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Formulating Responses in an Egalitarian Age: An Overview

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The modern ideal of human equality reverses the long-standing trend of societies to discriminate between human beings on ontological, racial, sexual, or religious grounds. Whether or not the pattern of human history displays a steady progression toward equality, egalitarianism is certainly the pervasive spirit of our age. Those who are imbued with the egalitarian ideal view equality not only as a basic corollary of fairness, which demands symmetry of treatment within human relations, but also as a crucial means to avoid humiliation of others and to promote collective bonds of affection within the political community.

The premisses of egalitarianism are in tension with central aspects of Judaism, beginning with Judaism's relationship to others. The basic themes of Jewish distinctiveness, chosenness, and separation find expression not only in Jewish theology but also in Jewish law. The religio-legal obligations of Jews differ from those of non-Jews and non-Jews do not enjoy equality of treatment under Jewish civil and criminal law. Jews owe less obligations of solidarity to non-Jews than they do to their fellow Jews. Segregative rules extend well beyond the prohibition on intermarriage. Moreover, the discriminatory rules of the *balakhab*, the idea of chosenness, as well as older patterns of distrust stemming from a long history of persecution, combine to foster an unfortunate attitude of disdain toward and even denigration of non-Jews.

Jewish particularity is not the sole issue. Traditional Jewish society is organized on non-egalitarian terms, as evidenced by the differential obligations, and therefore rights, of Jewish men and women. Moreover, religious objections to certain forms of conduct, such as homosexual activity or abortions,

affect Orthodox Jewish attitudes toward the pursuit of equality in civil society. Some Orthodox Jews fear that the pursuit of equality in contemporary America not only threatens to undermine the basic social organization of Judaism but also is undermining the moral quality of the larger political community. Religious objections to homosexual activity and abortions have caused some within the Orthodox community to oppose equal rights for gays and women even within non-Jewish society.

Yet many modern Orthodox Jews are increasingly discomfited by the discriminatory rules of the *halakhab* and especially by the persisting pattern within orthodoxy of denigrating others. This discomfort is not solely attributable to the penetration of general societal attitudes into modern orthodoxy. First, the contemporary setting of Judaism in America differs from prior historical settings in ways that profoundly affect Jewish attitudes toward equality. American egalitarianism finds expression not only through abstract devotion to the principle of equality. It is concretely expressed through the unparalleled grant of opportunities to religious Jews to participate in society, even to lead it (as the 2000 election dramatized). Traditional Jews who are sympathetic to civic equality as a political ideal and to norms of mutuality and respect between groups as ethical ideals are impelled not only by considerations of abstract principle but also by feelings of gratitude and the laudatory human desire to reciprocate beneficence. One critical question raised in this volume is whether reciprocity is a halakhic value, one that should be recognized and affirmed in a new age characterized by the creation of just societies, and evidenced specifically by the decent treatment of Jews.

Second, the ideal of human equality that is at the core of egalitarianism is rooted in a view of humans that comports with the universalist dimension of biblical and rabbinic thought. Egalitarianism rests on a vision of man captured by the biblical assertion that all humans are created in the image of God. The idea of human creation in God's image implies that all people share a basic similitude and worth, despite differences of race, gender, and religion. A second critical question addressed in this volume is whether the concept of creation *be'zelem*, which until now has played a muted role in rabbinic thought, can provide a basis for increased openness and sensitivity within the *halakhab* to modern ideas about equality and tolerance.

In this overview, I have been invited to address two questions. The first is as follows: "How should we respond" to societal changes ushered in by the egalitarian age that "are motivated by a combination of both positive factors of equal respect for all persons as a manifestation of *tzetlem Elohim* and negative factors (for example, tolerance of sexual practices beyond halakhic norms)?" In evaluating what form of response best comports with halakhic norms, ethical aspirations, and communal needs, we may expect to find that the halakhic, ethical, and pragmatic implications of egalitarianism will be in some tension with one another. This raises the sensitive question whether

ethical ideals and practical concerns may shape or even alter halakhic norms. Accordingly, I also have been asked to address how one distinguishes "between ordinary halakhic processes responding to new stimuli, and calls for direct revision of a divinely inspired, permanently fixed Torah." Although the transcendental nature of Torah sharpens the wish to clarify and maintain this distinction, all legal systems struggle with defining the difference between the application of legal norms in light of new conditions in society and direct revision of a permanent law. I shall offer here my own views on this distinction, drawing both on rabbinic sources and parallel discussions in American law.

I

There are several ways to structure the relationship of *halakhab* to a new historical age or social phenomenon. Current social settings may simply be treated as neutral background facts that are largely irrelevant to the application of halakhic norms to concrete questions except insofar as they make new questions possible or remove prior questions from the table. Often, however, in the course of *p'sak*, a historical age itself must be contextualized and understood in order to determine how to fashion an appropriate halakhic response.

What then is meant by the "egalitarian age"? The choice of the term "the age of egalitarianism" for this volume, rather than "the age of equality," is intended to capture both the positive and negative aspects of the pursuit of equality in contemporary American culture. The constitutional protection of abortions, private homosexual activity, and potentially gay marriage on equality grounds within general society, as well as the increasing breakdown of the historic attitude against intermarriage within Jewish society, have led some to associate egalitarianism with moral relativism and devotion to personal autonomy, both clearly problematic from a halakhic perspective. As a result, the genuine ethical passion for equality that underlies the egalitarian ethos is all too often slighted. It is important, therefore, to define and distinguish the variety of related, yet distinct, ideals and ideologies that characterize our age: equality, personal autonomy, liberal toleration, identity politics, and the acceptance of morally diverse ways of life.

Egalitarianism, strictly speaking, concerns only "the story of equality."¹ How it emerged and what functions it performs in American society are critical to its evaluation. The political roots of egalitarianism lie in the rise of nationalism. In the West, national identity is conceived in political terms. With the French Revolution, the modern terms of national identity were set. National identity is achieved by re-organizing former corporate groups, such as Jews, into equal, rights-bearing individuals as the price of citizenship. While individuals can be

full members of traditional societies without possessing the same status, entitlements, or duties as other members, in modern pluralistic nations membership is defined by equality. Discrimination on the basis of race, religion, national origin, sex, and the like is viewed as denying full membership in the national community. This understanding of national identity reaches its pinnacle in the United States. America lacks a common culture of ethnicity, religion, or language to give it a national identity. Instead, national identity is defined by and consists of a small set of shared civic values; chief among them equality.² Equal rights bond citizens together as members of the nation and promote a collective bond of affection and loyalty.

Beneath the political roots of egalitarianism is a set of philosophical and religious ideas that have transformed the way Western societies envision divisions between humans. Egalitarianism's near philosophical root is probably in Kant's philosophical anthropology. Kant views equality as a corollary of fairness, of "symmetry or parity of treatment" in human relations, and he joins this with "a vision of man in which our real identity is tied to something identical in all of us—our rationality." All other differentiations between humans are "relegated to a morally inferior realm . . . the realm of mere appearance."³ Egalitarianism's larger cultural roots also can be traced back to Christianity. Protestant Christianity, in particular, assumes that society consists of discrete individuals, which has led thinkers to distinguish between the person as a moral agent, the "primary role shared by all equally," and a person's secondary social role, such as his or her religion, nationality, or gender.⁴ The intensification of this idea in the Protestant notion of the equality of believers played a central role in the philosophy of America's founders. All these ideas converge into a worldview that refuses to divide humans hierarchically into different kinds of beings.

Despite the long roots of the egalitarian ideal, egalitarianism only truly penetrated American society forty years ago, with the civil rights revolution of the 1960s. The logical trajectory of the civil rights revolution also produced, some claim, egalitarianism's other characteristics, moral relativism and devotion to personal autonomy. But we should be careful not to conflate these ideas, and, as a consequence, obscure the genuine ethical power of the idea of equality that is at the core of egalitarianism. In theory, there is no necessary connection between the pursuit of equality, on the one hand, and moral relativism or devotion to personal autonomy, on the other. One can easily conceive of a heteronomous system, a system in which the source of authority is divine legislation structured around a set of concrete obligations, in which equality, parity of treatment, and even the metaphysical uniformity of man are, nevertheless, regarded as basic principles and values. Moreover, the current acceptance of morally diverse ways of life is more properly understood as an outgrowth of liberal notions of tolerance, and not as an outgrowth of the ideal of equality.

According to the classical liberal formulation, tolerance is the willingness to live with ideas or practices that are regarded as erroneous and even reprehensible.⁵ Liberal tolerance grew out of the religious wars that marked pre-Enlightenment Western civilization. In the wake of religious strife and bloody and ineffective coercion, liberal thinkers advocated tolerance of erroneous ideas and practices in order to maintain social peace and to enhance diversity of opinion. Religious toleration and later toleration of minorities such as Jews, Catholics, African Americans, homosexuals, and so on, call for restraint in response to various beliefs or practices, not because they are acceptable, but because we value personal autonomy (Mill) or view religious coercion as counterproductive (Locke), or because we value civil peace between the diverse groups within the nation. By definition, classical liberal tolerance is the opposite of moral relativism. The demand for tolerance, strictly speaking, only arises once an activity is judged morally wrong. Tolerance regulates how society responds to such activities.

Tolerance has developed in American society, however, in a way that resembles moral indifference, the easy acceptance of heterogeneous moral values and ways of life. In America, where the liberal distinction between public and private realms is sharp, toleration and respect for privacy have become equated. Most moral issues have been relegated to the private domain, while the public domain aspires to be, for the most part, morally neutral. Certain beliefs or practices are deemed private and almost by definition to be tolerated. This results in what might be called a "principled indifference"—one has no right to intervene in private matters or even to judge them.⁶ Private matters are now enshrined as substantive constitutional values and extended dramatically in recent years to cover abortion and, most recently, private, consensual gay activity.

The age we live in is also determinedly multicultural. Multiculturalism, the so-called "politics of recognition," has brought with it a demand for a new and different form of tolerance: pluralism. This, in turn, has created a culture of public acceptance of morally diverse ways of life.⁷ The emergence of multiculturalism as a new political ideal in Western societies is, in part, a reaction against Enlightenment ideals. It is a reaction against the relegation of group particularity to the sphere of private life. As Charles Taylor tells it, its roots can be traced to the idea of authenticity.⁸ The contemporary ideal of authenticity translates into a demand for public recognition of the individual as a member of a particular group to which his or her identity is tied. In other words, one can no longer be a Jew at home and a citizen (the same as everyone else) in public if one wishes to be "authentic." Different identities not only should be disregarded as a basis for disqualification from various entitlement rights—for example, gay identity may not form the basis for denial of rights to vote, public housing, and so on. Instead, different identities should be given public recognition through public affirmation of the worth of identity groups and of the value of different lifestyles.

I have argued that egalitarianism and an attitude of indifference to morally diverse ways of life grow out of different political and philosophic assumptions. Egalitarianism is rooted in political and philosophic assumptions about human equality, while the acceptance of morally diverse ways of life is rooted in the postmodern transformation of the concept of tolerance. This does not make the task of formulating Orthodox Jewish responses to the present legal and social culture, taken in its entirety, easier. But it allows us to refocus attention on the ethical and pragmatic issues we face in a more cogent and systematic fashion. We face two distinct questions. First, does the *halakhab* have the capacity for greater openness to equality as an ethical ideal and to norms of mutuality and respect between persons, especially Jews and non-Jews? In other words, what is the appropriate balance between the particularist and universalist dimensions of Judaism? Second, what degree of tolerance should be extended to groups that pursue ways of life antithetical to halakhic norms? Before turning to these questions, allow me to comment briefly on the ethical and pragmatic dimensions of egalitarianism, as they affect the Jewish community.

II

How should religious Jews assess the values that characterize the egalitarian age? Halakhic responses to new social conditions too often are viewed as necessary accommodations to inescapable parts of life, or deserving attention primarily because they affect the security of the Jewish community. In this volume, however, we approach the issue in the spirit of free inquiry by asking whether aspects of egalitarianism have independent ethical value deserving our commitment, if possible, or reflect values latent in the *halakhab* which should be given further expression and development in this new age. This approach particularly befits a new stage in Jewish history, in which observant Jews are no longer merely responding to their social and political environment but, rather, here and especially in Israel, actively creating it. American Jews live in a uniquely tolerant society that grants orthodox Jews the power to assume leadership positions, a privilege that carries with it the responsibility not to react simply as a beleaguered minority. Jews in Israel are reconstituted as a political society. As the majority people in power, Jews are singularly responsible for shaping the ethos of that society.

The ethical appeal of egalitarianism need not be belabored. One may concede that in principle the *halakhab* does not contemplate an egalitarian political society, and, indeed, poses considerable obstacles to its achievement in Jewish political society. Yet, a return to a caste society that discriminated against minority groups or women in the public sphere would be deeply morally disturbing to all of us. Many of us are equally troubled by halakhic

norms that discriminate against non-Jews in the private sphere of Judaism, that restrict norms of mutuality and social solidarity, and that perpetuate an attitude of disdain. Apart from abstract questions of principle, the privileged situation of American Jews gives rise to an additional ethical dilemma. Do Jews, who have benefited so dramatically from the spirit of egalitarianism, have an ethical obligation to reciprocate by supporting the struggle of other groups to achieve the civic equality that defines membership in our shared nation? Indeed, is reciprocity an ethical factor that ideally should affect how non-Jews are treated under Jewish law itself? Positing an unlimited obligation of Jews to reciprocate by supporting equal treatment of all identity groups in society, however, is equally ethically problematic. It would deny the political community to which we belong the moral perspectives of our tradition.

Concededly, American Jews also have a practical interest in fostering religious toleration and must examine carefully how egalitarianism and religious rights of free exercise are interconnected. There are those who argue that gay and other identity group rights are rooted in the principle of religious toleration.⁹ Such arguments raise the question whether we should refrain from voicing any objection to same-sex marriage, for example, in order to cast a protective net around religious toleration. Judicial equation of identity group rights with the idea of freedom of conscience, which is the core principle of religious toleration, is unlikely.¹⁰ Yet, there remains the practical question whether affirmation of group identity rights fosters a culture that is anti-assimilationist, more liable to decrease intermarriage, and particularly receptive to the free exercise claims of religious groups. Logic alone suggests that the more equality is instantiated in society generally, the more religious rights of Jews will be protected. Orthodox Jews have thrived in the new multicultural environment. It is far easier to be a religious Jew than at any other time in American history and far easier to pursue Jewish communal needs in the public realm. There are, to be sure, costs to such expanded religious opportunities. First, we must share public space with other groups whose values and lifestyles may be antithetical to halakhic norms. Second, the more equality is instantiated in society, the more it threatens to become a comprehensive principle. Not only does the instantiation of equality in society as a comprehensive norm increase intellectual tensions for observant Jews, it also poses the specter of governmental imposition of equality as a norm in the private realm of Jewish society.

From the perspective of ethics and practical politics, norms of equality and reciprocity clearly deserve our more active support. Accordingly, we reach the question whether it is possible to forge a bridge between *halakhab* and the egalitarian idea. Although that bridge may be subject to limitations, there is a growing sense that equality and reciprocity are values latent in the *halakhab* that require further development. Specifically, we should examine

more carefully whether various minority views, such as that of Menahem Me'iri, have been underutilized. Second, we should investigate whether halakhic principles that have a more universalist dimension, such as creation *be-zelem* and *darkhei shalom*, might be elaborated so as to become more powerful means of fostering norms of equality and mutuality.

III

This threefold inquiry—assessment of the ethical value of equality, practical evaluation of the needs of our community, and the creative examination of halakhic precedents and principles—bears on the second question I have been asked to address for this volume: How do we distinguish “ordinary halakhic processes responding to new stimuli” from calls for direct revision of Torah? In other words, at what point does reliance on subjective ethical intuitions, on pragmatic factors, and on creative reinterpretations become an illegitimate attempt to change *halakhab* in order to conform Torah to contemporary ideology?

All legal systems face a version of this question. The Constitution, for example, is written, enacted law and can be changed only through amendment, not judicial interpretation. At what point does judicial discretion to interpret the United States Constitution become an illegitimate and unauthorized attempt to rewrite the Constitution in light of present ideology? The religious dimension of *halakhab*, however, introduces a far more anxious quality to the discussion. Torah, unlike the Constitution, is, after all, a transcendental and not a human document. The transcendental nature of Torah can paralyze decision making for fear that the Torah will be distorted. At the same time, the religious dimension of *halakhab* provides more leeways of judicial discretion than exist within other legal systems. Judges have the power to deviate from the law in order to effectuate the spirit of Torah.¹¹ This authority implies that greater trust is accorded the judge within the halakhic system than is true in other legal systems, where judicial discretion is viewed as in need of constraint. Such expanded authority is dependent on the community's perception of the judge as “the embodiment of Torah.” Given this perspective, halakhic authority to innovate could be formulated, in broad terms, as dependent on two factors: first, the use of legal arguments that are recognizable within the authoritative tradition of *halakhab* and, second, their articulation by authorities who are recognized as Torah personalities—individuals with knowledge and, as Rashi put it, “purity of intent.”¹² The first part of the test has analogues in secular jurisprudence.¹³ The second is unique.¹⁴

This broad formulation, however, begs the critical issues we face today. Contemporary halakhic activity is set within an increasingly polarized community. On the one hand, halakhic authorities with the communal support

to rule boldly are often perceived as insulated from knowledge of and exposure to new social conditions. Moreover, with few exceptions, they function within communities that do not reflect the worldview of modern orthodoxy, which places emphasis on openness to outside culture and universal aspects of *halakhab*. There also is a pervasive sense that halakhic decisors are generally reluctant to rule as boldly as was the case in the past.¹⁵ On the other hand, orthodoxy is also concerned with articulating a response to increasing calls for direct revision of Torah in order to accommodate new ideologies. Such calls tend to proceed from the assumption that historical evidence of halakhic change in the past in itself provides authority for changing at will halakhic norms that are incompatible with the spirit of a new age. In light of both sets of current concerns, it is important to attempt to articulate more clearly the difference between relying on ethical concerns or more open-ended halakhic values in applying *halakhab* to new social conditions and illegitimate revision of *halakhab*. The halakhic corpus, needless to say, does not provide us with an explicit test to discern the difference between legitimate legal application and illegitimate legal change. American constitutional law and theory have been far more self-consciously deliberative in attempting to define the distinction between legitimate interpretation and application and illegitimate change and I shall draw on that literature in my own attempt to clarify this distinction.

A pivotal question bearing on this distinction concerns the role of morality or ethics in shaping halakhic norms. Although the relationship of law and morality is a problem in any legal system, the problem is exacerbated within a religious legal system. On the one hand, the *halakhab*, as the reflection of divine law, is thought to provide the definition of morality. Therefore, independent moral perceptions must be measured and judged in light of the *halakhab*. The danger of redirecting *halakhab* in light of present ethical sensibilities is felt to be all the more acute when ethical perceptions are stimulated by living in a society not governed exclusively by the value-system and ethos of the *halakhab*. On the other hand, the religious impulse to equate *halakhab* with morality itself leads to the question whether a norm that seems unjust is a result of incomplete or insufficient halakhic development or interpretation. New interpretations stimulated by living in a new age, in this view, do not redirect the halakhic process; rather, they uncover the *halakhab* as it was ideally intended to develop.

The question whether there is an ethic independent of *halakhab* has been discussed at length. Rabbi Lichtenstein, in his seminal article on that topic, makes the critical intervention that the classical depiction of *halakhab* as self-sufficient is inadequate. The *halakhab* contains gaps—areas in which it does not speak with specificity. Judges have no choice but to fill gaps in such cases and must resort to independent judgment, a judgment that should be informed by ethical thinking.¹⁶ The idea that *halakhab* has gaps or is, to

some degree, incomplete, is itself controversial. It challenges one traditional picture of *halakhab* as a comprehensive and complete set of legal norms rooted in divine command.¹⁷ Far more controversial is the role of ethical perceptions in cases where no clear halakhic gap exists. Is there an ethic independent of *halakhab* by which the *halakhab* itself is interpreted?

The question whether halakhic norms are subject to interpretation in light of ethical values and intuitions is only one aspect of a much larger set of questions concerning the role of extra-halakhic considerations, not derivable from concrete halakhic norms, in applying *halakhab*. Extra-legal considerations may be rooted in moral or philosophical thinking, in the ethical thrust of *aggadot*, in political or economic realia, or in actual practices of the Jewish community. The very description of these considerations as "extra-halakhic" derives from a conception of *halakhab* as consisting solely of concrete legal norms. This understanding of *halakhab* conforms to the classical positivist definition of law as autonomous from all other disciplines, including moral, economic, philosophical, or political thought, and confined to the rules recognized as authoritative within a particular legal system.¹⁸ It also is associated with the classical understanding of law as proceeding according to standards of legal reasoning that are objective on the order of mathematics, a mode of legal reasoning called formalism. Formalism asserts that the application of law takes place through a distinctive form of legal reasoning that has an axiomatic-deductive structure like geometry. Demonstrably correct, rather than merely plausible or reasonable answers to legal questions can be found by reasoning solely from authoritative rules. "Decisions follow deductively from the rules; the judge, as person," contributes little to the outcome.¹⁹

Pursuant to both understandings of law, judges apply the rules to new situations. They do not exercise discretion, except in cases where there is a gap in the rules themselves. Ethical considerations are not concrete and specific. They are debatable and, therefore, are not part of the system of legal rules. The geonic interdiction against deriving halakhic norms from the *aggadab* reflects this viewpoint.²⁰ The *aggadab* is too vague and subjective to constitute part of the legal corpus. Taken together, law's autonomy and formalism allow us to describe any legal "change" that occurs over time as one contemplated by the lawgiver and not as the product of judicial subjectivity. Rather, law has its own internal logic implanted in it and, therefore, when it seems to change, it does so in response to the promptings of its inner nature, like a caterpillar turning into a moth. According to this view, any perceived halakhic "change" was contemplated and foreseen by the divine lawgiver, who implanted the concrete norms and methods of legal reasoning into the *halakhab*.

Positivism, formalism, and law's autonomy from morality are descriptive theories increasingly challenged in current schools of legal thought. One ob-

jection to these theories is that they do not give adequate weight to the creative aspects inhering in the act of judicial interpretation. Another objection is that they give an inadequate account of the authoritative sources of law by confining these sources to concrete rules. Depictions of law and the process of legal interpretation different from the classical models now claim attention. The impetus for rethinking models of law in American jurisprudence was also a conflict between law and morality revolving around issues of equality. Modern models of law arose from a general effort to rethink how the Supreme Court could have avoided upholding slavery and all its later inflections during the Dred Scott era and from a specific effort to secure the legitimacy of the Supreme Court's decision in *Brown v. Board of Education*.²¹ In that opinion, the Court held segregation unconstitutional, without overruling prior precedent reaching the opposite result. The moral goodness of *Brown* is nearly universally acknowledged but the legal basis of *Brown*, given prior authoritative sources, is difficult to discern.

Modern challenges to positivism can be distilled into three. According to the legal realists, judges do not apply law through deductive methods. They make and change the law, unconsciously or deliberately, however much they may adhere to the rhetoric of the constraining force of precedent or of the formal application of norms. Judicial interpretation reflects the judge's ideological concerns and biases formed by the judge's life history. This may endanger the autonomy, integrity, and even legitimacy of law, but it is unavoidable reality.²² According to natural law theory, a counter-tradition in Anglo-American law, the concept of law necessarily includes a moral element. A rule is not truly law unless it satisfies a moral test of acceptability.²³ In other versions, law is not the judicial decision, but law as it ought to be.²⁴ In this view, the judicial task has no gap-filling or law-making aspect but consists solely of discovering the law as it really was. Both schools of thought account for *Brown*. But neither gives an account of law as autonomous, as its own special discipline, nor an account of the difference between legal interpretation and legal change and, therefore, neither is viewed as a serious challenge to the classical positivist model.

What is now deemed "the third theory of law"²⁵ attempts to bridge the gap between positivism and naturalism by linking law to morality while still preserving law's autonomy. Its most forceful articulator is Ronald Dworkin.²⁶ Dworkin does not offer a universal definition of the concept of law. To know what the law is, Dworkin asserts, it is necessary to start with that which is recognized as law in a particular legal culture. In the Anglo-American legal system, the norms and opinions that positivists regard as exhaustive of law are not all that is internal to the law. Law does not consist solely of concrete norms or rules. Law also consists of values and principles, which are implanted in the legal system at its base. These values and principles, which are the internal aims and ends of the law, have gravitational weight in decision

making that cannot be predicted in advance. They guide the judge in reading an authoritative text or prior opinion, in deciding how much weight to give prior opinions, or in deciding whether a rule or norm is applicable to the case at hand.²⁷ Legal interpretation is a purposive activity, in which judges must consider the point of the practice—the legal system's aim and ends—while applying authoritative rules. All the sources of a legal system, including its rules, values, and principles, must be made coherent and brought out in their best moral light. This purposive activity is not the ordinary stuff of judging, which is often mechanical. It is, however, called into play in "hard cases," such as *Brown*, where prior legal norms must be applied to changed societal conditions. Together, rules and principles, however, are sufficient to cover even hard cases. Law does not, in this theory, have gaps and judges do not make law in the gaps. Nor do judges "exercise discretion except in the weak sense of bringing to bear their judgment in interpreting the law."²⁸ Thus, Dworkin defends the formalist position that the law determines the outcome of cases. Judges discover the right legal answer by coordinating the rules and principles.

One of Dworkin's principal aims is to describe how legal continuity coexists with legal creativity. Hercules, Dworkin's model judge, is not a legal reformer. He is, however, a path-breaking interpreter, creative, and unconventional. Hercules must decide for himself what the practice requires and must not think about what other members of the legal community believe the practice requires or what future members might think of his work. Dworkin's model of interpretation is entirely backward looking—at the authoritative sources requiring interpretation—and not outward-looking at other judges. Nor is it forward-looking. The conscious decision to depart from prior norms in order to meet present or future needs of society is not a legitimate act of interpretation. Thus, he analogizes legal interpretation to the writing of a chain novel that the judge inherits and then must continue by writing the next chapter.²⁹ How that chapter is received, in turn, is of no concern to the judge. Ultimately, time will bear out whether Hercules correctly perceived the point of the practice. An interpretation viewed radical in its day may appear far less so over time.³⁰ The historical situatedness of the judge enhances legal creativity but legal creativity does not constitute deliberate reform or conscious legal change, given the backward-looking nature of interpretation and its confinement to authoritative sources internal to the law.

Turning now to the halakhic system, I want to briefly address the following questions: Is the application of *halakhab* to new societal conditions best described in terms of the classical positivist model of law, as the objective application of concrete rules, or can it be conceived as a purposive activity, in which the range of possible applications of a legal norm are determined in light of its overall aims and ends? Are values and principles also internal to

the halakhic system and thus properly viewed as authoritative sources of the law? Is the determination of the law's aims and ends legitimately influenced by the judge's historical situatedness and, if so, how does one distinguish between legitimate interpretation and illegitimate revision of halakhic norms to conform them to values prevalent in current society?

These issues are well illustrated by halakhic approaches to the question whether religious behavior should be coerced indirectly through "religious" legislation in a societal age characterized by secularism and freedom. Halakhists have offered radically different opinions on this matter, reflecting different views of the aims of halakhic norms and different assessments of the progress of civilization. Thus, one may hold that religious coercion is a halakhic ideal and that religious legislation is mandatory. Or, one may take the position that coercion is an ideal applicable only when it has the capacity to bring about internal assent, possible in a religious but not in a secular age.³¹ Or, one may take the position that religious coercion is not the ideal of *halakhab*; rather, coercion is antithetical to the general thrust of *halakhab* to limit punishment, and therefore the range of its application in an age of freedom may properly be restricted.³² Judgments of this kind involve not only an evaluation of the thrust of *halakhab* itself but also an ethical evaluation of the positive or negative features of historical development. One may view the freedom ushered in by modernity as negative, a reflection of "God's hiddenness" that separates the Jew from Torah observance,³³ or as positive, leading to a more ideal state of religious observance.³⁴

Thus, defining the range of application of a preexisting halakhic norm in new societal conditions calls into play evaluative judgments about the purpose of the halakhic norm within the overall system of *halakhab* as well as its fit with the conditions of a new age. This evaluative judgment takes place in time. The "historical formation of an authentic Jewish consciousness" should be frankly acknowledged.³⁵ Subjective ethical intuitions accessible at a particular historical time shape how the *posek* interprets and weighs authoritative sources as well as how he assesses the purpose of halakhic norms.

It may be argued that it is solely the inner logic of halakhic norms and the *posek's* grasp of and identification with the "halakhic worldview" that determines how characteristics of an age are evaluated, whether positively or negatively. But there is clearly an interrelationship between halakhic values and societal change because the *posek's* own historical situatedness affects the way he will perceive the thrust of halakhic norms and values in the first place. Thus, there is no pre-interpretive meaningful distinction between so-called foreign values and values internal to the halakhic system. One cannot know whether the value is foreign or internal until one engages in the act of interpretation itself. Voluntarism in matters of religion is a hallmark of modern liberal thought, yet some halakhists have discerned precisely this value

within *halakhab*. The apprehension that religious coercion is a concession, and not an ideal, reflects an insight about halakhic norms and values accessible to a *posek* only at a particular point of historical or moral development in general society.

Consider increased efforts today to equalize the rights of women with that of men with respect to Jewish divorce. These efforts are attributable, in part, to the historical situatedness of halakhic authorities in an age of equality. It is not necessarily that "foreign values" have penetrated halakhic thought but, rather, that the historical situation allows us to see more vividly that the trajectory of Jewish divorce law from the biblical to the modern period is largely one of increasing halakhic efforts to ameliorate the status of women and equalize their rights with those of men. Developments in general society, such as enhanced equality between the sexes, may become a catalyst for halakhic innovation because a *posek's* historical situatedness leads to the insight that the *halakhab's* own values as yet have been imperfectly realized.

The claim that interpretation and application of halakhic norms in new societal conditions may be described as a purposive activity, requiring coordination of concrete norms with an evaluative assessment of their ideal aim—one necessarily influenced by the *posek's* historical situatedness—should be distinguished from the argument that *halakhab* is revisable at will in order to conform it to new ideas appearing in general society that seem ethically compelling. The distinction between the two, as by now should be clear, is that between (re)interpretation—a backward-looking reassessment of all the authoritative sources of law in light of the law's internal aims and purposes—and conscious revision in the sense of an intentional act of departure from the norms and aims of the law. (The distinction might also be formulated as that between creativity and human conceit.) Yet, increasingly, arguments circulate about "the need for change to be introduced into Jewish law through a true understanding of its historical development."³⁶ Calls for conscious reform of halakhic norms based on historical evidence of legal change in the past have two defects. First, they turn historical arguments into normative ones. Second, they tend to adopt a viewpoint of the distinction between interpretation and reform that is not internal to law.

"Calls for direct revision" of *halakhab* seem to proceed from the assumption that the descriptive fact of past legal change provides legal authority in the present and future to change halakhic norms at will. But, as in all legal systems, "no normative conclusions can be drawn from the historical fact of legal change."³⁷ Appeals to adopt a new norm or rule of law must be based on arguments that fall within the class of arguments recognized as legitimate bases for legal action within the legal system. The historical fact of legal change in the past is not a recognized legal argument for current judicial "change" of the law within the halakhic, or any other, legal system.

Second, calls for direct reform often ascribe prior legal "change" to conscious reform, rather than creative legal interpretation, either because they assume that concrete norms are exhaustive of the sources of law or because they adopt an external analysis of judicial opinions. Judicial opinions can be assessed from two different perspectives. In an external analysis, judicial opinions are assessed from the perspective of an outside observer of the system—for example, an historian or legal realist. In an internal analysis of law, such as that of Dworkin, legal interpretation is assessed from the perspective of one who is acting inside the legal system, and who accepts and is committed to the legal system's modes of reasoning, norms, principles, and their elaboration—for example, a judge who possesses an internal sense of being bound by the law.³⁸ The internal sense of being bound by the law is not the equivalent of "being subject or subservient to the law."³⁹ To be bound by the law connotes a stance of internal commitment to the law as an ongoing normative project and, thus, to its elaboration based on authoritative considerations. By definition, from the internal viewpoint of law, legal "change" is understood as an internal dynamic. It is the process of internal development, which follows from a new insight into prior precedents made possible by new societal conditions, or from an expanded sense of the sources of law or of what sort of arguments are acceptable modes of legal reasoning, rather than a deliberate change, the result of consciously allowing external considerations to alter what would otherwise be the natural trajectory of the law.

Historians tend to adopt an external viewpoint of the law and therefore historical studies often describe legal development as conscious legal change. Pursuant to the external point of view of the historian, for example, the *halakhab* has undergone vast transformation. But where historians retrospectively see change, judges and legal theorists such as Dworkin see continuity through creative interpretation. Viewed synchronically, at a given moment in time, a novel judicial reading is perceived as implicit in the earlier rule. From the perspective of the particular moment in time, no conscious revision necessarily takes place. When viewed historically and diachronically, as legal interpretation accumulates, the law appears to have undergone radical change. But, absent a judge's own admissions, it is only the external, retrospective view that permits ascribing revision, rather than continuation, to an interpretation that seems unpredictable or forced.

To concretize this point, allow me to offer two examples, one culled from American law and the other from the halakhic corpus. The difference between the internal and external viewpoint is vividly exemplified in analyses of the Supreme Court's affirmation of the constitutionality of Roosevelt's New Deal legislation. These decisions, like *Brown*, posed a legitimacy crisis for those who saw them as directly responsive to Roosevelt's threat to alter the composition of the Court to secure a majority and, in effect, a constitutional amendment paving the way for the modern welfare state. Thus, for legal realists, the

"switch in time that saved nine" merely affirmed their intuition that law is a mask for political ideology.

The New Deal cases generated an interesting debate among historians. Political historians tend to view the New Deal cases as capitulations to outside forces. Legal historians, by contrast, tend to point to precedents in constitutional cases decided before the court-packing threat that support the court's later cases, even if incipiently. They also point to changes in how the Court understood the curriculum and philosophy of constitutional interpretation, which also were inaugurated before the court-packing threat. In short, while political historians often look outside the system of law to explain the court's decisions, thus placing the emphasis on the free choice of the judge who is shaped by political ideology or political pressures, legal historians tend to look inside the law, at values, principles, and accepted modes of legal reasoning, which are internal to the legal system as it develops, to explain new interpretations.

The internal view of legal interpretation is well illustrated by the bold and novel opinion of the Me'iri, whose transformation of the talmudic rules that discriminate against non-Jews is most pertinent to the subject of equality and reciprocity that we address in this volume. The Me'iri, alone among medieval commentators, eliminated many of the discriminatory rules through comprehensive re-interpretation of the letter of the law. He held that the discriminatory rules are aimed at the pagans of talmudic time. Me'iri concluded that the Gentiles of his day, the *ummot ha-gedurot*, do not satisfy the implicit condition precedent of the talmudic rules because they are possessed of religion. The Me'iri's insight, to be sure, also may have been shaped by various philosophical assumptions about the role of religion in securing a lawful social order and ethical considerations such as reciprocity. Gentiles in a lawful society do not mistreat Jews; hence, Jews owe parity of treatment in turn.

From the internal perspective of law, the Me'iri proceeds along creative, yet conventional, paths of legal interpretation. He defines the range of application of a preexisting halakhic norm in order to apply it to a new historical age, discerning in the norm a condition precedent no longer applicable. Such halakhic narrowing of the range of application of a preexisting norm is not a form of disguised halakhic "change." Narrowing the range of application of prior legal norms is a common judicial technique in legal systems. It is properly classified as the process of applying and distinguishing precedents, and not as judicial "change" of the law. As the legal philosopher Joseph Raz points out, "distinguishing differs from the general power to modify rules and make new ones."⁴⁰ Distinguishing means restricting the application of the original rule by adding a new condition to it. With the new condition added to it, the rule no longer applies to the situation at hand. But the restricted rule is simply a possible alternative formulation of the original rule, in which a hidden additional factor that the prior ruling failed to make

explicit is discerned. From the internal point of view of law, such narrowing is classic interpretation, not direct revision or conscious change. Additionally, where the historian may describe various philosophic and ethical motivations about the role of religion or reciprocity as factors extraneous to the legal system, a legal theorist such as Dworkin, who adopts an internal perspective of law, will ask whether these factors are more appropriately classified as values and principles internal to the law.

Thus far, I have argued that the application of halakhic norms to new conditions is a purposive activity, in which the purpose of the halakhic norm under scrutiny must be evaluated in order to discern its range of application in new societal conditions. The question I wish to consider now is whether more open-ended, general principles and values play a role in shaping halakhic interpretation. The *halakhab* contains several open-ended and general principles, some rooted in Scripture, that direct attention to ethical and pragmatic considerations. In addition to creation *be-tzelem* and *darkei shalom*, principles such as *tikun olam*, *billul* and *kidush ha-Stern*, and so on, appear throughout halakhic literature. The role of these principles within the halakhic system is unclear. Are such halakhic "principles" solely explanations of specific, concrete, and particular norms (that is, essentially *ta'mei ha-mizvot*)? If so, these principles must be regarded as merely explanatory, external to the legal system, and thus having no special legal weight. Alternatively, does the *halakhab* view these principles as articulations of the *halakhab*'s overall internal aims and ends? If so, these principles have, to borrow Dworkin's term, "gravitational weight" in decision making. They may guide the *posek* in choosing between diverse opinions, in determining how much weight to give a minority opinion, or in determining whether a specific halakhic norm is applicable in a new situation and time. Although their weight cannot be predicted in advance, these principles, if viewed as internal to the legal system, properly enter into the formulation of *pesak*.

Even more critically, given the concerns of this volume, are principles such as creation *be-tzelem* also capable of generating new norms of behavior in light of social change, through a process that Gerald Blidstein has called "dynamic" elaboration?⁴¹ In his study of the principle *kevod ha-beryot*, Blidstein suggests that, in the medieval period, this principle served to generate several new norms.⁴² Blidstein advocates the dynamic elaboration of principles such as *darkei shalom* and creation *be-tzelem*, as well, in order to meet the challenge of forging norms of equality and mutuality in a societal age in which equality is a basic expectation.⁴³ This argument is not free from difficulty, however. Blidstein's own study of *kevod ha-beryot* reveals that the range of halakhic application of this principle was severely circumscribed because of the principle's subjective, "aggadic," character and its radical potential to supplant other halakhic norms. The question whether halakhic principles such as *darkei shalom* and especially creation *be-tzelem*

can be seen as halakhic counterparts to modern concepts of reciprocity and equality is addressed in the next section.

IV

Other presentations in this volume discuss various rabbinic opinions that may serve as legal precedents for forging new norms of mutuality between Jews and non-Jews. An emerging consensus from these discussions is that the distinction between Jews and non-Jews need not be seen as an ontological division but, rather, one that is rooted in the question what makes a person and a society ethical and just. In contributing to this discussion, I concentrate on the question whether equality and reciprocity may be seen as internal halakhic values, values that may have gravitational weight in choosing between diverse opinions, in weighing minority opinions, or in determining the range of application of a specific halakhic norm in new societal conditions. A comprehensive analysis is not possible here. Rather, I briefly address whether there are halakhic counterparts to modern political and philosophic arguments for equality.

The biblical idea of man's creation *be-tzelem* is often viewed as the closest analogue to the modern ideal of equality. Indeed, Western civilization's gradual development of the egalitarian idea and of equality as a basic human right may be viewed as the slow working out of this biblical concept. This is nowhere more apparent than in the citation in America's Declaration of Independence that "all men are created equal," and in Lincoln's subsequent evocation of that phrase in the Gettysburg Address. American legal commentators concede that there is a distinctive "theological foundation for America's commitment to equality."⁴⁴ This is not surprising. Not only was America from its inception a deeply religious society that self-consciously modeled itself on the Hebrew Bible, the political philosophy of America's founders is rooted in Protestant Christianity. But the course of the Western development of equality as an ideal also underscores the difficulty of vesting creation *be-tzelem* with similar weight within the halakhic tradition. The working out of equality in the liberal tradition is a direct result of the translation of biblical themes through Christianity into political thought—a process that bypasses the rabbinic tradition. Within the rabbinic tradition, by contrast, creation *be-tzelem* occupies a relatively negligible role.

From the perspective of the rabbinic tradition, the creation of humans in God's image implies that humanity has special worth distinguishing it from other creatures. Creation in the image may even embody an ethical ideal of social harmony between the diverse members of humankind, one that the prophets envision as the goal of the end of days. But, even in the biblical portrayal, humanity is not intended to be a universal human order, "one fellow-

ship and society," as Locke wrote.⁴⁵ Rather, creation in the image is the beginning of the unfolding in biblical and certainly rabbinic thought of a drama of hierarchy, distinction, and difference that moves from humanity to Noahide (civilized) society; to the political community of resident strangers and Jews; to the congregation of Israel charged with becoming "a holy nation of priests"; and, then, to the community of fellows, which at least in theory, excludes rebellious Jewish sinners. Within the rabbinic tradition, different classes of people are treated differently with regard to basic legal rights and obligations of social solidarity. The rabbinic tradition thus offers an alternative model of how associational life should be structured in a pluralistic society. Communal and religious bonds, social proximity, political and material dependence, beliefs, and conduct determine the level of social solidarity and reciprocity (equality under the law) owed to society's diverse members. This system is at odds with the notion of creation *be-tzelem* as mandating "equal respect for all persons," in a manner that is relevant to the modern ideal of equality.⁴⁶

Few halakhic norms are derived from or justified by reference to creation *be-tzelem*. As a halakhic category, man's creation *be-tzelem* is invoked to justify the intrinsic equal value of human life,⁴⁷ the duty to procreate,⁴⁸ and the respect owed to the human body, even to the corpse of a killer. All these invocations of creation *be-tzelem* are limited to physical matters. True, for Ben Azzai, creation *be-tzelem* is the cardinal principle of the Torah (whereas Rabbi Akiva invokes a genuinely egalitarian principle, "love thy neighbor as thyself," one limited, however, to Jewish society). The Mishnah in Sanhedrin, in discussing creation *be-tzelem*, emphasizes humanity's diversity and each individual's uniqueness.⁴⁹ God created each human in His likeness, yet no two people are the same. The Mishnah's comment is meant to underscore God's unique creative capacities, rather than to serve as a positive valuation of pluralism. Moreover, Ben Azzai's statement and that of the Mishnah, and later philosophical speculation about the precise nature of the similitude between man and God, provide no guidance as to the kind of respect Jews owe to humanity on account of creation *be-tzelem*. These statements hardly illuminate whether the principle of man's creation *be-tzelem* is capable of supplying the crucial equality of people that entitles them to be treated equally under general or Jewish law.

More disturbing is the persistent strain of rabbinic thought that further limits the ambit of creation *be-tzelem* by seeking to restrict its application to Jews. There is the view of Rabbi Shimon bar Yohai, which gave rise to the tosafists' question: "Are the gentiles called man (*adam*)?"⁵⁰ The tosafists seem to reject bar Yohai's opinion and Rabbenu Tam suggests that Scripture uses the term *adam* in different ways, some of which do include Gentiles. But the Zohar and kabbalistic literature (although not halakhic sources) take up the view of bar Yohai in pursuing an ontological division between non-Jews and

Jews. This problem resurfaces in the contemporary application of *be-tzelem* as a halakhic category in connection with the question whether autopsies done for the advancement of medicine are permissible. In contrast to Rabbi Uziel, who equates all humans in the matter of respect for the dead,⁵¹ Rabbi Kook rules that such autopsies may be conducted only on non-Jews. He comments: "The prohibition of desecrating a corpse is derived from the *tzetlem Elohim* in man, which is unique to Israel in its greater sharpness as a result of the sanctity demanded by the Torah."⁵² The messianic and idealistic tendencies of Rabbi Kook's rulings have been addressed by Michael Nehorai, who points to the significance of the concept of the *segulah* of the Jewish people in his thought.⁵³ In this ruling, Rabbi Kook notes the unique sanctity of the body of Jews who are charged with ritual commandments such as *kashruth* that fashion the body's sanctity.

Yet, Rabbi Kook does not, strictly speaking, limit the concept of *be-tzelem* to Jews. Instead, he writes that Jews are, as it were, "more fully *be-tzelem*" than non-Jews as a result of the sanctity bestowed by the Torah's ritual commandments. Although unpromising at first blush, Rabbi Kook's opinion may provide a new avenue for further development of the principle of creation *be-tzelem* in a manner consonant with the modern ideal of equality. Rabbi Kook treats creation *be-tzelem* as a comparative concept, a matter of degree, and not as an ontological division between Jews and others: Jews are more fully *be-tzelem* than non-Jews because they perform more commandments. In this view, the concept of *be-tzelem* is a statement about the potential of humans to perfect themselves through observance of Torah law. It is a theory about human potentiality to become full moral and legal subjects.

The conceptual link between man's creation *be-tzelem* and equality is as follows: All humans are born equal in their capacity to become full moral and legal subjects and perfect themselves. When humans realize their potential sufficiently, they are entitled to parity of treatment under Jewish law. But when has this potential been sufficiently realized? Rabbi Kook implies that only full observance of Torah suffices. In this view, non-Jews are entitled to parity of treatment under Jewish law only upon conversion. But other stopping points might be posited. The Me'iri ruled, for example, that juridical equality is owed to the non-Jews of his time, because they are members of nations under the rule of religious law. According to the Me'iri, societies bound by religious law occupy an intermediate category between idolaters of old and Jews. Such societies have critically progressed toward perfection. Their final perfection, he writes, is conversion.⁵⁴ Yet, those within the intermediate category are entitled to juridical equality. The critical question, then, is what makes a person or a society ethical or just, so as to merit juridical equality under Jewish law: observance of the entirety of Torah, observance of Noahide commandments, or, as David Berger argues in this volume, the empirically observed creation of a just and decent society committed to the rule of law.

To summarize, creation *be-tzelem* can be viewed as a concept that rejects the idea of inherently biological, racial, or even ontological divisions between humanity. But resort to creation *be-tzelem* as a source for positive halakhic valuation of equality under the law remains problematic. It is difficult to tell whether this universalist concept has been underelaborated until now because of lack of historical opportunity or because of a more general rabbinic concern to confine the ambit of theological and open-ended legal principles, especially those that are largely set within the fluid aggadic realm and that have the potential to undermine Jewish distinctiveness. Like the principle *kevod ha-beriyot*, creation *be-tzelem*, if "dynamically elaborated," has the capacity to reduce significantly the set of halakhic norms that preserve Jewish particularity. Nonetheless, creation *be-tzelem* could be viewed as a theory of potentiality, emphasizing the capacity of humans to become full moral and legal subjects so as to trigger rights of equal treatment under Jewish law and a fortiori general law. This theory is fully compatible with various halakhic approaches detailed in other contributions to this volume, which emphasize that the ethical level of a society is a relevant factor in determining the scope of Jewish obligations to its members.

Is legal equality regarded as a halakhic value in other contexts? Some theorists argue that the rule of law requires the enactment of non-discriminatory laws and the non-arbitrary execution of these laws. (Pursuant to this view, the equal protection clause merely reinforces the rule of law by providing an alternative way of testing whether, when the state acts to distribute benefits and burdens, they are distributed so as not to discriminate against or in favor of a particular group.) This perspective has halakhic parallels. The principle of *dina de-malbhuta dina* only applies to laws that bind all of the sovereign's citizens in an equal fashion. Equality is a pre-condition that has to be satisfied before non-Jewish legal activity will be deemed "law"—*dina*. This halakhic pre-condition is, to use Lon Fuller's term, a "procedural rule of legality."⁵⁵ Procedural rules of legality do not tell us about the justness of any individual substantive norm. Rather, they describe the basic characteristics that any law must possess in order to be deemed a legitimate law.⁵⁶ Pursuant to the *halakhabah*, taxes imposed in a discriminatory fashion on Jews as a class or on particular persons within that class are not legitimate laws of the sovereign.⁵⁷ The sovereign is permitted to differentiate between citizens and aliens but not between citizens.⁵⁸ Thus, no class of citizens may be excluded by the sovereign from the proper generality of the law in distributing burdens or benefits.

Another argument advanced for equality is political. This argument has been stated in both negative terms—it is better to treat people as equals than run the risk of hatred between groups within the population—and positive terms—equality under the law fosters bonds of affection and loyalty among citizens of the nation. Obligations of social solidarity to non-Jews living in

proximity to Jews traditionally were imposed to promote social peace (*darkhei shalom*).⁵⁹ It is customary to view *darkhei shalom* as a negative prudential principle, motivated by the need to fend off Gentile hatred. It is more appropriate today, however, to interpret the principle of *darkhei shalom* as equally based on a positive, ethical concept of reciprocity, emphasizing norms of mutuality, moral symmetry, and gratitude. Various Jewish sources stress reciprocity as an ethical ideal. The Bible appeals to one form of reciprocity as a value when setting forth the proper treatment of the *ger toshava*—"for you, too, were strangers in the land of Egypt." Hillel's famous statement, "Do not do to others what they did to you; what is hateful to you do not do to others," is a succinct expression of the value of reciprocity and certainly a basis for Jewish support of the struggle of other groups in American society to achieve the equal treatment granted to Jews. The more positive dimension of reciprocity, moral symmetry, seems to underlie the Me'iri's ruling that the discriminatory juridical rules of the *halakhab* apply only to members of non-Jewish societies that are unconstrained by religious law. Societies that have reached a sufficiently developed ethical level, evidenced by their decent treatment of Jews, deserve reciprocity under Jewish law.

That the ethical level of society is a factor in determining Jewish obligations toward its members thus seems fully compatible with a variety of halakhic principles. One may add the basic halakhic principle obligating Jews to adhere to ethical standards of behavior instantiated in general society, even when not specifically mandated by Jewish law. Thus, the talmudic rule: "There is nothing permitted to an Israelite yet forbidden to a gentile."⁶⁰ The underlying logic of this rule also finds expression in various applications of *dina de-malkhuta dina* to incorporate just and equitable rules promulgated by other legal systems, which prohibit conduct that Jewish law permits.⁶¹

V

The question must be raised, however, whether the instinct shared by many of us that we are living in a civilized and just society, a critical factor in determining Jewish obligations toward its members, ought to be tempered, given societal tolerance and even support of sexual practices that contravene universal halakhic standards of behavior. Thus, David Berger addresses the question whether the Me'iri's assessment of the progress of civilization is applicable to secular societies lacking belief in a cosmic God, and constrained not by religious law but, rather, by the rule of law. A similar question is posed by the emergence of societies that reject Noahide precepts regarding sexual norms. Rabbinic sources distinguish between societies in which homosexual conduct is prevalent and those that formalize it through marriage, with the latter viewed as a mark of societal decay.⁶² This distinction is repli-

cated in current American public debate. Although the Supreme Court recently extended constitutional protection to private, gay activity and several states have legalized same-sex marriage, the formalizing of gay lifestyle through marriage still is viewed as a highly contested social issue in the United States.

From a halakhic perspective, then, there is a crucial difference between the prevalence of homosexual activities within society, which may properly be the subject of Jewish tolerance, and official recognition of same-sex marriage. Thus, the pursuit of equal civil rights for gays in the workplace or the political sphere presents little difficulty. There is no more reason to countenance discrimination in the distribution of governmental burdens or benefits against gay individuals than against individuals who violate other halakhic norms, including sexual norms such as adultery. The parameter of tolerance in the Jewish tradition is a large topic.⁶³ The justification for tolerance most compatible with the Jewish sources is respect for persons. Tolerance is a virtue that exists in the sphere of interpersonal relations, as much as in the political sphere.⁶⁴ Tolerating the sinner but not the sin rests on the notion that being judgmental toward persons is not always a virtue, because we should sometimes respond to persons not through their actions, but through the reasons for their actions. The individual sinner can be tolerated because the fault for the sin lies in inferior education or upbringing, intellectual seduction, or other forces, including desire, that shape the actual self. The model, moreover, has been relied on to justify continued social relations not only with Jews, whom there is heightened incentive to retain within the collectivity of Israel, but also with non-Jews, even pagan idolaters.

Is this model of tolerance appropriate where a group, whose very identity is defined by its association with halakhically forbidden sexual activity, seeks public recognition and affirmation of that identity through heightened protection of equal citizenship rights? There are valid reasons to oppose public affirmation of gay rights such as same-sex marriage, chief among them the preservation of a neutral public space in which contested forms of sexuality are not unduly displayed. The realm of the public, the *pharbesia*, is a concept that has significant halakhic ramifications. Because it is the sphere of communicative action, public space matters. It may be questioned, however, whether the concept of *pharbesia* has relevance to non-Jewish space or in conditions of modernity. Moreover, there is a genuine issue whether the *halakhab* recognizes a status and, therefore, gay identity altogether, for just as acts do not translate into identities, identities do not translate into acts. Nonetheless, because the message sent is so powerful from an educational standpoint, "making peace" with official state affirmation of gay identity, such as formalizing same-sex marriage, remains a thorny issue for modern orthodoxy.

The procedural aspect of formulating responses in an egalitarian age deserves comment. There is concern, even yearning, today for a spiritually and intellectually satisfying articulation of a halakhic principle, a theory that would affirm the value of equality and yet set forth the limits of that equality, in light of halakhic norms both forbidding intermarriage or homosexual acts and maintaining divisions between men and women. Hence, the increased attraction of the Meiri's views, which rest on a comprehensive principle. Of course, recourse to casuistic reasoning, ad hoc solutions, localized decision making, and even silence remains a possibility. Increasingly, such muddling through "seems inadequate—inadequate educationally and inadequate socially."⁶⁵ This is especially the case for Jews living in Israel, where Jews are responsible for shaping the very ethos of society. Yet, common sense suggests that, given a social phenomenon of such complexity as the one we discuss in this volume, no such principled response will be forthcoming soon.

I wish to raise the question whether "muddling through" as a form of response to societal change might still have virtue. Another name for "muddling through" is pragmatism, the anti-theory of choice of judges from Oliver Wendell Holmes to Richard Posner.⁶⁶ Pragmatists, in contrast to theorists such as Dworkin who see the task of judicial interpretation as one of making all the prior sources of the legal system coherent and viewed in their best moral light, assert that law is not necessarily coherent or utopian. It is inconsistent and reflects diverse aims often in tension with one another. Accordingly, rather than pursue a grand theory or principle, judges should make small decisions that work, using all the legal resources available, including legal fictions, casuistic reasoning, and creative analogies, to problem-solve on a local basis. Pragmatists are optimists and they believe the sources of the law are adequate to the task. In its least radical versions, it is the description of the common law method employed by its best practitioners, such as Justice Cardozo, and the chief characteristic of complex legal systems.⁶⁷

Casuistic reasoning, also the chief characteristic of the *halakhah*, is capable of achieving satisfying results. Thus, sensitive issues of religion and state in Israel have been addressed through casuistic reasoning, such as analogizing participation of non-Jews in governmental functions, which raise issues of *severab*, to participation in a business partnership. A sensible result was achieved, although no statement of principle about civic equality issued. Muddling through may even have its advantages. First, when one examines new social phenomena or is faced with a hard case and tempted to strike out in a bold direction, it is often difficult to avoid slippery-slope arguments about the dangers of a bold course or to assess them dispassionately. Sec-

ond, it is easier to incorporate moral or pragmatic concerns in case-by-case reasoning. Third, ad hoc or local solutions preserve inconsistency, and therefore a continuing dialectical tension between two polar concerns, such as between universalism and particularism. Finally, gradualism, slow development, through arguments from analogy and careful distinguishing of one situation from another, is a virtue because it combines flexibility with stability. By contrast, attempting to articulate a principle or position may solve one problem in a satisfying fashion and yet create a new set of intellectual, spiritual, or practical problems. It may even lead us to the very disturbing conclusion that no reconciliation is possible.

NOTES

1. Ernest Gellner, *Culture, Identity, and Politics* (London: Cambridge University Press, 1987), 91. Gellner offers a penetrating analysis of the social roots of egalitarianism. *Ibid.*, 91–110.
2. See Kenneth J. Karst, "The Bonds of American Nationhood," *Cardozo Law Review* 21 (2000), 1141–62, which summarizes his seminal work on this topic.
3. Gellner, *Culture, Identity, and Politics*, 110.
4. Larry Seidentop, "Liberalism: The Christian Connection," *Times Literary Supplement*, Mar. 24–30, 1989, 308.
5. See generally David Heyd, ed., *Tolerance: An Elusive Virtue* (Princeton: Princeton University Press, 1996).
6. Adam B. Seligman, "The Problem of Religious Tolerance," Berlin, January 1998 (unpublished manuscript, on file with author).
7. I examine multiculturalism and its effects on nationalism and liberalism in Suzanne Last Stone, "Comment: Cultural Pluralism, Nationalism, and Universal Rights," *Cardozo Law Review* 21 (2000), 1211–24.
8. Charles Taylor, "The Politics of Recognition," in Amy Gutman, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994), 25, 28–37.
9. According to the legal philosopher David Richards, there is a conceptual link between the rights of gays, blacks, and women, on the one hand, and religious freedom, on the other. Discriminatory practices based on religion, race, gender, or homophobia create a state of "moral slavery"—"the unjust degradation" of what a person reasonably assumes to be central to his or her public and private identity. Moral slavery is the deprivation of the moral right to personality—to express oneself not only privately but also publicly. Richards argues that the moral right to personality can be equated with conscience, which is the core right protected by the free exercise of religion clause of the United States Constitution. See David A. J. Richards, *Identity and the Case for Gay Rights* (Chicago: University of Chicago Press, 1999).
10. Protection of conscience from governmental coercion rests on the inviolability of private beliefs. Richards' equation of the *public* display of personality with freedom of conscience is problematic because any social organization limits the identities individuals can assume in public. Thus, even clearly religious forms of public display,

43. Bildstein, "Halakhah and Democracy," 29, 33.
44. George P. Fletcher, "In God's Image: The Religious Imperative of Equality under Law," *Columbia Law Review* 99 (1999), 1608. Fletcher argues that the principle of equality is best grounded in a holistic view of human dignity, and draws on the biblical ideal of creation in God's image as well as on Kant.
45. John Locke, "The Second Treatise of Civil Government," in Peter Laslett, ed., *Locke's Two Treatises of Government* (Cambridge: Cambridge University Press, 1967), 401.
46. I address the rabbinic "ethical vision of social life" and its contemporary challenges at greater length in Suzanne Last Stone, "The Jewish Tradition and Civil Society," in Will Kymlicka and Simone Chambers, eds., *Alternative Conceptions of Civil Society* (Princeton: Princeton University Press, 2000), 208.
47. Genesis 9:6.
48. Tosefta, *Yevamot* 8:6.
49. Mishnah, *Sabbethin* 8:4.
50. Tosafot, *Bava Kamma* 38a, s.v. "ela."
51. Piskei Uziel, *Orah Hayyim*, 178-79. See also Rabbi Eliezer Waldenberg, *Tzitzit* *Eliezer* 4:14.
52. Rabbi Abraham Isaac Ha-Kohen Kook, *Da'at Kohen*, no. 199, 383.
53. Michael Z. Nehorai, "Halakhah, Mehalakhah, and the Redemption of Israel: Reflections on the Rabbinic Rulings of Rav Kook," in D. Shatz and L. Rosen, eds., *Rabbi Abraham Isaac Kook and Jewish Spirituality* (New York: New York University Press, 1995).
54. Rabbi Menahem Ha-Meiri, *Sabbethin* 59a.
55. Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).
56. For further discussion of how rabbinic elaboration of both the Noahide commandment of *dinin* and of *dina de-malkhuta dina* may reflect rabbinic views on the procedural rules of legality that must be satisfied to generate legitimate law, see Suzanne Last Stone, "Sinaitic and Noahide Law: Legal Pluralism in Jewish Law," *Cardozo Law Review* 12 (1991), 1157.
57. This principle of equality is formulated by Ibn Migash and codified by Maimonides. See generally Shmuel Shilo, *Dina de-Malkhuta Dina* (Heb.) (Jerusalem: Magnes Press, 1974).
58. Shmuel Shilo, "Equity as a Bridge between Jewish and Secular Law," *Cardozo Law Review* 12 (1991), 737.
59. "We support the heathen poor along with the poor of Israel, visit the heathen sick along with the sick of Israel, and bury their dead along with the dead of Israel in the interest of peace." *Gittin* 61a.
60. *Sabbethin* 59a.
61. See Shilo, "Equity as a Bridge," supra, for a fuller discussion.
62. See Rashi, *Hullin* 92a.
63. See Suzanne Last Stone, "Tolerance versus Pluralism in Judaism," *Journal of Human Rights* 2.1 (March 2003), 105-17; Moshe Sokol, ed., *Tolerance, Dissent, and Democracy* (Northvale: Jason Aronson Inc., 2002); Aviezer Ravitzky, "The Question of Tolerance in the Jewish Tradition," in Yaakov Elman and Jeffrey S. Gurock, eds., *Hazon Nahum: Studies in Jewish Law, Thought, and History* (New York: Yeshiva University Press, 1997), 359-91.

64. For an analysis of tolerance from this perspective, see Heyd, *Tolerance*, 10-17.
65. Bildstein, "Halakhah and Democracy," 33.
66. On old and new versions of pragmatism in law, see Richard A. Posner, *Overcoming Law* (Cambridge: Harvard University Press, 1995), 2-21, 387-405.
67. Pragmatism is actually both a weak form of legal realism and an outgrowth of a jurisprudential shift associated with Justice Holmes in which law came to be seen as a science and judges as legal scientists, policy makers, or problem solvers. For them, legal sources—cases—may be distinct vehicles for problem solving, but the law itself is not an autonomous discipline consisting of reasoning through the authoritative cases and precedents for the right answer to a legal question; rather, the law is just an aspect of the larger discipline of general social science, of making law more progressive and responsive to contemporary social needs. Judges are therefore not primarily interpreters who harmonize prior rules with present opinions. They are, like legislators, forward-looking policy makers who ask what is reasonable in order to govern this society now. But judges still need to use the cases and authoritative sources to accomplish this end. Judges cannot simply change the rules and doctrines whenever such a change would improve the world. Although deeply anti-formalist and anti-positivist, in theory, pragmatists use the concrete rules of the legal system in a way that is unthreatening to positivist and formalist conceptions of law.