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## Berlin Diary: Jewish Legal History in Germany's Capital

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Jeffery I. Roth

## **Abstract**

This Essay chronicles the author's activities in Berlin. It includes the contents of the seminar, detailed on a class-by-class basis, which he hopes may serve others as a useful outline for a Jewish legal history course. In addition, in our era of increasingly globalized legal education, some may find accounts of American law professors' visits abroad useful in their own right. The Essay also includes the author's observations of a reunited but still divided city and its people. In the broader context, he offers the diary of his visit as a window into the process of German-Jewish rapprochement, a process to which courses like the one at Humboldt's Law Faculty, the author came to believe, contribute in a significant way.

# BERLIN DIARY: JEWISH LEGAL HISTORY IN GERMANY'S CAPITAL

Jeffrey I. Roth\*

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## INTRODUCTION

On May 11, 1933, by order of Joseph Goebbels, Propaganda Minister of the Third Reich, Nazi storm troopers ignited a bonfire at the center of Opernplatz, a large public square in Berlin. They consigned to the flames the books of authors, German, foreign and Jewish, whose ideas they wished to extirpate from German culture. One guidebook, marking the event, suggests we reflect on Heinrich Heine's maxim uttered a century earlier: "Where they start by burning books, they'll end by burning people."<sup>1</sup>

By contrast, for the past five years in a classroom building on the perimeter of Opernplatz (now renamed Bebelplatz), German law students attending Humboldt University's Law Faculty have registered for a seminar in Jewish law as a component part of their required first year course in World Legal History. The seminar, a joint project of Humboldt University and the Berlin Jewish community, is sponsored by the Berlin Center for the Study of Jewish Law. The Center, established in 1996, promotes the study of Jewish law at German law faculties and disseminates knowledge of the topic to the general public through lectures and conferences. Each spring it brings a visiting professor to Humboldt to lead the Jewish law seminar and to present a series of public lectures at the Centrum Judaicum, Berlin's Jewish community center.

When I was invited to teach the seminar in the spring of 1998, I realized that my semester in Berlin would not be an ordinary stint as a guest professor. The notion of bringing a course in Jewish legal history to Germany elicited a variety of conflicting emotions, negative, positive, and mixed. If academics prior to visiting abroad are preoccupied with practical arrangements like travel and accommodations, darker matters were uppermost in my mind. It could not be otherwise. Berlin is the very spot where a diabolical program to end Jewish history was initiated and pursued with all the vigor and resources, human and material, that the perpetrators could muster. If some of their descendants now wish to study a part of the Jewish heritage, does

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1. JACK HOLLAND & JOHN GAWTHROP, *THE REAL GUIDE: BERLIN* 76 (2d ed. 1993). The number of volumes burned was 20,000 and among the authors were Karl Marx, Heinrich and Thomas Mann, Albert Einstein, Sigmund Freud, Ernest Hemingway, Helen Keller, and Heinrich Heine himself. DAVID CLAY LARGE, *BERLIN* 273 (2000).

this signal a sea change in attitudes, a welcome dividend of decades of political and social change? Or is their expression of interest a thin veneer overlaying an unreconstructed society that remains warped at its core? In short, I was uncertain whether my course would contribute to the process of reconciliation or merely to the illusion of it.

I entitled the course "Jewish Law: History, Sources and Literature." I would have two classroom hours a week for six weeks to survey the development of Jewish law from its Biblical and Talmudic roots through the modern era, a tall order. The language of instruction was English and the reading materials, excerpts from primary and secondary sources, were presented in English translation. Prior to my departure, I shipped a syllabus and reading packet to Professor Peter Benoehr at the Law Faculty. Since wrestling with texts is crucial for any authentic encounter with the Jewish legal tradition, I planned to spend the first hour each week describing the broad periods of Jewish legal history and the second hour leading the students through an assigned text from a primary source—Mishnah, Talmud, Maimonides and the like.

In the end, some forty German law students enrolled. Three of their professors, Peter Benoehr, Bernhard Schlink, and Cristoph Paulus, actively supported the course. Their participation ensured that all arrangements for the course went smoothly and that my visit to Berlin was an exceedingly pleasant one.

This Essay chronicles my activities in Berlin. It includes the contents of the seminar, detailed on a class-by-class basis, which I hope may serve others as a useful outline for a Jewish legal history course.<sup>2</sup> In addition, in our era of increasingly globalized legal education, some may find accounts of American law professors' visits abroad useful in their own right.<sup>3</sup>

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2. On Jewish law courses at American law schools, see Samuel J. Levine, *Teaching Jewish Law in American Law Schools: An Emerging Development in Law and Religion*, 26 *FORDHAM URB. L.J.* 1041 (1999), and Jeffrey I. Roth, *Fraud on the Surviving Spouse in Jewish and American Law: A Model Chapter for a Jewish Law Casebook*, 28 *CASE W. RES. J. INT'L L.* 101, 101-104 (1996). Virtually all Jewish law courses begin with a survey of Jewish legal history, lasting several weeks, but so far as I know the course in Jewish Legal History at Touro College Law Center is the only course at an American law school devoted entirely to the subject.

3. See, e.g., George A. Critchlow, *Teaching Law in Transylvania: Notes on Romanian Legal Education*, 44 *J. LEGAL EDUC.* 157 (1994); Francis Heller & John Peck, *American Law Teachers in an Austrian University*, 42 *U. KAN. L.R.* 507 (1994).

The Essay also includes my observations of a reunited but still divided city and its people. In the broader context, I offer the diary of my visit as a window onto the process of German-Jewish rapprochement, a process to which courses like the one at Humboldt's Law Faculty, I came to believe, contribute in a significant way.

### I. *EN ROUTE TO BERLIN*

Monday, May 11, 1998

When I boarded the plane en route to Berlin, my destination seemed to me a distant and exotic place, and the pairing of "Jewish Law" with "Berlin" struck me as a most unlikely combination. I wondered how many students would enroll for a course in a peculiar subject, offered in a foreign language. I wondered how my lack of German-language skills would affect my stay. I was very uncertain how I would react to a prolonged period of residence in the former capital of the Third Reich. The author of a massive history of Berlin I was reading did not help things by writing, "Berlin is itself a testimony to the insidious nature of evil. . ." <sup>4</sup>

The only thing I knew for certain was the importance of reserving judgment upon arrival. I had learned from previous visits abroad, at law faculties in Budapest and Amsterdam, that there is always a period in the beginning, the opposite of a "honeymoon period," when things do not go smoothly. Simple tasks, like navigating the city or learning how to operate the university's photocopiers, are frustratingly difficult at first. But once practical glitches are surmounted, then the overwhelming benefits of a visit abroad become so apparent that early reservations seem laughable. If my experience in Berlin proves similar, then factors that initially may seem negative are more than likely in the end to contribute to the value of the visit.

### II. *A HARD LANDING*

Tuesday, May 12

A two-room apartment had been set aside for my stay at

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4. ALEXANDRA RICHIE, *FAUST'S METROPOLIS: A HISTORY OF BERLIN 883* (1998). In her well-balanced portrait of the city, the author goes on to say that Berlin is also many other, more positive things. *Id.* at 890.

Humboldt University's guesthouse in the city center (*Stadtmitte*). Settling in that afternoon, I had a chance to experience all the conflicting emotions that are induced by sudden isolation from family and friends in unfamiliar surroundings, coupled with jetlag. My firm resolve not to make any rapid judgments completely dissipated. For example, I debated whether or not to unpack, since obviously I would not be staying. Fortunately, a sense of mission counteracted the irrational thoughts. The university had arranged for a Jewish law course and the students were expecting one; it would be churlish to disappoint them.

I took a walk to explore the area. The immediate vicinity of the guesthouse seemed bleak. On the block, there were just two commercial establishments, an Air China ticket office and a Herend porcelain shop, evidently holdovers with long leases dating back to D.D.R.<sup>5</sup> days. But just around the corner, a revolving neon sign perched atop the home of the Berliner Ensemble, where in 1928 Berthold Brecht introduced his *Threepenny Opera* to the world. The workers' cafeteria, known as The Casino and preserved in all its socialist charm, still operates so that one can have a light meal and imagine the scene as Brecht and his cronies entertained each other on its small stage. This was indeed a unique and interesting corner of the world. The opportunity to live and teach for two months in this precise locale grew more appealing with each exploratory step.

As the weeks passed, I came to enjoy the quiet isolation of the guesthouse on its lonely stretch of Ziegelstrasse. It was especially nice on lazy Sunday afternoons or anytime after returning from a visit to the bustling western portion of the city. After a guided tour of the neighborhood with my friendly and supremely helpful research assistant, Sophie, I was educated enough about the location of shops and services to handle most of the practical aspects of my visit. I would also discover quite soon the many attractions of the gentrifying Mitte district, including stylish clubs and cafes and important cultural attractions, including the Pergamon Museum and State Opera, all in walking distance.

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5. D.D.R. is an acronym for *Deutsche Demokratische Republik* (German Democratic Republic) also known in the West as East Germany. Stalin created the D.D.R. in 1949 out of the portion of Germany occupied by the Soviet army after World War II. See *id.* at 871.

My reveries were interrupted when Professor Benoehr came to fetch me. The law faculty was hosting a pub evening for entering students and I was invited. I was happy to be integrated into school events right from the start.

### III. A SHORTENED HIKE

Sunday, May 17

Taking advantage of a beautiful day and excellent public transportation, I set out for a hike in Babelsberg Park southwest of Berlin. I hoped to tour Babelsberg Castle, a site often neglected in favor of its flashier neighbor, Sanssouci. With a wrong turn on the path, I ended up on the opposite side of a lake with no access to the castle. Someone I met on the path suggested that I continue in a northeasterly direction and visit the Wannsee Villa, a major site in the history of the Holocaust. A conference of Nazi officials took place there on January 20, 1942; their agenda was the Final Solution. I discovered I had no desire to make the villa my destination.

I had run into a situation that would recur with some regularity during my stay in Berlin. Another idea for a hike, this time in Grunewald, will be discarded when I learn that this swath of greenery on the outskirts of Berlin also played a role in the Holocaust. After the citizenry complained to Nazi officials about how distasteful it was having to see their Jewish neighbors rounded-up in the center of town, Grunewald became the out-of-the-way place from which Jews were deported. For me it was not a question of escaping from history or memory or even wanting to. Rather it was a question of being able to engage in normal, every-day activities without at the same time dwelling on one of history's greatest tragedies. Across the street from the KaDeWe department store there is a sign naming the principal concentration camps. What are appropriate thoughts for someone on their way to purchase sheets and pillowcases?

This was to become a refrain of my stay in Berlin. Walking to a colleague's house, I noticed excerpts from the Nuremberg racial laws posted on placards on the lampposts. He said that after a while, one does not notice them anymore. He regards this as both a blessing and a curse. What does it mean when memorials to evil become such a routine part of the landscape that you no longer notice them? When he told me that his



apartment building was used as a point for detaining Jews prior to deportation, I became uncomfortable with my visit. The anxiety and fear his rooms once experienced seemed palpable. I discovered that spending time in Berlin is like breaking a glass at the end of a Jewish wedding, always taking time to remember the destruction of Jerusalem at the height of one's personal happiness.

#### IV. *PREPARING FOR CLASS*

Monday, May 18

I spent most of the day reviewing my notes and preparing for the first class session. Teaching European law students presents a number of challenges for an American law professor. The students tend to be bright but young, college-age by our standards. They expect to take notes during a lecture delivered with a minimum of classroom dialogue. Unleashing a Socratic dialogue would surprise them. They are often reluctant to speak in class because they are unnecessarily concerned about their ability to express themselves correctly in English. They are used to lectures full of dates and facts but do not particularly like them. For me there is the added problem of compression, since I have such a broad stretch of legal history to cover in so few hours. When, however, a professor departs from the normal routine, emphasizes the connections between facts and dates, and engages the students in an interesting dialogue, they appreciate the effort and can be quite responsive. Hence, my goals for the first session are to try to start a dialogue as early as possible while, at the same time, to move rapidly through the material that has to be covered. Rehearsing ways to do this keeps me busy for most of the day.

#### V. *THE FIRST CLASS: ON BIBLICAL LAW AND JEWISH LAW*

Tuesday, May 19

About half an hour before class was scheduled to begin, I located our classroom in the Hegel Building across the street from Humboldt's Law Faculty. The Law Faculty is housed in the former Royal Library, built 1774-1780, a baroque structure with a curved facade thought to resemble a chest of drawers and for

that reason called the “Kommode.”<sup>6</sup> The law school is part of Humboldt University, founded in 1810 by the Prussian Minister of Education, Wilhelm Humboldt. Its professors in the nineteenth century included Hegel, Schopenhauer, and the Brothers Grimm. When the university became part of the Russian Sector after World War II, the Free University was established in West Berlin in 1948. Today both schools train students for the legal profession.<sup>7</sup> Three thousand students are enrolled in Humboldt’s Law Faculty.

The renovations modernizing much of Humboldt University had not yet reached the classroom assigned to our course. The classroom was decrepit and chalk dusty. Cramped desks and poorly positioned blackboards suggested a Depression-era rural grammar school in the United States. It was hot but opening the windows made it noisy. Students began arriving and soon all the seats were taken. The number of students was close to 50, a pleasing development that, however, forced late arrivals to bring their own chairs from neighboring classrooms. Three professors attended the session, Profs. Schlink, Benoehr, and Schroeder. My mind wandered while the dean, Johannes Hager, introduced me in German. Had he misunderstood our arrangement that this course would be conducted entirely in English or had I?

Finally, my turn came to begin the course. Since the students were expecting a lecture, I began the class by asking some questions to try to start a dialogue. Did they think “Biblical law” and “Jewish law” were one and the same thing? Did they believe they could learn Jewish law from reading the Bible? I saw some nodding heads but did not receive a full-fledged response. I suggested a number of reasons why it is wrong to equate Jewish law and Biblical law. First, this view presumes no development of Jewish law after the Biblical period ended. Second, it slights the contents of the Oral Law that, according to tradition, accompanied the written law from earliest times.<sup>8</sup> Third, it overlooks customs that achieved the force of law—the Jewish people’s impor-

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6. GILES MACDONOGH, *BERLIN* 72 (1997).

7. For a description of German legal education and reform proposals, see Jutta Brunnee, *The Reform of Legal Education in Germany: The Never-Ending Story and European Integration*, 42 J. LEGAL EDUC. 399 (1992).

8. We will explore the Oral Law tradition in the second class. See *infra* notes 28-40 and accompanying text.

tant contribution to the development of their law.<sup>9</sup> Finally, it ignores the massive post-Biblical rabbinic contribution to the development of Jewish law. The rabbis interpreted the law, applied its provisions, enacted new regulations to meet the needs of their times, and erected protective fences to forestall violations.

To illustrate the concept of a "fence" (*sayag la-Torah*), I take the students back a month to the Jewish holiday of Passover during which the Bible prohibits the eating of leavened bread. Interpreting various verses, the rabbis concluded that the Biblical prohibition commences at midday on the eve of Passover.<sup>10</sup> The rabbis, however, extended the prohibition to the hour before midday, and then extended it further to two hours before midday because, they feared, on a cloudy day one might mistake the exact time and eat leavened bread when it was prohibited by the Bible.<sup>11</sup> Hence, someone who eats leavened bread on Passover eve between 10 A.M. and noon (approximately<sup>12</sup>) is violating Jewish law but not Biblical law, although in a sense he or she is violating Biblical law by not harkening to the rabbis' edicts.<sup>13</sup>

Far from ending with the close of the Biblical period, the history of Jewish law was just beginning. We may regard the Bible as the starting point in Jewish legal history, similar to a constitution or fundamental law. Like all constitutions, you may (1) interpret its provisions and (2) develop its principles in light of ever-changing conditions, but unlike modern constitutions, you cannot amend the text.

Next I introduce two terms: *halakhah*, the Hebrew term for Jewish law; and *mishpat ivri* ("Hebrew Law"), which is used by some modern scholars when they wish to designate those parts of Jewish law that are nonreligious in character and have cognates in modern legal systems. These terms we distinguish from Israeli law, the law of a modern, secular nation whose legislature has adopted some aspects of Jewish law, mostly in the realm of personal status (marriage and divorce).

9. On custom in Jewish Law, see MENACHEM ELON, *THE PRINCIPLES OF JEWISH LAW* 91-110 (1975).

10. 3 MOSES MAIMONIDES, *THE CODE OF MAIMONIDES: THE BOOK OF SEASONS, LAWS CONCERNING LEAVENED AND UNLEAVENED BREAD* 326 (S. Gandz & H. Klein trans., 1961).

11. *Id.* at 326-27.

12. An "hour" for this purpose is not sixty minutes but computed as one-twelfth of the day's total duration of daylight time.

13. The duty to obey rabbinic authority is based on a Biblical passage, *Deuteronomy* 17:8-11.

Having mentioned the Biblical period, we place it in its historical context by sketching a “time-line” of the period. We touch on the Patriarchs (c. 1700 B.C.E.<sup>14</sup>); the Egyptian bondage (c. 1600-1200 B.C.E.); Moses and the Exodus (c. 1200 B.C.E.); Joshua and the conquest of the Promised Land; the tribal league and Israel under the Judges; the United Monarchy of David (1004-965 B.C.E.) and Solomon (965-928 B.C.E.), followed by the split into northern and southern kingdoms, Israel and Judea; the Assyrian conquest of Israel (722 B.C.E.), its deportation of the population and the eventual loss of “the Ten Tribes”; the legal reforms in Judea under the reign of King Josiah (640-609 B.C.E.), who discovers a “book of the Law” while renovating the Temple; the Babylonian conquest of Judea and the destruction of the First Temple (586 B.C.E.); and the Babylonian captivity, ended by the Persians under Cyrus who permits the Jews to return to Judea and to rebuild Jerusalem and the Temple (c. 515 B.C.E.).<sup>15</sup>

We conclude the class with a discussion of the work of Ezra the Scribe and his circle. Ezra arrived in Judea c. 428 B.C.E. with a mandate from the Persian king to revitalize a lax community’s observance of its ancestral laws, the Torah.<sup>16</sup> Ezra redefined the meaning of “Israel” as a nation defined not by geography but by devotion to its Law.<sup>17</sup> Those who dwelled in the Land of Israel but did not observe the Torah were cast outside the community, while others who remained faithful to the Law, although living in Exile, were members of the community. To make the Law of Moses, now eight centuries years old, a living law required interpreting its provisions in light of current conditions. This Ezra did with a group of scholars who, when the Torah was read to the people, “gave the sense and caused them to understand the

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14. I explained that in Jewish studies, it is customary to use B.C.E. (Before the Common Era) in place of B.C., and C.E. (Common Era) in place of A.D.

15. For useful surveys of the patriarchal and biblical periods in light of modern scholarship, see A. Malamat, *Origins and Formative Period*, in *A HISTORY OF THE JEWISH PEOPLE* 1-87 (Haim H. Ben-Sasson ed., 1969) and H. Tadmor, *The Period of the First Temple, the Babylonian Exile and the Restoration*, in *A HISTORY OF THE JEWISH PEOPLE* 91-182 (Haim H. Ben-Sasson ed., 1969).

16. For a good discussion of Ezra’s mission and the problems involved in dating it, see JOHN BRIGHT, *A HISTORY OF ISRAEL* 362-386 (1960). Tadmor places the date of Ezra’s arrival in Jerusalem at 458 B.C.E. See Tadmor, *supra* note 15, at 174.

17. BRIGHT, *supra* note 16, at 374-375.

reading.”<sup>18</sup> They did more than translate the reading from Hebrew into Aramaic; they interpreted the texts. With Ezra, interpretation (*midrash*) becomes the primary engine for the development of Jewish law. I emphasized that Bible interpretation in this sense is different from what any rabbi or preacher does in a sermon, drawing out a contemporary message from the text; rather it has the force of law. We read in the Book of Ezra, “For Ezra had prepared his heart to seek (*le-d’rosh*) the law of the Lord, and to do it, and to teach in Israel statutes and judgments.”<sup>19</sup> First came interpretation, then statutes and judgments.

To end the class, I assigned the reading for next week, an excerpt from the Introduction to Maimonides’s legal code, *Mishneh Torah*.<sup>20</sup> I asked the students to outline Maimonides’s proof for the authenticity of the Oral Law tradition.

As the students filtered out, I huddled with the professors over the need for a new classroom. They were not at all sure that a change was necessary. They assured me that the students had endured worse. Further, no one was certain the same number would return next week. If they did return, the professors promised to arrange for a larger classroom. Discussing the cramped conditions later with a student, she would confirm that the students always preferred an interesting lecture in a crowded classroom to a boring lecture in a large one.

After class, Professor Schroeder showed me the subtle underground memorial to the book burning on Bebelplatz—empty bookshelves, enough to hold all the books that were burned, ring a subterranean chamber which can be viewed through a skylight cut into the center of the plaza. Professor Schroeder is clear that at least part of the motivation for offering the Jewish law course at Humboldt, despite the absence of Jewish students, is to right some of the historical wrongs that the memorial brings to mind.

## VI. A VISIT TO THE STASI MUSEUM

Wednesday, May 20

I had trouble finding the Stasi Museum. The street num-

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18. *Nehemiah* 8:7-8.

19. *Ezra* 7:10.

20. MOSES MAIMONIDES, *MISHNEH TORAH* 2a-17b (Moses Hyamson trans., 1971).

bers had been altered after the city's unification, so my guidebook sent me to the wrong address. I stopped in a number of local shops to ask for directions. It took a number of inquiries before I found someone who was able to tell me where the museum was located. I found the general lack of knowledge odd. The museum was located in the former Stasi headquarters. Richie's description of the Stasi compound came to mind:

An entire city block was taken over, the outside bristled with aerials and cameras, the entrances where made of thick steel and Volkspolizei patrolled the streets outside. It was a modern fortress. The thirty-eight buildings housed 3,000 offices and 33,000 employees. There was also a munitions bunker, a barracks, a canteen, a hospital, two copper-lined room to prevent satellite surveillance, and at the very center the office of Minister Erich Mielke.<sup>21</sup>

From my inquiries, it seemed that most people in the vicinity did not know where this gigantic installation once was located. If the F.B.I. had once been headquartered in your neighborhood, would you forget where even if the offices had been closed for several years? It is true that most of the Stasi buildings now are dedicated to other purposes. Only one building is used for the museum. Still I wondered, as I dealt with the practical problem of finding it, whether I was encountering a post-Communist example of self-induced amnesia, similar to the type that was seen after World War II.

The museum, if only a small portion of the former headquarters, is well worth the visit. There are exhibits dedicated to Stasi methods and to types of dissidents. Mielke's office suite has been preserved and may be toured.<sup>22</sup> The heavy wooden decor of his office, private conference room, bedroom, dressing room, and canteen are as interesting as examples of post-War interior design as they are stark mementos of the former regime. In the era of overhead projectors and computer-generated imaging, I enjoyed seeing the sliding doors in the conference room that open to reveal a series of maps, first of Berlin, then Germany,

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21. RICHIE, *supra* note 4, at 759.

22. Mielke's obituary in the New York Times makes interesting reading. See David Binder, *Erich Mielke, Powerful Head of Stasi, East Germany's Vast Spy Network, Dies at 92*, N.Y. TIMES, May 26, 2000, at C19. Mielke is quoted as having told his subordinates: "All this twaddle about no executions and no death sentences, it's all junk, comrades. Execute, if need be without a court sentence." *Id.*

then the world, exactly as portrayed in countless vintage black and white movies about war and espionage.

A van is parked outside the building. It was used to transport unfortunate detainees to their interrogations in small, dark cubicles, isolated from each other. You can get into the van and experience a chilling reminder of the machinery of Cold War repression. The revisionist view of the D.D.R. holds that the state was bureaucratic, dull, and gray but essentially harmless.<sup>23</sup> Exhibits like this are good medicine for rose-tinted “Ostalgia”—the nostalgic belief that things were not so bad in the D.D.R. before the Wall came down.

### VII. *LIAISING WITH THE JEWISH COMMUNITY*

Friday, May 22

I headed for a meeting in the western portion of the city via the double-decker Bus 100 from Unter den Linden to Zoo Station. The S-Bahn (light railway) is quicker but this route is quite scenic, passing through the Brandenburg Gate and Tiergarten. The contrast between a gray and dour east and a livelier, more animated, and more happening west remains surprisingly palpable almost a decade after unification.

I met my liaison with the Jewish community, Dr. Roman Skoblo, at the very slick Hotel Bleibtreu. During the meeting, Dr. Skoblo is impressive, focused, and fluent. Of Polish background, his parents survived the Holocaust. Born after the war, he made his way west and eventually settled in West Berlin. A medical doctor, entrepreneur, hotelier, and communal leader, to me Dr. Skoblo represented the prototypical *parnas*, the traditional lay leader of a European Jewish community since the early Middle Ages. Some towns had seven of them who functioned like a Jewish board of aldermen. The *parnas*, always prosperous and public spirited, shared with the rabbinate the temporal leadership of the Jewish community, advancing its interests, interceding with local government authorities when necessary, and protecting Jews from harm where possible.

We discussed the Jewish Legal History course at Humboldt. Dr. Skoblo predicted that I would not have any Jewish students. It seems that despite the unification of the two halves of the city,

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23. RICHIE, *supra* note 4, at 876.

which made it possible for university students regardless of where they live to enroll at either Humboldt (in the former East Berlin) or the Free University (in the former West Berlin), virtually all of them prefer to stay close to home and attend university in the company of familiar faces from secondary school. This is a manifestation of the “Wall in the Head” syndrome that has replaced the concrete Wall and still divides the city. With few university-age students among East Berlin’s Jewish population, none was likely to register for my course.

We next selected the topics for my public lecture series. I suggested two subjects I had researched for publication. Fortunately, they were acceptable to Dr. Skoblo. The first lecture, to be entitled “Rabbinic Compensation—When and Why?,” will explain how rabbis, initially learned men who placed their knowledge of the Torah before the community free of charge, became in the end salaried professionals, employed by their congregations and receiving fees for their services. Dr. Skoblo, like just about everyone involved in modern Jewish life, takes an active interest in the rabbi’s salary and liked this practical topic. The second lecture, to be called “The Culture of Controversy and the Development of Jewish Law,” will explore how the multiplicity of opinions regarding Jewish law, evident on every page of the Talmud, has contributed to the development, flexibility, and historical relevance of Jewish law over the centuries. Dr. Skoblo, who understands the importance of controversy for intellectual progress, thought a talk on constructive controversy would serve Berlin’s Jewish community well.

I was more than ready to stop with two lectures but Dr. Skoblo wanted a third to mark the end of the course. I mentioned that several years ago I lived in Budapest for three months. During my stay, I closely observed the Jewish community’s revival following the collapse of the Communist system. I suggested a talk comparing Budapest and Berlin, focusing on the restoration of Jewish communal life in the two cities. Dr. Skoblo liked the idea of a talk that links the problems and prospects of two Jewish communities in the region. He hopes the future will bring greater cooperation among the Jews remaining in Central Europe. He has a vision of the Berlin Jewish community as a bridge over which Western approaches to Judaism can



cross into the East—to Budapest, Warsaw, and Moscow.<sup>24</sup> He would like to see Berlin become central in the revitalization of Jewish life in the region despite its small numbers.<sup>25</sup> Although smaller by far than either the Jewish populations of Budapest or Moscow, in his view Berlin's Jews deserve a leading role in the region. Since, he believes, Berlin will be the major European city in the twenty-first century, its Jewish community should naturally occupy a pre-eminent position. Beyond that, he hopes Berlin, as the city where Jews suffered their greatest defeat in the twentieth century, will be the place where they celebrate their greatest measure of triumph and rebirth in the twenty-first.

At the end of our meeting, I decided to broach the issue of my accommodations in Berlin. The venue of our meeting, the stylish Hotel Bleibtreu, with its contemporary decor, inviting shops, and pleasant outdoor courtyard, could not have presented a starker contrast to the bleak university guesthouse. Further, since Dr. Skoblo's stock in trade as a hotelier was rooms for transients, it was logical to think that he might have a suggestion for me. I described the guesthouse to him as a graduate students' dormitory, sterile and institutional, with cinderblock walls, hard floors, minimal furnishings, and poor lighting. Dr. Skoblo said that I did not have to explain my request at all. As someone who had spent a lifetime making good his transition from East to West, he understood the problem perfectly and would see what he could do.

After we parted, I considered whether our conversation was an example of history repeating itself. In the not too distant past, I wondered, how many countless East Berliners had asked a friend or colleague living in the West to help get them out?

Returning from my meeting, the S-Bahn passed the construction site of Berlin's new central railway station, Lehrter Bahnhof. Here all the major international train routes that pass

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24. In his views Dr. Skoblo expresses a Jewish version of "the notion of standing at the center, of being a 'Weltstadt'—a world city—midway between Stockholm and Venice, Paris and Moscow, [which] is very much of Berlin: an extravagant idea regularly summoned from the boggy plains of Prussia to provide a beacon in an often featureless sea of provincialism." Roger Cohen, *Building a Capital Where Triumph Is Taboo*, N.Y. TIMES, Apr. 11, 1999, § 2 at 33.

25. In 1933 over 160,000 Jews lived in Berlin. The Jewish population of Berlin stands now at about 12,000. This includes some 8,000 recent Jewish immigrants from the former Soviet Union who have little prior connection to their faith. GREG CAPLAN, FEDERAL REPUBLIC OF GERMANY, 100 AMERICAN JEWISH YEARBOOK 338, 352-353 (2000).

through Berlin will meet underground. It is an impressive sight, much like the other major construction site in Berlin, Potsdamer Platz. There the American, British, and Russian sectors are being replaced with the "Sony Sector," the "AT&T Sector," and the "Daimler-Benz Sector," three corporate parks containing 31 skyscrapers all being built at once.<sup>26</sup> The scope of the construction is truly amazing. It is as if all the great pyramids of Egypt were being built in the same spot and at the same time. New York City, where I live, has been trying for decades, so far unsuccessfully, to move the train tracks and the entrance to Pennsylvania Station exactly one block west. I am quite certain that in the time it will take to break ground on this modest project, Lehrter Bahnhof will be up and running.

#### VIII. *IN RE: THE SCEPTER OF GOLD*

Sunday, May 24

The Pergamon Museum, home to three of the ultimate museum exhibits in the world, the Pergamon Altar, the Miletus Gate, and the Ishtar Gate, seems barely able to contain them. During my visit, a much smaller object in the antiquities department caught my eye, a magnificent Persian royal scepter, made out of multi-colored precious stones. Anyone who has ever celebrated the Jewish festival of Purim will think immediately of the *sharbit ha-zahav*, the golden scepter that the Persian king Ahasuerus, in one of the most dramatic moments in the Bible, must extend to Esther if she and the Jewish people are to live.<sup>27</sup> If the object in the display case is not that life-giving scepter, it is an evocative substitute.

#### IX. *THE SECOND CLASS: THE SECOND TEMPLE PERIOD*

Tuesday, May 26

The second session of the course convened in the same classroom as before. A handful of students did not return, but enough did to keep the room overcrowded. The turnout guaranteed us a new classroom beginning with the next session.

Our first topic is the Oral Law. According to tradition,

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26. For a description, see Herbert Mucshamp, *Once Again, A City Rewards the Walker*, N.Y. TIMES, Apr. 11, 1999, § 2 at 34.

27. See *Esther* 4:10-11 & 5:2.

when Moses received the Torah at Sinai, he also received from God an oral commentary that elaborated on the written laws. This Moses transmitted orally to the elders who taught it to their successors in every generation. In the introduction to Maimonides's *Mishneh Torah*, we find a list of the principal teachers who conveyed the Oral Law in an unbroken chain of transmission, from teacher to student, for forty generations.<sup>28</sup> At the end of the passage, Maimonides recapitulates the names on the list in reverse order, beginning with the last link in the chain, Rav Ashi (c. 400 C.E.), and ending with the first, Moses, who received the Oral Law from God Himself.<sup>29</sup> "Why repeat the list backwards?" I asked. To prove the reliability of hearsay (or even gossip), one typically states a chain of provenance in reverse order, stating "I heard it from so-and-so, who heard it from so-and-so, who heard it directly from the source." By reciting the list of names in reverse, Maimonides is not so much writing history as engaging in polemics, arguing for the reliability and authenticity of the Oral Law tradition against those, such as the Karaites,<sup>30</sup> who doubted it.

Based on our reading from the *Mishneh Torah*, a student posed the following question. Maimonides begins, "All the precepts which Moses received on Sinai were given together with their interpretation,"<sup>31</sup> and as a proof-text, he cites Exodus 24:12, "And I will give unto thee the tables of stone, and the law, and the commandment." Maimonides explains that "the law" refers to the Written Torah, "and the commandment" refers to the Oral Law.<sup>32</sup> The student asked, "Is this Biblical verse the best that Maimonides could find to prove the existence of the Oral Law? Doesn't the Bible say directly somewhere that God taught the Oral Law to Moses during the forty days and nights he spent on Mount Sinai?" A good question indeed. But in fact, in the Jewish tradition, the "proof" of the authenticity of the Oral Law

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28. For an English translation, see MOSES MAIMONIDES, *MISHNEH TORAH: THE BOOK OF KNOWLEDGE* 1b-3a (Moses Hyamson trans., 1965).

29. *Id.* at 3a.

30. See Salmon ben Jeroham, *Refutation of Sa'adiah's Arguments for the Validity of the Rabbinite Oral Tradition*, in *KARAITE ANTHOLOGY* 71-82 (Leon Nemoy ed., 1952). On the Karaites, a schismatic sect of Jews founded in the eighth century C.E. who rejected the Oral Law Tradition, see *Introduction* to *KARAITE ANTHOLOGY* xvi-xxvi (Leon Nemoy ed., 1952).

31. MAIMONIDES, *supra* note 20, at 1b.

32. *Id.*

does not come from Biblical verses but rather from faith in the absolute reliability of the sages who form the links in the chain of transmission. If they claim that they received the Oral Law from their teachers and they from theirs in an unbroken chain stretching back to Moses, then we believe their testimony on this issue or we destroy the basis for considering Jewish law reliable, authoritative, and binding.

Next, we continue tracing the historical "time-line" of Jewish law, beginning where we left off last week. We touch briefly on major events and trends during the crucial Second Temple period. These include Alexander's conquest of Judea (326 B.C.E.) initiating the Jews' first encounter with the West; the status of Judea under his successors, the Ptolmeys and the Seleucids; the cultural confrontation between Hellenized Jews and Hasidim, their tradition-minded brethren; the suppression of Judaism under the Syrian ruler Antiochus IV Epiphanes (175-164 B.C.E.), leading to the Maccabean revolt (167 B.C.E.); the rulers of the Hasmonean dynasty; the rivalry for national ascendancy between two rival parties—the Sadducees, who based their claim on their custody, as hereditary priests, of the Temple and its rites, and the Pharisees, lay teachers who claimed authority based on their access to the Torah, ancestral traditions, and the corpus of the Oral Law; the dynastic dispute over succession between Hyrcannus and Aristobolus which the Roman general, Pompey, mediates, whereupon Judea becomes a vassal state of Rome (c. 63 B.C.E.); the teachers Hillel and Shammai and their schools; the troubled reign of Herod (37-4 B.C.E.); Judea under the harsh rule of the Roman procurators; events leading to the revolt against Rome (67 C.E.), which culminates in the destruction of Jerusalem and the Second Temple (70 C.E.); and the siege at Massada (73 C.E.).<sup>33</sup>

Around the time the revolt started, the High Court of Jerusalem, known as the Great Sanhedrin, ceased to meet. This deliberative body of 71 members, a quasi-legislature with some judicial functions, was not an appellate court but enjoyed original

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33. Two volumes that cover the history of the period are EMIL SCHURER, *A HISTORY OF THE JEWISH PEOPLE IN THE TIME OF JESUS* (1961) and VICTOR TCHERIKOVER, *HELLENISTIC CIVILIZATION AND THE JEWS* (S. Applebaum trans., 1959). See also Isaiah Sonne, *The Schools of Shammai and Hillel Seen From Within*, Louis Ginzberg Jubilee Vol. 275-291 (1945) (surveying reasons for the rise of the two schools and explanations for their disputes).

jurisdiction in a limited set of cases with national importance.<sup>34</sup> It was the highest authority in the Jewish legal system whose enactments and interpretations of Jewish law were final and binding on Jews worldwide. It stood at the apex of a Jewish court system that required in every locality a 23-member court to try capital cases (a “small sanhedrin”), and a *beth din*, a 3-member panel to try non-capital criminal matters and civil cases. Rome abrogated Jewish capital jurisdiction, but it allowed Jewish courts to retain concurrent jurisdiction with Roman courts to try civil cases among Jews according to Jewish law.<sup>35</sup> The Great Sanhedrin and the small sanhedrins never resumed their functions but the *beth din* remained a permanent feature of the Jewish landscape, available in every community where Jews resided to decide cases according to Jewish law.<sup>36</sup>

In the aftermath of the defeat by Rome, the Jews face a leadership vacuum. Their political leaders are discredited by the failure of the revolt. Restoring the Jewish monarchy is not an option under Rome’s dominion. With the Temple in ruins, the priestly aristocracy lacks a base of popular support. Into the leadership vacuum step the Torah sages, leaders of the people not just by default but also because they have solutions to pressing problems. If the Temple rites are discontinued, the sages ordain substitutes—prayer, study, and good deeds will replace animal sacrifices.<sup>37</sup> If meetings of the central organ of Jewish self-rule, the Sanhedrin, are suspended, the sages will meet in its place.

The Torah remains in force and the sages will interpret and apply it as the Sanhedrin formerly did. Under the leadership of Johanan ben Zakkai, the scholars begin sifting through the Oral

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34. MISHNAH, *Sanhedrin* 1:5-6 (stating jurisdiction of High Court, including condemning a city, adding to the boundaries of Jerusalem, and declaring an optional war). For a discussion of the Jewish court system and the role of the Great Sanhedrin, see MAIMONIDES, *MISHNEH TORAH, Sanhedrin*, chs. 1, 5, and *Rebels* ch. 1 (A. Hershamn trans., 1949). For modern approaches to the history of the Sanhedrin, see S. HOENIG, *THE GREAT SANHEDRIN* (1953) and H. MANTEL, *STUDIES IN THE HISTORY OF THE SANHEDRIN* (1961).

35. A. M. Rabello, *Jewish and Roman Jurisdiction*, in N. S. HECHT, *AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW* 141, 145 (1996).

36. See Note, *Rabbinical Courts: Modern Day Solomons*, 6 *COLUM. J.L. & SOC. PROBS.* 49 (1970) (describing operation of contemporary rabbinical courts); H. Kirsh, *Conflict Resolution and the Legal Culture: A Study of the Rabbinical Court*, 9 *OSGOODE HALL L.J.* 335 (1971) (surveying history and operation of rabbinical courts).

37. TALMUD, *Berakoth* 26b; TALMUD, *Yoma* 86b.

Law to resolve legal controversies. By the end of the first century C.E., a dynasty of leading sages descended from Hillel has assumed the mantle of leadership. At about this time, the sages close the canon of the Hebrew Bible, resulting in a 24-book tripartite Scripture, *Tanakh*, consisting of Torah (the Five Books of Moses), Prophets, and Writings.

Things take a turn for the worse when the Emperor Hadrian (76-138 C.E.) suppresses Judaism. This sparks a new revolt, this time led by a general, Bar Kokhba, and a scholar, Rabbi Akiva.<sup>38</sup> A second devastating defeat at the hands of Rome ensues (135 C.E.). But under Hadrian's successor, Antoninus Pious (138-161), a pragmatic shift in policy occurs that leads to rapprochement with the Jews. Rome recognizes the scion of the Hillelite dynasty, Rabbi Simeon ben Gamaliel, as Ethnarch (*nasi*) of the Jews, endowing the religious office with political significance. The ground is prepared for Rabbi Judah Ha-Nasi (c. 135-217 C.E.), the pre-eminent leader of the period, whose collection of the Oral Law, the Mishnah, becomes the basic code of Jewish law for his and all succeeding generations.

The established *modus vivendi* between Rome and the Jews continues until Constantine's conversion to Christianity (313 C.E.). Thereafter, Church Fathers place increasing pressure on the Jews. When the Ethnarch Gamaliel VI dies without issue (c. 425 C.E.), the Emperor Theodosius II declines to confirm a successor. This ends the *nasi's* office and with it ceases the ordination of judges (*rabbis*) conferred by him.<sup>39</sup> The line of ordination that, according to tradition, stretched back to Moses's ordination of Joshua,<sup>40</sup> is broken. The Jews of Judea enter a period of quiescence that does not lift until the national revival in the twentieth century.

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38. For a biography, see L. FINKELSTEIN, AKIVA (1936).

39. Ordination will be a theme that runs through the course. We will explore the problem of identifying authority in a decentralized legal system, like the Jewish legal system, that has no central body to license its authorities. We will compare how the same topic is treated in a variety of classic texts. Thus, in the fourth class, we will study Talmudic passages relating to the ordination of judges. Then in the fifth class, we will study passages in Maimonides's code addressing the same topic. Our study of these texts will give us a platform on which to base our discussion of proposals to revive ordination of judges and to restore the Great Sanhedrin in Jerusalem. For a monograph treating the history of ordination in Jewish law, see JULIUS NEWMAN, SEMIKHAH (ORDINATION): A STUDY OF ITS ORIGIN, HISTORY AND FUNCTION IN RABBINIC LITERATURE (1950).

40. *Numbers* 27:15-23.

At the end of the class I assign the reading for next week and leave the students with a question to try to answer from the assignment: "Is kidnapping one of the offenses prohibited by the Ten Commandments?"

### X. A WOODY ALLEN MOVIE IN BERLIN

Saturday, May 30

Woody Allen's movie, *Deconstructing Harry*, is savagely funny with a clever premise. An author, Harry Block, writes novels thinly disguising people and incidents in his own life. Harry is "a black magician" who takes everyone else's suffering and turns it into literary gold. The real participants easily recognize themselves in his literary portraits, much to their chagrin. Harry, played by Woody Allen, is of course an easily recognizable stand-in for Woody Allen who behaves in exactly the same way, making movies that thinly disguise people and incidents in his own life. The one-liners fly fast and furious. When his sister berates him for a life full of "nihilism, cynicism, sarcasm, and orgasm," Harry says he could use that as a slogan and win election in France. For the thoroughly modern Harry, religion is merely superstition, a way of "fostering the idea of the other so you know who to hate." But without anything to believe in, Harry admits, "I'm spiritually bankrupt, I'm empty, I've got no soul." In the end, we discover that Harry Block is a completely unsympathetic character, unable to achieve his own happiness and unhappy about anyone else's.

Sitting in the midst of a German audience in Berlin, I find myself suddenly sensitive to the way Jews are portrayed on the screen. Biting portraits of Jews and their comic foibles punctuate the film. There is Harry's first wife who, after their son was born, became "Jewish with a vengeance" and recited Hebrew blessings before taking any action, including sex. There is his half-sister Doris who was "normal" as a child but changed after she married an Orthodox Jew and became "professionally Jewish." There is the mild mannered senior citizen who keeps a secret from his wife for 30 years—that he ax-murdered his first wife and children and ate them. The savvy filmmaker anticipated my response to his portrayals when he has Doris accuse Harry of being "a self-hating Jew" for the unflattering portraits of Jews that appear in his novels. Indeed, I find myself wondering

how the German audience will perceive and react to the negative stereotypes of Jews in the film. A German student who saw the movie assures me later that the German audience accepts the unflattering portraits exactly as intended, as comic shtick by a zany filmmaker who will do anything for a laugh, and nothing more.

I had concerns about the film, as a Jew, that I never would have had viewing it in the United States. I was told that American Jews often come to Berlin feeling American and leave feeling Jewish. I seem to have experienced the transformation in a movie theater watching *Deconstructing Harry*.

#### XI. HADRIAN'S BUST

Sunday, May 31

I toured the newly installed antiquities galleries of the Altes Museum. The installation covers ancient civilization from Crete to Rome with exceedingly fine objects grouped according to topics. Captions give very lucid explanations of everything from Greek religion to geometrical designs on vases. The collection of abstract Mycenaean figurines is particularly noteworthy. At the end of the exhibit I came face to face with impressive busts of the emperors Alexander and Hadrian, both of whom figured prominently in last week's Jewish legal history class.

#### XII. A KLEZMER CONCERT

Monday, June 1

The entertainment magazine *Zitty* listed a klezmer concert in Berlin almost daily and tonight I attended one. I enjoyed the music, none of it familiar yet at the same time all of it was. The klezmer revival in Berlin attracts a very high proportion of its participants from the non-Jewish population. I spent a good portion of the evening contemplating klezmer concerts with virtually no Jews in the audience or on stage. Was the music a little tepid and was the audience's reaction a trifle off, or was I just imagining it? Surely this active interest in the Jewish heritage, whatever its source and whoever presents it to the public, was better than hostility or indifference.

I had wondered prior to arrival whether I would find in Berlin a desert free of Jewish cultural programming. I found exactly



the opposite. In my last public lecture in Berlin, I would join the ranks of journalists, scholars, and pundits seeking to explain this striking state of affairs.<sup>41</sup>

### XIII. *THE THIRD CLASS: MIDRASH AND MISHNAH*

Tuesday, June 2

We have been assigned a new classroom, U-shaped and comfortable, with good sightlines and sufficient space for the 40-odd students who are returning each week. The dialogue now seemed to flow better than before and I was able to cover more material. The students asked more questions. Clearly, everyone was performing better in our improved learning environment.

My aim in the third session was to introduce the students to two literary forms, *midrash* and *mishnah*, and to contrast them as alternatives for transmitting the Oral Law. To modern students, whose capacity for rote learning has atrophied (except immediately prior to examinations), the Oral Law may seem like a myth. For students in the ancient world, with no printed books, scarce writing materials and few manuscripts, learning the Oral Law by heart and conveying it intact were practical problems that had to be faced and surmounted. During the first two centuries C.E.—the period under consideration in this class—the problems were aggravated in Judea by harsh conditions following two defeats at the hands of Rome. Scholars and students were often distracted, forced to wander from place to place, their academies uprooted and the normal course of instruction interrupted for extended periods. At the same time, the quantum of the Oral Law was increasing as generations of scholars added their interpretations to the corpus of knowledge.

We discussed why any enduring legal code, such as the Torah, would elicit successive layers of interpretation. All legal codes contain ambiguities and difficult passages that have to be clarified, and no code can cover with an express rule every situation that may possibly arise in the future. There are gaps in coverage that have to be filled by inferences from the text. Further, conditions change over time and legal practices must be updated in harmony with the text.

To ensure that departures from the plain meaning of the

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41. See *infra* Section XXIII.

text can be justified, formal rules, known as canons of construction, govern the process of interpretation. We studied Rabbi Ishmael's thirteen rules of interpretation.<sup>42</sup> Many are logical and seem strikingly contemporary: "Inference is drawn from a minor premise to a major one, or from a major premise to a minor one" (Rule One); "From the similarity of words or phrases occurring in two passages it is inferred that what is expressed in the one applies also to the other" (Rule 2).<sup>43</sup> Others are more challenging and rooted in peculiarities of the Biblical text: "If a generalization is followed by a specification and this in turn by a generalization, one must be guided by what the specification implies" (Rule 6).<sup>44</sup>

In a traditional society that values continuity and scholarship, the accumulating results of this on-going interpretive effort will be collected and transmitted to future scholars, at first orally and then in writing. We discussed why the rabbis regarded it, for a time, as prohibited to write down the Oral Law<sup>45</sup> and when and why the prohibition was finally lifted.<sup>46</sup> In this manner, interpretation (*midrash*) passed through three stages. It began as an *activity* necessary for any living legal system; it next formed the ba-

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42. For the thirteen rules, see, e.g., ELLIOT N. DORFF & ARTHUR ROSETT, *A LIVING TREE* 201 (1988), quoting the translation by Phillip Birnbaum that originally appeared in *THE DAILY PRAYERBOOK* 41-46 (1949). Dr. Birnbaum's footnotes include excellent examples showing how each of the rules was applied.

43. *Id.*

44. *Id.* As an example for this rule, Dr. Birnbaum cites *Exodus* 22:8, "For every matter of trespass [generalization], whether it be for ox, for ass, for sheep, for raiment [specification], or for any manner of lost thing [generalization]," the thief must pay double. Applying Rule 6 ("one must be guided by what the specification implies") yields this result: The double fine applies only to items like those that are specified—ox, ass, sheep, and raiment—i.e., items of tangible property that have intrinsic value. Excluded from the rule of double fines are (1) real estate and (2) intangible personal property, like stocks and bonds, which have only symbolic value.

45. For a collection of reasons why it was prohibited to transcribe the Oral Law into writing, see DORFF & ROSETT, *supra* note 42, at 215-223 (citing, inter alia, a reluctance to change the initial form of the revelation, the impossibility of writing down all laws, the advantages of a legal corpus taught orally from teacher to student, and the flexibility of an oral tradition).

46. HERMAN L. STRACK, *INTRODUCTION TO THE TALMUD AND MIDRASH* 18-20 (1931) lists two groups of authorities who have dealt with this issue. One group, which includes Maimonides, maintains that the Oral Law was written down at the end of the second century C.E. when Rabbi Judah compiled the Mishnah and reduced it to writing. The other group, which includes Rashi, believes that the Oral Law remained oral until the sixth century C.E. when the Talmud was reduced to writing by a group of scholars known as the *Savora'im*.

sis of a *curriculum*, taught orally in the schools; and when it was finally transcribed into writing, it became a *literature* with a recognizable form.

To illustrate these points, we turned to a second century *midrash* on Exodus.<sup>47</sup> We studied a chapter whose subject is Exodus 20:12-14, the three verses that contain the last six of the Ten Commandments—Honor of father and mother; prohibitions on murder, adultery, theft, bearing false witness, and coveting. The first passage in the chapter reads as follows:

*Honour Thy Father and Thy Mother.* I might understand it to mean only with words but Scripture says: "Honour the Lord with thy substance," etc. (Prov. 3.9) Hence it must mean, with food and drink and with clean garments.<sup>48</sup>

The passage illustrates the *midrash* form—the citation of a Biblical verse followed by its interpretation (the Oral Law). It demonstrates the "rules of interpretation" in action. Here a dubious word, "honor," is explained by the same word used in another Biblical verse (Rule 2, *supra*). The outcome of the process is a legal rule, the duty to provide one's parents with material support, although it is impossible to know whether the sages derived the rule from the Biblical verse or merely pegged a pre-existing rule to a likely Biblical source.<sup>49</sup> For purposes of comparison, I asked the students whether children had a legal duty to support their parents under any of the modern legal systems with which they are familiar.

From studying the *midrash*, we learned that Jewish law, in criminal matters, requires both (a) a warning that certain conduct is prohibited and (b) a separate statement of the penalty for violating the prohibition. We found here an analogy to modern legal systems that prohibit *ex post facto* laws that impose punishment on conduct before it has been criminalized by a statute. Thus we read:

*Thou shalt not murder.* [Exodus 20:13] Why is this said? Because it says: "Whoso sheddeth a man's blood [by man his blood shall be shed]." (Gen. 9.6) We have thus heard the

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47. 2 MEKILTA DE-RABBI ISHMAEL, TRACTATE BAHODESH, 257-266 (Jacob Z. Lauterbach trans., 1933).

48. *Id.* at 257.

49. This is Elon's distinction between "creative interpretation" and "integrative interpretation." ELON, *supra* note 9, at 58-59.

penalty for it but we have not heard the warning against it; therefore it says here: "Thou shalt not murder."<sup>50</sup>

That the warning against conduct appears in one volume of the Pentateuch, Exodus, while the penalty is stated in another, Genesis, matters not at all. The Five Books of Moses contain a single unitary legal code whose various provisions, penalties and warnings, may be found at any point in the narrative.

The students learned from the *midrash* that the Ten Commandments are tightly woven into the Torah's larger scheme of 613 commandments. A passage in the Ten Commandments may represent just one element of a larger topic whose other facets are treated elsewhere in the Bible. From the Jewish perspective, the Ten Commandments are not regarded as a freestanding code, whether for Jews (who are enjoined to fulfill 613 Biblical commandments)<sup>51</sup> or for gentiles (who are obligated to observe the seven Noahide commandments).<sup>52</sup>

Our reading permitted us to answer a question from last week, whether kidnapping is prohibited by one of the Ten Commandments. According to the rabbis in the *midrash*, it is. Kidnapping is the subject of the command, "Thou shalt not steal," meaning steal a person. The prohibition against stealing property is stated elsewhere in the Bible (Lev. 19:11) and would not have been repeated in the Ten Commandments. To hold that it was stated twice would violate the cardinal notion that the Biblical text is free of repetition.

The students particularly enjoyed the passage in which the *midrash* reads the Ten Commandments *across* the two tablets of stone, rather than down. In this reading, the first commandment, "I am the Lord,"<sup>53</sup> is juxtaposed against the sixth, "Thou

50. MEKILTA DE-RABBI ISHMAEL, *supra* note 47, at 260.

51. For a listing of the 613 commandments (248 positive, 365 negative), see MOSES MAIMONIDES, THE 613 COMMANDMENTS (Charles B. Chavel trans., 1967).

52. On the seven Noahide laws, see ELON, *supra* note 9, at 708-10. A standard enumeration includes the obligation to establish courts of justice and prohibitions on idolatry, blasphemy, murder, sexual immorality, theft, and the eating of flesh torn from living animals. *Id.*

53. The Jewish tradition regards Exodus 20:2, "I am the Lord thy God, who brought thee out of the land of Egypt, out of the house of bondage," as the First Commandment, imposing the affirmative obligation to believe in the existence of God. MAIMONIDES, THE BOOK OF THE COMMANDMENTS, *Commandment No. 1*. The Christian traditions generally begin the enumeration of the Ten Commandments with the negative prohibition of verse 3, "Thou shalt have no other gods before Me." See, e.g., 6 THE ANCHOR

shalt not murder," teaching that whoever murders a human being diminishes God's image. The second commandment, "thou shalt have no other gods before Me," is ranged against the seventh, "thou shalt not commit adultery," since both involve breaking a covenant (the covenant between Israel and God, on the one hand, and the covenant between husband and wife, on the other). The third, "Thou shalt not take the name of the Lord thy God in vain," stands across from the eighth, "Thou shalt not steal," teaching that one who steals will in the end swear falsely when he denies it. The fourth, "Remember the Sabbath day," is positioned against the ninth, "Thou shalt not swear falsely," to show that one who violates the Sabbath testifies falsely that God did not create the world in six days and rest on the seventh. The fifth, "Honor thy father and thy mother," is juxtaposed against the tenth, "thou shalt not covet," to teach that one who covets his neighbor's wife may in the end beget a son who honors someone else as his father. The passage makes a larger point, arguing that the Ten Commandments cannot be divided into two separate realms, one religious (appearing on the first tablet) and the other secular (appearing on the second); all of the laws, wherever they appear, are too closely interconnected in a unitary ethical system to permit the artificial division between religious and secular.

Placing ourselves in the shoes (sandals) of *yeshiva* students around the year 100 C.E., we assessed the *midrash* form as an aid to memorizing the Oral Law.<sup>54</sup> On the plus side, the verses of the Bible are fixed pegs on which we may hang the contents of the Oral Law, using the sequence of verses as a mnemonic device. Further, *midrash* makes the relationship between the written Torah and its Oral Law counterpart perfectly clear. On the downside, the Torah is not organized like a standard legal code. It does not group together all similar and related laws, whether civil or criminal, and it often addresses the same topic in several widely scattered locations. Further, we must admit that on occasion the commentary seems strained when recited alongside the

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BIBLE DICTIONARY 385 (David Noel Freedman ed., 1992) (stating *Exodus* 20:2 is a preamble and *Exodus* 20:3 begins the First Commandment).

54. For a comparison of the relative merits and demerits of *midrash* and *mishnah* as aids in the study and memorization of the Oral Law see JACOB Z. LAUTERBACH, RABBINIC ESSAYS 163-256 (1951).

written Torah (e.g. when we learn that the rabbis understand “Thou shalt not steal” as a prohibition on kidnapping).

With these difficulties in mind, teachers of the Oral Law in antiquity developed a new format for teaching it, called *mishnah*. This consists of concise statements of the laws that do not cite the Biblical source verses from which the laws were derived. The laws are arranged by topic. All laws relating to the same topic appear together, whatever their sources in Bible.

In the last decades of the second century C.E., Rabbi Judah Ha-Nasi compiles a *mishnah* collection that becomes the definitive statement of the Oral Law for his and subsequent generations.<sup>55</sup> He divides the corpus of Jewish law into 60 (now 63) tractates, arranged in six orders by topic.<sup>56</sup> Rabbi Judah’s *Mishnah* attains a degree of authority that exceeds all of its predecessors and becomes the standard curriculum in the schools. Its wide acceptance is based on the excellence of the work, coupled with Rabbi Judah’s personal qualities as a teacher and scholar and his official position as Ethnarch that enables him to promulgate his work. With several possible aims, Rabbi Judah may have compiled the *Mishnah* to serve as a history of the Oral Law tradition, a curriculum for teachers, a manual for judges, a handbook for students, or a legal blueprint for the future’s Third Jewish Commonwealth. Subsequent generations regarded it as a legal code that settled the law in disputed cases. Whether the compiler intended the *Mishnah* to become a legal code remains uncertain.

Although the same laws can be taught using either format, *midrash* or *mishnah*, the pre-eminence of the *Mishnah* heralds a radical shift in Jewish legal culture. Previously, the written Torah was the focal point of study and the source of new law. After the *Mishnah* is compiled, the Oral Torah becomes the direct source of law. With the *Mishnah* promulgated, one no longer searches in the Bible for new law; instead one consults the *Mishnah* and applies its provisions to the situation at hand. Further, the *Mishnah*’s form obscures the close link between the written and oral Torahs. In the *Mishnah*, the connection between the

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55. See THE MISHNAH (H. Danby trans., 1933) and his useful introduction to the work.

56. The six orders are laws of prayer and agriculture (*Zera'im*); Sabbaths and festivals (*Mo'ed*); family law (*Nashim*); civil and criminal law (*Nezikin*); Temple rites (*Kodashim*); and ritual purity (*Toharot*).

two tends to be implicit rather than express. In the shift from *midrash* to *mishnah*, the Oral Law attained a new prominence; it came to stand on its own and speak with an innate authoritative-ness.

To demonstrate ease of access and logical organization of topics, I ask the students to consult a "table of contents" for the Mishnah<sup>57</sup> and try to locate the exact chapter in which they will find laws concerning kidnapping. By reviewing the titles of the Six Orders,<sup>58</sup> the class quickly reaches a consensus that the best place to look would be the fourth order, *Nezikin*, containing civil and criminal laws. Taking the exercise a step further, we then review a summary of the contents of the ten tractates that comprise *Nezikin*<sup>59</sup> and select the fourth tractate, *Sanhedrin*, "Courts of Justice," as the likely one. We next study a table of contents for *Sanhedrin*,<sup>60</sup> and because we already know that kidnapping is a capital offense, we expect to find the laws somewhere in chapters 9-11 which treat capital offenses. In fact, we find the discussion of kidnapping in chapter 11.<sup>61</sup> There the topic is addressed in close proximity to other similar capital offenses, and various rules concerning kidnapping, such as the elements of the crime and certain exemptions, also appear.

Our demonstration shows why *mishnah* supplanted *midrash* as the form used to transmit the Oral Law. It was not just different; it was better. Mishnah was an improvement that promoted comprehensive and logical thinking about legal topics, eased access to the law, and aided memorization. In the future books of *midrash* would be composed only for collections of Biblical folklore (*agaddah*), not for law.<sup>62</sup>

I ended the class with the reading assignment for next week, two excerpts from the Talmud. I asked the students to try to

57. The author of the Mishnah included no table of contents. We use the table of contents in GEORGE HOROWITZ, *THE SPIRIT OF JEWISH LAW* 729-35 (1973).

58. *See supra* note 56.

59. HOROWITZ, *supra* note 57, at 732-33.

60. HERMANN L. STRACK, *INTRODUCTION TO THE TALMUD AND MIDRASH* (1931), provides a chapter-by-chapter summary of the contents of the Mishnah at 29-64; the contents for tractate *Sanhedrin* appear at 50-51.

61. MISHNAH, *Sanhedrin* 11:1.

62. For introductory essays concerning the use of *midrash* to convey *agaddah* (folklore) relating to the Bible, see HARRY GERSH, *THE SACRED BOOKS OF THE JEWS* 139-153 (1968) and Barry W. Holtz, *Midrash, in BACK TO THE SOURCES: READING THE CLASSIC JEWISH TEXTS* 177-211 (1984).

determine from their reading whether the texts are verbatim transcripts of actual dialogues, deliberately edited versions of the exchanges, or stream of consciousness narratives.

#### XIV. RABBINIC COMPENSATION: TONIGHT

Thursday, June 4

This afternoon I received a telephone call from a writer for *Jüdisches Berlin*, the Jewish community's monthly magazine, with a question about my talk scheduled for this evening at 8 P.M. It was fortunate that she called since this was how I learned about the event. Since my name and address were not on the Jewish community's mailing list, I had not received an invitation. I spent the afternoon planning the presentation and trying not to imagine the scene if the audience had assembled and the speaker never appeared. In the end I developed a lecture that would necessarily be more spontaneous and less rehearsed than usual, probably a good thing.

About thirty people assembled in a conference room at the Hotel Savoy for the talk, "Rabbinic Compensation: When and Why?" After Dr. Skoblo's introduction, I spent the next half hour discussing how rabbis came to receive salaries.<sup>63</sup> In ancient times, those learned in the Torah were expected to place their knowledge at the community's disposal free of charge, just as Moses had received the Torah from God free of charge.<sup>64</sup> These early rabbis and scholars earned their livelihoods and supported their families with other types of employment. Some were farmers, others tailors, some sandal-makers, and a lucky few were wine tasters. Great wealth was neither sought nor required. Maimonides counseled that the way of Torah is to eat bread with salt, drink water in small measures, sleep on the ground, and endure hardships to acquire Torah.<sup>65</sup> One should limit one's study of Torah to nine hours per day and allocate three hours daily to plying a trade.

In time, doubts arose whether part-time scholars were capable of preserving Torah knowledge over the generations.<sup>66</sup> Fur-

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63. See Jeffrey I. Roth, *Three Aspects of the Rabbinate: Compensation, Competition and Tenure*, 45 *DRAKE L. REV.* 569, 571-88 (1997).

64. TALMUD, *Nedarim* 37a.

65. MAIMONIDES, *MISHNEH TORAH*, *Talmud Torah* 3:6.

66. Roth, *supra* note 63, at 580-84.



ther, the pressing exigencies facing Jewish communities in the harsh years of the Exile required rabbis who could minister to their needs full-time. In the end, the rabbinate was professionalized. Serving as a rabbi became a full-time occupation. Rabbis drew their livelihoods from the communities they served. They received salaries, fees for services, and free-will donations.<sup>67</sup> Yet, always, the hoary maxim, "Never use the Torah as a spade with which to dig,"<sup>68</sup> acted as a brake on the material demands of the rabbinate. It discouraged rabbis from regarding their posts primarily as a means to acquire material possessions.

During the question and answer session, the discussion was lively. One listener asked, granting that a rabbi is entitled to compensation, at what level should he be paid? Should he receive an average salary, a low one that covers his bare subsistence needs, or a high one equal to that of the highest paid professional in his community? It came as no surprise to the audience that halakhic authorities were of two minds on this. Some held a bare subsistence salary is appropriate, the rabbi's reward arriving in full measure in the world to come. Others argued for a generous measure of compensation.<sup>69</sup> In their view, a rabbi who has difficulty making ends meet will command the respect of neither Jews nor gentiles. His congregation will ignore his admonitions and the gentile authorities will not regard him as a worthy individual to represent the interests of the Jewish community. By the end of our discussion, proponents of both views had ammunition they could employ the next time the rabbi's contract came up for renewal.<sup>70</sup>

After the talk, Dr. Skoblo offered to solve my accommodation problem with a stay at the Savoy. I declined with appreciation, having long since decided to make the best of my residency at the university's spartan guesthouse.

## XV. *PRENZLAUER BERG*

Sunday, June 7

One of my students, Sergej, arranged a tour of the Pren-

67. *Id.* at 584-88.

68. *MISHNAH, Avot* 4:5.

69. Rabbi Simon ben Zemah Duran, *Tashbetz*, Part I, No. 148 (1963 ed.).

70. An account of the talk appeared in the Jewish community's magazine. Elisa Klapheck, *Wieviel darf ein Rabbiner verdienen?*, 6 *JÜDISCHES BERLIN* 23 (1998).

zlauer Berg neighborhood. Our first stop was the Jewish cemetery. On the way, I began to worry about heading coverings. When I arrived Sergej said, "I brought two hats in case we need them." The cemetery was closed on Sunday but we could view it through the gates. I made another entry into my growing record of instances of acute German sensitivity to Jewish sensibilities.

## XVI. THE FOURTH CLASS: THE TALMUDIC ERA

Tuesday, June 9

We devoted the fourth class to the great compendium of Jewish law and folklore, the Talmud, its history, organization and contents.<sup>71</sup> We started with an overview of the history of the Jews in ancient Mesopotamia (Babylonia). The community traces its origins to Jews whom the Babylonians deported from Judea after the First Temple's destruction (586 B.C.E.). Although the Persian king Cyrus permitted the Jews to return to their homeland (c. 539 B.C.E.), some elected to remain. The community continued quietly for centuries, enjoying a degree of autonomy that allowed them to observe ancestral traditions and preserve their national identity in exile. The Babylonian community is augmented by waves of Jewish immigration from Judea after two revolts against Rome end in defeat (70 C.E. and 135 C.E.). The Judean arrivals bring with them a sophisticated form of Judaism including, after 200 C.E., the Mishnah of Rabbi Judah. Two of his disciples, Rav (Abba Arika, c. 175-247 C.E.) and Samuel (c. 180-257 C.E.) teach the Mishnah at academies in Sura and Nehardea. "Flying rabbis" who regularly travel between Babylonia and the homeland keep their colleagues informed of academic and legal developments in the two localities. I ask the students how long they think it would take to make the trip between Babylon and Israel in ancient times. Some guess two months, others two years. To see who is right, we consult maps of ancient caravan routes in the Near East.<sup>72</sup> We arrive at an estimate of 2-3 weeks (1 camel x roughly 20-30 miles/day over 400-500 miles = 14-25 days), indicating that the trip was not par-

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71. For an introduction and overview, see Robert Goldenberg, *Talmud*, in *BACK TO THE SOURCES: READING THE CLASSIC JEWISH TEXTS* 129 (Barry W. Holtz ed., 1984).

72. See, e.g., 2 Jacob Neusner, *A HISTORY OF THE JEWS IN BABYLONIA* 39 (1966) (showing map of trade routes in the Near East).

ticularly arduous and that the two Jewish communities could readily maintain close contact.

The political situation of the period has an impact on the development of Jewish institutions. In Judea, the Jews under Roman rule are led by a rabbi who traces his ancestry to King David through the female line. He serves as a quasi-Roman official, Ethnarch of the Jews (*nasi*). To counter his influence, the rulers in Babylonia appoint as their own court official, styled the Head of the Exile (Aram. *resh galuta*), the scion of a family that traces its ancestry to King David through the male line. Rabbis and scholars are employed by both as judges, teachers, and officials but the rabbis have a source of authority that is independent of their official status, *viz.* the Torah and their role as custodians of its interpretation.

The rabbis and students of the period gather in assemblies and schools (*yeshivot*) to study the great texts, the Bible and the Mishnah, and the growing body of explanatory material that surrounds them. Lectures focus on the Mishnah and problems raised by its text.<sup>73</sup> The scholars harmonize contradictory passages, find Scriptural support for Mishnaic rules, emend the text where necessary, generalize from specific cases to form general rules, decide the law in controversial cases, and apply their legal reasoning to contemporary problems. For the most part, instruction proceeds orally. Students commit the expanding mass of material to memory until this proves impossible. At some point (the Talmud is frustratingly silent about the process of its own composition), anonymous editors begin to sift through the material that generations of scholars have produced. They organize it, edit it, and transcribe it in a series of tractates. The editorial process takes centuries to produce the two Talmuds, the Jerusalem Talmud (c. 400 C.E.), and the Babylonian Talmud (c. 500-650 C.E.).<sup>74</sup> In form, the Talmuds are partial commentaries on the Mishnah with a practical orientation. But their contents are not limited to legal matters. In contents, the Talmuds comprise encyclopedias of Jewish life and

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73. See S. K. Mirsky, *Types of Lectures in the Babylonian Academies*, in *ESSAYS ON JEWISH LIFE AND THOUGHT* 375 (Joseph L. Blau et al. eds., 1959).

74. For a comparison of the two Talmuds, see Louis Ginzberg, *An Introduction to the Palestinian Talmud*, in *JEWISH LAW AND LORE* 3 (1955).

folklore of the period. In impact, the Babylonian Talmud becomes a virtual code of law for the Jewish people.

In the Babylonian Talmud, reflecting the situation of Jews living in exile outside of Israel, we find the notion that a country's civil laws are binding, as a matter of Jewish law, on the Jewish residents. "The Kingdom's law is law."<sup>75</sup> This great principle permits Jews to live as law-abiding residents of their host countries, provided that the government is legitimate and that its civil laws neither impinge on the Jewish faith nor discriminate against Jews. Interestingly the Jerusalem Talmud does not mention this principle, possibly because Jews never accepted Roman rule in Judea as legitimate.

It is a challenge to select brief excerpts from the Talmud to present to the students to illustrate its contents. In the end, I opted for two passages from the Babylonian Talmud. The first addresses ordination of judges and their authority in Palestine and Babylonia, which depends in part on who ordained them, the *nasi* or the *resh galuta*.<sup>76</sup> The passage contains a good dose of *aggadah* (folklore) that complements the *halakhah* (legal discussions). We learned that when the rabbis ordained Rabbi Ammi and Rabbi Assi, they sang of them, "Only such men, only such men, ordain for us, but don't ordain any dimwits or half-wits."<sup>77</sup> Rabbi Zira hid to avoid being ordained. When his colleagues found him and ordained him, they sang a bridal song to praise the candidate, "Neither paint nor rouge nor [hair-]dye, yet radiating charm."<sup>78</sup>

The second passage<sup>79</sup> interprets Exodus 21:24, "eye for eye, tooth for tooth." This and similar verses were not understood by the authorities of Jewish law to require that physical retaliation be exacted from a wrongdoer. Rather it required the culprit to pay monetary compensation to offset five categories of expense—the victim's pain, medical expenses, depreciation in value, loss of time and humiliation. In the passage we study, nine scholars are cited in support of this view, offering "proofs" that to the modern reader seem to vary in their degree of per-

75. S. Shilo, *Dina De-Malkhuta Dina*, in ELON, *supra* note 9, at 710.

76. TALMUD, *Sandedrin* 4b-5a, 13b-14a.

77. *Id.* at 14a. The passage uses ancient Aramaic slang whose meaning is unclear. The translation is based on SANHEDRIN 65 n.13 (I. Epstein trans., 1935).

78. *Id.*

79. BAVA KAMMA 83b-84a.

suasiveness.<sup>80</sup> When a tenth scholar suggests the passage can be understood literally, his colleagues reinterpret his position so that in the end he agrees with them. The passage is a good demonstration of Talmudic methodology and highlights the relationship between the Oral Law (compensation) and the written Torah ("eye for eye"). It is always a revelation for students since most have been taught that "eye for eye, tooth for tooth," literally construed, is the very paradigm of Old Testament, hence Jewish, justice.

### XVII. *GETTING TO KNOW THE STUDENTS*

Wednesday, June 10

About half way through the term I begin to feel I am not getting to know the students well enough from classroom encounters. I want to learn more about their motivations for studying Jewish legal history. I propose a number of ways to meet in informal settings. Last week we held a "happy hour" at a local pub. A small convivial group of students joined me for conversation that focused on Israel and Israelis, life in the United States, shopping on Sunday and holidays (a German taboo being reevaluated), Jews in general and Woody Allen in particular. Later I scheduled "office hours" for private consultations. Two students made appointments, one to discuss spending a year in Israel, the other for advice on his thesis, which concerns the way heretics are treated in various religious traditions.

Today I led a small group discussion. All of the seminar students had been invited to join the discussion, which would cover any topics they wished to explore. About ten students accepted the invitation. They quickly reminded me how a university course in Jewish studies always proceeds on at least two levels. If some students just want basic information about the subject, others (Jewish and non-Jewish) are seeking a window into the Jewish religion. The students attending the discussion were decidedly of the latter persuasion. All of their questions concerned religion. They asked about the Jewish concept of the afterlife. They wanted to know what it would be like in "the end of days." They asked when, in the Jewish tradition, the Messiah

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80. For a modern reflection on these proofs, see Irene Rosenberg & Yale Rosenberg, *Lone Star Liberal Musings on "Eye For Eye" and the Death Penalty*, 1998 UTAH L. REV. 505, 525-39 (1998).

is expected to arrive and when the Third Temple will be rebuilt in Jerusalem. They asked whom the Jewish religion considers "false Messiahs" and where the late Lubavitcher Rebbe<sup>81</sup> (whom some of his disciples consider the Messiah, possibly) fits into the picture.

Here was my opportunity to ask about their reasons for enrolling in the course. One said he signed up "because every encounter with Jewish things is mysterious and interesting." Another student was intrigued because "the Jews always seem to succeed and get things right." (How kind!) One took the Jewish law seminar every year it is offered. He said that because the opportunity to study Jewish subjects in Germany is not great, he takes advantage of every opportunity that comes along. One student said she was interested "because of our special German history." For students like her, the Holocaust creates a sense of obligation to learn about the Jews. When they study the Holocaust, they learn what was done to the Jews but this does not satisfy their curiosity about who the Jews were and are. Courses like ours help to fill in some of the gaps.

For other students, their interest may be a fad that mirrors the burgeoning interest in Judaism in German society which some have reported.<sup>82</sup> At least I did not encounter among the students anyone who admitted to enrolling only to escape another course in contracts or torts. But then such students were not likely to voluntarily attend an extra session.

Very often, the students' response to my question was a simple "because of what we lost." They sense that Germany lost something precious and irreplaceable in the Holocaust. They want to know what existed before the catastrophe and might have been here still if circumstances were different. There seems to be a degree of atonement in their interest, as if keeping an interest in the Jewish heritage alive in Germany helps repair some of the damage that was done. Their interest has bitter-

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81. Rabbi Menachem Mendel Schneerson (1902-1994), the seventh head of the sect of Lubavitcher Hasidim, headquartered in Brooklyn, New York, died without a successor.

82. Jack Zipes, *The Contemporary German Fascination for Things Jewish: Toward A Minor Jewish Culture*, in REEMERGING JEWISH CULTURE IN GERMANY: LIFE AND LITERATURE SINCE 1989, 15-45 (Sander L. Gilman & Karen Remmler eds., 1994). For a recent popular treatment of the topic, see Andrew Nagorski, *Getting to Know You*, NEWSWEEK, June 8, 1998, at 23-26.

sweet and melancholy qualities and seems to me quite genuine. Whatever their motivations I was pleased that bright, serious students like these, members of Germany's future legal establishment and possibly leaders in other fields as well, found time during their university training to engage the Jewish tradition in a thoughtful manner.

### XVIII. THE FIFTH CLASS: THE POST-TALMUDIC ERAS

Tuesday, June 16

Our focus for the fifth class is the initial centuries of the post-Talmudic era, a story that unfolds first in the Near East and then shifts to Europe. During the earlier period (c. 650-1050 C.E.), the center of Jewish life is Babylonia, where the new Muslim leaders permit the rabbinical academies of Sura and Pumbeditha to reopen under the leadership of principals styled *Geonim* ("excellencies").<sup>83</sup> Their challenge is to digest the corpus of Talmudic jurisprudence in all its ramifications, ponder its implications for the faith, and apply it to solve contemporary problems. How does one observe the Sabbath while aboard a ship? Do wives have any recourse against husbands who are absent on trading missions to the Orient for years at a time? In a country where a Jewish family may not own Muslim slaves, may a Jewish family retain a Christian girl who is unwilling to convert to Judaism if sending its own womenfolk to market to purchase necessities will expose them to possible harm? The *Geonim* answer these and similar questions based on Talmudic precedents.<sup>84</sup>

The achievements of the *Geonim* are considerable. They overcome the fierce opposition of Jews, such as the Karaites, who would continue to base their Judaism on the Bible rather than the Talmud. They succeed in establishing the Talmud (i.e., the Babylonian Talmud; the study of the rival Jerusalem Talmud is neglected) as henceforth the fundamental source of Jewish law. Responding to inquiries that arrive from all the countries under the Caliph's sway, they ingrain in the Jews the habit of turning to a *rosh yeshiva* (principal of a rabbinical academy) for answers to

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83. Histories of the age of the *Geonim* will be found in 3 HEINRICH GRAETZ, A HISTORY OF THE JEWS 86-126 (1894) and LOUIS GINZBERG, GEONICA 1-64 (2d ed. 1968).

84. For a survey of the legal questions asked the *Geonim* and their answers, see JACOB MANN, RESPONSA OF THE BABYLONIAN GEONIM AS A SOURCE OF JEWISH HISTORY (Arno reprint, 1973).

novel legal questions.<sup>85</sup> They produce in the course of four centuries a rich literature of dictionaries, commentaries, and codes of law based on the Talmud to guide Jewish life in the Diaspora.<sup>86</sup>

If the age of the *Geonim* is a period of legal consolidation after the close of the Talmud, the era of the *Rishonim*, the rabbinic authorities that follow them (c. 1050-1550), is a period of great advances in the development of Jewish law. The focus shifts from the Near East to Europe where Jewish merchants, having bargained for and received the right to settle with their families and to trade, form the kernels of small Jewish communities. In the medieval corporate state, the Jews are regarded as a nation in exile. Local rulers grant them autonomy to govern their internal affairs by Jewish law. Hence, in areas of law as diverse as contracts, commercial law, family law, torts, criminal law, administrative procedure, and taxation, the halakhah is studied, developed, and applied to solve everyday problems.<sup>87</sup>

Although rabbinic authority is decentralized, a succession of prominent rabbis achieve stature and renown that afford their views a large measure of impact beyond the boundaries of their communities, regions, or countries. Rabbenu Gershom (c. 960-1028), "the Light of the Exile," organizes the isolated Jewish settlements of Germany into something of a league, bans polygamy among the Jews of Christian Europe, and painstakingly establishes a correct text of the Talmud.<sup>88</sup> Rabbi Solomon Yitzhaki (*Rashi*, c. 1040-1105), authors a running commentary on the Talmud, at once profound and accessible, permitting local scholars in each country to consult the Talmud directly without seeking guidance from distant authorities like the *Geonim*.<sup>89</sup> Moses Mai-

85. 6 SALO W. BARON, *A SOCIAL AND RELIGIOUS HISTORY OF THE JEWS* 111 (1958).

86. Gideon Libson, *Halakhah and Law in the Period of the Geonim*, in *AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW*, *supra* note 35, at 197, 203-14 (describing types of legal literature produced during the era of the *Geonim*).

87. See JACOB BAZAK, *JEWISH LAW AND JEWISH LIFE: SELECTED RABBINICAL RESPONSA* (Stephen M. Passamanek trans., 1979) (containing an anthology of Jewish legal decisions from the eleventh through the fifteenth centuries).

88. On the work of Rabbenu Gershom, see LOUIS FINKELSTEIN, *JEWISH SELF-GOVERNMENT IN THE MIDDLE AGES* 20-35 (1924).

89. For biographies, see MAURICE LIBER, *RASHI* (Adele Szold trans., 1938) and CHAIM PERL, *RASHI* (1988). For appreciations of Rashi's work, see Alexander Marx, *The Life and Work of Rashi*, in *AMERICAN ACADEMY FOR JEWISH RESEARCH, RASHI ANNIVERSARY VOLUME 14-28* (1941) and Ismar Elbogen, *What Does Rashi Mean to Us Today?*, in *AMERICAN ACADEMY FOR JEWISH RESEARCH, RASHI ANNIVERSARY VOLUME*, *supra*, at 31-38.



monides (*Rambam*, 1135-1204) composes a comprehensive code of Jewish law, the *Mishneh Torah*, that achieves an unprecedented level of clarity and depth and provides endless insights into the philosophy at the heart of Jewish law.<sup>90</sup> Rabbi Meir of Rothenberg (*Maharam*, c. 1215-1293), serves as a court of appeals for world Jewry, writing over 1,000 responsa that settle disputes in Germany, Austria, Italy, France and Spain.<sup>91</sup>

During this period, the Ashkenazic Jews of Franco-Germany and the Sephardic Jews of the Iberian peninsula develop differing nuances of practice and style, although not belief. We discuss theories, anthropological, social, political, and religious, regarding the origins of this split.<sup>92</sup> We trace the careers of Rabben Asher ben Yehiel (c. 1250-1328), who emigrates from Germany to become chief rabbi of Toledo, Spain, and of his son, Rabbi Jacob ben Asher (c. 1270-1340), who, in his code of law, *Arba'ah Turim*, attempts to bridge the gap.<sup>93</sup> The expulsion of the Jews from France in 1395 forms a natural barrier between the two branches. When the Jews who are expelled from Spain in 1492 land in Turkey and elsewhere, they form distinct communities of their own. The presence of both Ashkenazim and Sephardim becomes a permanent feature of the diverse Jewish landscape.

To conclude the session we studied passages in Maimonides's code that cover the ordination of judges.<sup>94</sup> Our aims were to compare his presentation to the Talmudic passages on which it was based, which we studied earlier in the course,<sup>95</sup> and to explore the role of codification in Jewish law. We also wanted to review the famous passage in which Maimonides states that ordination of judges, discontinued early in the fifth century C.E., could be revived upon unanimous consent of all the scholars in Israel, an uncharacteristically equivocal passage that he begins "It seems to me. . . ." and ends, "But this matter requires careful

90. On the *Mishneh Torah*, see ISADORE TWERSKY, INTRODUCTION TO THE CODE OF MAIMONIDES (*Mishneh Torah*) (1980).

91. IRVING A. AGUS, *RABBI MEIR OF ROTHENBERG* (1947) (containing biography and digest of responsa).

92. See HIRSCH J. ZIMMELS, *ASHKENAZIM AND SEPHARDIM* (1976).

93. On the contents and methodology of the *Arba'ah Turim*, see ELON, *supra* note 9, at 134-137.

94. *MISHNEH TORAH*, *Sanhedrin* 4:1-15.

95. See *supra* notes 76-79 and accompanying text.

reflection."<sup>96</sup> The full significance of his view resides in the fact that if ordination were revived, then the Great Sanhedrin, whose 71 members must be ordained, could be restored as the central authority in Jewish law. Proposals to follow this course were floated on two occasions in Jewish history, once in the sixteenth century and again in the twentieth,<sup>97</sup> but they sank both times, leaving authority in Jewish law decentralized to the present day.

After class, Professor Benoehr made an interesting comment. He said he had now attended classes on Jewish law from four visiting professors and "each one told a different story." This reminded me of the statement in the *midrash* that each word in the Torah has forty-nine facets.<sup>98</sup> By this reckoning, Professor Benoehr has forty-five more stories to hear.

### XIX. "THE CULTURE OF CONTROVERSY"

Wednesday, June 17

A *minyan* (quorum) of ten men and women convened at the Jewish Community Center on Fasanenstrasse for my second study session with the Berlin Jewish community. The smallish turnout permitted a round-table format and a lively dialogue. We explored how Jewish law develops through the thrust and parry of competing viewpoints. We see this clearly in classical texts, such as the Talmud and its commentaries. If one scholar, addressing a given issue, answers "permitted," a colleague is sure to respond "prohibited," and neither approach is rejected or la-

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96. MISHNEH TORAH, *Sanhedrin* 4:11 (Abraham M. Hershman trans., The Book of Judges, 15, 1977). There are some 200 passages in his code which Maimonides introduces with the phrase "It seems to me" or similar words indicating a personal preference. Regarding the role Maimonides's personal views play in his code, Professor Twersky has written: "These soft and unobtrusive formulae, speaking to us almost in a barely audible whisper, occasionally introduce fresh and innovative options with far-reaching implications. . . . [Maimonides] identified these views in order to call attention to their originality and by implication emphasize the consensual character of the remainder of the work." I. TWERSKY, INTRODUCTION TO THE CODE OF MAIMONIDES (*Mishneh Torah*) 117-118 (1980).

97. On the first proposal, see SOLOMON BENNETT FREEHOF, A TREASURY OF RESPONSA 97-107 (1973); on the second, see J. L. MAIMON, HIDUSH HA-SANHEDRIN BE-MEDINATENU HA-MEHUDESHEH (Restoration of the Sanhedrin in Our Restored State) (1967). For a discussion of the Messianic underpinnings of the first proposal, see Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 190-97 (1985).

98. 1 MIDRASH ON PSALMS 173 (William Braude trans., 1959).

beled incorrect.<sup>99</sup> The texts present Jewish law as a series of legal alternatives rather than as a catechism with fixed answers to every question. This openness to alternatives is based on the notion that all of the views expressed were part of the original revelation at Sinai.<sup>100</sup> In this vein, the Talmud refers to the conflicting views of Beth Hillel and Beth Shammai and states, "Both are the words of the Living God."<sup>101</sup> Dissenting opinions are simply correct answers whose time has not yet arrived; they are waiting for the proper occasion on which to be implemented.<sup>102</sup>

The listeners raised good questions for discussion. In the modern world, should we regard Jewish law as binding law or merely as suggestions for proper behavior? How can we have Jewish law without sanctions? Why do passages in the Talmud meander but never reach a conclusion? If every aspect of Jewish law was revealed to Moses at Sinai, then how can it be that God revealed to Moses a lecture that Rabbi Akiva was destined to deliver in the distant future and Moses did not understand it?<sup>103</sup> Only the lateness of the hour draws our session to a close.

## XX. NO BAUHAUS ON MICHIGAN AVENUE

Thursday, June 18

My sightseeing today included a visit to the Bauhaus Archives and Museum housed in a modern white building designed by the school's founder, architect Walter Gropius. The movement's ideas were too modern and international to suit the Nazis' taste in architecture; they closed the school in 1933. The Chicago Tribune seemed to agree when, in a competition held in 1922, it rejected Gropius's design for a modern office tower in favor of a neo-Gothic design inspired in equal parts by the Woolworth Building and the Rouen Cathedral.<sup>104</sup> The museum

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99. TALMUD, *Hagigah* 3b.

100. 1 MIDRASH ON PSALMS, *supra* note 98, at 173.

101. TALMUD, *Erubin* 13b.

102. Jeffrey I. Roth, *The Justification for Controversy Under Jewish Law*, 76 CAL. L. REV. 337, 377-87 (1988).

103. TALMUD, *Menahot* 29b.

104. The Tribune's call for proposals elicited 258 entries. GERARD R. WOLFE & G. E. WOLFE, *CHICAGO IN AND AROUND THE LOOP* 222 (1996). The building that Gropius envisioned was "a tense interrelationship of asymmetrical parts [and] a mechanistic abstraction, celebrating the idea of a modern communications building[;] its effects of lightness and transparency were as hallmarks of the new architecture." WILLIAM J. R. CURTIS, *MODERN ARCHITECTURE SINCE 1900*, at 223 (3d ed. 1996). Although Gropius's

displays a plan for the Gropius design and I marvel at how different a vista along Michigan Avenue I would have had growing up in Chicago if the Tribune, in making its selection of an architect, had looked forward rather than backward.

### XXI. SABBATH DINNER WITH GUN

Friday, June 19

I attended Sabbath dinner in a pleasant district of the city. My host's gated home was a comfortable residence that would not be out of place in any upscale U.S. suburb. To welcome the Sabbath, an extended family gathered—parents and children, cousins, and friends. The warm late spring weather allowed us to take dinner on the garden patio. To begin the meal, wine was sanctified and courses followed in their traditional progression. The conversation related to family affairs and current events in equal measure. One of the guests, a toddler visiting from Israel with her parents, offered her rendition of the Israeli pop hit, "Viva La Diva." As usual in modern households, teenagers were anxious to leave the table and parents were reluctant to let them go. As usual, the teenagers won.

I marveled at the normalcy of it all. I still tended to encase every instance of ordinary Jewish life in Berlin in a framework of the miraculous. That an ordinary Jewish family can enjoy the Sabbath at their home in Berlin as if nothing had happened seemed to me both surreal and deeply satisfying. This Sabbath dinner, in its very ordinariness, spoke volumes about the tenacity of Jewish life, its continuity and universality, and its ability to regenerate after devastation.

Still, I could not shake the feeling that things cannot be this normal. In the end, my feeling was confirmed to a degree. The host invited his guests into the study to inspect his newest acquisition, a pistol, explaining, "If they come for my children, I'll be ready." I declined the invitation. It seemed out of character

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submission was "widely praised for its modernity," it failed to place among the top three. PAULINE A. SALIGA, *THE SKY'S THE LIMIT: A CENTURY OF CHICAGO SKYSCRAPERS* 109 (1990). The winning design, submitted by New York architects John Mead Howells and Raymond M. Hood, "brilliantly caught the right nostalgic and slightly romantic mood," but its selection was criticized by Europeans as reactionary. CURTIS, *supra*, at 223. It was the design by the second-place finalist, Eliel Saarinen of Finland, that pointed to the future of the modern skyscraper—abstract and vertical with graduated setbacks. AIA GUIDE TO CHICAGO 102 (Alice Sinkevitch ed., 1993).

with the nature of the Jewish Sabbath to inspect a firearm. But perhaps in Berlin, the reverse is true.

## XXII. THE FINAL CLASS: THE MODERN CENTURIES

Tuesday, June 23

The sixth and final session of the class is devoted to the modern era, broadly defined as the four centuries leading up to the present. The period is ushered in by the appearance in print in 1565 of the last great code of Jewish law, the "Prepared Table" (*Shulhan Arukh*) of Rabbi Joseph Caro (1488-1575).<sup>105</sup> The work, admired by many for its condensation of Jewish law, is disparaged by others for its brevity, omission of sources and neglect of Ashkenazic practices. To remedy these perceived deficiencies, Rabbi Moses Isserles of Cracow (1520-1572) spreads a "tablecloth" (*Mappah*) over Caro's work, appending a series of glosses that cite Ashkenazic views and customs where they differ from the Sephardic regime that Caro presents.<sup>106</sup> The two components of this hybrid work, Caro's text and Isserles's glosses, along with subsequent commentaries and super-commentaries, render the useful code supremely authoritative for both Ashkenazic and Sephardic Jews, uniting the two branches in their allegiance to a single code that at the same time erects a legal barrier between them.

Despite its increasing age, the *Shulhan Arukh* is never superseded by a new code of Jewish law. The need for a new code is obviated by the Emancipation of the Jews. Starting in Europe in the eighteenth century, revolutionary principles of equality, citizenship, and the non-absolutist state begin to encompass the Jews, country by country.<sup>107</sup> The Parisian Sanhedrin, convened at the behest of Napoleon, defines the new relationship between the Jews and the countries in which they reside.<sup>108</sup> The Jews are

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105. On the composition of the *Shulhan Arukh*, see ELON, *supra* note 9, at 137-40; see also Isadore Twersky, *The Shulhan Aruk, Enduring Code of Jewish Law*, 16 JUDAISM 141 (1967).

106. For a survey of reactions to the *Shulhan Arukh* and a description of Moses Isserles's work, see ELON, *supra* note 9, at 139-44.

107. For a useful survey of Jewish Emancipation, see PAUL JOHNSON, *A HISTORY OF THE JEWS* 311-421 (1987).

108. See DIOGENE TAMA, *TRANSACTIONS OF THE PARISIAN SANHEDRIM* (Brown Classics in Judaica 1985) (F. D. Kirwan trans., 1806); David Sorkin, *TRANSACTIONS OF THE PARISIAN SANHEDRIM, Introduction, supra*, at xi-xiii.

no longer a nation within a nation. Instead, Jews are loyal to the State and acknowledge the supremacy of its laws and courts. In return, they are endowed with citizenship and undertake to faithfully fulfill its obligations. They regard the general population kindly, to be treated as brethren rather than strangers. Judaism is a religion, a private faith, a matter of conscience and belief. The rabbis have no police powers and Jewish courts cannot enforce compliance with their decrees.

New branches of Judaism are formed that do not regard *halakhah* as normative. When, in time, the majority of Jews adopt these views, then even religious Jews turn to the civil courts for justice.<sup>109</sup> Large areas of Jewish law, civil, criminal, and administrative, lose their practical force in everyday life. However, some Jews continue to guide their private lives, including marriage and divorce, by the canons of Jewish law, guided by a traditional rabbinate that applies Jewish law to modern problems. They do not compose new legal codes but generate a *responsa* literature, faithful to Talmudic and rabbinic precedents, on a case-by-case basis.<sup>110</sup>

At the end of the nineteenth century, the nascent Zionist movement, seeking a plausible legal framework for a new Jewish state, considers whether Jewish law can be revived as a living law in the modern world. The interest in doing so comes from secular Jews who would naturally modify Jewish law as needed to meet contemporary conditions; religious Jews oppose the Zionist undertaking. When early settlers in Palestine establish Jewish arbitral courts as an alternative to corrupt Ottoman courts, the rabbinate opposes them.<sup>111</sup>

The outbreak of World War II overshadows these developments. The Holocaust decimates the world of observant Jewry. Their fidelity to Jewish law under the most extreme conditions is documented in rabbinical decisions issued in ghettos and

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109. On the abrogation of Jewish judicial autonomy, see 4 MENACHEM ELON, *JEWISH LAW* 1576-87 (B. Auerbach trans., 1994).

110. For brief surveys of rabbinic *responsa* in the modern era and descriptions of the major respondents, see Edward Fram, *Jewish Law from the Shulhan Arukh to the Enlightenment*, in *AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW*, *supra* note 35, at 359-77 and David Novak, *Modern Responsa: 1800 to the Present*, in *AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW*, *supra* note 35, at 379-95.

111. ELON, *supra* note 109, at 1592-97.

camps during crisis times.<sup>112</sup> After the war, problems created by the Holocaust confront halakhic authorities, such as the status of wives whose husbands are missing with no clear evidence of their deaths.<sup>113</sup> There is also the need to restore Torah scholarship and the *yeshivot* that were destroyed during the war. The rebuilding takes place primarily in the United States and later in Israel. By the end of the millennium, it is likely that the number of students studying in *yeshivot* is greater than it ever was in pre-War Europe.<sup>114</sup> The student body at U.S. *yeshivot* today numbers 18,000.<sup>115</sup> Many thousands more study at similar institutions in Israel and Europe.

When, after the War, the creation of a Jewish state appears certain, religious Zionists begin to debate how Torah law can be applied in the new entity. They begin their work too late and no consensus is reached by the time Israel is established in 1948. Hence the new State preserves the status quo, the legal framework in effect on the date of its creation—a patchwork of Ottoman law, the enactments of the British Mandate, English common law and, in matters of personal status (marriage and divorce), the religious law of the parties.<sup>116</sup> The Knesset legislates

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112. See, e.g., IRVING ROSENBAUM, *THE HOLOCAUST AND HALAKHAH* (1976); H. J. ZIMMELS, *THE ECHO OF THE NAZI HOLOCAUST IN RABBINIC LITERATURE* (1977).

113. Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 MD. L. REV. 312, 316 (1992). Since Jewish law lacks a presumption of death from prolonged absence and the husband must initiate a divorce, a wife whose husband is missing cannot remarry until his death is conclusively proved. *Id.* at 316. See also Yael Levy, *The Agunah and the Missing Husband: An American Solution to a Jewish Problem*, 10 J.L. & RELIGION 49, 69 (1993) (suggesting that a Jewish ordinance to establish a presumption of death after a stipulated period of absence is “the ideal solution to the Jewish *agunah* problem resulting from a husband’s disappearance.”). Among rabbinic authorities, there is no consensus on an “ideal” solution.

114. According to the historian Dr. Haym Soloveitchik, whose ancestor and namesake, Rabbi Hayyim of Brisk (1853-1918), was a pillar of instruction at the famous yeshiva in Volozhin, the decades prior to World War II “witnessed a constant flow out of the yeshivot, and the students enrolled in higher yeshivot numbered in the mere hundreds. Thousands are currently found in the yeshivot of today.” Haym Soloveitchik, *Clarifications and Reply*, 7 TORAH U-MADDA J. 137, 143 (1997). *But see* Abraham Menes, *Patterns of Jewish Scholarship in Eastern Europe*, in 1 *THE JEWS: THEIR HISTORY, CULTURE, AND RELIGION* 376, 422-24 (L. Finkelstein ed., 1960) (“Between the two World Wars the number of students in the East European *yeshivot* grew considerably. . . . In all, the *yeshivot* in Poland, Lithuania, and Latvia had a student body of about 25,000.”). Soloveitchik may be limiting his remarks to “higher yeshivot,” post-graduate institutions, while Menes’s figure may include enrollments at all levels of instruction.

115. Gustav Niebuhr, *Yeshivas of Traditional Orthodoxy Flourishing*, N.Y. TIMES, June 11, 2000, §1 at 18.

116. ELON, *supra* note 109, at 1612.

as a secular legislature and an independent judiciary functions while, at the same time, the Chief Rabbinate supervises Jewish courts that apply Jewish law in matters of personal status. A slight movement in the direction of Jewish law comes with the passage of the Foundations of Law Act (1980) that requires judges to consult Jewish law, rather than English common law, to fill gaps in Israeli statutes and case law.<sup>117</sup>

We end the course by discussing a fortunate and timely question from one of the students. Can Jewish law ever serve as the law of a modern state? In standard Socratic fashion, I ask the students what they think. Answers tend to be skeptical, citing Iran as an example of what happens when mullahs and religious law become dominant. I tend to agree that neither Jewish law, as presently constituted,<sup>118</sup> nor the rabbis who are trained to apply it are capable in any realistic sense of providing and maintaining the legal framework of a modern nation state, including Israel. At the same time I believe that Jewish law should remain available as an option for individuals who, exercising a free choice, wish to govern as much of their conduct as possible by its dictates and submit to its authorities. This should be possible in any liberal, democratic state that guarantees to its citizens a large realm of personal freedom for individual choices regarding lifestyles, including religious life-styles. Hence, we end the course by confronting a final irony. The development of the modern nation state caused the decline of Jewish judicial autonomy when it extended citizenship to Jews and displaced *halakhah* as their everyday legal system. Yet, in the modern era, only the liberal, democratic state, neutral on matters of religion and respecting the rule of law, affords its Jewish citizens enough personal liberty to choose *halakhah* as the primary factor around which to organize their private lives.

After the class is over, I spent some time saying so-long to

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117. Foundations of Law, 5740-1980, 34 The Laws of the State of Israel 181 (Ministry of Justice trans., 1980). For a collection of references to Jewish law in Israeli judicial opinions from 1948-1987, see 1-2 NAHUM RAKOVER, MODERN APPLICATIONS OF JEWISH LAW (1992). For an Israeli Supreme Court case construing the Foundations of Law Act, see *Jerczewski v. Prime Minister*, (1991) 45(i) P.D. 749, translated in JEWISH LAW: CASES AND MATERIALS 422-34 (Menachem Elon ed., 1999).

118. Cf. Mordecai Breuer, *The Sea Change in American Orthodox Judaism*, 33 TRADITION 92 (1999) (arguing that it would be impossible to base a modern state on Jewish law, citing "the absence of biblical and Rabbinic legislation and codification on the vast majority of subjects that make up the agenda of a modern state legislature.").



the students. A farewell dinner is scheduled for later in the week. Professor Benoehr will administer and grade a final examination in German. Although I was happy to have completed the course and to be closer to returning home, I was also sad about having to leave the city. On my way back to the guesthouse, I passed buildings whose facades are still pockmarked with bullet holes from World War II. I stopped at a cafe to watch some afternoon World Cup soccer action with a boisterous crowd. There are sights, sounds, and experiences that New York City, with all its diversity, will be hard-pressed to duplicate.<sup>119</sup>

### XXIII. *A FAREWELL ADDRESS: A SHORT ONE*

Tuesday, June 23

I approached my final address to the Jewish community scheduled for this evening with a degree of misgiving. Two hundred guests have been invited. My remarks will be translated simultaneously from English into German and delivered to the audience via headphones. A press agent for the Jewish community has organized a press conference prior to the speech so that reporters can preview my remarks and ask questions. A reception will follow. It became obvious to me that the organizers have designed the occasion as more than a simple valedictory address for the departing guest professor. They want to publicize the work of the Berlin Center for the Study of Jewish Law and to showcase the collaboration between Humboldt's Law Faculty and the Jewish community. The working relationship between the two deserves to be celebrated. I found their collaboration to be close, productive, and well coordinated, unlike anything I had come across in U.S. legal education.

The scale of the event was not apparent to me when, many weeks earlier, I selected the subject, "Reviving Two Jewish Communities: Reflections on Budapest and Berlin." At the time, the topic had seemed current and likely to interest a central European audience. Now I was not so sure. The topic no longer seemed substantive enough to satisfy the highly educated, eager to learn Berlin audience that I knew from experience would venture forth to attend a lecture by a university professor.

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119. Rereading this passage, it seems I must have been suffering from temporary amnesia while in Berlin. New York City also has buildings pockmarked by bullet holes (regrettably) and many cafés where patrons enjoy watching World Cup soccer matches.

In planning my talk, I should have taken my cue from the grand rabbis of Europe in days of yore. They remained silent most of the year but addressed their congregations twice, in major sermons on the Sabbaths just prior to Passover and the Jewish New Year. On these special occasions, they dazzled their audiences, skillfully weaving complex Talmudic passages into a rich tapestry of legal argument, practical advice, moral exhortation, and story telling. Recalling his elderly rabbi's speech many years after the event, one impressed listener wrote: "It was amazing to see a man nearly in his eighties speak with such fire. . . . [T]he fire of God burned in his words; the flames emitted from his mouth entered the hearts of the listeners—the flames of the Lord!"<sup>120</sup> A tour-de-force of this magnitude, involving fire and flames, was obviously beyond my reach, especially given the topic I was locked into. Possessing about half the rabbi's years, even less of his erudition, and none of his moral authority, I could not hope to match his achievement.

Still, I had my points to make and I did so when it was my turn to speak that evening. I wanted to draw on my experiences teaching Jewish law in Budapest and Berlin to assess two models for the revival of Jewish communal life in central Europe in the post-Communist era. After thanking my hosts at the Law Faculty and in the Jewish community for their welcome and their friendship, I briefly described the Jewish legal history course. I noted the contrast between my students in Berlin, none of whom was Jewish, and my students in Budapest, virtually all of whom were Jewish or had a connection through a Jewish parent or grandparent. What explains the difference in class composition? It was not simply a function of the number of Jewish students attending the two schools. This might account for the absence of Jewish students in Berlin, but it would not explain the high enrollment of non-Jewish students in Berlin versus their small number in Budapest.

The disparity reflects a deeper difference in the relationship between general culture and Jewish culture in the two countries. In Hungary, there is an on-going debate whether the Jews are a religious or an ethnic minority. European listeners know this question can be fraught with important and sometimes sinister

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120. Quoted in MENACHEM ELON, 4 JEWISH LAW 1580, n.10 (B. Auerbach trans., 1994).

overtones. If the Jews are a religious minority, they can still be Hungarians, just as other Hungarians are Protestant or Catholic.<sup>121</sup> But if the Jews are an ethnic minority, then their status is different. Ethnic minorities are regarded as separate and distinct peoples who come from somewhere else and belong there, like Romanians living in Hungary (or for that matter, like the Turkish population living in Germany). They and their children are distinguishable from “ordinary citizens” and tend not to blend with the general population.

This characterization based on ethnicity threatens the Jews’ place in Hungary today more than traditional forms of anti-Semitism. The proponents of an aggressive, chauvinistic nationalism, who refuse to see in “things Jewish” an authentic part of the Hungarian cultural heritage, lay the groundwork for more extreme elements who seek to exclude Hungarian Jews from their rightful place as citizens in their own country. When the Holocaust Memorial was dedicated in Budapest, a government minister said, “Your dead give us pain as if they were our dead.”<sup>122</sup> Some noted the “you-us” dichotomy. Were not Hungarian Jews Hungarians?

From the nationalist perspective, the recent revival of Jewish life and culture in Hungary is an internal matter that concerns the members of the Jewish community only. In the post-Communist era, they are free to revive their communal organizations, schools and cultural life, if they wish, but they must go it alone.

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121. Some Hungarian politicians on the extreme right would challenge this assertion. See Gyorgy Bence, *The Limits of Religious Neutrality*, in *THE LAW OF RELIGIOUS IDENTITY: MODELS FOR POST-COMMUNISM* 17 (A. Sajo & S. Avineri eds., 1999) (citing politicians who espouse the view that “Hungary is a Christian nation, or should become one again” and that “a certain political party—by virtue of its Christian character—has its own mission and calling to govern the country.”); Kim Lane Scheppelle, *The Constitutional Basis of Hungarian Conservatism*, 9 *E. EURO. CONST. REV.* 51 (2000) (reviewing parliamentary debate in which right wing members argued that the Holy Crown of Saint Stephen requires Hungary to revert to being a Christian nation).

122. Professor Geza Komoroczy reported the minister’s remarks in a speech at the Conference on Hungarian-Jewish Co-Existence sponsored by the Batthyany Association and the Council of Europe in Budapest on October 23, 1991. I attended the conference and heard Professor Komoroczy’s remarks. The quotation in the text is Professor Komoroczy’s English rendition of the minister’s statement.

For an interesting comparison, consider the remarks of Israeli Prime Minister Ehud Barak addressing an audience of Israeli Arabs after Israeli police killed thirteen Israeli Arab demonstrators: “The blood of your sons is as dear as the blood of Jews.” Deborah Sontag, *Israeli Arabs, Despairing of Sharon, Aren’t Sure About Barak*, *N.Y. TIMES*, Jan. 26, 2001, at A6.

Jewish culture functions on a track that is separate from the national culture of Hungary. Hence, non-Jewish Hungarians tend to remain aloof from the Jewish cultural agenda. This attitude explains the low enrollment of non-Jewish students in my Jewish law course in Budapest. They simply are not interested. The topic does not concern them.

The situation in Germany is different. It is true that Germans and Jews also debate the status of the latter as citizens or foreigners,<sup>123</sup> ethnic or religious minority, and that reaching a consensus here seems no more achievable than in Hungary. But in Germany, additional factors not present elsewhere temper the debate. Half a century after World War II, many Germans have come to appreciate the long and distinguished history of the Jews in Germany and how the Holocaust, far from eradicating the Jewish part of the story, made the history of the two peoples inextricably intertwined. No electable German government seems poised to repeat the mistake of denying German Jews their rightful place in society. Even right wing extremists, with a variety of other targets that tempt them, are apt (most of the time, but not always) to leave the Jews alone.<sup>124</sup> With the grow-

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123. Unlike the Jewish community in Hungary following World War II, which consisted of survivors of Hungary's pre-war community, a majority of Germany's post-war Jewish community were displaced Jews from other countries who found themselves in Germany when the war ended and elected to remain there. Y. Michal Bodemann, *A Reemergence of German Jewry?*, in REEMERGING JEWISH CULTURE IN GERMANY: LIFE AND LITERATURE SINCE 1989 [hereinafter REEMERGING JEWISH CULTURE] 45, 55 (Sander L. Gilman & Karen Remmler eds., 1994). Hence, while Hungary's post-war Jewish community is a *remnant* of the pre-war community, Germany's is largely a *transplant*, consisting of both Jews who are German citizens and Jews who are not. The latter group has been augmented recently by Jewish arrivals from the former Soviet Union. Thus, in Germany, "the Jews" in the aggregate can be viewed as either citizens or foreigners. See REEMERGING JEWISH CULTURE, *supra*, at 10 (stating, "'Jews' and 'foreigners' are overlapping but certainly not interchangeable categories."). Jeffrey M. Peck, in his essay, *The 'Ins' and 'Outs' of the New Germany: Jews, Foreigners, Asylum Seekers*, in REEMERGING JEWISH CULTURE, *supra*, at 130, 139, notes the inherent contradiction between being a citizen and a foreigner at the same time and ponders the political and social implications of this dual status: "If the Jews are vulnerable to attack, even if they are citizens, then one asks how important is the citizenship issue for insuring the safety of foreigners." *Id.* at 139.

124. In its review of right-wing extremism in Germany in 1998, the AMERICAN JEWISH YEARBOOK reported:

While rightist violence almost exclusively targeted foreigners and leftists, there were still 991 anti-Semitic crimes reported in 1998. This came to just about 9 percent of all "right-wing extremist" crimes, but the number becomes more significant in light of the fact that Jews make up only one-tenth of 1% of the German population.

ing population of many nationalities and racial groups in Germany, Jews have lost the status of "principal victims."<sup>125</sup>

Further, in the desire to normalize German society, to lessen its preoccupation with Nazi-era victims and perpetrators, there resides a powerful incentive for the restoration of living Jewish culture in Germany. Germans who feel some guilt over the Nazi past have a collective interest in the Jews' shedding their image as victims.<sup>126</sup> For these Germans, and for their young German-Jewish compatriots, it does not help overcome the darkness of the past to have a cringing, fearful, backward-looking group of Holocaust survivors and their descendants living in their midst, "sitting," as the phrase goes, "on packed suitcases." It is far preferable to have a proud, self-affirming group of German Jews whose cultural flowering, visible for all to see, testifies that the Holocaust's wounds are healing in an open, democratic, even multi-cultural society. If the absence of Jewish culture is a by-product of the Holocaust, then reviving it is a way to return to normality.

Thus, for a variety of reasons, the Jewish community in Berlin, unlike Budapest, has among the general population important allies in the revival of Jewish culture. Significant segments of the non-Jewish public are strongly motivated to help in the restoration and strengthening of Jewish institutions and cultural life in Germany. They attend klezmer concerts and Jewish street fairs. They welcome the Jewish Museum and support plans for the new Holocaust Memorial. Some devote their careers to editing Jewish publications and heading Jewish research institutes.<sup>127</sup> And, as demonstrated to me so vividly at Humboldt's Law Faculty, they fill the seats for university courses in Jewish subjects.

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Greg Caplan, *Federal Republic of Germany*, 100 *AMERICAN JEWISH YEAR BOOK* 338, 344 (2000).

125. Bodemann, *supra* note 123, at 59. The shifting of the brunt of right wing animosity away from Jews and towards others, far from creating a sense of relief or complacency in the Jewish community, is creating a feeling of solidarity with those who are the current targets. *Id.*; Esther Dischereit, *No Exit from This Jewry*, in *REEMERGING JEWISH CULTURE*, *supra* note 123, at 277 (stating, "As far as I am concerned, no Jew can believe that he or she can live as a citizen among citizens in Germany as long as nothing is done about all the others who are excluded from the exercise of their civil rights.").

126. Katharina Ochse, *'What Could be More Fruitful, More Healing, More Purifying' Representations of Jews in the German Media after 1989*, in *REEMERGING JEWISH CULTURE*, *supra* note 123, at 120-21.

127. *See, e.g.*, Bodemann, *supra* note 123, at 61 n.22.

This participation of non-Jews is something the Jewish community should acknowledge and welcome, even as it ponders how their involvement will affect the Jewish content.<sup>128</sup> Given the small size of the Jewish community, the general public's participation is vital to the success of the Jewish cultural agenda. Early observers of the scene were too pessimistic about the prospects for reviving Jewish culture in Germany given the small number of Jews, precisely because they did not foresee that the German general public would develop a strong interest in Jewish culture.<sup>129</sup> Major cultural events, exhibits, and university courses with Jewish themes will not be scheduled without the general public's participation. Further, in the post-Holocaust world, few doubt the value of increasing cross-cultural understanding through widely attended events such as these.

In this fashion there has developed in Berlin, whether by design or happenstance, a new and useful model for Jewish cultural revival. It is a model based on inclusiveness. Non-Jews participate as full partners in the effort to rebuild a vibrant Jewish cultural life, by creating some of the demand, shouldering part of the burden, and accepting a share of the responsibility for custody and transmission of the heritage. This model, which differs markedly from the largely go-it-alone approach I observed in Budapest, commends itself to other small Jewish communities in Central and East Europe as they mount similar efforts to restore a semblance of Jewish life in the post-Communist era.

I left the podium twenty minutes after I arrived. My talk was followed by remarks from Dr. Skoblo and Professor Benoehr. I understood them intermittently over malfunctioning headphones. I received as a farewell gift a silver medallion with a graven image of Dr. Hans Galinsky, the revered past president of

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128. Y. Michal Bodemann, noting that Jewish culture in Germany today is being manufactured largely by German experts on Jewish culture and religion, states, "this has an important bearing on the type of Jewish culture that is actually being produced: a culture that is not lived, that draws heavily from the museum, [but] that is still no less genuine for that." *Id.* at 57. Does the author mean genuinely Jewish, genuinely German, or genuinely German-Jewish? The issue he raises is an important one but his answer is possibly too early. It is too soon in the revival of Jewish culture in Germany to test its products for "genuineness" or to assess their "authenticity," however these elusive concepts are defined.

129. See, e.g., Rafael Seligmann, *What Keeps the Jews in Germany Quiet?*, in REEMERGING JEWISH CULTURE, *supra* note 123, at 182 ("In the current intellectual climate, a full-scale renaissance of Jewish culture in Germany is impossible. There are just not enough Jews.").

Berlin's Jewish community. His successor sat next to me all evening but did not comment on my remarks. In retrospect I believe this might have been because I had praised Berlin's non-Jews too highly and its Jews not enough.

At the reception afterwards, a German colleague said he liked the combination of scholarly observation and emotion in the speech but allowed that the audience would have enjoyed another ten or fifteen minutes. A Hungarian member of the audience told me he thought my assessment of the situation in his country was correct and things were likely to get worse. As the popularity of the right increases, the center will have to move to the right to counteract it.

My overwhelming recollection of the evening is one of heat. The hall was hot and the lights on the stage were hot.

#### XXIV. *DEPARTURE*

Tuesday, June 30

In the days after my speech at the Centrum Judaicum, I waxed philosophical about it. If it was too short for the occasion, at least brevity in law professors is far better than the opposite. The talk did generate its share of coverage in the daily press.<sup>130</sup>

During my final week in Berlin, my thoughts returned to Alexandra Richie's study of the city's history. She observes that unification has worked well on the constitutional, legal, and institutional levels, but less well in social relations, political culture, and everyday life.<sup>131</sup> Everything I encountered during my visit confirmed this assessment.

Berlin's Jewish community has taken root in a manner no one could have anticipated after the devastation of the Nazi era. Its continuity, although subject to diverse challenges, seems assured and its cultural life is vibrant, two assertions no one could have made in the decades following World War II. This dynamic

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130. Henriette Seyfferth, *Berliner Studien zum Jüdischen Recht an der Humboldt-Uni* ("Berlin Studies on Jewish Law at Humboldt U."), *BERLINER MORGENPOST*, June 24, 1998, at 16 ("Cooperation with non-Jewish citizens has special significance for small Jewish communities like Berlin," said the law professor."); Anja Kuhne, *Klezmer und Nationalismus: Die jüdischen Gemeinden in Berlin und Budapest*, ("Klezmer and Nationalism: The Jewish Communities of Berlin and Budapest"), *DER TAGESSPIEGEL/KULTUR*, June 30, 1998, at 27 ("Compared to Budapest, the desire of non-Jews in Berlin to participate in Jewish culture is stronger and very visible.").

131. RICHIE, *supra* note 4, at xxvii.

community, composed of an ever-changing human landscape of German Jews and new arrivals, religious Jews and secular ones, Holocaust survivors and younger generations, *Ossis* and *Wessis*, interacts daily with a non-Jewish population that is far from indifferent to its fate. The community's future course cannot be predicted except to say it will be a fascinating story, worth watching from a distance or observing up close, as I was able to do during my visit to Humboldt's Law Faculty.

In the departure lounge, British Airways distributed free copies of the morning press, including the issue of *Der Tagespiegel* containing an account of my talk at the Centrum Judaicum last week. I removed the "Kultur" section from three or four newspapers to keep as souvenirs and left Germany under the disapproving eye of a fellow passenger who watched me do it.