is no different from the Israelite in two essential respects: Israelites, too, were once strangers in Egypt; moreover, everyone is a stranger in the world in relation to God.

In its original biblical setting, the stranger is an individual of non-Jewish birth living in the land who accepts Jewish political authority and obeys some, though not all, of the covenantal law. Strangers were gradually assimilated into the covenantal community and reconceived as converts, who became full members of the covenant once they assumed the obligations of the law. The rabbinic tradition equates the biblical stranger with the resident stranger, which it identifies as a non-Jew who does not obey Jewish law, but, rather, formally accepts the Noahide laws. In return, Maimonides holds, the resident stranger is owed full ethical and charitable reciprocity. He portrays the duty to love the stranger as a pure moral law, one that is counter-instinctual, because the stranger shares no thick, primordial tie, no common ethnic bond, nor religious tradition, with the Israelite. The obligation of Israelites to engage in concrete acts of solidarity with the stranger is based, instead, on allegiance to universal criteria of morality. The category of resident stranger had no application in exile because there was no Jewish authority to impose formal acceptance of Noahide law. The early talmudic discussion of the obligations owed by Jews to non-Jews with whom they lived assumes that non-Jews are pagan idolators and erects encumbrances against free intercourse with them. The Talmud also permits blatantly discriminatory treatment of non-Jews, although much of the discussion is academic. Even in the talmudic period, however, the differential rules were often held inapplicable, not because pagans were 'strangers,' but, rather, because other principles demanded their suspension. If discriminatory rulings against idolators would cast a bad light on Judaism, the principle of avoiding desecration of the divine name requires their suspension. Similarly, the principle of pursuing paths of peace in social life was invoked as a legal basis for supporting the pagan poor, for visiting the sick of both groups, and for burying their dead with Jews. According to one view recorded in the Talmud, pagans, too, should be likened to "babes in captivity," because they are blind followers of their ancestors. (Hullim 13a).

In the medieval period, these pragmatic and idealistic rationales were supplanted by a more comprehensive theory, initiated by Maimonides's ruling that Moslems were not idolators but rather fellow believers in the monotheistic idea. Maimonides's follower, Menahem Me'iri, a thirteenth century French decisor, extended this principle to Christianity and at the same time formulated the entire talmudic system of rules and exceptions into an explicit principle. He held that the category of the idolator referred to those who lived in the culture of the ancient world, who "were not bound by proper customs," and not to the people of the

medieval era, who are disciplined by enlightened religion. Although Me'iri compares religiously enlightened non-Jews to resident strangers who observe Noahide law, he does not equate them. Me'iri frees the non-Jew from dependence on biblical revelation, thus creating a new intermediate category between paganism and Judaism. The ethical level of a culture determines its status. As Jacob Katz suggests, Me'iri had in mind all societies that maintain legal institutions and enforce moral standards in society. ¹⁰Judaism's intricate system of associational duties presents, as Gordon Lafer points out, a "hierarchy of obligations," privileging community members over resident strangers, resident strangers over members of 'civilized' societies, and 'civilized' societies over those who disregard the moral law. Communal bonds, dependence, and moral character determine the level of obligation owed rather than an abstract commitment to universal criteria, which assumes that "the proper subject of politics must be the human species." ¹¹

Values and Responsibility

The religious program of the Torah is social, not private or personal. Hillel, a first century teacher, viewed the commandment to love one's fellow as the cardinal principle of the law, stating that all other commandments were merely its "interpretation." Maimonides identifies love of fellow as the second cardinal principle, in which "one's fellows become second selves." For Maimonides, social solidarity is not just a good in itself; it is linked to the first principle, love of God. It is through love of God that one comes to understand that social solidarity is based not on self-interest but, rather, on reciprocity, "the perspective which the social imperative "Love thy fellow as thyself" commands us to adopt."

In contrast to Christianity, however, social solidarity is not grounded in human nature. Instead, it is a product of a congerie of positive commandments mandating some associations and forbidding others. The legal principles regulating associational life are thus part and parcel of the larger purpose of the law: In biblical terminology, to mold a holy nation; in the philosophic language of Maimonides, to provide for the objective human well-being or happiness of the community. In the Bible, holiness is defined as separation, both physical separation of Israelites from idolators and social and cultural separation from general society. Such separation is designed to preserve cultural distinctiveness and prevent the infiltration of foreign norms. For this reason, as Jacob Katz notes, HaMeiri refused to suspend segregative laws designed to separate Jews from idolators, even after ruling that Christianity was not idolatrous. Without cultural separation, "we would become one people."¹² The purpose of mandating communal association is precisely to preserve and transmit cultural values through group reinforcement.

¹⁰ Katz, at 121.

¹¹ Lafer, at 199.

¹² Katz, at 127.

For Maimonides, the fellowship created by the social commandment assures general human well-being. Only a divine law can guarantee objective human well-being; human systems of governance are, at best, approximations and, at worst, radically defective. Human well-being consists in the well-being of the body, to use Maimonides's terminology again, that is, the human need for physical security and material sustenance. Because humans are diverse, a common structure of civil, penal, and public law is provided to create conditions of security, mutual cooperation, and trust. But human well-being consists, more importantly, of the creation of conditions that allow persons to perfect their moral character and their intellect. The laws concerning diet, sacrifice, idolatry, sabbath observance, sexual laws, and the rest are all aimed at moral or intellectual perfection. These laws are not only cultic. They include the obligation of fathers to educate their children; the obligation of children to care for parents, economic restrictions on maximizing profits designed to protect weaker parties and redistribute resources according to need, charity, and the like. In short, the law is responsible for assuring human well-being and it is the law that determines who is to do what.

Responsibility for performing the law and thus providing for the well-being of oneself and others rests on each individual community member in the first instance. The social organization of Judaism, which includes extensive education of children and adults as well as periodic public recitation of the law, is designed to promote self-governance, to enable persons to perform the law themselves. The pedagogic and justificatory form in which the law is cast invites adherence rather than coerced compliance, although coercive institutions are provided by the law. Although some early talmudic authorities questioned the validity of any religious act performed under compulsion, most assumed that coercion was as applicable in the religious context as in the civil or criminal. But, even with respect to the latter, there is a tendency to devalue coercion. Many of the laws, particularly those that involve no public act, also entail no public sanction. Even major criminal offenses were often unpunished by human authorities, as a result of the well-known biblical procedural rules that make it nearly impossible to convict anyone.

The principal function of judges (later, rabbinic authorities) is to determine the law that the individual community member is obliged to perform. In contrast to the natural law tradition, which posits that humans can discern their obligations through reason, or the Confucian tradition, which combines affective and cognitive modes of knowing one's obligations, in Judaism, the innate moral capacities of humans is developed within the context of revelation, the source of genuine moral knowledge. The law itself specifies the good, while human reason is employed to interpret the law so that its moral and ethical import is realized. The law is assumed to contain the principles for its own elaboration, serving as a mandate for judicial

legislation and interpretation, including broadening or adding to its provisions, and restricting or annulling others.

Conspicuously absent from the biblical model is any assignment of responsibility for human well-being to private or communal associations. Communal associations first emerged in the Talmudic period. According to the Talmud, the 'townspeople,' a legally-recognized partnership, provided for local public needs, such as synagogues, schools, ritual baths, and police protection.¹³ They also acted as labor unions, with the right to fix weights and measures, prices and wages. (Babylonian Talmud, Baba Bathra 8b.) The medieval kehillot, lay representative associations that legislated for the public good, were viewed as extensions of this talmudic model. The communal associations had the right to tax and to subject individuals within their geographic jurisdiction to their authority, subject to rabbinic review, a right medieval jurists justified as grounded in the consent of their membership.¹⁴ They became the vehicle for fulfilling fellowship obligations, including dispensing charity and interest-free loans and redeeming captives. It is unclear whether the communal associations are properly classified as mediating institutions or political institutions. In a society without a state, the distinction is, needless to say, elusive. Private, voluntary associations, organized for religious, charitable, educational, and occupational purposes proliferated in the late medieval period.¹⁵ But these associations were not endowed with any legal or theoretical importance.

Post-Enlightenment Judaism and Contemporary Pluralism

Risks, Freedom

From the rabbinic perspective, liberal civil society, defined as a realm of voluntary association and free entry and exit, is the problem of modern Jewish existence because it liberates individuals from the group, enabling them to discard traditional forms of life, express their identity in nontraditional terms, or put aside the question of identity altogether. Civil society encourages sectarian divisions to multiply and overlapping associations to proliferate, and interprets this fragmentation as benign because "plural memberships and divided loyalties make

¹³ See Encyclopedia Talmudit, vol. 3, s.v. bene ha'ir.

¹⁴ See Martin P. Golding, "The Juridical Basis of Communal Associations in Mediaeval Rabbinic Legal Thought," *Jewish Social Studies*, 18, 2 (1966), pp. 67-78.

¹⁵ See Derek J. Penslar, "The Origins of Modern Jewish Philanthropy," in Warren F. Ilchman, Stanley N. Katz, Edward L. Queen II eds., *Philanthropy in the World's Traditions* (Bloomington: Indiana University Press, 1998), pp. 197-201.

for toleration.”¹⁶ The main risk that the rabbinic vision of associational life poses for its members in contemporary conditions of freedom is self-isolation and estrangement, both from general society from nontraditional Jews. This isolation, although often seen by members as an intensification of the principle of holiness as separation embodied in the remnant of the faithful, is an abdication of rabbinic Judaism’s historic role of assuring the survival of the religio-national community. In order for rabbinic Judaism to play a positive role in the drama of Jewish life in Israel and in the West, it needs to develop a mode or theory of associational life in an ethically pluralistic society existing under modern conditions of freedom and equality.

Israel

The critical questions of associational life in Israel concern the place of secular Jews and non-Jews in a Jewish polity and the role of religious legislation. Rabbinic discussion of these issues sheds some light on what form of civil society the Jewish tradition could support or tolerate in a modern Jewish state.

Given the traditional definition of Jewish society as excluding deviants, including public desecrators of the Sabbath, the question arises whether secular Jews are, from the rabbinic perspective, within Jewish society. This question arose immediately on the heels of the Jewish Enlightenment, well before the creation of the state, when nontraditional denominations and secularist movements began to proliferate. As expulsion or banning was not an option, several traditional communities, instead, self-separated themselves from general Jewish society and formed segregated communities of the faithful.¹⁷ The early settlement community in Israel raised the question in its most acute form but also spurred efforts at accommodation because the very fact of the individual’s continued attachment to the idea of a Jewish nation softened the rabbinic category of rebellious sinners who reject the law.

Although one still can find contemporary rabbinic opinions holding that those who deny the divinity of Jewish law or publicly desecrate the Sabbath are no longer a part of the covenantal community,¹⁸ most rabbinic authorities hold otherwise. These

¹⁶ Michael Walzer, “Rescuing Civil Society,” *Dissent* (Winter 1999) p. 65.

¹⁷ See Judith Bleich, “Rabbinic Responses to Nonobservance in the Modern Era,” in Jacob J. Schacter, ed., *Jewish Tradition and the Nontraditional Jew* (New Jersey: Jason Aronson Inc., 1992), pp. 37-115.

¹⁸ For samples, see Norman Lamm, “Loving and Hating Jews as Halakhic Categories,” p. 158 n.22._

opinions, for the most part, continue the earlier pattern of viewing sinners as not fully responsible for their actions. External factors, and not individual autonomous decision, cause the sin.¹⁹ Both Rabbi Abraham Yeshayahu Karelitz, the Hazon Ish, argues more broadly, however, that the times have so changed that the traditional categories no longer even apply. Modernity is different because it is “a time of God’s concealment.”²⁰ These rulings are motivated by communitarian concerns, and not by respect for the value of diverse forms of Jewish life or of individual choice. As such, they create a virtual fellowship, in which the primordial obligation of social solidarity exist only on one side. Still, these rulings enable social interaction among all Jewish citizens in the state.

The far more nettlesome issue for the rabbinic tradition is the place of the non-Jew within the state. Does the halakha provide an adequate “model of mutuality as a basis for stable group relations”²¹ Social reciprocity does not present a serious legal issue, given the norms of mutuality stipulated by Me’iri and achieved even in the earlier talmudic model, through invocation of the principle of pursuing paths of peace. (Political realia is a far greater impediment.) The more critical issue is the extension of full citizenship rights. According to Maimonides, non-Jews (and Jewish women) are forbidden to hold positions of political authority in the Jewish polity. (Maimonides, *Mishneh Torah*, *Hilkhot Melakhim* 1:4-5). The exilic models of reciprocity do not resolve this issue because they address only the sharing of acts of benevolence.

The admission of non-Jews (and Jewish women) as equal partners in the polity would seem to require a bolder theory, one that affirms the equality of all persons under the law. The Jewish philosopher Hermann Cohen claimed that the biblical injunction to provide one law for the citizen and the stranger (who obeys Noahide law) was, in fact, the precursor of this emancipation ideal. “The Noahide,” he writes, “is a citizen,” a person whose equal moral worth is recognized, triggering full equality under the law.²² Cohen seems to have no followers within the halakhic community, however.

¹⁹ See Aviezer Ravitzky, “The Question of Tolerance in the Jewish Religious Tradition,” pp. 381-384.

²⁰ Hazon Ish 13:16, cited in Lamm, “Loving and Hating Jews as Halakhic Categories,” pp. 160-161.’

²¹ Gerald J. Blidstein, “Halakha and Democracy,” *Tradition* 32, 1 (1997), p. 28

²² Quoted in David Novak, “Universal Moral Law in the Theology of Hermann Cohen,” *Modern Judaism*, 1 (1981), p. 105.

The more common rabbinic strategy is to retain the differential rules in theory but to make them inapplicable to the issue at hand. Thus, Chief Rabbi Isaac Herzog argued that the ban on non-Jews holding political authority refers to the exercise of non-elective, life-tenure powers because it had in mind the office of the Jewish king.²³ Rabbi Shaul Yisraeli proposes to circumvent the ban by conceiving the state itself as no more than a partnership, modeled on the talmudic partnership of the 'townspeople.' He analogizes the holding of office in the state to holding office in a business, which a non-Jew may head.²⁴ The difficulty with these opinions is not their result but their rationales, which highlight the paucity of resources in the tradition for the development of a genuine theory of equal citizenship.

The most controversial issue in Israel today is religious coercion. Must an authentic Jewish civil society incorporate religious law? Here, rabbinic writers have been far more bold, drawing on early and persistent discomfort in the halakha with religious coercion. Performance of the commandments is ideally undertaken freely. At the same time, the biblical model implies that coerced performance of the law is religiously valid and even required and the medieval communities often enforced the law both to preserve the character of the community as a whole and on the assumption that compelled observance still had value, especially in the context of a society generally desirous of observing the law. Several rabbinic authorities suggest, however, that only coercion that has the potential of bringing about "inner consent" is religiously valid. (Rabbi Meir Simha of Dvinsk, Oyr Sameakh, Hilkhot Gerushin 2:20; Hilkhot Mamrim 4:3.) Such inner recognition of the ultimate justice of coercion, prevalent in a religious age, is no longer relevant "in our generation" of religious decline.

Far more significant is that some authorities, rather than lamenting the decline of a religious worldview, assign a positive value to the contraction of opportunities for religious coercion and attribute this contraction to the providential progression of history. The progression of human history toward a maximizing of individual human freedom was providentially ordered in order that the law may be performed under ideal conditions of free choice. Thus, a political climate that protects the right of individual autonomous decision-making, in an age of moral maturity, is endowed with positive value. (Kook) In either view, religious coercion becomes illegitimate under modern conditions of freedom.

²³ The opinion is discussed in Gerald J. Blidstein, "Halakha and Democracy," pp. 25-27.

²⁴ Rabbi Shaul Yisraeli, Ha-Torah ve-haMedina, again discussed in Gerald J. Blidstein, "Halakha and Democracy."

The far-reaching implication of this re-conception of the value of religious coercion is that religious legislation in the secular state would have no halakhic justification if its purpose is to compel observance of Jewish law. Such legislation must be justified on other grounds, such as the will of the people -- a return to the talmudic partnership model of the 'townspeople' and its medieval successor, the kehillah, which legislated for the common good of the geographic community on the basis of consent. Thus, the critical question is what is the communal will at a given time. Debates about religious jurisdiction over marriage, for example, suggest that some form of consensus still exists about the form a Jewish civil society should take.

Pursuant to a political compromise between religious and secular parties entered into at the creation of the state, the state retains the Ottoman millet system, ceding matters of personal status to the jurisdiction of recognized religio-ethnic groups. Although it is fashionable to view the political arrangements as purely instrumental, the compromises are best understood as tentative agreements about what a Jewish society that does not define its identity exclusively in terms of the halakha should entail. Religious parties advocate religious jurisdiction over marriage and divorce, not primarily in order to impose religious standards of behavior on individuals, but because they fear that civil marriage and divorce will produce two exogamous groups leading to a rupture in the unity of the Jewish people living in close proximity in the state. Secular Zionism views the laws of society as reflections of the collective self and not merely convergences of interest between individuals and thus is also willing to subordinate individual rights for the welfare of the collective society. For secular Zionists, religious jurisdiction over marriage and divorce is still largely viewed as in the interests of the collective to preserve a Jewish national identity as well as an expression of Jewish national and cultural norms. A new group has entered this debate. This group wishes to establish a particular form of liberal democratic society in which rights are located in the individual and not in the collectivity that constitutes society and in which the "the individual is freed from the burden of a priori duty to a collectivity in which he was born by chance and not of his own free choice."²⁵ They stress the heterogenous character of Israel, which includes other ethnicities and religious groups, and urge a liberal vision of civil society as one in which people freely enter and exit groups-- a vision that requires civil marriage and divorce. So far, these perspectives have not led to a call for complete reform of religious jurisdiction over marriage but rather for adjustments, the establishment of an alternative structure for those individuals who cannot be accommodated by the halakha.

²⁵ Eliezer Schweid, at 240

These debates open a window onto what a distinctively 'Jewish' form of civil society might look like. Both the rabbinic tradition and Zionism would be philosophically opposed to a model of society in which voluntarily chosen groups form and dissolve at the pleasure of their membership, as both stress the critical role of the community in defining individual identity and as both affirm nationhood, ethnicity, and peoplehood as ways to organize society. Both link the value of individual diversity to the uniqueness of human collectivities, which is valued over any abstract universal human order, and both see associational rights as lodged in the community or culture itself, not in individuals. Finally, both might claim that voluntarist groups are parasitic on cultural or religious traditions for, if the underlying traditions disappeared, voluntary groups could not form around them. Thus, a distinctively 'Jewish' form of civil society should ideally support a collectively held right of cultural perpetuation.

But there is a critical difference between nationalist and rabbinic methodology and they may part ways when it comes to the question whether a liberal theory of society could be tolerated. The nationalist imagination is unconstrained by texts and traditions. In the rabbinic tradition, however, the issue is ultimately a legal question, to be determined by the halakha. If there is no halakhic validity to religious legislation under modern conditions of freedom other than that rooted in consent, any model of civil society could be tolerated so long as it would not impinge on the halakhic practices and institutions of those desirous to observe the law. What forms of civil society do, indeed, present difficulties for the halakha is best taken up in the discussion of associational life in the West, to which I now turn.

The transformation of Judaism from a corporate body enjoying group rights of religious autonomy into a private, voluntary religious association within civil society, whose freedoms are protected through individual rights of free exercise and association, does not in and of itself pose an insuperable obstacle for traditional Judaism. The very particularity of Judaism implies that the non-Jewish state is under no obligation to conduct itself in accordance with particularist Jewish precepts or to impose such precepts on non-Jewish society. Nor does rabbinic Judaism contain any theories about state obligation to support or refrain from interfering with the activities of the smaller associations within its midst, akin to the Christian idea of subsidiarity. Rabbinic Judaism never entertained the possibility of dictating terms to its host states; it searched for legitimate halakhic ways to survive under conditions of foreign rule. The early talmudic principle that "the law of the state is the law," whether understood as a pragmatic concession to alien state power or as a principle of recognition of the legitimacy of all political governance, exemplifies the kinds of accommodation the halakha made.

The relegation of religion to the private domain is not conflict-free, however. The halakhic principle that “the law of the state is the law,” can never serve as a justification for state incursions on matters of religious prohibition or permission; its application is confined to “civil” matters (as defined by the halakha), such as the fields of criminal law, civil law, and public administration. Thus, it is axiomatic that halakhic Judaism cannot thrive in exile if the state prevents Jews from fulfilling their religious obligations, whether requiring Jews to perform acts that are forbidden or forbidding Jews from performing acts that are required, such as circumcision.

Other effects of the reorganization of Judaism from an independent corporate body to a private religion present a different level of conflict because they bear on the question of cultural distinctiveness. Marriage and education illustrate two different variations of the theme. Marriage and divorce are matters of religious prohibition and permission in Judaism; they are not civil. A Jewish divorce is required to dissolve a marriage valid under Jewish law. Such divorces must be initiated by the husband. Jewish law developed strategies that enabled the Jewish court to secure a bill of divorce from a recalcitrant husband in order to free a woman from the union. But the ability to do justice from within is difficult to achieve when the Jewish court lacks autonomy or coercive powers and when the husband can divorce and remarry under civil law, despite failure to grant a Jewish divorce. In the absence of comprehensive halakhic solutions, rabbinic authorities have sanctioned resort to the state for assistance, urging it either to recognize the authority of the Jewish court over parties who have evidenced a prior commitment to its jurisdiction or to enact special legislation to offset cultural disabilities unique to Jewish women, such as conditioning the grant of a civil divorce on removing barriers to the remarriage of a spouse. But the argument for juridical recognition or for non-neutral legislation is not easily accommodated within the liberal individualist model of rights.

Education of children is a particularly sensitive topic. May the state compel private associations to teach particular values that are seen as critical to the maintenance of a healthy civil society or that are based in ‘universal’ principles, such as egalitarianism, individualism, or tolerance? Although the issue still is more theoretical than real, several participants in this symposium raise the question whether sexual inequality or illiberalism within the associations comprising civil society should be permitted in a democratic state. Michael Walzer, for example, proposes that “associational policies and practices that radically curtail the life chances of members” or that “limit the rights or deny the responsibilities of citizenship” should be resisted by the state, offering a hypothetical refusal to educate Catholic women as one example. These practices cannot be justified on

grounds of free choice for, as he points out, “voluntary associations are often in part involuntary: children are enrolled by parents and membership is tied up with fundamental aspects of identity that are powerful constraints on rights of exit.” If, as Will Kymlicka comments, rights of association may be shaped in light of an ideal conception of civil society, democratic features of education -- not only in the basics of citizenship but also in the values of individual autonomy, tolerance of diversity, and skepticism about authority -- could be imposed in the private sphere. Indeed, even in a liberal regime that regards civil society solely as a byproduct of rights of association, because of an a priori commitment to individual freedom, associational rights may be limited in cases where it can be argued that group practices conflict with the production of an individual capable of choosing between alternative forms of life.

The most traditional segments of halakhic Judaism are particularly vulnerable to this critique because they routinely curtail the life chances of their members for economic success or social integration by imposing restrictions on secular education. They believe that the development of integrated halakhic personalities, of individuals who internalize the Jewish system of obligation and who will embody its values both in their personal lives and in their role as transmitters of the tradition, requires near-exclusive immersion in the intricate content and value system of the halakhah, particularly at an early age. Individual autonomy, tolerance of diversity, and skepticism of authority are not halakhic values. To protect the integrity of the community, Judaism would urge that the state should not interfere with a group’s efforts to perpetuate a way of life of enormous significance to its members, provided dissenters aren’t harmed.

So far I have concentrated on what Jews require from civil society. But what do they owe to civil society? The existence of universals within Judaism, the Noahide commandments, raises the question whether Jews have an halakhic obligation to assure a civilized society by actively promoting observance of Noahide law. Although nominally seven, each Noahide principle is the subject of extensive juridical elaboration so that Noahide law potentially covers a large variety of topics, including international human rights, euthanasia, abortion, and capital punishment. So far, the concept has been far less useful than one might suppose. Most rabbinic authorities hold that Jews are not legally obliged to promote observance of Noahide law, because the responsibility of one Jew for the preventable transgressions of another, applies only to covenantal fellows.

Noahide law aside, there is a constellation of halakhic principles that could be interpreted to impose an obligation on Jews to collaborate with other members of

society in projects that better the ethical and material condition of general society. The intuition that such an obligation exists sustains those who interpret Judaism in terms of a Jewish mission to pursue justice in the social sphere and who define Jewish identity associationally, as participation in sub- or extra-communal voluntary social organizations.²⁶ That observant Jews have failed to turn their energies in this direction, favoring projects that advance the interests of Jews over those involving humanity, is not surprising. This group was the most affected by the Holocaust, which led to despair over common projects of social solidarity and a pouring of energies into the reconstruction of Eastern European Jewry. Given time and stable political conditions, one may expect to see developments on this front.

Concluding Note

It is virtually impossible to construct a modern theory of civil society from the sources of the Jewish tradition. This is hardly surprising, given a tradition that continues to envision the individual as heteronomous and embedded in a primordial community. The rabbinic sources provide, instead, pragmatic accommodations to new historical conditions, drawing on early traditions of associational life developed against the backdrop of radically different social conditions from those existing today. This is, of course, the traditional rabbinic method. But it must be conceded that the reasoning often seems tortuous and out of place. Whether such accommodations will continue to suffice remains to be seen. Perhaps, it is time, as Gerald Blidstein recently has urged, to attempt a new position, based on the candid acknowledgement that we relate to the non-Jew, for example, as “fully human possessors” of the divine image. Blidstein poses the question whether “the divine image of man” can “become a more powerful halakhic concept than it seems to be at present or than it has been historically?” In other words, can the idea that man is created in the image of God provide a new universal category of membership in the Jewish polity? As tempting as this proposal is, it seems too facile, given a tradition that begins with the idea of the uniqueness of human collectivities and with a basic philosophic objection to the creation of a universal human order. Perhaps, ethical reciprocity is the best this tradition can offer.

²⁶ See Penslar, “The Origins of Modern Jewish Philanthropy,” p. 205-208.