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CREATIVITY AND CULTURAL INFLUENCE IN EARLY JEWISH LAW

*Roberta Rosenthal Kwall**

INTRODUCTION

Jewish law maintains that man is obliged to create and to renew the cosmos with his creative enterprise. According to Rabbi Joseph Soloveitchik, a leading modern authority on Jewish law, “[t]he peak of religious ethical perfection to which Judaism aspires is man as creator.”¹ Soloveitchik claims that the Torah chose to relate to man “the tale of creation” so that man could derive the law that humans are obligated to create.² The Jewish religion introduced to the world that the “most fundamental principle of all is that man must create himself.”³ According to Jewish law, man was not intended to be a passive recipient of the Torah, but rather “a partner with the Almighty in the act of creation.”⁴ Significantly, “[t]he power of creative interpretation is the very foundation of the received tradition.”⁵

Human creativity thus lies at the heart of Judaism, both from a theological and a legal standpoint. Therefore, there are many secular

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1 JOSEPH B. SOLOVEITCHIK, HALAKHIC MAN 101 (1983).

2 *Id.*

3 *Id.* at 109.

4 *Id.* at 81.

5 *Id.* (translation omitted).

scholars who are interested in the creative process from a secular standpoint as it relates to the Jewish tradition. On the secular side, legal scholars currently are turning their attention to analyzing law within cultural terms because political “culture” struggles are being waged increasingly on legal turf.⁶ This pairing of law and culture requires clear articulations of what culture means and what the relationship between law and culture should look like. Scholars who examine law through a cultural analysis paradigm emphasize that it is important to focus on culture to “locate the ways in which law influences who we are and who we aspire to be.”⁷ This approach enables us to transcend the standard inquiries of what the law is, and what we want it to be, by asking instead what the law makes us.⁸

Among those scholars who invoke cultural analysis, there is a general sense that law and culture should not be viewed as two distinct entities but rather as embodiments of one another. When law is seen as culture and culture as law, it becomes logical to discuss how to interpret law in cultural terms. The view of culture I adopt in this Article is a fluid one popular in legal academic circles. According to this view, culture embodies heterogeneous, intersecting practices and processes emerging from within and beyond its borders.⁹ This is in contrast to the more classic view that sees culture as a self-contained entity composed of coherent patterns.¹⁰

Jewish religious law, known as *halakhah*, has been influenced by cultural developments both within the Jewish community and outside of it. Cultural analysis reminds us that cultures are not hermetically sealed but continuously interact with the world around them. This reality is especially true with respect to Jewish law given that the history of the Jewish people is such that they have been living in foreign cultures in the Diaspora for thousands of years. This Article illustrates how these cultures, generally and particularly with respect to Hellenism, have exerted an enormous influence on the development and application of Jewish law in its formative period.¹¹ It adopts a cultural

6 See, e.g., SUSAN SCAFIDI, WHO OWNS CULTURE 12 (2005); Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35 (2001).

7 See Mezey, *supra* note 6, at 66.

8 See generally PAUL W. KAHN, THE CULTURAL STUDY OF LAW 6 (1999) (noting that law “is a way of organizing society under a set of beliefs that are constitutive of the identity of the community and of its individual members”).

9 See Mezey, *supra* note 6, at 43; Madhavi Sunder, *IP²*, 59 STAN. L. REV. 257, 331 (2006).

10 See Mezey, *supra* note 6, at 43.

11 Of course, throughout history, Jewish law and culture also have influenced the majority of surrounding cultures. See, e.g., Isaiah Gafni, *Babylonian Rabbinic Culture*, in CULTURES OF THE JEWS 223, 248-50 (David Biale ed., 2002) (documenting that

analysis perspective, thus positing that Jewish culture and Jewish law are inextricably intertwined. Further, it argues that from an early stage in the development of Jewish law, its inherent creativity derives from its confrontation with outside cultural influences.

Part I of this Article examines the analytical relationship between law and cultural analysis, and establishes the important symbiotic relationship between law and culture. Part II initially explores the fundamental tenets of the Jewish legal system in the law's formative years. It then investigates the influence of the surrounding cultures, particularly Hellenism, on the development of early Jewish law. Throughout this Part, the Article develops the argument that the need for adaptation to the surrounding environment ensured the inherent creativity of Jewish law's development and application. Part III contrasts the situation involving American Jewry in the twenty-first century with earlier times. It posits that the familiar and successful pattern of acculturation that historically insured a creative Jewish legal system is no longer viable in the sociological milieu in which most American Jews live.

I. THE EMERGING FOCUS ON LAW AND CULTURAL ANALYSIS

As the twenty-first century moves forward, the focus on culture as an analytical construct seems to intensify. In general terms, cultural analysis emphasizes "the analysis of beliefs and values."¹² Its starting point is that human beings are creative and continually seek to make and remake their world, and thus emphasizes people's participation in the processes of cultural production.¹³

The cultural analysis paradigm necessitates an emerging definition of culture, a concept that is markedly contested in our time. As Amherst professor Austin Sarat fittingly observed, "[t]o talk about culture is . . . to venture into a field where there are almost as many definitions of the term as there are discussions of it."¹⁴ Today, cul-

archaeological discoveries in Mesopotamia and Iran dating back to the fourth and seventh centuries C.E. suggest that non-Jews relied upon their Jewish neighbors to remove certain forces or spirits); Erich S. Gruen, *Hellenistic Judaism*, in *CULTURES OF THE JEWS*, *supra*, at 77, 101 (discussing how Josephus documented the influence of Jewish practice on Greek culture).

12 Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 *YALE J.L. & HUMAN.* 3, 9 n.30 (2001).

13 See Toby Miller, *What It Is and What It Isn't: Cultural Studies Meets Graduate-Student Labor*, 13 *YALE J.L. & HUMAN.* 69, 70 (2001); Sunder, *supra* note 9, at 323.

14 Austin D. Sarat, *Redirecting Legal Scholarship in Law Schools*, 12 *YALE J.L. & HUMAN.* 129, 144 (2000) (reviewing KAHN, *supra* note 8).

tural studies scholars view culture as heterogeneous, with the practices deriving from both within and outside of its borders.¹⁵ According to this perspective, culture is fluid and characterized by a sense of sharing among those with a common cultural framework as well as contested from within.¹⁶ As a dynamic entity, culture manifests continual evolution as a result of a variety of internal and external influences.

Cultural analysis initially emerged in disciplines such as anthropology and literary studies.¹⁷ The connection between culture and law has been the focus of scholarly discussion only fairly recently. A cultural analysis approach to law asks "how to talk about and interpret law in cultural terms."¹⁸ According to Austin Sarat and Jonathan Simon, cultural analysis has traditionally been "associated with 'softer' research traditions like feminist jurisprudence and other critical legal studies, but the 'harder' traditions like economics" are beginning to grapple with cultural implications."¹⁹ By the last third of the twentieth century, many legal scholars began paying attention to the "imaginative life of the law and the way law lives in our imagination."²⁰

A key characteristic of the relationship between law and culture is the interrelationship between these two areas. A cultural analysis perspective sees law as reflecting culture as well as creating culture. Naomi Mezey contrasts this approach with the more typical vision of law which understands culture "as the unavoidable social context of an otherwise legal question."²¹ According to a cultural analysis framework, the law is "constitutive," meaning that law both constitutes culture and is constituted by cultural norms.²² When law is seen through a cultural analysis paradigm, law is understood as both a product of, and catalyst for, cultural production rather than as a neutral, objective system. Significantly, cultural analysis sees law as lacking an auto-

15 See *id.*; see also Richard Johnson, *What Is Cultural Studies Anyway*, 16 *SOC. TEXT* 38, 39 (1986) ("[C]ulture is neither an autonomous nor externally determined field, but a site of social differences and struggles.").

16 This fluidity illustrates the "deeply compromised" nature of culture. See JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE* 10, 14 (1988).

17 See Sarat & Simon, *supra* note 12, at 9 (explaining the rise in popularity of cultural studies and cultural analysis in the legal realm).

18 Mezey, *supra* note 6, at 36.

19 Sarat & Simon, *supra* note 12, at 7 n.23. Sarat and Simon welcome this trend given that the "the logics of governance in the late modern era" have similarly turned from "society to culture as a way of organizing social relations." *Id.* at 7 (emphasis omitted).

20 *Id.* at 18.

21 Mezey, *supra* note 6, at 35.

22 See *id.* at 47-48.

mous quality.²³ Robert Cover recognized this relationship between law and culture when he observed that “the creation of legal meaning . . . takes place always through an essentially cultural medium.”²⁴

The foregoing discussion underscores that the implementation of the law always occurs in culturally specific contexts. As the next Part shows, this dynamic has been present in Jewish law from its inception.

II. THE IMPACT OF SURROUNDING CULTURES ON THE DEVELOPMENT OF EARLY JEWISH LAW

The essence of Jewish law is similar to any type of cultural property in that it has been developed and adapted by humans throughout the ages. Although Jewish law differs from secular legal systems in that God is viewed as the ultimate Author of the laws, in practice the operation of Jewish lawmaking historically has incorporated a pronounced human element, which necessarily entails both subjectivity and fluidity of interpretation. Jewish law embodies a humanly developed tradition of interpretation that has been evolving over centuries and in diverse locales. Significantly, Jewish law is a cultural product of creative human activity that represents the product of human judgment about God’s will. The undeniable human component of Jewish law is of vital importance in applying the cultural analysis paradigm to Jewish law.

Social historian Jacob Katz has noted that Jewish law “conceived of the Jewish community as not only a religious congregation but as a people with a distinct ancestry, a documented history, and a well-defined destiny.”²⁵ Further, he states that this perspective can be found in the earliest of Jewish law sources, which “revealed the Jews as a people, or at least a community, constituted by common descent and attachment to a cultural heritage.”²⁶ This observation underscores the interrelationship between Jewish law and Jewish culture. In addition, the incorporation of the influences from the surrounding cultures played a significant role in shaping the worldview of the Jewish people from the outset. This Part explores the nature of some of these early influences.

23 See *id.* at 47.

24 Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983).

25 JACOB KATZ, *OUT OF THE GHETTO* 208 (1973).

26 *Id.*

A. *The Written and Oral Law*

Before discussing more specifically the nature of extraneous influences on the development of Jewish law, a few words about the development of Jewish law and the source of its authority are in order. Significantly, Jewish law maintains a framework that reveals a dualistic source of authority. Initially, Jewish law is rooted in the concept of Divine Revelation, and this component of its framework embodies a vertical model with the operative power relationship existing between God and the Jews. The core doctrine of Jewish law under the vertical model is Revelation by God of His will to the Jewish people at Mount Sinai. Jewish tradition maintains that through this Revelation, the Divine presence permeated the earth with instructions, laws, and commands. Still, the exact content of this Revelation is uncertain and the subject of endless debate and discussion.²⁷

According to the tradition, Revelation encompassed not only the Written Law, but also the Oral Law that provided explanations and elaborations upon the Written Law. Although the part of the Oral Law that the tradition assumes God revealed directly to Moses is a product of the same vertical paradigm as the Written Law, the Oral Law also supports a rich tradition of human interpretation. That is to say, a part of the Oral Law was “committed to the halakhic authorities” in every generation “to fashion and develop.”²⁸ Given that this component of the Oral Law was developed and applied by humans, who are in theory equal to one another, the model at issue with respect to this part of the Oral Law is horizontal rather than vertical.²⁹ Thus, the nature of legal authority created by the Oral Law incorporates both a vertical and a horizontal model. Given the tradition’s understanding

27 See ABRAHAM JOSHUA HESCHEL, HEAVENLY TORAH 378 (Gordon Tucker & Leonard Levin eds. & trans., 2005). In addition to disagreement regarding the content of God’s Revelation, the tradition also has acknowledged the possibility of variation as a result of individual reception at Sinai. In other words, some believe that the presence and acceptance of the Torah by the individuals witnessing the Revelation at Sinai “shaped the very content of the Torah at the critical historical moment it took effect.” Michael Rosensweig, *Eilu ve-Eilu Divrei Elohim Hayyim: Halakhic Pluralism and Theories of Controversy*, in RABBINIC AUTHORITY AND PERSONAL AUTONOMY 93, 108-09 (Moshe Z. Sokol ed., 1992). This “mystical-historical” position “dramatizes the spiritual significance that *halakhah* ascribes to human singularity by revealing that the subjective inclinations of individuals invested their perspective of Torah with intrinsic worth.” *Id.* at 108–09. These conceptions of Revelation move the model from a strictly vertical one to a paradigm with varying levels of horizontal elements.

28 1 MENACHEM ELON, JEWISH LAW 193 (Bernard Auerbach & Melvin J. Sykes trans. 1994).

29 My friend and colleague, Dr. Zohar Raviv, was the initial inspiration behind the “vertical” and “horizontal” paradigms as used in this context.

of the dualistic nature of the Oral Law as being partially “Revealed” and partially the product of human interpretation, the need for, and importance of, creativity and innovation in the development of Jewish law has existed from the outset.

In the early centuries of the Common Era, the Sages were concerned that the Oral Law could be forgotten given its increasing voluminous nature and the massive efforts made by the Romans to eradicate the teaching of Torah law. Therefore, they began to write down the Oral Law. One of the earliest written texts of the Oral Law, known as the Mishnah, emerged around 200 C.E. in Palestine. The entire process of reducing the Oral Law to a written form culminated around 500 C.E.³⁰ with the redaction of the Babylonian Talmud, regarded throughout Jewish history as the central book of Jewish law and life.³¹ An earlier Talmud, called the Jerusalem Talmud, was redacted in Palestine about 100 years earlier, but it has never been regarded with the same reverence as the Babylonian Talmud.³²

B. *Synopsis of the Early Jewish Diaspora and the Need for Adaptation*

The First Temple of the Israelites was destroyed in 586 B.C.E. Shortly prior to and after this time, large numbers of Israelites living in the Judaeen region were captured and exiled to Babylonia.³³ The majority of Jews living in this eastern Diaspora stayed in Babylonia, even when some of their contemporaries returned to Jerusalem during the sixth and fifth centuries B.C.E.³⁴ Meanwhile, even before the conquest of Alexander the Great in the late fourth century B.C.E., Jews had settled in areas such as Syria, Egypt, and the lands of the Tigris and Euphrates, but the development of a Greek Diaspora facilitated the development of a Jewish Diaspora in areas that extended into Greece itself.³⁵ Further, Greek towns appeared even in Palestine and “the Jews of Judaea could not and did not isolate themselves altogether from the pervasive aura of Hellenism.”³⁶

30 See Steven H. Resnicoff, *Autonomy in Jewish Law—In Theory and in Practice*, 24 J.L. & RELIGION 507, 528 nn.112-13 (2009).

31 See *id.* at 528-29; see also Elliot Dorff, *Judaism as a Religious Legal System*, 29 HASTINGS L.J. 1331, 1334 n.9 (1978). This writing process can be understood as a form of knowledge curation as discussed in Michael Madison, *Knowledge Curation*, 86 NOTRE DAME L. REV. 1957 (2011).

32 See Stephen G. Wald, *Mishnah*, in 14 ENCYCLOPEDIA JUDAICA 319, 319-31 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007).

33 See Gafni, *supra* note 11, at 223.

34 See *id.* at 225.

35 See Gruen, *supra* note 11, at 77-78.

36 *Id.* at 78.

Despite the rededication of the Second Temple (around 515 B.C.E.), the majority of Jews remained in the Diaspora.³⁷ During the period of the Second Temple, which was destroyed in 70 C.E., and even for about 150 years following its destruction, Jewish historiography focuses almost exclusively on the Jews living within the Hellenistic-Roman Empire, including Palestine.³⁸ On a comparative level, Babylonian Jews enjoyed far more cultural autonomy than their Palestinian counterparts, who had to face an overpowering Hellenistic cultural presence. Thus, in western Palestine, Jews had to preserve and perpetuate their culture through the "media and methods" of the more pervasive Hellenistic culture.³⁹ As will be discussed more fully below, the Sages who produced the rabbinic literature composing the Oral Law during the pre-Talmudic and Talmudic periods were subject to the cross-cultural influences of Hellenism, Persia and Zoroastrianism.

Thus, from this early period in time, many Jews lived in alien lands, a reality which required that they simultaneously adapt their lifestyles to those of the surrounding cultures, yet also cleave to their ways in order to maintain their particularity. A fascinating story appears in the Mishnah illustrating this dilemma. Rabbi Gamaliel, the patriarch of the Palestinian Jewish community of the second century C.E., was asked how he could bathe in the Bath of Aphrodite, which contained a statute of the Greek goddess. His reply was: "I did not come within her limits; she came within mine."⁴⁰ The rabbi's reply is significant because he acknowledged the reality that the Jewish people must bathe, even if they must do so in an environment that is spiritually polluted. According to Arnold Eisen, the Chancellor of the Jewish Theological Seminary, Rabbi Gamaliel's "assertion of Israelite sovereignty over the polluted Land of Israel ('she came within my limits') is essential to Jewish survival."⁴¹

Scholars have emphasized that this notion of adaptation by assimilating selected ingredients from the surrounding culture has been the key to the survival of the Jewish religion throughout the ages. Political science professors Bernard Susser and Charles Liebman have

37 Eric M. Meyers, *Jewish Culture in Greco-Roman Palestine*, in *CULTURES OF THE JEWS*, *supra* note 11, at 135, 137.

38 Gafni, *supra* note 11, at 225 (noting also that these areas were primarily in Judaea as well as Ptolemaic and Roman Egypt).

39 *Id.* at 230.

40 MISHNAH, *Avodah Zarah* 3:4.

41 ARNOLD M. EISEN, *GALUT* 40 (1986); *see also* Meyers, *supra* note 37, at 135 (noting that this narrative "attests to the sense the Jews had of participation in the discourses of the wider culture").

observed that "Judaism . . . learned from and was enriched by the many cultural legacies it inherited from the dozens of countries through which Jews passed."⁴² Thus, they posit that the source of "Jewish cultural creativity" may "well lie" in its multidimensional confrontation "with so many of the world's greatest cultures."⁴³ According to Gerson Cohen, the late Chancellor of the Jewish Theological Seminary, Judaism "was able to survive as a living culture . . . precisely because of its ability to translate its culture: that is, to accept as a positive value a considerable degree of assimilation."⁴⁴ Moreover, Cohen stressed that history proved that rather than impeding Jewish continuity and creativity, "this assimilation and acculturation was a stimulus to original thinking and expression, a source of renewed vitality."⁴⁵ In a rather bold commentary, he asserted: "To a considerable degree, the Jews survived as a vital group and as a pulsating culture *because* they changed their names, their language, their clothing, and their patterns of thought and expression."⁴⁶ Jewish history professor David Biale concurs that throughout history, the Jews were able to construct their particular identities through their "profound engagement with the cultures of their environment," but he notes two "seeming paradoxes" resulting from this phenomenon: "On the one hand, the tendency to acculturate into the non-Jewish culture typically produced a distinctive Jewish subculture. On the other hand, the effort to maintain a separate identity was often achieved by borrowing and even subverting motifs from the surrounding culture."⁴⁷ The cultural analysis paradigm reminds us that what is true for Jewish culture generally is also true for Jewish law, since these societal elements are completely intertwined. In other words, Jewish law both reflected and was shaped by the reality of this assimilation and acculturation. The following subparts illustrate these interrelationships.

C. Hellenistic Influences

In the period from Alexander the Great until the destruction of the Second Temple in 70 C.E., "Jewish involvement with Hellenism

42 BERNARD SUSSER & CHARLES S. LIEBMAN, CHOOSING SURVIVAL 88 (1999).

43 *Id.*

44 GERSON D. COHEN, *The Blessing of Assimilation in Jewish History*, in JEWISH HISTORY AND JEWISH DESTINY 145, 151 (1997).

45 *Id.*

46 *Id.* at 151–52 (emphasis in original); see also Meyers, *supra* note 38, at 136 (arguing that "Hellenism, as both a challenge and an inspiration . . . produced the most creative expressions of Jewish culture in Palestine, expressions that greatly enriched the Jewish tradition without sacrificing its own indigenous, semitic core").

47 David Biale, *Preface* to CULTURES OF THE JEWS, *supra* note 11, at xv, xxi.

. . . was a central, even a defining, characteristic.”⁴⁸ In general, the Jews “redefined their heritage in terms of Hellenistic culture itself” by engaging “actively with the traditions of Hellas, adapting genres and transforming legends to articulate their own legacy in modes congenial to a Hellenistic setting.”⁴⁹ Thus, around the third or second century B.C.E., the Hebrew Bible was translated into Greek to accommodate the needs of Diaspora Jews for whom Greek was their primary language.⁵⁰

Significantly for purposes of this Article, the emerging Jewish legal system also was directly impacted by Hellenistic culture. Professor Elias Bickerman, a noted authority on the Jews of the Hellenistic period, has documented extensively this influence. Bickerman notes that the initial accommodation of Hellenistic civilization to the Written Law was begun by the Maccabees,⁵¹ who ruled from around 163–42 B.C.E.⁵² One prominent example of the Maccabees’ imitation of their Hellenistic enemies at the expense of traditional Jewish practice was the establishment and addition of the Hanukkah holiday to the Jewish calendar, marking their reclaiming the Temple from the Seleucids and its subsequent re-dedication.⁵³ This addition was a departure from Jewish practice since Hanukkah is not mentioned in the canonical Bible.⁵⁴

The reforms of the Pharisaic sect in the post-Maccabean period essentially shaped the religion as it is practiced in many quarters even today.⁵⁵ The Pharisees emphasized the construction of a system of norms of holiness rather than the Biblical period’s emphasis on public institutions such as the Temple and the priesthood. They stressed “the personalization of Judaism, the construction of a system of norms

48 Gruen, *supra* note 11, at 79.

49 *Id.* at 90.

50 *See id.* at 78-79. This translation is known as the Septuagint. Although historians explain the creation of the Septuagint as discussed in the text, some classical Jewish sources provide a different picture. *See* AMMIEL HIRSCH & YOSEF REINMAN, ONE PEOPLE, TWO WORLDS 188 (2002) (quoting Josef Reinman) (asserting that the Septuagint was the result of Egyptian King Ptolemy’s order to translate the Torah into Greek around 250 B.C.E.; Reinman claims this event is “recorded as an awful tragedy in Megillat Taanit, composed during Mishnaic times, not more than a century or two after the fact”).

51 *See* ELIAS BICKERMAN, FROM EZRA TO THE LAST OF THE MACCABEES 160 (Schocken Books 1962) (1947); *see also* Meyers, *supra* note 37, at 143–44 (explaining that “the Maccabees themselves were not immune to Hellenistic influences”).

52 *See* Meyers, *supra* note 37, at 143.

53 *See id.* at 144-45.

54 *See id.* at 145.

55 *See* BICKERMAN, *supra* note 51, at 160.

of holiness—and a promise of salvation—addressed not only to the collective, but to the individual as well.”⁵⁶ In other words, the Judaism characteristic of the Pharisees’ model “centered not around the Temple, but around the table, where all could eat like priests, and the school, where their dual Torah—the written and the oral—was taught.”⁵⁷

From a cultural analysis standpoint, it is worth noting that the Pharisaic model was a very democratic one in that it required participation by everyone, not just the priests.⁵⁸ Further, one’s knowledge of the Torah, rather than one’s social station, determined whether one could be qualified for membership in the rabbinic profession.⁵⁹ In this sense, therefore, “the Pharisaic program foreshadows one of the basic features of modern democratic theory.”⁶⁰ More significantly, Bickerman notes that the Pharisaic goal of bringing the Torah to everyone, and the concept that “piety was teachable and to be attained only through teaching,” was a Platonic concept.⁶¹ According to Bickerman, Hellenism introduced “the first epoch of general popular education in the Occident” and afforded citizenship rights “only after a sort of ‘proficiency test’ was passed.”⁶²

As was true of the rabbinic tradition throughout its history, these outside concepts were imported into Judaism but reworked so as to comply with the precepts of the tradition. In other words, the rabbis operated within a paradigm that emphasized discontinuity within the tradition of continuity. Thus, the Pharisees emphasized the importance of everyone learning Torah in order to fulfill the prefatory command to the Revelation on Sinai: “Ye shall be unto Me a kingdom of priests, and a holy nation.”⁶³

Further, in stressing the importance of global education, the Pharisees added to the Written Law. This model was in contrast to that of their rival sect, the Sadducees, who wished to continue the norms of the Biblical period and objected to the incorporation of anything outside of the Written Law. According to Bickerman, “the Phar-

56 Jonathan S. Woocher, *Sacred Survival* 158 (1986).

57 *Id.*

58 See Judah Goldin, *The Period of the Talmud*, in 1 *THE JEWS* 119, 157 (Louis Finkelstein ed., 4th ed. 1970) (noting that the law was not just for the priests but for the entire “house of Jacob”).

59 See Gerson D. Cohen, *The Talmudic Age*, in *GREAT AGES AND IDEAS OF THE JEWISH PEOPLE* 141, 165, 187 (Leo W. Schwarz ed., 1956).

60 *Id.* at 187.

61 BICKERMAN, *supra* note 51, at 162.

62 *Id.*

63 *Id.* at 163; see also *Exodus* 19:16.

isaic idea of education promoted the tendency to develop the Torah as time and circumstances demanded."⁶⁴ Moreover, this remarkable concept of setting the "halakhah alongside the written law is again Greek."⁶⁵ Bickerman has observed:

It is the concept of the "unwritten law" (*agraphos nomos*), which is preserved not on stone or paper but lives and moves in the actions of the people. But whereas in the Greek world this notion often served to negate the written law, Pharisaism used the oral law to "make a fence for the Torah."⁶⁶

Some scholars assert that the Pharisees unilaterally created a "chain of tradition" stretching back to Moses, through which the rabbis traced the lineage of their authority.⁶⁷ The Mishnah provides that Moses received the Law from God on Sinai, and it was transmitted throughout the generations to specific men of learning, culminating in the "men of the Great Synagogue."⁶⁸ Judaic Studies professor Eric Meyers has observed that this Pharisaic tradition is "closely related to the Hellenistic philosophical schools that traced their lineage back to Plato himself."⁶⁹ Meyers also has noted that the Pharisees even imitated Greek legal hermeneutics in their interpretation of the Oral Law.⁷⁰ According to the Jewish tradition, the Oral Law is believed to contain specific hermeneutic rules as to how the early Sages could derive Torah laws. The standard hermeneutical method is embodied in the thirteen principles attributed to Rabbi Ishmael, whose life spanned the first and second centuries of the Common Era.⁷¹ In fact, these thirteen principles are recited every day by observant Jews dur-

64 BICKERMAN, *supra* note 51, at 163.

65 *Id.*

66 *Id.* at 163-64.

67 See DAVID WEISS HALIVNI, *MIDRASH, MISHNAH, AND GEMARA* 47 (1986) (observing that this "chain of tradition" was composed "around the first quarter of the second century for the purpose of strengthening [the Sages'] authority, showing themselves to be direct successors of Moses, who received the Torah from Sinai").

68 Mishnah, *Avot* 1:1.

69 Meyers, *supra* note 37, at 167. Meyers also notes that this chain of tradition became transformed "from the succession list of a particular school of rabbinic thought and practice . . . to the guarantor of the sole legitimacy of the 'universal' rabbinic leadership," an innovation that occurred "roughly parallel in time to the second-century invention of the 'apostolic succession' among Catholic Christians." *Id.*

70 See *id.* at 170.

71 See MOSES MIELZINER, *INTRODUCTION TO THE TALMUD* 127 (1997); see also HERMANN L. STRACK, *INTRODUCTION TO THE TALMUD AND THE MIDRASH* 25 (Varda Books 2004) (1931) (noting that the attribution of these thirteen rules to Rabbi Ishmael is historically inaccurate since this framework was developed centuries later).

ing the morning service.⁷² Meyers notes that the thirteen principles associated with Rabbi Ishmael, along with “other related legal forms of Talmudic literature have their precise parallels in Greek legal hermeneutics.”⁷³ Indeed, Talmud professor Saul Lieberman’s extensive study of the Hellenistic influences in Palestine during this period explained that the rabbis invoked the interpretative strategies accepted in the civilized world at this time so that their methods would be “understood and appreciated by their contemporaries.”⁷⁴

From a theological perspective, Hellenism also played a part in the Pharisees’ development of a new spiritual agenda. Bickerman credits Josephus Flavius, the Jewish historian who lived during the first century C.E., with the observation that “the Pharisaic doctrine of the future life derives from the Greek teaching of the Pythagoreans.”⁷⁵ The Hellenistic world popularized the notion that evil on earth can be explained by rewards and punishments that would become operative after death. This idea was foreign to the Bible. The Pharisees adopted the Hellenistic doctrine of resurrection but gave it a spin that was consistent with the Torah. Thus, whereas “among the Pythagoreans each soul must automatically return to new life after death, each according to its merit. . . . [T]he Pharisees substituted the single event of the Last Judgment, whose day and scope God would determine”⁷⁶ Thus, the Pharisaic Sages “dovetailed the new Hellenistic idea into the structure of biblical ideas,” and forged a doctrine that developed into a stable of Jewish belief.⁷⁷ Again, the operative theme is discontinuity within continuity.

Another paradigmatic example of rabbinic innovation following the destruction of the Second Temple is the re-creation of the Passover Festival. Talmud professor Baruch Bokser emphasized how Passover became the paradigm for the creation of new, discontinuous religious measures that nonetheless traced their roots to the Biblical

72 Moses Mielziner discussed the origin and content of these principles at length in his book, *Introduction to the Talmud*. He notes that as long as the validity of the Oral Law was not in question, there was no need to tie it to particular scriptural authority. Over time, however, a philosophy began to spread which rejected everything that was not based upon Scripture. As a result, a perceived need emerged to ground the authority for the Oral Law in the Written Law. See MIELZINER, *supra* note 71, at 120.

73 Meyers, *supra* note 37, at 170; see SAUL LIEBERMAN, *HELLENISM IN JEWISH PALESTINE* 55–64 (1994).

74 LIEBERMAN, *supra* note 73, at 78 (noting this similarity also extended to interpretations of dreams).

75 BICKERMAN, *supra* note 51, at 165.

76 *Id.*

77 *Id.*

period.⁷⁸ One aspect of this re-creation that is particularly relevant concerns the possible Hellenistic influence on the re-creation of the seder. In the Bible, the Paschal sacrifice is depicted as the basis for a family meal. In chapter twelve of Exodus, the text states that each family is to slaughter its own lamb unless the household is too small.⁷⁹ In that case, one household can share the lamb with a neighbor dwelling nearby.⁸⁰ In the times of the early rabbis, however, the Greco-Roman tradition of symposia and banquets, with their emphasis on intellectual discourse, may have influenced the development of the seder's focus on storytelling and discussion. The Bible requires parents to instruct their children with respect to the Passover rite. For example, Exodus states: "And when your children ask you, 'What do you mean by this rite?' you shall say, 'It is the Passover sacrifice to the Lord, because He passed over the houses of the Israelites in Egypt when He smote the Egyptians, but saved our houses.'⁸¹ In this regard, the requisite textual instruction pertains to the Paschal sacrifice itself rather than to the narrative of the Exodus that is the focus of the seder.⁸² Although Bokser concludes that "the seder's intellectual dimension does not have a simple linear relation to the Bible," or to the Greco-Roman symposia,⁸³ there is a level at which the rabbis began with the family meal delineated in the Bible and adapted it to their current situation by infusing it with a new meaning that was appropriate to their political and cultural milieu.

As the above discussion illuminates, the rabbis of this period were masters of creating new, discontinuous approaches that nonetheless maintained an authentic connection to the past. Rabbi Eugene Borowitz captured the essence of rabbinic Judaism with the following observation: "The rabbis' theological creativity operates mainly in their reshaping of the multitudinous ideas and images of biblical belief. In this process they continue the millennial Jewish experience of reinterpreting the covenant as times change and as their own intel-

78 See BARUCH M. BOKSER, *THE ORIGINS OF THE SEDER* 8 (1984).

79 *Exodus* 12:3-4.

80 ETZ HAYIM 381 (David L. Leiber et al. eds., Rabbinical Assembly 2001) (providing English translation of *Exodus* 12:3-4).

81 *Id.* at 386 (corresponds to *Exodus* 12:26-27).

82 Bokser indicates the instruction is concerned with the rite of placing blood on the doorposts and lintel that accompanied the Passover sacrifice. BOKSER, *supra* note 78, at 12; see also *Exodus* 12:7 ("They shall take some of the blood [of the sacrifice] and put it on the two doorposts and the lintel of the houses in which they eat it."). According to a commentary in the *Etz Hayim*, this instruction pertains to the Passover offering rather than the blood on the doorposts and lintel. ETZ HAYIM, *supra* note 80, at 386 n.24.

83 BOKSER, *supra* note 78, at 12.

lectuality and religious sensitivity demand.”⁸⁴ This reinterpretation emerged in Jewish Palestine, which provided “a fertile setting for a constructive symbiosis between Jewish and Hellenistic cultures.”⁸⁵ The leaders of the Jews in Hellenistic Palestine saw “no inherent contradiction between a Hellenized lifestyle and a Jewish practice.”⁸⁶ Thus, “the presence of mythological Greek images on the sarcophagi of the Sages suggests that burial in such containers did not contradict rabbinical Judaism.”⁸⁷ Eric Meyers notes that “the manner in which the Jews accommodated” to living in the Hellenistic world culture “became the paradigm for future accommodation to other major world civilizations, such as Rome, Byzantium, Islam, and Christianity.”⁸⁸

D. Other Cross-Cultural Influences on the Early Law: Babylonia

As a general matter, with respect to social and professional interaction between Jews and others, the Babylonian environment demanded less caution on the part of the rabbis than the more overwhelming Hellenistic culture.⁸⁹ This distinction manifested itself in somewhat divergent legal positions. For example, whereas the Mishnah that was produced in Palestine prohibited business transactions with idolaters for three days preceding their heathen festivals,⁹⁰ the Babylonian Talmud only forbid such activity on the actual day of the festival.⁹¹ This distinction could well be attributed to the diminished fear on the part of the Babylonian Sages that the Jews would become involved in local cultic worship.⁹²

Another area in which the local Babylonian culture exerted an influence on the content of the Babylonian Talmud, thus differentiating it from the Jerusalem Talmud, concerns the extent to which each one discusses angels and demons. The Babylonian Talmud contains numerous narratives concerning angels and demons in contrast to the relative lack of such narratives in the Jerusalem Talmud. This can be explained by the heavy Iranian and Zoroastrian influence on Babylo-

84 Eugene B. Borowitz, *Judaism: An Overview*, in JUDAISM 3, 13 (Robert M. Seltzer ed., 1987).

85 Meyers, *supra* note 37, at 174.

86 *Id.* at 161.

87 *Id.* at 171.

88 *Id.* at 136.

89 See Gafni, *supra* note 11, at 239-40; *supra* notes 38-39 and accompanying text.

90 See MISHNAH, *Avodah Zara* 1:1-2. For a modern commentary on this practice, see EISEN, *supra* note 41, at 37-38.

91 See BABYLONIAN TALMUD, *Avodah Zara* 11b.

92 See Gafni, *supra* note 11, at 243.

nian culture.⁹³ In discussing the more substantial preoccupation in the Babylonian Talmud with the belief in spirits, Jewish History Professor Isaiah Gafni posited that "when we encounter fairly obvious affinities of expression or behavior between Babylonian Jews and their Persian neighbors, with no parallel expression anywhere in Palestinian rabbinic literature, the likelihood of an internal Iranian process of acculturation is at least partially enhanced."⁹⁴ He also observes that "in the Babylonian rabbinic corpus . . . we sense a true affinity to specific demonological images prominent in Iranian religious thought."⁹⁵ Although the Sages were uncomfortable with demonology, their literature shows that they did not refrain from addressing the realities of the culture in which they lived.⁹⁶

Less exotic differences also exist in the legal content of the two Talmuds that are most likely attributable to other cultural differences between Babylonian and Palestinian society. For example, consider the law concerning deathbed gifts, known as gifts *causa mortis*. Both Talmuds accept the Palestinian Mishnaic law that a sick man can give away his entire estate, but then retract this gift if he recovers. The Mishnah does provide, however, that the gift is not revocable if the giver sets aside sufficient land to support himself.⁹⁷ One section of the Jerusalem Talmud, produced in an agricultural society, states that if one reserves movable property (as opposed to land), it is as though the giver parted with everything and therefore can revoke the gift.⁹⁸ In contrast, according to the Babylonian Talmud, which is the product of a more commerce-oriented society, there is an opinion that the type of property reserved does not make a difference with respect to this position.⁹⁹

One of the most significant principles explaining the survival of Judaism can be derived from a third-century Babylonian Sage, Samuel, to whom the famous maxim "the law of the kingdom is law"

93 LOUIS GINZBERG, *An Introduction to the Palestinian Talmud*, in LOUIS GINZBERG, *ON JEWISH LAW AND LORE* 3, 22 (Atheneum 1981) (1955); Gafni, *supra* note 11, at 244-50.

94 Gafni, *supra* note 11, at 244.

95 *Id.*

96 *See id.* at 250.

97 *See* MISHNAH, *Baba Batra* 9:6.

98 *See* JERUSALEM TALMUD, *Baba Batra* 29a (quoting R. Jeremiah in the name of Rab). This view appears to be questioned, however, in another section of the Jerusalem Talmud. *See* JERUSALEM TALMUD, *Pe'ah* 18a.

99 *See* BABYLONIAN TALMUD, *Baba Batra* 149b. The distinction discussed in the text between the Jerusalem and Babylonian Talmuds is also discussed in GINZBERG, *supra* note 93, at 18.

(*dina de-malekhutha dina*) is attributed.¹⁰⁰ Although the original context of this principle in the Babylonian Talmud largely concerned the government's right to enforce tax collection,¹⁰¹ this principle "ultimately attained a sweeping political significance for the totality of Jewish Diaspora life."¹⁰² Jacob Katz has written that this principle, which "meant that legal rulings of non-Jewish origin [also] were regarded as valid within the Jewish system," became an essential ingredient in the preservation of Jewish law because "it served as a method of adaptation to the requirements of the non-Jewish environment."¹⁰³

Ultimately, the rabbinic culture that emerged in Babylonia, rather than Palestine, had the greatest impact on the development of Jewish law throughout the centuries to come. The rabbis who lived in Babylonia during the early centuries of the Common Era crafted and propagated "a self-image that would project this culture as being the embodiment of the one unique and ancient model of true, unadulterated Israelite tradition, with uncontaminated roots going back to First-Temple Jerusalem and the days of the prophets."¹⁰⁴ By the end of post-Talmudic times, these Sages succeeded "in securing a near-universal acceptance of their Babylonian Talmud as the definitive expression of rabbinic Judaism."¹⁰⁵

III. BEYOND THE TALMUDIC PERIOD TO MODERN CHALLENGES

David Biale has written that "[f]or every period of history, interaction with the non-Jewish majority has been critical in the formation of Jewish culture."¹⁰⁶ As discussed above, the Jews of the Hellenistic Diaspora redefined their heritage "in terms of the Hellenistic culture" and "strove to present Judaic traditions and express their own self-definition through the media of the Greeks—and to make those media their own."¹⁰⁷ This pattern was continuously repeated throughout the centuries and in different locations.

The Jewish Middle Ages can be defined as the period spanning the seventh to the eighteenth centuries. The Emancipation of the Jews and the beginning of modernity tends to mark the end of this time frame. Significantly, by the beginning of this period, the Talmudic literature produced in both Palestine and Babylonia informed

100 See Gafni, *supra* note 11, at 224-25.

101 See *id.*; e.g., BABYLONIAN TALMUD, *Baba Batra* 54b.

102 Gafni, *supra* note 11, at 225.

103 JACOB KATZ, EXCLUSIVENESS AND TOLERANCE 54 (1961).

104 Gafni, *supra* note 11, at 253.

105 *Id.*

106 Biale, *supra* note 47, at xx.

107 Gruen, *supra* note 11, at 80.

the dominant mode of Jewish practice.¹⁰⁸ During this period, Jewish law and culture developed initially in Islamic and later in Christian environments.¹⁰⁹ In the Muslim Mediterranean basin, all Jews—from the rabbis to their dissenters—adopted Arabic language and culture just as the earlier Jews of Palestine embraced Greek culture by both owning and transforming it.¹¹⁰ Saadia Gaon, who lived in Babylonia under Muslim rule during the ninth and tenth centuries, translated the Bible into Arabic and thus “helped to accelerate the process of the adaptation of rabbinic Judaism to the canons and tastes of intellectual Arabic society.”¹¹¹ Moses Maimonides, one of the most renowned Jewish philosophers, also was a product of Islamic culture. In discussing the environment during which Maimonides lived in the twelfth century, Professor Menachem Kellner, a scholar of medieval Jewish philosophy, observed:

Just as today many Jews, even those learned to one degree or another in Judaism, use essentially alien categories in their own understanding of Judaism . . . , so Maimonides' audience lived in a culture suffused with elements of Greek and Muslim thought and very likely understood at least portions of their own faith in terms of categories borrowed from the host society.¹¹²

Professor Bernard Lewis, a scholar of Oriental Studies, has observed that during the Middle Ages, Jewish law was heavily influenced by the mores and norms of the dominant Islamic and Christian cultures. Further, differences in these respective cultures impacted Jewish law in different ways. He illustrates this general point by looking to the law of marriage:

One of the clearest and most striking differences between Christian and Islamic usage is that while Islam permits polygamy and concubinage, Christianity bans both. In the Christian world the Jews adopted and practiced monogamy to the point of making it a rule of law; in the Muslim world most Jewish communities practiced, or at least permitted, polygamy and concubinage until almost the present day.¹¹³

108 David Biale, *Introduction to Part Two: Diversities of Diaspora*, in *CULTURES OF THE JEWS*, *supra* note 11, at 305, 305.

109 *Id.*

110 See generally Raymond P. Scheindlin, *Merchants and Intellectuals, Rabbis and Poets: Judeo-Arabic Culture in the Golden Age of Islam*, in *CULTURES OF THE JEWS*, *supra* note 11, at 313, 313–82 (examining developments in fields such as poetry, scholarship, language, and religious life).

111 COHEN, *supra* note 44, at 153.

112 MENACHEM KELLNER, *DOGMA IN MEDIEVAL JEWISH THOUGHT* 45 (1986).

113 BERNARD LEWIS, *THE JEWS OF ISLAM* 82 (1984).

The influence of Christianity was particularly prominent among European Jews during the Middle Ages. As early as the ninth century, small groups of Jews migrated from Italy to France and Germany. These groups ultimately grew into the prominent Ashkenazic Jewish culture of Northern, and eventually Eastern, Europe.¹¹⁴ The Ashkenazic Jews developed their culture and ritualistic laws in the High Middle Ages within the milieu of Christianity, resulting in an interesting process that involved both borrowing and polemics, a process termed "inward acculturation" by Jewish history and religious studies professor Ivan Marcus.¹¹⁵ These Jews responded to persecutions and the ensuing pogroms "by developing a cult of martyrdom and rituals to memorialize the dead, elements of which they adapted from Christian imagery."¹¹⁶

With respect to adherence to the ritualistic precepts of the tradition, once again the halakhists of this period sought "to justify the legality of the adjustments in terms of the ancient tradition" so that although there were deviations from older practices, "Jewish life was made to appear as a continuation of that of earlier times."¹¹⁷ In this sense, therefore, the function of Jewish law was to balance "the necessity for adjustment to new conditions and the preservation of Jewish identity."¹¹⁸ One interesting example of this process involves the rabbinic inclination to permit trading in wine prepared by Gentiles, while maintaining the prohibition against personal consumption of such beverages. The rationale behind this distinction was the socio-economic reality that "the use of wine for business was an economic necessity, and to grant permission for this purpose did not imply any social contact with non-Jews,"¹¹⁹ which, it was feared, would lead to intermarriage. Nevertheless, the Talmudic prohibition is clear in that it applies to both trading and consumption.¹²⁰

Another interesting example of this process involves the prohibition of interest. The Five Books of Moses contain three separate prohibitions outlawing lending with interest.¹²¹ Rabbi Hillel

114 See Biale, *supra* note 108, at 306.

115 Ivan G. Marcus, *A Jewish-Christian Symbiosis: The Culture of Early Ashkenaz*, in *CULTURES OF THE JEWS*, *supra* note 11, at 449, 461.

116 Biale, *supra* note 108, at 306-07; see also MARK R. COHEN, *UNDER CRESCENT AND CROSS 174-75* (1994) (discussing the origins of the Ashkenazic Jewish tendency toward martyrdom).

117 KATZ, *supra* note 103, at 45-46.

118 *Id.* at 46.

119 *Id.* at 46-47.

120 See *id.* at 46 ("The Talmudic sources do not make any distinction between the Gentile's wine as an object of trade and as a commodity for personal consumption.").

121 See *Exodus* 22:25; *Leviticus* 6:36; *Deuteronomy* 23:20.

Gamoran's extensive scholarly treatment of these prohibitions and their historical interpretations notes that these Biblical prohibitions must be understood in the context of protections for the poor rather than regulation of commerce.¹²² Although the Mishnah also prohibits credit sales,¹²³ the Sages were already finding ways to circumvent the prohibition and allow for the development of trade and commerce.¹²⁴ Additional latitude was developed later in Talmudic times.¹²⁵ As was the case with trading in wine by Gentiles, by the Middle Ages the Rabbis had significantly loosened the strictures concerning buying on credit in order to legalize the practices of the people and to allow Jewish law to coexist with the economic realities of the times.¹²⁶ Very simply, the Jewish people "lived in a credit society" and "[t]o abandon interest would imperil their livelihoods."¹²⁷ As was the case throughout history, the problem was solved through creative legal interpretation.

Both the medieval, and later the modern, centuries manifested the same type of cultural exchange between the Jews and their host cultures as occurred during the Talmudic period. This reality "demonstrates how the culture of a minority group like the Jews can never be separated from that of the majority surrounding it."¹²⁸ The process, repeatedly, was a complex one that mediated between "adaptation and resistance."¹²⁹ This adaptation also produced a wide range of divergent religious practices and customs.¹³⁰ Yet, despite the existence of a wide range of religious practice and customs among the Jews as a whole during this time, there remained a remarkable uniformity of legal practice which served as a "testimony not only to the power of the classical texts but also to the authorities who were its custodians."¹³¹ In his study of the early modern period, Dean Bell

122 HILLEL GAMORAN, *JEWISH LAW IN TRANSITION* 5–8 (2008).

123 See, e.g., MISHNAH, *Bava Metsia* 5:2.

124 See GAMORAN, *supra* note 122, at 20 (noting that "if the 'regular' price of the goods already included the cost of credit, then the transaction was allowed").

125 See *id.* at 31, 66 (discussing the complicated and not completely defined Talmudic concept of the *tarsha* as a means of circumventing the prohibition on interest).

126 See *id.* at 62–93.

127 *Id.* at 179.

128 Biale, *supra* note 47, at xx.

129 *Id.* at xix.

130 One division familiar to many Jews even today is that of the Ashkenazic Jews and their Sephardic brethren, whose roots can be traced to the Iberian Peninsula in the period preceding the Expulsion of the Jews from Spain. See generally Benjamin R. Gampel, *A Letter to a Wayward Teacher: The Transformations of Sephardic Culture in Christian Iberia*, in *CULTURES OF THE JEWS*, *supra* note 11, at 389.

131 Biale, *supra* note 108, at 309.

remarked that “Jews appear to have had a remarkable ability to engage the world around them,” to adapt to the majority’s customs while infusing them with Jewish meaning, and to retain their own religion.¹³²

Thus, although the Jews incorporated and revamped aspects of their surrounding culture throughout history, up until the Emancipation they adhered to their practices and maintained true to their religious heritage. Jacob Katz, in his study of the Jews between the years 1770 and 1870, noted that in the early part of this period, the Jews were still socially and culturally isolated, tightly organized, and relied on their religion “as a mighty force for unification.”¹³³ By the second half of the nineteenth century, however, Jews were no longer culturally isolated; the economic isolation was ameliorated if not completely gone; and they “were divided among themselves in point of religion.”¹³⁴ Significantly, however, Jews still adhered to the practice of maintaining “exclusively Jewish family ties.”¹³⁵

The situation facing American Jewry today is distinct from any other period in history. Although a comprehensive analysis of this phenomenon and its causes are beyond the scope of this Article, a few brief comments concerning the relationship between American Jews, their religious practices, and their relationship to the majority culture are in order. Sociologists of American Judaism stress the importance of the term “coalescence” in understanding the current unique milieu. Sylvia Fishman describes the process of “coalescence” in the following manner: “For most American Jews today, the distinction between what is Jewish and what is American is not recognized. . . . Rather, in many ways the boundaries have disappeared and the two belief systems have merged into one coalesced whole widely known as ‘Judaism.’”¹³⁶

In other words, “coalescence” occurs when the American and Jewish values have become so blended that even knowledgeable American Jews no longer recognize the distinct origins of these value sys-

132 DEAN PHILLIP BELL, *Jews in the Early Modern World* 232 (2008). Note that the entire process of the development of Jewish law over time and space reveals a focus on stages seven and eight in the paradigm identified by Keith Sawyer in his paper on creativity. R. Keith Sawyer, *The Western Cultural Model of Creativity*, 86 *NOTRE DAME L. REV.* 2027 (2011). Specifically, Jewish Law reveals a marked tendency to both select the best ideas of potential solutions and externalize these ideas. See *id.*

133 KATZ, *supra* note 25, at 213.

134 *Id.* at 213-14.

135 *Id.* at 214.

136 SUSSER & LIEBMAN, *supra* note 42, at 77 (alteration in original) (quoting SYLVIA BARACK FISHMAN, *NEGOTIATING BOTH SIDES OF THE HYPHEN* 40 (1996)).

tems.¹³⁷ Thus, the concept of “coalescence” embodies far more than just the borrowing, and refashioning, from other cultures that characterized the behavior of Jewish communities historically.

The problem presented by the “coalescence” phenomena is not so much the cultural fluidity resulting in evitable borrowing by Judaism from the American culture, but rather the Jewish illiteracy on the part of American Jewry, which prevents recognition of the distinct nature of the American and Jewish value systems. Jonathan Woocher, the intellectual force behind the Jewish Education Service of North America, clearly acknowledges the “coalescence problem” with the following observation: “For large numbers of Jews, the boundaries separating them from the larger American society and culture have collapsed to the point where their Jewishness and Americanness are not only compatible but virtually indistinguishable (at least in their minds).”¹³⁸ Today, the vast majority of American Jews have lost not only the knowledge of what it means to be Jewish, but also the interest in reclaiming this knowledge. Judaism today is viewed largely as a matter of personal choice, both in terms of how and even whether to practice the religion.¹³⁹ This phenomenon mirrors the Internet generation’s more generalized obsession with personalized experiences across the board—from clothing to media.¹⁴⁰ Significantly, however, this emphasis on personal autonomy is completely at odds with the Jewish tradition and its worldview.

An understanding of the process of creativity in the development of Jewish law can be an important antidote to this dilemma. Those who understand the foundational pattern of the development of Jewish law throughout history will gain a better appreciation for why the situation facing American Jews today represents a marked departure from prior times. This understanding will, in turn, facilitate a

137 See Byron L. Sherwin, *The Assimilation of Judaism: Heschel and the ‘Category Mistake,’* JUDAISM, Fall/Winter 2006, at 44.

138 Jonathan Woocher, “*Sacred Survival*” Revisited: *American Jewish Civil Religion in the New Millennium*, in THE CAMBRIDGE COMPANION TO AMERICAN JUDAISM 283, 284 (Dana Evan Kaplan ed., 2005).

139 At the 2005 Lay Leaders Retreat at the Shalom Hartman Institute in Jerusalem, founder David Hartman observed that Judaism now is viewed as a matter of choice and must compete with other alternatives that are viewed as equally appealing. The statistics furnished by Bruce Phillips support this position. See Bruce Phillips, *American Judaism in the Twenty-First Century*, in THE CAMBRIDGE COMPANION TO AMERICAN JUDAISM, *supra* note 138, at 397, 411–13; see also AKIVA TATZ & DAVID GOTTLIEB, *LETTERS TO A BUDDHIST JEW* (2004) (discussing the appeal of Buddhism for many Western Jews).

140 See Nick Bilton, *A Tech World that Centers on the User*, N.Y. TIMES, Sept. 13, 2010, at B1.

stronger understanding of the increasingly complex issue of Jewish survival in the face of escalating assimilation and arguable attrition of the Jewish worldview.

CONCLUSION

The historical pattern of creativity in Jewish law's development may not be viable in today's American society given the prevalence of the coalescence phenomenon characteristic of Jews in the United States. Specifically, the boundaries that always have been critical to the framework of Jewish law and identity have been blurred beyond recognition. Therefore, many current innovations to Jewish law encouraged by the liberal movements may simply be outside of the framework of the tradition's boundaries. On the other hand, the resistance to innovation characteristic of less liberal groups also may be inconsistent with the historical flexibility and adaptation manifested by the tradition.¹⁴¹ What this means for the future of American Judaism is unclear, but it is a cause for concern among those who take the continuity of the tradition seriously.

In navigating these extraordinarily difficult waters, I believe the invocation of a cultural analysis paradigm is a promising way of explaining why Jewish law, and Jewish education, matters to those interested in Jewish survival. A cultural analysis paradigm facilitates an understanding of how an evolving yet traditionally inspired Jewish law can maintain authenticity of the Jewish worldview in modernity.

141 For an exploration of modernity's resistance to fluidity in a very different context, see Funmi Arewa's discussion of sacrilization in connection with opera arias in Olufunmilayo Arewa, *Creativity, Improvisation, and Risk Copyright and Musical Innovation*, 86 NOTRE DAME L. REV. 1829 (2011).

