LAW AS A PRISM INTO NATIONAL IDENTITY: THE CASE OF MISHPAT IVRI

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* Associate, Dechert LLP. J.D., University of Pennsylvania Law School, 2016. Thank you to William Ewald and Shahar Lifshitz for their guidance and helpful suggestions. David Engel, Jeffrey Rubenstein, and David Stern for all that they have taught me about Jewish History, and Gabriel Slamovits for his helpful editing and suggestions. My gratitude to my parents, Myer and Janis Roszler, for all of their love and encouragement. In memory of my grandfather, Robert A. Cohn.
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1. INTRODUCTION

In 2014, the Israeli Knesset debated the so-called “nation-state” bill of Israel.1 If it were to pass, it would have become a Basic Law, the Israeli equivalent of a constitution.2 However, the bill encountered much resistance, particularly from the center and left of the country. Among the opponents’ complaints was the bill’s definition of Israel as “the Nation state of the Jewish people.”3 They argued that it would give precedence to Jewish needs over minorities.4 As one observer noted, Israel’s courts and laws have consistently defined Israel as ‘Jewish and democratic,’ giving equal weight to both, and on paper, at least, the Arab Israelis . . . To go back and emphasize nationality and religion in defining the country, moreover, runs counter to the long-term movement among liberal democracies toward a more inclusive vision of a state.5

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1 A watered down nation-state bill is still currently being discussed in the Knesset, although no timetable has been given for a vote on it. Jonathan Lis, Netanyahu Instructs Cabinet Ministers Not to Vote on Nation-state Bill, HAARETZ (Oct. 24, 2015), [https://www.haaretz.com/israel-news/.premium-1.682143](http://www.haaretz.com/israel-news/.premium-1.682143).The Basic Laws were initially to be used as blue prints for an eventual constitution; however, infighting prevented a constitution from being created. See Daphne Barak-Erez, From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective, 26 COLUM. HUM. RTS. REV. 309, 312-13 (1995) (detailing the history of the Basic Laws). Starting in the 1980s, the Israeli Supreme Court, headed by then Chief Justice Aharon Barak, established the Basic Laws to be the supreme law of the land. See CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village, PD 49(4), 221 (1995) (Isr.) (holding that the Basic Laws give the Supreme Court the right to invalidate Knesset legislation). See generally Aharon Barak, The Role of the Supreme Court in a Democracy, 3 ISRAEL STUD. 1, 10 (1998) (“Israel not only has a defacto constitution, it also has a formal constitution. This is the document or set of documents that anchor, through their requirements, a defacto constitution. There is currently full realization of the existence of a formal constitution in Israel. These are the eleven ‘basic laws’ of Israel.”).

2 Isabel Kershner, Israeli Cabinet Approves Nationality Bill, N.Y. TIMES (Nov. 23, 2014). [https://www.nytimes.com/2014/11/24/world/middleeast/israeli-cabinet-backs-nationality-bill-that-risks-wider-rift-with-arab-minority.html](https://www.nytimes.com/2014/11/24/world/middleeast/israeli-cabinet-backs-nationality-bill-that-risks-wider-rift-with-arab-minority.html). The Basic Laws were initially to be used as blue prints for an eventual constitution; however, infighting prevented a constitution from being created. See Daphne Barak-Erez, From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective, 26 COLUM. HUM. RTS. REV. 309, 312-13 (1995) (detailing the history of the Basic Laws). Starting in the 1980s, the Israeli Supreme Court, headed by then Chief Justice Aharon Barak, established the Basic Laws to be the supreme law of the land. See CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village, PD 49(4), 221 (1995) (Isr.) (holding that the Basic Laws give the Supreme Court the right to invalidate Knesset legislation). See generally Aharon Barak, The Role of the Supreme Court in a Democracy, 3 ISRAEL STUD. 1, 10 (1998) (“Israel not only has a defacto constitution, it also has a formal constitution. This is the document or set of documents that anchor, through their requirements, a defacto constitution. There is currently full realization of the existence of a formal constitution in Israel. These are the eleven ‘basic laws’ of Israel.”).


4 Id.

5 The Editorial Board, Israel Narrows its Democracy, N.Y. TIMES (Nov. 24, 2014).
While supporters argued the bill was needed in order to show that Israel was a Jewish state, that argument rang hollow, as two Basic Laws – Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation – define Israel as a “Jewish and democratic state.”

The 2014 debate underlies a major tension within Israeli society, namely, what exactly is the interaction between a Jewish and a democratic state? Does one have precedence over the other? While this issue has been argued in many contexts, the one I focus on is the debate surrounding the use of Mishpat Ivri in Israel. As will be explained below, the Mishpat Ivri movement started in the late nineteenth century as an attempt to adopt a secular version of Halakhah, Jewish religious law, to govern the state. In many ways, it straddles both sides of a “Jewish and democratic state”; however, it has only been used sparingly. Many have criticized Mishpat Ivri by arguing that Jewish law cannot be the basis of secular law, but its coherence as a legal system is not the focus of this article. Instead, following the work of Paul Kahn’s The Cultural Study of Law, this paper argues that by looking at the debate over the adoption of Mishpat Ivri, one can understand the various difficulties with using Jewish law in a secular state; Bernard Jackson, Mishpat Ivri, Halakhah and Legal Philosophy: Aggadah and the Theory of “Legal Sources,” 1 JEWISH STUD., AN INTERNET J. 69, 69-107 (2002). (arguing that Mishpat Ivri is not a form of positive law); but see Menachem Elon, More About Research Into Jewish Law, in MODERN RESEARCH IN JEWISH LAW, 66 (Bernard S. Jackson ed., 1980) (arguing that Mishpat Ivri is a viable modern legal system). It should also be pointed out that these scholars, particularly Jackson, all have a presumption that Israeli law must conform to western ideas of law. This, however, assumes that Israel, and the Zionist project in general, must do the same. As this paper argues, this assumption is not self-evident and, in fact, is a much debated point within the annals of Zionist philosophical writings.
schisms in Israeli society in the area of self-identity and what a specific, elite subset of Jewish Israelis believe the state of Israel should be. While arguments spanning decades in different contexts are the result of many internal and external factors specific to that time period, I argue that it is possible to see a continuous line of debate that belies an unresolved tension within Zionism that has existed from its inception - whether Israel should be a Western style state run by Jews or a state influenced by Jewish culture and tradition? Part II discusses the theoretical underpinnings of a cultural study of law. Part III details different historical understandings of Zionism and the influence those approaches continue to have on the current debate over Israel’s identity as a Jewish and democratic state. Parts IV and V give a history of the Mishpat Ivri movement pre and post-1980, as well as the debate over whether it should be used or not. Part VI explains why the movement has failed to gain any traction and part VII discusses the broader issue of religious symbols in the secular public sphere in Israel.

2. The Cultural Study of Law

Setting out the parameters of the study, I am aided by the work of Paul W. Kahn’s The Cultural Study of Law. While I do not adopt Kahn’s programmatic suggestions wholesale and his discussion focuses solely on Western law, his approach to a cultural study of law is incredibly useful for this study. Kahn notes that in a cultural study of law, one, “approaches [legal] propositions not from the perspective of validity, but from the perspective of the meaning

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9 It should be noted that both the framing of this question and the answers to it are from the perspectives of a subset of Jewish Israeli intellectuals. It goes without saying that Muslims, Christians, and other religious groups are part of Israel and certainly have different views on the relationship between state and religious culture. However, while their interests may be represented by one or more sides, religious minorities’ specific views on Mishpat Ivri are rarely ever cited, though they are also affected by the outcome of the debate. It should also be noted that I will not be discussing the views of an extreme religious Zionist approach to law, that Israel should be governed by Jewish religious law, not a secularized version. While this approach has many constituents, the fundamental assumptions of the movement differ from the other two in their assumptions about the state. The former sees Israel as a modern country that creates positive law, while the latter sees the state, and Jewish law, as being endowed with religious significance that will eventually lead to the coming of the Messiah. See generally Suzanne Last Stone, Law in the Light of Zionism: A Comparative View, 19 ISRAEL STUD. 111 (2014) (discussing different Jewish groups’ views of law in Israel).
they have for the individual within the community of belief.”

One does not make any truth claims regarding a law, but takes, “the social construction of reality as a given, in order to explore the conceptual and historical conditions of these constructions.” Kahn splits his inquiry into two areas of analysis: genealogy and architecture. Genealogy shows, “how the nature of belief in the rule of law emerges from longer traditions within . . . culture” whereas, architecture marks the current structure of that legal belief. This article, then, will begin by tracing the genealogy of Zionism and the Mishpat Ivri movement in order to help explain the current tension in the architectural self-identity of Israel. In contrast to Kahn who focuses on the general population, I focus on the legal elite, judges who, for the most part, reject the idea of using Mishpat Ivri in their decisions. This, I argue, is part of a tension that has existed within the founding of Zionism that, while never settled, is now clearly skewed toward one pole – political (“Herzlian”) Zionism.

3. ZIONISM – A JEWISH STATE OR A STATE RUN BY JEWS?

In its modern usage, Zionism is synonymous with a movement to create a Jewish homeland in Palestine, a mission first articulated at the Zionist Organization’s first meeting in Basel, Switzerland in 1897. While historically there were, and currently still remain, many different forms of Zionism – political, cultural, religious, revisionist – this paper will focus on the two that have arguably

11 Id. at 34.
12 Id. at 39.
13 Id. at 41; see also id. at 44 (“Not until we place an authoritative command within an historical narrative of the community of which we are a part do we begin to reach the distinctive character of legal rule”). Genealogy also focuses on the geographical boundaries of the law. Id. at 55–56.
14 Id. at 41.
played the largest role in Israel’s self-identity, political and cultural. In its historical context, Zionism was a political solution to an age-old question - how to cope with anti-Semitism? Of course, anti-Semitism (or anti-Judaism) is not a new concept, dating from at the very least to the third century BCE anti-Israelite propaganda of the Egyptian historian Manetho, who believed that the Israelites were a group of exiled Egyptian lepers who went to Palestine and became the Israelites.16 The idea of creating a Jewish homeland is also not new. Its roots stem from the Hebrew Bible with Moses leading the Israelites to Palestine, as well as the Second Commonwealth, which began with Ezra and Nehemiah returning the Israelites to Palestine in the late sixth to early fifth century BCE.17 Jews have been living in Palestine since the fall of the Second Commonwealth in 70 CE and throughout the ages individuals moved there for religious reasons.18 Zionism as a political movement, however, differs from the above religiously motivated treks to Is-

16 See Lucia Raspe, Manetho on the Exodus: A Reappraisal, 5 Jewish Stud. Q. 124 (1998) (discussing Manetho’s version of the Exodus). Manetho actually records two versions of the Jews’ migration to Palestine, the first equates the Israelites with the migration of the Asiatic group known as the Hyksos and the second describes an Egyptian priest named Osarsiph, who changed his name to Moses and led a group of lepers out of Egypt. Id. at 132. Manetho’s original work is lost, but is recorded in Contra Apionem by Josephus, a first century Jewish historian, who wrote the work to combat the first century CE anti-Semitic Egyptian priest Apion. Id. at 142. Jan Assmann has argued that these stories, in fact, have nothing to do with the Exodus and were originally linked to the Egyptian Pharaoh Akhenaton, who created an early type of monotheism, which posited that the sun god, the Aten, was the supreme god. See Jan Assmann, Moses the Egyptian: The Memory of Egypt in Western Monotheism: 30–42 (1997) (detailing how Manetho’s stories are actually a distortion of polemics against Akhenaten). Of course, the term “anti-Semitism” is itself a relatively new phrase that only came into existence when the idea of race and peoplehood started to take hold in popular imagination. Prior to this, “anti-Israelite” and later “anti-Judaism” would be more appropriate terms. The word “anti-Semite” is thought to have been coined by Wilhelm Marr, a German anti-Semite, in his work, Der Weg zum Siege des Germanentum’s über das Judentum (“The Way to Victory of the Germanic Spirit over the Jewish Spirit”) (1880). See Moshe Zimmerman, Wilhelm Marr, the Patriarch of Anti-Semitism 8 (1987) (describing the life of Wilhelm Marr). It also should be noted that pre-World War II, Zionism was not the dominant Jewish response to anti-Semitism. In fact, the Bund, a Jewish socialist society, had the most members. See Abraham Bramberg, Anniversaries in Conflict: On the Centenary of the Jewish Socialist Labor Bund, 5 Jewish Social Studies 196, 205 (1999) (detailing the rise of the Bund).


rael. Its founders were not deeply religious Jews, but Maskilim (lit. "the enlightened"), a group of Jews who believed in adopting secular culture, either in conjunction with or in total replacement of their Jewish identity. They also intended on making a new type of Jew, one who controlled his or her own destiny and was not subject to the whims of monarchs. It would be these Maskilim who would ultimately become the leaders of the fledgling Zionist movement, but not until there was a catalyzing event. While there were precursors to Zionism in the writings of Moses Hess and other proto-Zionists, and the movement itself has intellectual roots in European colonial philosophy, the modern version of political

19 The religious impetus to move to Palestine at the time was a complicated one. The Talmud mandates that, following the destruction of the Second Temple, Jews are prohibited from going back en masse to Palestine. This, however, does not apply to individuals going by themselves. See B. Ketubbot 111a (describing God’s oath to the Israelites that they not return to Eretz Yisrael en masse). However, many religious Jews no longer believe that this law applies. The term “Zionism” was coined by the Jewish nationalist writer Nathan Birnbaum in 1892. See Mitchell Cohen, Zion and State 71 (1987) (explaining the history of the term “Zionism”).


21 The extent that early Zionist calling for legal renewal tried to erase the exilic Jew is a matter of debate between Ronen Shamir and Assaf Likhovski. Compare Ronen Shamir, The Colonies of Law: Colonialism, Zionism, and Law in Early Mandate Palestine 41 (2000) (arguing that the legal renewal was a celebration of the legal past of the Jewish exile that served as a model for the present endeavor), with Assaf Likhovski, Law and Identity in Mandate Palestine 132–34 (2006) (arguing that it was a completely new creation of a secular law that broke with the religious past).


23 The relationship between Zionism and colonialism is a heavily debated topic. Maxime Rodinson has argued that Zionism is a form of settlement-colonialism because there was an indigenous population that was colonized by a European population, who believed they were on a mission to civilize a barren land. See Maxime Rodinson, Israel: A Colonial-Settler State? 36 (David Thorsrud trans., 1973) (describing the colonial background of Zionism); see also Edward Said, The Question of Palestine 56–57 (1979) (describing Zionism as a systematic attempt at colonization). However, there are major points of departure between Zionism and colonialism that make the picture much murkier, including: the lack of a colonizing state (as Jews did not have one before 1948), a historic relationship with the land, original feelings of familial affinity towards the native population, a civilizing mission that was focused internally, and that Jews were, arguably, themselves being colonized by European powers who wanted them to assimilate to European mores. As a result, it has been argued that it is more appropriate to see Zionism as a mixture of colonialism, anti-colonialism, and post-colonialism. See Derek J. Penslar, Israel in History: The Jewish State in Comparative Perspective 90–111 (2007) (arguing that Zionism cannot be purely thought of as a colonial movement).
Zionism began as a reaction to Russian pogroms in 1881.24 Following the assassination of Czar Alexander II in 1881, the Russian population, spurred by the press and deep-seated distrust of Jews, attacked and pillaged Jewish towns in the Pale of Settlement.25 This event caused many Russian Maskilim, originally believers in Jews living side by side with their fellow nationals, to argue that there was no future for Jews in Europe. Thus, Peretz Smolenksin, one of the earliest political Zionists, argued in 1881 that, “[t]hey [the Maskilim], too, were foolish enough to believe that the way of enlightenment would bring them success and honor.”26 He suggested that to fight anti-Semitism, the Jewish population in gentile countries must be substantially reduced and that those who were leaving could only go to one place, Palestine, or in the traditional Hebrew, Eretz Yisrael, for, “no other country in the world is conceivable except Eretz [Y]israel.”27 Another early Zionist was Leon (Leo) Pinsker, the founder of the Hibat Zion (lit. “love of Zion”) movement, the first political Zionist organization, who argued in his magnum opus Auto-Emancipation that without a land of their own, Jews were, “a ghostlike apparition of a people,” who were “nowhere at home, nowhere regarded as a native, [and] remain[] an alien everywhere.”28 The most important heir to this line of thinking, at least in lasting influence, was Theodor Herzl (1860-1904), considered by many to be the father of political Zionism. In contrast to the Russian Zionists, who were always separate from the Russian population due to czarist policies, Herzl was an assimilated Austro-Hungarian Jew who worked as a reporter and playwright.29 The precipitating event for his Zionism was not the pogroms, but the surrounding rise of anti-Semitism induced by the trial of Alfred Dreyfus, a French army officer falsely accused of spying for Germany.30 Herzl, sent to write on the Dreyfus affair,
saw the rise in anti-Semitism in the same country that authored the Declaration of the Rights of Man, and ultimately concluded that Jews needed their own country.\textsuperscript{31} Thus, he writes in his work \textit{The Jewish State}:

\begin{quote}
\[ \text{[t]he nations in whose midst Jews live are all either covertly or openly Anti-Semitic \ldots We are one people - our enemies have made us one without our consent, as repeatedly happens in history. Distress binds us together, and, thus united, we suddenly discover our strength. Yes, we are strong enough to form a State.}\textsuperscript{32} \]
\end{quote}

Most important for the topic under discussion, however, is how he envisioned his future state. It was not a Jewish-centered one, but one modeled on European governments, particularly a democratic monarchy or an aristocratic republic.\textsuperscript{33} Indeed, Herzl had no issue with disregarding Hebrew as the \textit{lingua franca} of the Jewish state, writing that, “every man can preserve the language to which his thoughts are at home \ldots and the language which proves itself to be of greatest utilities for general intercourse will be adopted without compulsion as our national tongue.”\textsuperscript{34} While accepting the fact that there would be religion in his new state and that “faith unites us,” Herzl was clear that in the Jewish state, “we shall keep our priests within the confines of their temples.”\textsuperscript{35} Herzl and the other political Zionists did not believe that the future land of the


\textsuperscript{31} This, however, was not Herzl’s initial solution to the Jewish problem in Europe. Before the Dreyfus affair, he contemplated having all the Jews convert to Christianity. See \textit{Theodor Herzl, I The Complete Diaries of Theodor Herzl} (Raphael Patai ed., Harr Zohn trans., 1961) (“About two years ago I wanted to solve the Jewish Question, at least in Austria, with the help of the Catholic Church. I wished to gain access to the Pope \ldots and say to him: help us against the anti-Semites and I will start a great movement for the free and honorable conversion of Jews to Christianity”).

\textsuperscript{32} \textit{Theodor Herzl, The Jewish State} 86, 92 (Sylvie D’Avigdor trans., 1989) (1896).

\textsuperscript{33} \textit{Id.; see also} Dimitry Shumsky \textit{This Ship is Zion! Travel, Tourism, and Cultural Zionism in Theodore Herzl’s Altneuland}, 104 \textit{Jewish Q. Rev.} 471, 479 (2014) (“It was desirable, according to Herzl, that this process of the Jews’ European enlightening and acculturation should continue with even greater intensity in their own country.”).

\textsuperscript{34} \textit{Herzl, supra} note 32, at 145–46.

\textsuperscript{35} \textit{Id.} at 146.
Jews needed to be anything particularly Jewish – Herzl even contemplated accepting the British offer to have the Jewish state be in Uganda (the “Uganda plan”), modern day Kenya – all it needed to be was a modern state run by Jews.36

At the other end of the spectrum were the cultural Zionists, led by Ahad Ha’am, the nom de plume of Asher Ginsberg (1856-1927). Ginsberg was raised by a traditionally religious grandfather, but eventually became a Mashkil, earning the nickname the “agnostic rabbi.”37 He always retained a special love for Jewish history and tradition, albeit a secularized version, which totally permeated his view of Jewish nationalism. Ahad Ha’am believed that Zionism would serve as a complete renewal of the inner spirit of the Jewish people. A quote from the essay “The Jewish State and Jewish Problem” summarizes his position:

It [Judaism] does not need an independent State... this Jewish settlement [in Palestine], which will be a gradual growth, will become in the course of time the center of the nation, wherein its spirit will find pure expression and develop in all its aspects to the highest degree of perfection of which it is capable. Then, from this center, the spirit of Judaism will radiate to the great circumference, to all the communities of the Diaspora, to inspire them with new life and to preserve the over-all unity of our people.38

As shown in the above quote, Ahad Ha’am did not necessarily require the existence of a modern state, but required that the Jews be in their historic land renewing their culture. As one scholar puts it, for Ahad Ha’am, “the establishment of a Jewish state is not a first priority for the Jewish people and if posited as such it will only do harm. A cultural revival of Judaism must come prior to the establishment of a Jewish state.”39 Ahad Ha’am and Herzl did

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36 See Cohen, supra note 19, at 68, 78 (discussing the Uganda Plan and the opposition). Pinsker, like Herzl after him, believed that any land would do, not necessarily Palestine, as “the goal of our present endeavors must be not the ‘Holy Land,’ but a land of our own. We need nothing but a large piece of land for our poor brothers.” Pinsker, supra note 27, at 194.

37 Cohen, supra note 19, at 65.


not just have opposite views of Zionism, Ahad Ha’am’s followers, known as the “Democratic Faction,” also fought against the Uganda plan tooth and nail.\(^40\) Ahad Ha’am’s brand of cultural Zionism was always a minority view within the Zionist community, but it played an incredibly important role in the idea of a secular renewal of Jewish law. It also has always served as a counter balance to the strictly political Zionists following in the Herzl line of thinking. These two visions of a Jewish state have never been harmonized and are always in tension; however, after the founding of the state of Israel, no one is purely a follower of Ahad Ha’am or Herzl, as a physical state that purposefully identifies itself as the nation state of the Jews actually exists. It is, therefore, more appropriate to see these two approaches as separate ends of a spectrum of how distinctively Jewish the state of Israel should be. Within the specific legal culture of Israel, those poles correspond to those groups who want a form of Jewish secular law (the Ahad Ha’am pole) and those who want to limit the Jewish character of Israel as much as possible (the Herzlian pole).

4. THE ORIGINS OF MISHPAT IVRI

Before proceeding to discuss the Mishpat Ivri movement, it is important to give a background of how Halakhah (also spelled “Halacha”), Jewish law, has been traditionally understood.\(^41\) According to traditional Jewish theology, God, through Moses, dictated the Torah, the five books of Moses.\(^42\) Moses Maimonides, the

\(^{40}\) COHEN, supra note 19, at 70. While the number of members in the Democratic Faction was small, they were very impressive. In particular, the leader of the faction was Haim Weizmann, first president of Israel and the man most responsible for getting the Balfour Declaration after World War I, in which England said it looked kindly on creating a Jewish state in Palestine. Id. at 68-69.

\(^{41}\) I shall also include academic approaches in the footnotes for further reading.

\(^{42}\) Nowhere is this explicitly said in the Old Testament itself, although the Pentateuch is referred to as the book of Moses in some post-Exilic biblical material. See, e.g., Joshua 8:31 (“as is written in the Book of the Teaching of Moses”); see also Malachi 3:22 (“Be mindful of the Teaching of My servant Moses”). The modern view of the Bible is that it is composed of at least four different documents, J, E, P, and D, each representing different times within Israelite religion and each document representing differing theological approaches. See generally RICHARD ELLIOT FRIEDMAN, WHO WROTE THE BIBLE? (1987) (discussing the Documentary Hypothesis). The dating of the documents, however, is a subject of debate. Compare JULIUS WELLHAUSEN, PROLEGOMENA ZUR GESCHICHTE ISRAELS (PROLEGOMENA TO THE HISTORY OF ISRAEL) 3-4 (J. S. Black and A. Menzeis trans., 1973) (1883) (argu-
twelfth century medieval philosopher and codifier of Jewish law, whose theological positions are accepted as doctrine by many Orthodox Jews, codified as a religious tenant that the Torah that is currently used is the same Torah, word for word, given to Moses. Along with the written Torah, traditional Jewish theology posits that God gave an Oral Law that explains all of the laws in the Torah. Eventually, most of these laws became categorized in a collection called the Mishnah around the year 220 CE, but some

ing that the P document is post-exilic and adds the legalistic dimension to Judaism, with Yehezkel Kaufmann, The Religion of Israel: From its Beginnings to the Babylonian Exile 174-211 (Moshe Greenberg trans., 2003) (1960) (arguing that the P document is pre-exilic and was created before the D document). See also Israel Knohl, Sanctuary of Silence (1995) (arguing that the Holiness Code (chapters 17-26 of Leviticus) postdates P).

Moses Maimonides, Maimonides’ Commentary on the Mishnah Tractate Sanhedrin (Fred Rosner, trans. 1981) 1:1. Maimonides’ approach is an extreme one, as there is a debate in B. Bava Batra 15a whether Moses wrote the last eight verses in the Torah, those after Moses’ death is recorded, or rather Joshua, his protegés, did. Maimonides held the opinion that Moses himself wrote the last verse, but went so far as to make it a theological tenant of Judaism, a status it did not previously have.

The historical origin of the Oral Torah is difficult to reconstruct. It is generally thought to have begun with Ezra’s public reading of the Torah after the Israelites came back from the Exile. See Lawrence Schiffman, From Text to Tradition: A History of Second Temple and Rabbinic Judaism 47-48 (1991) (explaining the rise in oral interpretation). The concept of biblical interpretation, however, exists within the Bible itself. Known as “inner biblical exegeses,” it is the idea that later parts of the Biblical canon interpret earlier ones. For example, the verse in Exodus 12:8 records, “they shall eat it [the Paschal lamb] roasted over the fire [Heb. “Sî esh”], while in Deuteronomy it says, “you shall boil and eat it [the Paschal lamb] [Heb. “ubisshāla”]. A later Biblical book, 2 Chronicles 35:13, harmonizes the disparate language and says, “and they boiled [Heb. “Wayebasselu’] the Paschal lamb in the fire [Heb. “ba-es’]. See generally Michael Fishbane, Torah and Tradition, in Tradition and Theology in the Old Testament 282-83 (Douglas A Knight ed., 1977). Within the Bible, one can also see an evolution of different laws. See, e.g., Alex P. Jassen, Tracing the Threads of Jewish Law: The Sabbath-Carrying Prohibition from Jeremiah to the Rabbis, 28 Annali di Storia dell’Essegesi 253 (2011) (discussing the development of Sabbath prohibitions in the Biblical and Rabbinic corpus).

The process from Ezra to the codification of the Mishnah is complicated. It is known that during the Second Temple period there was a group known as the Pharisees, who Josephus mentions had “traditions of the fathers,” which ostensibly are transmitted oral traditions. See generally Martin Goodman, A Note on Josephus, the Pharisees, and Ancestral Traditions, 50 J. of Jewish Stud. 17 (1999) (exploring Josephus’ account of the Pharasaic ancestral traditions). It is generally assumed that the Pharisees were precursors to the Rabbis of the Mishnah and Talmud, however, that connection has been questioned. See Shaye J.D. Cohen, The Significance of Yeve, 55 Hebrew Union Coll. Ann. 27, 30-31 (1984) (arguing that the connection between Pharisees and rabbis is tenuous). Attempts have been made to rediscover what some of the Halakhah was before the Pharisees. Much
were left out and combined into different collections known as Toseftot (lit. “addition”) and Baraitot (lit. “left out”). As commentary began to accrue around the Mishnah, it was combined with the Toseftot and Baraitot to form the Talmuds — first the Palestinian in circa 350-400 CE then the Babylonian circa 500 — the latter of which became the definitive source of Rabbinic law. The relationship between the Mishnah and Tosefta is also fraught with controversy. There are two different lines of argument: one school argues that the Tosefta is a commentary on the Mishnah, while the other argues that the Mishnah is an abridgement of the Tosefta. Compare Judith Hauptman, *Mishnah as a Response to Tosefta,* in *The Synoptic Problem in Rabbinic Literature* 13 (Shaye Cohen ed., 2000) (arguing that the redactors of the Mishnah had written tannaitic material in front of them) and Shamma Freidman, *The Primacy of Tosefta to Mishnah in Synoptic Parallels,* in *Introducing Tosefta: Textual and Intertextual Studies* 101-02 (Harry Fox et al. eds., 1999) (arguing the Tosefta contains a post-Mishnaic stratum, but also preserves the early form of the Halakhot that were subsequently reworked by the Mishnah), with Robert Brody, *Mishnah and Tosefta Studies* 114 (2014) (arguing that each corresponding Tosefta and Mishnah must be looked at on a case by case basis).

Scholars have seen the creation of the Babylonian Talmud as a much longer process than is traditionally understood. David Weiss Halivni, arguably the foremost Talmudist of this century, argues that there are many different layers within the Talmud, including an anonymous redactor layer known as the “stam.” See David Weiss Halivni, *The Formation of the Babylonian Talmud* 4-57 (Jeffrey Rubenstein ed., 2013) (detailing the history and work of the stammatic layer). According to Halivni, the Babylonian Talmud was only completed around the middle of the eighth century. Id. at 26.

The traditional reason given for the supremacy of the Babylonian Talmud over the Palestinian is that, as it was finished afterwards, its authors were aware of the arguments in the Palestinian Talmud. See Isaac Alfasi, *Hilchot Alfasi,* B. Eruvin 35b s.v. “u-Mimalien me-Bor ha-Gola.” (“and we do not think that way, because our pericope in our [Babylonian] Talmud allows the matter. It does not bother us in what the Palestinian Talmud forbids because we rely on our Talmud for it came after [the Palestinian Talmud] and our Babylonian scholars were well versed in the Palestinian Talmud.”). Initial critical scholarship assumed that the Babylonian rabbis were not familiar with the Palestinian Talmud, however, recent scholarship has argued that, in fact, the Babylonian Talmud was aware of the Palestinian Talmud, at least in certain respects. Compare Jacob Nuesner, *The Bavli and its Sources the Question of Tradition in the Case of Tractate Sukkah* 53 (1987) (“It must follow that the Bavli is sufficiently unlike the Yerushalmi to be
next major era is called the Geonic era, circa sixth to eleventh century, during which groups of rabbis would join in Yeshivot, study halls, to learn and comment on the Talmud, as well as write respon- sa literature and reorganize the Talmud into pseudo codes. The following era, known as the Rishonim (lit. “the first ones”), circa eleventh to fifteenth century, saw the rise in rabbinic scholars writing explanations and commentaries solving contradictions and discrepancies in the dominant Babylonian Talmud. Most importantly, however, was the creation of full codes of law, the most important being the Mishneh Torah by Maimonides (1135-1204) and the Tur Shulhan Arukh by Jacob ben Asher (1269-1433). These two works, and the commentaries on them, have, over time, become accepted by many Orthodox communities as definitive sources for Jewish law. The era up to the present, known as the Achronim (lit. “the later ones”), began with the publication of the code the Shulkan Arukh by Rabbi Yosef Caro (1488-1575) and heralded more commentaries on the codes, as well as modern responsa.

The phrase “Mishpat Ivri” was invented in the late nineteenth century and became popular in the twentieth. Literally translated judged as an autonomous document, disconnected from and unlike its predeces- sor in all the ways that matter. ), with ALYSSA M. GRAY, A TALMUD IN EXILE: THE INFLUENCE OF YERUSHALMI AVODAH ZARAH ON THE FORMATION OF BAVLI AVODAH ZARAH (David C. Jackson et al. eds., 2005) (arguing that the Babylonian Talmud was familiar with the Palestinian and may have borrowed whole pericopes) and Martin Jaffe, The Babylonian Appropriation of the Talmud Yerushalmi, in THE LITERATURE OF EARLY RABBINIC JUDAISM: ISSUES IN TALMUDIC REDACTION AND CRITICISM 3 (ALAN J. AVERY-PECK ED., 1989) (arguing that while specific back and forth of the pericopes are not borrowed from the Palestinian Talmud, the arrangement of the material appears to be); however, it is clear that there was actually a Babylonian campaign against the Palestinian Talmud. For example, a Babylonian rabbi named Pirqei ben Baboi argued that due to the catastrophes that had befallen the Palestinian rabbis, their traditions were no longer reliable. See B.M. LEWIN, MISREDAI ha-Geniza [Geniza Fragments], 2 TARBIZ 383 (1931) (containing a critical version of Pirqei ben Baboi’s letter arguing against Palestinian Halakah).


50 Two major examples of this genre in contemporary Orthodox Judaism are MOSHE FEINSTEIN, IGGERET Moshe (published 1959–1996) and Ovadia Yosef, YABIA OMER (published 1956–1993).

51 See MENACHEM ELON, 1 JEWISH LAW: HISTORY, SOURCES, PRINCIPLES [hereinafter “Elon, Jewish Law”] 110 n. 79 (Bernard Auerbach & Melvin J. Sykes trans., 1994) (discussing history of the term “Mishpat Ivri”). See also Amihai Radzner, Ha-Mishpat Ivri Ainenu Halakhah (u-bechol Zot Yeish Erech), 16 AKDAMOT 139 (explaining that while Mishpat Ivri is not the same thing as Halakhah, it can still be used in Israel because of its symbolic value).
as either Jewish or Hebrew law, it comes from the Hebrew words “Mishpat” (lit. “law”) and “Ivri” (lit. “Hebrew”). The goal of the Mishpat Ivri movement is to revive Jewish law in a secular form, but what are its contours? The most subscribed definition comes from Mishpat Ivri’s greatest champion, Justice Menachem Elon. In his magnum opus *Jewish Law: History, Sources, Principles*, Elon defines Mishpat Ivri as, “only those parts of the Halakhah corresponding to what generally is included in the corpus juris of other contemporary legal systems, namely, laws that govern relationships in human society, and not the precepts that deal with the relationship between people and God.”

52 As Elon and others have pointed out, the distinction between religious and legal norms is not made in traditional Halakhah, “all halakhic precepts, ‘legal’ as well as ‘religious,’ include an aspect of divine commandment as the source of civil or criminal obligation.” For example, while American law divides tort law into the components of duty, negligence, causation, and damages, the Talmud categorizes tort law into four general archetypes of damages that all others fit into: an ox goring, a hole in a public domain, fire, and a man damaging.

53 Each of these torts is derived from a verse in the Torah and then its contours are debated. Certain exemptions to tort law, such as only paying half damages for when an animal or person steps on a pebble causing it to ricochet and strike someone, are understood to be traditions received from “Moses from Sinai.”

52 ELON, JEWISH LAW, *supra* note 51, 1:105. The distinction between laws in human society (Hebrew: bein adam le-chaver) and between man and God (Hebrew: bein adam le-makom), is a distinction made within the Rabbinic corpus, but even the laws of human society are endowed with religious significance.

53 Id. at 1:109 (discussing the lack of distinction); Jackson, *supra* note 8, at 71 (detailing the uniform theology of Jewish law).

54 See B. Bava Kamma 2a (discussing the different “fathers” of damages). Each different category of damage has its own specific characteristic and would not be able to be derived from another. There is a debate between two Babylonian rabbis over the archetype of the last category. According to Rav, it is a man damaging, according to Shmuel, it is “teeth,” or something where there is pleasure in the damage, like eating. See B. Bava Kamma 3b (explaining the argument).

55 Id. (Rashi ad loc.). For differing academic approaches to what the phrase in the Talmud means, see Shmuel Safrai, *Halakha le-Moshe mi-Sinai: Historia or Teología? in MEMOREE TALMUD* (Yaakov Sussman & David Rosenthal eds., 2011) (arguing that it is a mechanism to link rabbinic creativity with the halakhic corpus); Christine Hays, *Halakha le-Moshe mi-Sinai in Rabbinic Sources, in THE SYNOPTIC PROBLEM IN RABBINIC LITERATURE* 61 (Shaye J.D. Cohen ed., 2000) (explaining the eight different variations that the term connotes and how it has changed); David Weiss-Halivni, *Reflections on Classical Jewish Hermeneutics*, 62 PROCEEDINGS OF THE AM. ACAD. FOR JEWISH RES. 21 (1996) (explaining that the term was not originally
gious connection, however, Elon and others who espouse using Mishpat Ivri believe that these laws can be used in a modern state because they have secular analogues.\textsuperscript{56} Elon's definition of Mishpat Ivri is certainly dominant, but historically it was not the only one. For example, in the early twentieth century some Jewish law scholars defined it as the norms produced in modern Palestine or even norms created by Jewish institutions in Palestine, like municipalities.\textsuperscript{57} Despite these different approaches in definition, this paper relies on Elon's because of its dominance.

The concept of having a form of secular Jewish law can be traced to the writings of Ahad Ha'am and Hayim Nahman Bialik (1873-1934), the latter considered to be the finest Hebrew poet of the modern period.\textsuperscript{58} While not explicitly arguing for an adoption of a secular form of Jewish law, Ahad Ha'am's 1897 essay, \textit{Ancestor Worship}, tries to reframe the way Jews view Halakha. In the essay, he argues against the perception that Jewish law is outdated and based on superstition, as those criticisms, " provoke the antagonism of a powerful human feeling, that of respect for the past."\textsuperscript{59} Instead, he argues that one should treat a culture's laws through the lens of evolution, and to, "not [be] concerned to pronounce judgment on the objects which he examines, to say, 'this is good, that bad; this is sweet, that bitter; this is beautiful, that ugly.'"\textsuperscript{60} One who follows this reasoning understands that the irrelevancy of the law is not due to modern Jews' superiority, but that their mental condition and environment have changed.\textsuperscript{61} Ahad Ha'am was not endorsing the view that traditional Jewish religious law should be followed; indeed, he believed that parts of the \textit{Shulkhan Arukh}

\textsuperscript{56} See \textit{ELON, JEWISH LAW}, supra note 51, at 1:109 (comparing Mishpat Ivri to secular laws).

\textsuperscript{57} See generally \textit{Likhovski, supra} note 21, at 132-33 (describing the early definition of "Mishpat Ivri"). See also Assaf Likhovski, \textit{The Invention of "Hebrew Law" in Mandatory Palestine}, 46 AM. J. COMP. L. 339, 348-50 (1998) (discussing different definitions of "Mishpat Ivri").


\textsuperscript{59} Ahad Ha'am, \textit{Ancestor Worship}, in \textit{SELECTED ESSAYS BY AHAD HA'AM} 206 (Leon Simon trans., 1912) (1897).

\textsuperscript{60} \textit{Id.} at 208.

\textsuperscript{61} \textit{Id.} at 209.
were, “quite foreign to our spirit at the present day.”62 What he was endorsing, however, was the view that, “[t]he Shulhan ‘Aruk is not . . . the book that we have chosen for our guide, but the book that has been made our guide, whether we would or not, by force of historical development.”63 Thus, he states, that the Shulhan Arukh, “best suited the spirit of our people, their condition and their needs, in those generations in which they accepted it as binding on themselves and their descendants. If we proclaim that ‘this is not our Law,’ we shall be proclaiming a falsehood.”64 Ahad Ha’am dreamed of a new day, where:

there has been born and developed in us a new kind of need, a need to understand the rise and growth of traditional practices as a natural process; when we have a new Maimonides, gifted with the historical sense, to rearrange the whole Law, not in an artificial, logical order, but according to the historical evolution of each prescription; when in place of critics of the Shulhan ‘Aruk, proclaiming that “this is not our Law,” we have commentators of a new kind, who shall try to discover the source of its ordinances in the mental life of the people, to show why and how they grew up from within, or were imported and naturalized through stress or favor of circumstances.65

62 Id. at 211.
63 Id. at 212. In many ways, this corresponds to Ahad Ha’am’s general approach to criticism of the Jewish tradition, wissenschaft des judentums (“science of Judaism”) – downplaying the significance of the truth behind tradition and focusing on the effect that tradition had on the Jewish people. This same approach is seen in Ahad Ha’am’s essay “Moses,” where he argues that the attempt to find the historical Moses is irrelevant to the Jewish people:

And so it is when learned scholars burrow in the dust of ancient books and manuscripts, in order raise the great men of history from the grave in their true shape; believing the while that they are sacrificing their eyesight for the sake of “historical truth.” It is borne in on me that these scholars have a tendency to overestimate the value of their discoveries, and will not appreciate the fact that not every archeological truth is also a historical truth. Historical truth is that, and that alone, which reveals the forces that go to mould [sic] the social life of mankind. Every man who leaves a perceptible mark on that life, though he may be a purely imaginary figure, is a real historical truth.

Ahad Ha’am, Moses, in SELECTED ESSAYS BY AHAD HA’AM 2 (Leon Simon trans., 1912) (1904).
64 Id., Ancestor Worship, supra note 59, at 212.
65 Id.
Only at that time, he argues, will the Jewish people love and respect their law, even while acknowledging that it is no longer relevant in that day:

but not before, will there be a severance of the link between the feeling of respect for antiquity and practical life; and we shall be able to love and respect the spirit of our people perhaps even more than we do now, and to feel in every nerve the intense tragedy that lurks beneath even the most barbarous relics of our past, without being compelled to regard our tradition, in all its details, as a body of laws and ordinances superior to time and place.66

Bialik's vision of a new type of Jewish law was first developed in his 1916 essay *Halacha and Agaddah*, where he argues against the prevailing view that there is a separation between Halakhah and Agaddah, stories that are brought within the halakhic cannon.67

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66 *Id.* David argues that:

Ahad Ha'am, in the above excerpt, concisely elucidates the basic principles of the program for halakhic revitalization. One principle deals with the reorganization of halakhah based on standards of historical development rather than artificial (legal) logic. The second represents the program's intellectual challenge: to identify the internal relationship between the practical norms represented in halakhic literature - the articles of the Shulhan Arukh - and their metaphysical source - "the soul of the people."

David, *supra* note 58, at 223. I am not so certain that is exactly what Ahad Ha'am had in mind. In the second paragraph quoted, Ahad Ha'am appears to argue that once Jews have established their appreciation of the historical role of halakha there will then be a severance between the people and traditional law. In other words, there should not be a total renewal of Jewish law to be adopted, rather an appreciation. In personal correspondence, David responded:

I do think that he is wishing a revitalization of the halakha when he is expressing the hope for a new Maimonides that will recodify the law by historicizing its content . . . I think that the project of historicizing the traditional halakha seemed to him as twofold. On the one hand, it will trace back the origins of the halakha in the 'nation's spirit'. On the other hand, it will allow neutralizing [of] its normative aspect, i.e. the demands to act and behave according to the halakha.

Email from Joseph David, Professor of Law, Sapir Academic College School of Law, Tel Aviv, to Isaac Roszler (Oct. 7, 2015) (on file with author). In any event, Ahad Ha'am was certainly discussing a new approach to Halakha and the role it plays in Jews' daily lives.

Like Ahad Ha’am, Bialik appreciates Halakhah as a driving force in Jewish life, “[d]o not open the Mishnah with puckered brow . . . look with a discerning eye . . . and ask yourselves whether you are not beholding the actual life of a whole people, seized in its very progress, and petrified in all the multiplicity of its details.”68 As with Ahad Ha’am, Bialik sees Halakhah as a product of its time, but understands that it contains the raw material for something much more powerful, “[b]oth the Halacha and the Agaddah of those days bear the stamp of their time, the stamp of passivity . . . But a true artist will find no insuperable difficulty in creating something great, even from material such as this, if only the greatness is in his soul.”69 Bialik finishes his essay with a plea:

What we need is to have duties imposed on us! Let there be given to us moulds [sic] in which we can mint our fluid and unformed will into solid coin that will endure. We long for something concrete. Let us learn to demand more action than speech in the business of life, more Halakhah than Aggadah in the field of literature. We bend our backs. Where is the iron yoke? Why comes not the strong hand, the outstretched arm.70

Bialik went further than Ahad Ha’am and put his philosophy into action. Together with Yehoshua Ravenitzky, Bialik edited and published Sefer Ha-Agaddah, a collection of the aggadic stories in the rabbinic corpus.71 However, Sefer Ha-Agaddah does not just have old Rabbinic stories, it also contains “Midrash Halacha,”72 which Tsafi Sebba-Eran defines as a, “generic term for halachic midrashim, proverbs and short fables from the wisdom literature, with their morals.”73 For Bialik, however, the idea of aggadah was not just stories, but also the customs of the sages; “[t]he value of Aggadah is that it issues in Halachah. Aggadah that does not bring Halachah in its train is ineffective. Useless itself, it will end by in-

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68 Id. at 75.
69 Id. at 78–79.
70 Id. at 87.
71 See Tsafi Sebba-Elran, From Sefer Ha-aggadah to the Jewish Bookcase: Dynamics of a Cultural Change, 20 JEWISH STUD. Q. 272, 272 (2013) (discussing the effect of Sefer Ha’aggadah).
72 Id. at 276.
73 Id. at 277.
capacitating its author for action.” 74 Indeed, while the demarcation between literature and religious text is blurred by Bialik, he did envision a new version of modern Hebrew literature: one that contained the Jewish spirit as all of the religious texts once did; one that will be “a new Talmud which will contain the choice essence of the results of Jewish thought and feeling throughout the ages.” 75

Neither Ahad Ha’am nor Bialik specifically argued that a revived secular form of Jewish law should guide a Jewish state or commonwealth. This is probably due to the fact they were writing decades before the state of Israel was even created. However, the idea that Jewish Law could be revived and serve as a type of inspiration in law was born not too long after Bialik wrote his essay and the idea continues to animate the Mishpat Ivri movement to this day. 76

Of course, the idea of Jewish renewal was not the only driving force behind the idea of the creation of Mishpat Ivri. Many of the Jewish legal revivalists were influenced by the growing legal revival movement in Germany, particularly the works of Friedrich Karl von Savigny, the leader of the historical school. 77 Savigny wrote his theory of the origin of law in his work Of the Vocation of Our Age for Legislation and Jurisprudence, which was created to attack the movement dedicated to creating a civil code for Germany. 78 According to Savigny, law originally starts out as the creation of a people or culture and only then becomes a scientific endeavor of a specific class; “[t]he sum, therefore, of this theory is, that all law is originally formed in the manner, in which ... customary law is said to have been formed: i.e., that it is first developed by custom and popular faith, next by jurisprudence.” 79 To put it another

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74 Bialik, supra note 67, at 81.
75 HAIM NAHMAN BIALIK, THE HEBREW BOOK 17–18 (Minni Halkin trans., 1951) (1913). Indeed, Bialik refers to this choosing of Hebrew books as canonization: “each time that our literature found itself in a situation similar to the present one it necessarily sought a way out in this manner. We must resort to it this time, too - the phenomenon of literately 'ingathering,' that which is known in our literary history by the name of 'canonization.'” Id. at 10.
76 SHAMIR, supra note 21, at 33 (explaining that most of the Jewish Russian lawyers involved in Hebrew law were well versed in Ahad Ha’am).
77 See LIKHOVSKI, supra note 21, at 129 (tracing the Hebrew Law movement); MENACHEM MAUTNER, LAW AND THE CULTURE OF ISRAEL 33 (2011) (discussing the cultural milieu of the Hebrew Law Movement).
79 FRIEDRICH KARL VON SAVIGNY, OF THE VOCATION OUR AGE FOR LEGISLATION
way, for Savigny, "law was something that comes into being, as opposed to being created, and the locus of law was not on state legislation, but rather the daily customs and practices of a people and the notions and understandings prevalent among them."\(^{80}\)

The result of the mixture of cultural Zionism and Savigny's philosophy was the creation of two bodies: the Hevrat Ha-Mishpat Ha-Ivri (lit. "The Jewish Law Society")\(^{81}\) and the Mishpat Ha-Shalom Ha-Ivri, the Jewish Court of Arbitration (lit. "The Jewish Court of Peace").\(^{82}\) The Jewish Law Society was established in Moscow in the first decade of the twentieth century in order to, as one of its founders declared, create "a scientific society for the study of Hebrew Law."\(^{83}\) Following the Bolshevik revolution, however, the society disbanded and some of its members moved to Palestine.\(^{84}\) These emigrants would eventually create the Jewish Court of Arbitration in Jaffa.\(^{85}\) The Court was a completely different entity from anything else that existed in Palestine, which was governed by both Ottoman law and Jewish religious law, the latter of which was imposed by the rabbinic leaders of the Old Yishuv, the religious Jewish community living in Palestine before Zionist immigration began.\(^{86}\) The Ottoman Empire had, since the early nineteenth century, recognized a degree of independence for traditional Jewish law. In 1835, Sultan Mahmud II appointed the Rabbi of Istanbul the title of Hakham Bashi,\(^{87}\) Chief Rabbi, who was elect-

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\(^{81}\) It has also been translated as the Hebrew Law Society in order to differentiate it from Halakhah, traditional Jewish law. See Likhovski, supra note 21, at 129 (explaining the use of the word "Hebrew" instead of "Jewish").

\(^{82}\) This is how Shamir translates it. See, e.g., Shamir, supra note 21, at 30 (using the phrase “The Jewish Courts of Peace.”).

\(^{83}\) See Likhovski, supra note 21, at 129 (quoting Samuel Eisenstadt). See also Elon, *Jewish Law*, supra note 51, at 1588 (discussing the motivation for the Jewish Law Society).

\(^{84}\) See Likhovski, supra note 21, at 130.

\(^{85}\) Id.


\(^{87}\) "Hakham" (lit. "Sage" in Hebrew) and Bashi (Turkish for "Head" or "Chief"). See Haim Zew Hirschberg & David Derovan, *Hakham Bashi*, in 8 *ENCYCLOPAEDIA JUDAICA* 245 (2d ed. 2011) (discussing the office of Hakham Bashi).
ed by the Jewish community. In 1856, the Hatt-i Humayun was promulgated, which decreed the equal status of all religions. Under this system, all questions of personal status were determined by the religious office of the Hakham Bashi. This system would remain in place when the British conquered Palestine in 1917 and became officially enshrined in an ordinance in 1920. Indeed, one of the reasons for the creation of the Court of Arbitration was to avoid recourse to these other institutions.

While it was different from secular courts, the Court of Arbitration was afforded legal status by the British in 1926 under the Arbitration Ordinance, which authorized parties to submit disputes to a permanent court of arbitration. Like Savigny and Ahad Ha’am, the proponents of the Jewish Court of Arbitration believed that secular Jewish law was a result of the community, not a religious endeavor dictated by rabbis, as most traditional Jew believed. Despite this identification of Jewish law with the community, Assaf Likhovski traces a major shift within the revivers’ arguments of the cultural roots of Judaism and Jewish law, which mimicked Zionists’ own branding of their movement. Prior to the Arab riots in 1929, many Zionists and Jewish law revivers argued that Jews were an Eastern people and their laws were of non-Western origin. However, following the riots, they distanced themselves from the Arab population by arguing that Jews and their law were not to be conflated with Eastern, Islamic law.

While the Court of Arbitration did adjudicate some conflicts and grew in popularity after World War I, it was short-lived. There were many reasons for the Court’s decline, including grow-

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89 Id. at 313.
90 Id.
91 SHAMIR, supra note 21, at 32.
92 Arbitration Ordinance, 1926, § 2, reprinted in 1 LAWS OF PALESTINE, 1926-1931: INCLUDING THE ORDERS IN COUNCIL, ORDNANCES, REGULATIONS, RULES OF COURT, PUBLIC NOTICES, PROCLAMATIONS, ETC., 163 (Moses Doukhan ed., 1933); see generally ELON, JEWISH LAW, supra note 51, at 1593 (discussing the history of Jewish law in mandate Palestine).
93 SHAMIR, supra note 21, at 36.
94 LIKHOVSKI, supra note 21, at 142.
95 Id.
96 Id. at 145.
97 Id. at 130 (detailing the rising popularity after World War I).
ing professionalization of the legal field, the belief that Hebrew law was not really law, that its members did not understand Halakhah, and the inability to enforce the decisions.\footnote{Id. at 131; \textit{Shamir}, supra note 21, at 116-25 (detailing the decline of the council)} However, Ronen Shamir has identified another underlying reason: the conflict between cultural and political Zionists. While Likhovksi points out that many, if not the majority, of Jewish lawyers were interested in some type of Hebrew law, be it purely secular laws spoken in Hebrew or Mishpat Ivri,\footnote{See \textit{Likhovski}, supra note 21, at 156 (explaining the various approaches to Hebrew law).} Shamir convincingly shows that there was at least a subset of lawyers who argued over the use of Mishpat Ivri due to their different understandings of what Zionism demanded during that time period.\footnote{See \textit{Shamir}, supra note 21, at 108-25 (explaining the fight between cultural and political Zionists approach to the council). Likhovski, however, argues that Shamir’s dichotomy between cultural and political Zionism is overdone. \textit{Likhovski}, supra note 21, at 155-56. In some ways, Likhovski is correct. The idea that everything can be reduced to these ideological positions is incredibly reductionist – there are always a plethora of factors that affect actors’ decisions. That, however, does not mean that the two forms of Zionism were not at work in this situation. As this paper argues, each individual time period has its own idiosyncrasies that played a role in Jewish law being forsaken, but taken as a whole, the different events show a tension in the actors’ interpretation of Zionism.} Those who wanted the tribunal to succeed believed in creating a national revival of law in order to create a flourishing Jewish culture in Palestine,\footnote{See \textit{Shamir}, supra note 21, at 112.} while those opposed believed that Jews needed to become more involved in the British mandatory legal apparatus and make it like their own; in other words, adopt the British form of law.\footnote{Id. at 124.} As Shamir pithily summarizes:

what was at stake was not only a confrontation between community and state law or between case and abstract law. The Hebrew Law of Peace, potentially at least . . . represented the idea that law was not an end of itself but a means to create a qualitatively different political culture.\footnote{Id.}

While the tribunal would technically remain open until 1949,\footnote{See Daniel Sinclair, \textit{Jewish Law in the State of Israel}, in \textit{An Introduction to the History and Sources of Jewish Law} 397, 399 (N.S. Hecht et al eds., 1996) (de-

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it played no further significant role in Israel’s history other than shedding light, “on the renewal of Jewish national creativity.”

Despite the existence of the Court of Arbitration, the law of Palestine remained Ottoman, which was itself based on the French code, and then after World War I, a mix of English and Ottoman. In 1922, the British promulgated Article 46 of the Palestinian Order in Council, which directed all civil courts in Mandate Palestine be adjudicated in “conformity with the Ottoman Law in force in Palestine on November 1st, 1914” and any other Ottoman law that may be declared afterwards. Article 46 also included a clause that incorporated English equity into Mandate courts: “[the Ottoman laws] shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England.” Originally, the Supreme Court of Palestine held that Article 46 did not incorporate certain aspects of English law, including personal injury. However, the Court eventually overturned that ruling. Article 46 would eventually become a major tool for the Mishpat Ivri movement following the passage of the Foundations of Law Act in 1980 but until then, the connection between Ottoman and British law would remain.

On the cusp of independence, there was a debate in certain circles over what role, if any, Jewish law should play. For example, by 1947 the controversial Orthodox intellectual Yeshayahu...
Leibowitz began to question the place of religion in the new Jewish state and would, in his 1952 article, *The Crises of Religion in the State of Israel*, argue that Jewish law was in essence Diasphoric and that it must become more flexible to allow for self rule in Israel. The writings of the first Ashkenazi Chief Rabbi Abraham Isaac Kook and the halakhic decisions of the first Sephardic Chief Rabbi Benzion Uziel also show a tremendous amount of creativity and flexibility. All three scholars, however, were working within the traditional theology of halakhic decision making, i.e., there was an established body of divine law that was to be interpreted by rabbis, which was a completely different philosophy from the Mishpat Ivri movement.

Perhaps the most important person involved in the promotion of Mishpat Ivri was Haim Hermann Cohn, a future Israeli Supreme Court justice, who viewed himself as continuing the legacy of the Jewish Law Society. Born in 1911 in Lübeck, Germany, Cohn grew up in an ultra-Orthodox household and studied at Yeshiva Mirkaz Ha-Rav, a religious Zionist yeshiva in Jerusalem run

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113 *Id.* at 158 (discussing the problem of using Halakhah to run the state of Israel).

114 See, e.g., Abraham Ha-Kohen Kook & Ben Zion Meir Uziel, *The Halakhic Debate over Women in Public Life: Two Public Letters of Rav Abraham Ha-Kohen Kook & The Responsa of Rav BenZion Uziel On Women's Suffrage and Representation*, 1 THE EDAH J. 1, 15 (Zvi Zohar trans., 2001), http://www.edah.org/backend/journalarticle/1_2_debate.pdf [https://perma.cc/AY4S-ZWE4] (presenting a translation of Rabbi Uziel's responsa allowing women to vote in the new state of Israel despite traditional Jewish law that would appear to contradict the practice); see also Tamar Ross, *Between Metaphysical and Liberal Pluralism: A Reappraisal of Rabbi A. I. Kook's Espousal of Toleration*, 21 AJS REV. 61 (1996) (discussing Rabbi Kook's novel approach to non-religious Jews, who were involved in the creation of Israel). This type of flexible halakhic approach reached its apex with the Ashkenazi chief Rabbi Shlomo Goren. See, e.g., Shlomo Goren, *Limud AnATOMIA be-BEIT Sefer le-REFUAH al pi Halakhah* [Learning Anatomy in Medical School According to Halakhah], *in TORAT HA-REFUAH: MECHKARIM HILCHATI'IM be-NOSEI REFUAH* 225, 225–41 (2001) (discussing how with the advent of Israel it becomes an imperative on Jewish medical students to be able to dissect cadavers even though under traditional Jewish law dissection is considered impermissible).

115 Cohn was not the only one during this time period to contemplate Mishpat Ivri. His friend Abraham Frieman also espoused using it, but there were significant differences between the two scholars. See generally Ami Hadi Radzyner & Shuki Friedman, *Ha-Mechokok ha-Yisraeli veha-Mishpat Ivri: Chaim Cohn bein Machar le-Etnol* [The Israeli Legislator and Mishpat Ivri: Chaim Cohn Between Tomorrow and Yesterday], 29 INYANI MISHPAT 167, 177 (2005) (detailing the life of Chaim Cohn).

116 *Id.* at 180.
by Rabbi Abraham Isaac Kook.\textsuperscript{117} After finishing his legal studies in Germany, Cohn moved to Palestine after the Nazis gained power.\textsuperscript{118} Already in 1945, Cohn had espoused integrating Mishpat Ivri into the future state’s national law.\textsuperscript{119} In particular, Cohn was hoping to create a more scientific, modern language for the traditional sources, which would then lead to an actual change in the meaning of Mishpat Ivri. This, he hoped, would lead to Mishpat Ivri being the source of law in the future Jewish state. Indeed, he even attempted to codify modern laws of inheritance and wills based on Jewish law.\textsuperscript{120} However, Cohn eventually abandoned this idea because of religious fundamentalists’ opposition to secularized Jewish law, but continued to cite it in his decisions.\textsuperscript{121} In a final attempt to make Mishpat Ivri the law of Israel before independence, P. Dykan (Dikshtein) argued in 1948 that Article 46 of the Palestinian Order in Council should be replaced with a paragraph that stated, “wherever the existing law does not deal with any particular issue or interest or is ambiguous or inconsistent, the courts and other governmental agencies shall be governed by the rules of Jewish law, in accordance with the needs of the time.”\textsuperscript{122} The suggestion failed, however, in part due to the 1947 murder of Avraham Friemann, who was charged with deciding on the role of Jewish law and personal status in the future state of Israel,\textsuperscript{123} and, as was the case in Mandate Palestine, the opposition of many secular leaning Jewish lawyers, who felt that Jewish law, even secularized, was

\textsuperscript{117} Id. at 171. Despite growing up in an ultra-Orthodox household, Cohn was very familiar with works from the Haskalah, Jewish enlightenment. See Daniel Friedman, Chaim Cohn: Devarim le-Zechro [Chaim Cohn: In His Memory], 14 Ha-Mishpat 4, 4 (discussing the life of Chaim Cohn), http://www2.colman.ac.il/law/hamishpat/14/4-8.pdf [https://perma.cc/ACK3-A6SA].

\textsuperscript{118} Id.

\textsuperscript{119} Id. at 171. Despite growing up in an ultra-Orthodox household, Cohn was very familiar with works from the Haskalah, Jewish enlightenment. See Daniel Friedman, Chaim Cohn: Devarim le-Zechro [Chaim Cohn: In His Memory], 14 Ha-Mishpat 4, 4 (discussing the life of Chaim Cohn), http://www2.colman.ac.il/law/hamishpat/14/4-8.pdf [https://perma.cc/ACK3-A6SA].

\textsuperscript{119} Id. at 171. Despite growing up in an ultra-Orthodox household, Cohn was very familiar with works from the Haskalah, Jewish enlightenment. See Daniel Friedman, Chaim Cohn: Devarim le-Zechro [Chaim Cohn: In His Memory], 14 Ha-Mishpat 4, 4 (discussing the life of Chaim Cohn), http://www2.colman.ac.il/law/hamishpat/14/4-8.pdf [https://perma.cc/ACK3-A6SA].

\textsuperscript{120} See Radzyner, supra note 115, at 181.

\textsuperscript{121} Id. at 238–39.

\textsuperscript{122} See generally Elon, JEWISH LAW, supra note 51, at 1617-18 (explaining the history of Article 46). See also Radzyner, supra note 115, at 230 (detailing the proposed emendation of article 46). Dykan’s idea is very much like the Foundations of Law Act that would be adopted in 1980.

\textsuperscript{123} See Assaf Likhovski, “The Time Has Not Yet Come to Repair the World in the Kingdom of God:” Israeli Lawyers and the Failed Jewish Legal Revolution of 1948, in JEWISH AND THE LAW, 359, 371 (Ari Mermelstein, et al. eds., 2014) (describing the creation of a subcommittee to study the possibility of using Jewish law as Israeli law).
too closely tied to religion. 124

While The Declaration of the Establishment of the State of Israel was signed in 1948 and declared “the establishment of a Jewish state in Eretz-Israel, to be known as the state of Israel,” 125 all of the above suggestions for implementing Jewish law were disregarded. That same year, the Knesset passed the Law and Administration Ordinance of 1948, which prescribed that the law in existence on the eve of establishment of Israel should remain in force. 126 The result of the Ordinance was that the status quo would exist and that officially Jewish law was incorporated in the area of personal status only, as it was under the Ottoman and British empire. 127 David Ben-Gurion, Israel’s first Prime Minister, went further than the Ordinance and entered into what is known as the “status quo” agreement, 128 whereby certain demands by Ultra-Orthodox Jews – exclusive religious monopoly on marriage and divorce, the Sabbath being the official day of rest, and autonomy for Ultra-Orthodox schools – became law of the state. 129 The “status quo” was embodied in a series of laws created by the Knesset, including: The Hours of Work and Rest Law (1951), 130 The Rabbin-

124 Id. at 377 (“Zionism was, in essence, a secular movement that attempted to extricate the Jews from the ghetto of religion. Lawyers opposed to the revival of Jewish law manipulated this relationship between Jewish law and the Jewish Diaspora when they described Jewish law as an outdated, petrified religious system, ill-suited to life in a modern sovereign secular state.”).


126 See ELON, JEWISH LAW, supra note 51, at 1620 (detailing the state of law in Israel in 1948).

127 Id.; see also Sinclair, supra note 104, at 400 (detailing the role of Jewish law in Israel).


129 Barak-Erez, supra note 128, at 3. The discussions about this arrangement existed before Israel was created and the future Israeli government committed to it by 1947 at the latest. Id. (discussing the status quo document, whereby the Jewish agency agreed to the ultra-Orthodoxy’s demands).

130 Hours of Work and Rest Law, 5711–1951, 5 LSI 125 (1950–51) (Isr.).
ical Court’s Jurisdiction Law (1953), and the State Education Law (1953). These acts themselves beg the question of whether Israel can actually be considered a pure secular state, but that question is beyond the scope of this article. Regardless of how one defines the nature of the state, be it theocratic or secular, since its inception, Israel has referred to itself as a Jewish and democratic state and enshrined as much in its Basic Laws.

The fact that there was the “status quo” agreement and the Law and Administration Ordinance, however, did not totally eradicate the Mishpat Ivri movement. Almost since the beginning of the Israeli Supreme Court, there have been individual judges who utilized Mishpat Ivri, although it has never become a major movement. Thus, in one of the earliest citations to Jewish law, Judge Dunkelblum cited the Tur Shulkhan Arukh and the Shulkan Aruk in a case about damages. The case in question, Kaddar Porcelain LTD v. Adif LTD, revolved around the manufacturer’s defective cologne bottles that the company had agreed to indemnify. In his discussion of whether the buyer of the defective bottles had an obligation to mitigate the damage, Judge Dunkelblum cited both a treatise on damages, and then compared the concept in Jewish law to the section in B. Baba Kamma 10b, which says, “it was taught in a Beraita: ‘when the Mishnah says ‘he shall pay the damages,’ this means the owner shall keep the carcass of the dead animal and the damager only pays the remainder.” This opinion from 1949 is one of the few times in the Israeli Supreme Court’s early history where Jewish law was referenced, here comparatively. In one of the only studies of the Israeli Supreme Court from 1948 until 1994, Shachar, Harris, and Gross showed that references to Jewish law in the court’s opinions varied widely. In 1949, the first year where

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131 Rabbinical Court Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139 (1952-1953) (Isr.).
132 State Education Law, 5713-1953, 7 LSI 113 (1952-1953) (Isr.).
135 Id.
136 Yoram Shachar et al., Nohagai ha-Histamchut shel Beit ha-Mishpat ha-Elyon: Nitochim Kenotayim [References Patterns of the Supreme Court in Israel: Quantitative Analysis], 27 Mishpatim 119, 152 (1996). The study was randomized from a database of the official Piskei Din of the Israeli Supreme Court. They used rough-
there was a reference, Jewish law was referenced in only 0.2% of all citations. In 1979, however, Mishpat Ivri made up 5% (five percent) of all citations. The legal status of Jewish law, however, would fundamentally change in 1980.

5. 

Mishpat Ivri After 1980

The year 1980 marks what, ostensibly, should have been a major turning point in the Mishpat Ivri movement - the passage of Hok Yisodot Ha-Mishpat (The Foundations of Law Act). Under this law, Israel officially repealed Article 46 in the Law and Administration Ordinance of 1948 that incorporated Ottoman and English law. The new law reads, “[w]here the court, faced with a legal question requiring decision, finds no answer to it in statute law or case law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel’s heritage.” The law only applies in the case of lacuna – i.e., no statute or case law on the legal question – and “Israel’s heritage” refers to Mishpat Ivri, but the contours of what that means was much debated.

The symbolism of the occasion was not lost on the bill’s sponsors, as one of them declared in the Knesset, “The Foundations of Law Act . . . that disconnects Israeli law from English law is overdue. From the law that was adopted immediately after the formation of the state of Israel as another expression of new Israeli sovereignty.” However, not all were enamored with the idea of having “Israel’s heritage” as a source of law. One particularly
forceful argument, made by MK Mayer Wilner, was that Israel’s heritage was such an amorphous concept that every major sect of Judaism-Orthodox, Conservative, and Reform- argue upon.\textsuperscript{145} More than that, Wilner argued that the heritage of Israel is, in effect, antidemocratic, and cited the book of Joshua, which calls for the genocide of men, women and children of the Canaanite nations.\textsuperscript{146} He finally suggested that the “Heritage of Israel” be replaced with universal heritage.\textsuperscript{147} Of course, Wilner did not represent a majority of the Knesset – the act did pass after all – however, his argument belies the unease of having a democratic state use religious heritage to govern, even in limited circumstances.

What exactly the Foundations of Law Act required was a heated debate between Judges Menachem Elon and Aharon Barak.\textsuperscript{148} Not surprisingly, Judge Elon saw a wide, encompassing mandate to incorporate Jewish law into his opinions. Thus, he responds to those who believe that the Foundations of Law Act’s first clause only gives permission to use Jewish law only in cases of lacuna that, “this is not a necessary conclusion. The obvious logic of the words [of the Act] is that they are designed also for when the law is in doubt.”\textsuperscript{149} Elon argues that the use of Jewish law when there is a lacuna is not a discretionary act by a judge, but an obligation.\textsuperscript{150} However, Elon clearly saw the role of Mishpat Ivri to be far more than just clarifying lacuna or doubts. He made it clear that Jewish law should be used to interpret value laden terms like “good

\textsuperscript{145} Id. at 4027 (Mayer Wilher).

\textsuperscript{146} Id.; see also Joshua 6:21 (“They exterminated everything in the city with the sword: man and woman, young and old, ox and sheep and ass.”). On the role of holy wars in ancient Israel, see Michael Walzer, The idea of Holy War in Ancient Israel, 20 J. OF RELIGIOUS ETHICS 215 (1992) (discussing holy war in the biblical tradition). Wilner’s citation of Joshua is somewhat misleading, in that it overlooks that within all religious traditions there is a constant evolution in both theology and practice. Thus, it would be more accurate to say that there are parts of the Bible that are undemocratic. It does not flow from that argument that Jewish tradition, as it has developed since the Biblical period, is antidemocratic. Moreover, the biblical tradition is not monolithic, see, e.g., Moshe Halbertal, Halakhah and Morality: The Case of the Apostate City, 3 S’VARA 67 (1993) (arguing that the textual heritage of the Bible about collective punishment is contradictory and it really is up to the moral intuition of the interpreter to decide which paradigm prevails).

\textsuperscript{147} D.K., supra note 142, at 4027 (Mayer Wilher).

\textsuperscript{148} See generally MAUTNER, supra note 77, at 41-44 (detailing the debate between Elon and Barak on the Foundations of Law Act).


\textsuperscript{150} Id. at 234.
faith.”\textsuperscript{151} In his own words: “the ideas of justice, that their value is based in ethics and culture, such as: ‘righteousness,’ ‘good faith,’ ‘public policy’ and the like, that are found in the values of the Jewish legal tradition – they must be interpreted from the foundational viewpoint, the source of the value being the ethics and culture of Mishpat Ivri.”\textsuperscript{152}

Justice Barak, however, had a very different view. First, he emphasized that the literal words of the Foundations of Law Act require a court to initially look towards comparative law and only then utilize Jewish law when interpreting value-laden terms.\textsuperscript{153} Second, he disagreed with Elon that value-laden terms ever require a judge to turn to Mishpat Ivri. They are not, to use Barak’s phrase, “empty spaces”, but terms that the judge fills in based on the culture that he or she lives in.\textsuperscript{154} Indeed, in the case Handeles, which interprets the Foundations of Law Act, Barak comes close to closing the door on Mishpat Ivri completely. He writes,

when Israeli legislation uses basic terms such as ‘justice’, ‘good faith,’ ‘public policy,’ and similar value laden terms, the judicial function is to pour concrete meaning to these terms in accordance with the statutory purpose, taking into account the conditions, actual and ideal, of life in Israel. Therefore, I see no possibility in such a case of applying provisions of the Foundations of Law Act, which contemplates only the filling of a vacuum.\textsuperscript{155}

\textsuperscript{151} FH 13/80 Handeles v. Kupat Am Bank LTD 35(2) PD 785, 793 [1981] (Isr.).
\textsuperscript{152} Id. (my translation).
\textsuperscript{154} Id. at 269. See also, Handeles, supra note 151, at 797 (“where Israeli legislation has recourse to such fundamental terms as ‘justice,’ ‘good faith,’ ‘public policy,’ and other like value concepts the task of the court is to furnish them with concrete content according to the statutory purpose and having regard to conditions in Israel...Here the judge is not all confronted with a lacuna”) (J. Barak, concur) (Translation from NAHUM RAKOVER, supra note 134, at 19-20).
\textsuperscript{155} Handeles, supra note 151, at 797 (translation from ELON, JEWISH LAW, supra note 51, at 1872). Under Barak’s reading then, it seems almost impossible to have a vacuum, as everything would be filled in. There is a somewhat analogous circular logic under the American Chevron doctrine that reviews administrative agency’s interpretation of statutes. Under Chevron, the court uses a two-step process to determine whether congress has spoken on an issue. Under step one, the court “employ[s] traditional tools of statutory construction” to see if Congress has spoken on the issue. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984). If not, the court can uphold the agency’s decision if it is a reason-
The Case of Mishpat Ivri

The Foundations of Law Act’s incorporation of Jewish law was supplemented by two Basic Laws – Basic Law: Human Dignity and Liberty (1992)\textsuperscript{156} and Freedom of Occupation (1994)\textsuperscript{157} – that defined Israel as a “Jewish and democratic state.” As these Basic Laws were given the same status as a constitution, this language was interpreted as a mandate for the use of Jewish heritage.\textsuperscript{158} Again there was a split in interpretation. Elon saw this as reinforcing the idea that there is an obligation to use Jewish law without the need to find lacuna,\textsuperscript{159} while Barak tended to downplay their significance.

Elon and Barak’s differences stem from more than differing interpretations of specific laws, Basic or otherwise.\textsuperscript{160} The root of the disagreement is the relationship between Judaism and a democratic state. While both profess that there is no contradiction between the two, they harmonize them in completely different ways. For Elon, when the Basic Law: Human Dignity and Liberty says, “the purpose of this Basic Law is to protect dignity and liberty in order to establish as a Basic Law the values of the State of Israel as Jewish and Democratic state,” it means that, “the dual values of a state that is Jewish and democratic constitute, in fact, a single purpose, for each value casts light on and complements the other.”\textsuperscript{161} All one must do is have the proper understanding of Jewish law to see how “Jewish” and “democratic” reinforce each other. This inquiry does not water down Jewish law, but it does require an expert who

\textsuperscript{156} Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 150 (Isr.).
\textsuperscript{157} Basic Law: Freedom of Occupation, 5754-1994, SH No. 90 (Isr.).
\textsuperscript{158} See Menachem Elon, Constitution by Legislation: The Values of a Jewish and Democratic State in the Light of the Basic Law: Human Dignity and Personal Freedom, in 1 Israel As a Jewish and Democratic State 77, 95 (Asher Maoz ed., 2011).
\textsuperscript{159} Id. at 93. (“The entrance to the assurance of the values of the State of Israel as those of a Jewish state requires no ‘permission’ according to the first section of the Basic Law: Human Dignity and Liberty; it is not draped in the covering of lacunae, ‘development of the law’, and the like, but is wide open.”).
\textsuperscript{160} See generally Mautner, supra note 77, 44-53 (detailing the differences between J. Barak and J. Elon’s interpretations of the Basic Laws)
\textsuperscript{161} Id. at 83.
is able to understand what is truly immutable in Jewish law and what is not, thereby catering it towards a modern, democratic sensibility.\textsuperscript{162}

Barak, being bound by the language and ideas of the Basic Law, can only harmonize the two concepts by peeling away most of what makes Jewish law “Jewish.” He writes, for example, that when a law draws upon a legal idea from Jewish law, the latter should be used almost as a legislative history to explain the former, but only for definitions.\textsuperscript{163} This approach to stripping away the Jewish aspects of Jewish law is fully realized in his interpretation of the phrase “Jewish and Democratic state,” which he understands as a mixture of three competing ideas: democracy, Jewish tradition, and Zionism. Thus,

there may be contradictions between the values of Israel as a Jewish state and the values of Israel as a democratic state.

\ldots an appropriate analysis does not have to intensify these contradictions. On the contrary, a purposeful analysis, based on constitutional unity and normative harmony, aspires to find that which is unifying and common, while preventing contradictions and reducing points of friction.\textsuperscript{164}

Barak believes one can only harmonize Jewish and democratic

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\textsuperscript{162} Elon writes:

[It] is well known that Jewish thought throughout the generations, including even the halakhic system itself . . . is replete with different views and conflicting approaches . . . the scholar and researcher must distinguish between statement made for a particular time only and statements intended for all times . . . [o]ut of this vast and rich treasure, the researcher must extract the ample material to be applied so as to meet the needs of his time . . . [s]uch an approach and the making of such distinctions are essential to Jewish thought and to the Halakhah.

EA 2/84 Naiman v. Chairman of Central Elections Committee 39(2) PD 225, 293–94 (translation from Elon, Constitution by Legislation, supra note 158, at 89–90). Ostensibly, this approach would also apply for the Basic laws. The “needs of the time,” here, would be democratic liberalism.

\textsuperscript{163} See Barak, supra note 2, at 17 (“inasmuch as the language of the statute is taken from Jewish Law, the linguistic meaning that will be given to the piece of legislation will naturally include the linguistic meaning that is given to the text in Jewish Law. The interpreter is entitled to learn from our sources – historical, legal, and cultural – the meaning an expression can carry in the Hebrew language. Moreover, given that the content of the law is influenced by Jewish Law, Jewish Law must be taken into account as part of legislative history.”).

\textsuperscript{164} Aharon Barak, The Values of the State of Israel as a Jewish and Democratic State, 21 JEWISH L. ASS'N STUD. 6, 13 (2011).
\end{flushright}
ideas through, “a high level of abstraction, which will unite all members of society and find what is common among them.”

This idea, however, is fraught with a major contradiction. If one of the fundamental ideas about Judaism is that there is some type of particularity about the Jewish people and religion, then trying to find a common denominator with democratic ideas would, at best, leave universal ideas in Jewish garb. As a result, he defines Halakhah as having both democratic and Jewish aspects such as, “love your neighbor as yourself” and “do that which is honest and good.” These concepts exist in nearly every culture. In contrast to Elon, then, it is not by looking at the specific immutable nuances of Jewish law that one finds compatibility with democracy, but by looking at universal ideas that are merely bequeathed to Israel by virtue of Jewish tradition. Barak, then, has taken the legislative imperative of the Basic Laws that Israel is a Jewish state and moved it to as far towards the Herzl end of spectrum as possible.

Barak’s approaches to Jewish law, both in the Foundations of Law Act and Basic Laws, have become the accepted approach, but it still remains the law that Jewish law can be used under the Basic Laws and, in certain cases, can fill in lacuna under the Foundations of Law Act. Despite the auspicious place that Barak gives to the almost oxymoronic universalistic Jewish law, statistically, he almost never cites Jewish sources in his opinions. Between 1994 and 2006, Barak only cited to Jewish sources 19 times, which accounts for .88% of all of his decisions and 4.62% of all Jewish law cita-

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166 This is a tension that Barak is aware of. He writes, “we [Israel] are not like other people; we are not like other nations. We are a democracy, and our values are the values of every democracy. But we are also a Jewish state, and therefore our values are the values of a Jewish state.” Id. at 9.

167 Barak, supra note 164, at 11.

168 See also, A.S. HOFRI-WINogradow, *The Muslim-Majority Character of Israeli Constitutional Law*, 2 MIDDLE E. L. & GOVERNANCE 43, 62 (“Barak minimized the actual commitment to Judaism, let alone to the details of halacha, implied by the adjective ‘Jewish’, by holding that for both the Jewish and democratic elements of this tag to coexist harmoniously, the commitment to Judaism should be interpreted as a commitment to principles so abstract that they fit democracy (construed as a commitment to liberal human rights) as much as they fit Judaism, such as the love of mankind, the sanctity of life, social justice, doing good rather than bad, and respect for human dignity.”).

tions. In comparison, Judge Elon, who retired in 1994, cited Jewish law in all four of his cases that year. Coming in second to Elon was Judge Tal, who cited Jewish law in 13.63% of his decisions. In terms of citing Jewish law the most, however, Justice Hashin accounted for 27% of total Mishpat Ivri citations even though they accounted for only 7.89% of his decisions. Lest one think that Barak is an anomaly, it is really only specific judges, such as Elon and Tal, who cite to Jewish law in a substantial amount of their opinions; it is not a universal movement. Overall, between 1994 and 2006, the Israeli Supreme Court utilized Mishpat Ivri approximately 5.7%, of the time: 36.27% of which were cited in passing, and Mishpat Ivri only accounted for 14.29% of all comparative foreign citations.

6. THE HERZLIAN PRISM PREVAILS

Why is the use of Jewish law, if sanctioned, so rarely used in Supreme Court decisions? One possible explanation for this trend is that Jewish law is a complicated field and that these judges, many of whom do not have religious backgrounds, do not have the expertise to utilize it. While there is some truth to this, it overlooks the fact that Jewish heritage and culture are taught in state high schools and that law schools in Israel actually teach Jewish law, whether in the Talmud or the Bible. In Israeli state schools, the Bible is taught. See generally Shulamit Valler, Approaches to Jewish Studies in Secular Israeli Society (2006), http://hsf.bgu.ac.il/cqt/files/Knowledge/Valler.pdf [https://perma.cc/R4YQ-ZT2J] (discussing the history of education in Israeli public schools); Haviv Rettig Gur, New Committee to Bolster Bible Study in School, JPost (Jan. 10, 2007), http://www.jpost.com/Israel/New-committee-to-bolster-Bible-study-in-schools [https://perma.cc/X75N-C8WV] (reporting on new committee created to bolster Bible study in state public schools). Under traditional Zionist ethos, the Talmud and the responsa, which make up the bulk of Jewish law, are considered to be results of the Diaspora and frowned upon as a reminder of the old type of Jew.

170 Id. at 19.
171 Id. at 20.
172 Id.
173 SINAI, supra note 169, at 18. Note should also be made of Justice Rubenstein, who accounted for 18.7% of all Mishpat Ivri citations. Id.
174 See generally HIRSCHL, supra note 128, at 58-59 (arguing that citations to Jewish law in the supreme court depend heavily on the individual judge).
175 See SINAI, supra note 169, at 7 (average of table).
176 Id. at 13.
177 Id. at 10.
178 In high schools, it is mostly the Bible that is taught. See generally Shulamit Valler, Approaches to Jewish Studies in Secular Israeli Society (2006), http://hsf.bgu.ac.il/cqt/files/Knowledge/Valler.pdf [https://perma.cc/R4YQ-ZT2J] (discussing the history of education in Israeli public schools); Haviv Rettig Gur, New Committee to Bolster Bible Study in School, JPost (Jan. 10, 2007), http://www.jpost.com/Israel/New-committee-to-bolster-Bible-study-in-schools [https://perma.cc/X75N-C8WV] (reporting on new committee created to bolster Bible study in state public schools). Under traditional Zionist ethos, the Talmud and the responsa, which make up the bulk of Jewish law, are considered to be results of the Diaspora and frowned upon as a reminder of the old type of Jew.
albeit only a few classes. The question, therefore, remains: if there is the opportunity to learn both Jewish law and heritage in primary and professional schools, why is it that the Supreme Court as a whole does not utilize Jewish law more?

I believe that the reason that Mishpat Ivri has remained such a small part of Israeli jurisprudence is that many, if not most, of the Israeli Supreme Court judges view Israeli jurisprudence in the Herzlian prism—i.e., that Israeli law is a Western style legal culture that happens to be created by Jews. Two trends in Israeli jurisprudence bear out this hypothesis. First, since 1980, the Israeli Supreme Court has become one of the most activist courts in the world. Second, the Court primarily relies on case law from Western European and American courts.

The Israeli Supreme Court ranks as one of the most activist courts in the world currently. For example, in Ressler v. Minister of Defense, Justice Barak held that nearly every topic was justiciable and subject to proceedings in the Court. Taking this to the extreme, the Court has held that political agreements over coalitions and placement of executive positions were subject to review. Additionally, the Court has changed its level of review of administrative and governmental decisions from an ultra vires standard to

However, there is a growing movement by secular Israelis to reclaim the Talmud as a cultural artifact. See, e.g., Ruth Calderon, Tel Aviv and the Flowering of Jewish Renaissance, 85 J. OF JEWISH COMMUNAL SERVICE 77 (2010) (discussing the reclaiming of traditional Jewish works, like the Mishnah, by secular Israelis in Tel Aviv). One of the leaders of this movement is MK Ruth Calderon, founder of a secular yeshiva that studies Talmud, whose inaugural speech in the Knesset was an explanation of a Talmudic passage. See Ruth Calderon, The Heritage of All Israel, JEWISH WEEK (Feb. 13, 2013), http://www.thejewishweek.com/editorial-opinion/opinion/heritage-all-israel [https://perma.cc/S7T8-DJXX] (translated transcript of Ruth Calderon’s speech to the Knesset). It should also be remembered that Bialik’s Sefer Ha-Aggadah was one of the most popular works in Israel during its early history. See Sebba-Elran, supra note 68, at 2–3 n. 2. (detailing the popularity of Sefer Ha-Aggadah).

179 See, e.g., Courses (2011–12), HEBREW U. OF JERUSALEM, http://law.huji.ac.il/eng/merkazim.asp?cat=2347&xin=533 [https://perma.cc/BET6-8RKN] (listing courses teaching Jewish law in the law school). Tel Aviv University Law School, which was founded by members of the Jewish Courts of Arbitration, also publishes Dine Israel, a journal on Jewish legal thought.

180 See, MAUTNER, supra note 77, at ix (“This book tells the story of the Supreme Court widely regarded as the most activist in the world.”); Eli Salzberger, Judicial Activism in Israel, in JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS 217, 217 (The Israeli Judiciary is portrayed by both Israeli and non-Israeli scholars as one of the most activist judiciaries in the world.”).

181 HCJ 910/86 Ressler v. Minister of Defense 42(2) PD 441 (1988) (Isr.).

a reasonableness standard that looks at the principles of the law and balances them.\textsuperscript{183} Perhaps the apex of the activism of the Court occurred in \textit{United Mizrahi Bank v. Migdal Cooperative Village}, when the Court held that the Basic Laws were the supreme law of the land and the Knesset’s law could not contradict it.\textsuperscript{184} Various suggestions have been put forth to explain the rise in activism, the most convincing of these being Menachem Mautner’s.\textsuperscript{185} Mautner believes there were three causes of the activist propensity: the general rise of judicial activism,\textsuperscript{186} the decline of formalistic reasoning, and a shift in the court’s perception of itself from an arbitration mechanism to a political institution.\textsuperscript{187} Mautner, however, sees an overriding political proximate cause of all three of these changes – the rise of the Likud, a right wing Zionist political party, in 1977.\textsuperscript{188} By displacing the left leaning Labor (formerly Mapai) party that ruled Israel for twenty-nine years,\textsuperscript{189} Likud helped bring into power more right leaning political actors, including giving a voice to Gush Emunim, a group of religious Jews attempting to settle the West Bank, and other Ultra-Orthodox parties.\textsuperscript{190} As a result of this shift and a failure to get back into power, many of the left leaning liberal Zionists attempted to disrupt the new Likud regime by petitioning the Supreme Court to keep a check on the right wing government.\textsuperscript{191} The Supreme Court, led by Aharon Bark, accepted the

\begin{footnotesize}
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\item HCJ 389/90 Yellow Pages Ltd v. Broadcasting Authority 35(1) PD 421 (1980) (Isr.).
\item CA 6821/93 United Mizrahi Bank v. Migdal Cooperative Village 49(4) PD 221 (1995) (Isr.); see generally Mautner, supra note 77, at 175–80; Salzberger, supra note 180, at 238 (discussing United Mizrahi Bank). This was the beginning of the “constitutional revolution.” See generally Barak, supra note 2 (detailing the role of the Supreme Court).
\item See Mautner, supra note 77, at 100 (critiquing different theories as to the courts activism).
\item Id. at 54–55.
\item Id. at 102.
\item Id. at 99. Mautner’s view, however, is not universally accepted. See, e.g., Moshe Halbertal, \textit{Israel’s Supreme Court and the Transformation of Israeli Society}, 11 INT. J. CON. LAW 111 (2013) (explaining that the Supreme Courts’ activism stems from the Israeli situation of the 1970s, including occupation of people who are not involved in the democratic process, and not specifically from the downfall of the Labor party). No matter the actual cause of the activism of the court, both Halbertal and Mautner agree that the court sees itself as a liberal vanguard, not a body that is there to proscribe Jewish values.
\item See Mautner, supra note 77, at 109.
\item Id. at 116–26 (explaining the rise of Likud and its coalition partners).
\item Id. at 143–44.
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challenge and the judicial activism written about above began. In other words, since 1980 the Supreme Court has become a bastion of Western, liberal jurisprudence to counterbalance the right wing swing of the Israeli government.

The second trend that illuminates why Mishpat Ivri is disfavored lies in the type of foreign law that the Israeli Supreme Court cites. Citations of foreign law reflects a court's own self-understanding: "the specific scope and nature of engagement with the constitutive laws of others in a given polity at a given time cannot be meaningfully understood independent of the concrete sociopolitical struggles, ideological agendas, and ‘culture wars’ shaping the polity at that time." In the context of Israel, Ran Hirschl has shown that the Israeli Supreme Court cites case law almost entirely from Western democratic jurisdictions, including: the United States, United Kingdom, Canada, and Germany. As an example, in Mizrahi Bank United v. Migdal Cooperative Village, the Court cited 123 precedential cases, including seventeen from the Supreme Court of the U.S., three from the Supreme Court of Canada and Australia’s high court, two from the German Federal Constitutional Court, one from the Supreme Court of India, and eight from Jewish sources, which were used mostly as pitgamim (Hebrew phrases), not substantively.

At first sight, this does not seem like such an odd phenomenon – Israel is, like those countries listed above, a Western style democracy. Indeed, Judge Barak attempted to explain this by saying that Israel shares the democratic principles of these mostly Western European countries. The Supreme Court’s use of comparative law bears witness to this philosophy; when it cites to the Western style countries, it does so dialogically, i.e., “to help identify and enforce principles embedded in the Israeli constitutional order.” With this Western liberal philosophy, it is only natural to rely heavily on countries in the same situation. Looking beyond the façade, however, Hirschl notes that Israel’s issues with identity and ethnic reli-

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192 Id.
193 HIRSCHL, supra note 128, at 7.
194 Id. at 23.
195 Id. Justice Elon did not participate in the decision. Most of the Jewish citations came from Former President Shamgar and Justice Cheshin, who utilized Mishpat Ivri 7.89% and 7.8% respectively. See SINAI, supra note 169, at 18, 22 (detailing the use of Mishpat Ivri in the Supreme Court).
197 HIRSCHL, supra note 128, at 44.
igious tension are shared by India, Pakistan, Malaysia, Turkey, Sri Lanka, and Ireland, yet the Supreme Court rarely cites to any of those courts. More than that, Hirschl notes the dearth of citations to Jewish law. He argues, cogently I believe, that the reason behind this is that Israeli judges attempt to project to the world that they are a Western style democracy. Israeli judges try to adopt Western style jurisprudence, “while at the same time residing in a conflict-ridden and deeply divided society, whereby judges with cosmopolitan and liberal leanings wish to differentiate themselves and project on to the world an image of their country that is removed from the local ‘masses.'”

Mautner and Hirschl’s studies show that specific political and social forces have created a self-conscious court, one that deliberately identifies as a Western, liberal judiciary. Indeed, Justice Barak was known for his belief in “transnational legal communication,” whereby courts in different jurisdictions communicate with each other through their respective decisions and teachings. With the court’s intentional citing of only Western style jurisprudence, which is very much concerned with the separation of church and state, it was only inevitable that the Israeli judiciary as a whole downplays Jewish law as a substantive source of law.

7. NOTE ON SECULARIZED RELIGIOUS PRACTICES AS LAW

This article has argued that there is a tension in Israel between “Jewish” and “democratic,” which is reflected in heated debates over the Mishpat Ivri. This tension was put on a spectrum with one pole leaning towards Ahad Ha’am’s idea of a culturally Jewish

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198 Id. at 50.
199 Id. at 52.
200 See also Hofri-Winogradow, supra note 168, at 62 (“the Court’s westernized conception of Israel’s identity and constitutional order, which it used as the standard by which the constitutionality of primary and secondary legislation was scrutinized, was adopted as an effort by Israel’s westernized elite, which still controls the court, to counter its declining political fortunes by subjecting legislation and administrative acts expressive of the beliefs and preferences of other subgroups of Israel’s population, primarily the rising religious bloc, to judicial control.”).
201 See generally Markus Wagner, Transnational Legal Communication: a Partial Legacy of Supreme Court President Aharon Barak, 47 TULSA L. REV. 437 (2011) (discussing Aharon Barak’s relationship with other jurisdictions’ high courts).
state and the other towards Theodore Herzl’s European styled secular state. The main focus until now has been on the elite in Israel, judges who interpret and set down the law and have skewed towards the Herzlian, democratic pole. However, in order to fully discuss Israel’s legal culture on this topic, a note should be made about the average Israeli’s relationship with secularized religious practices, i.e., practices that have their roots in religion, but are not in themselves considered religious. Specifically, I want to focus on secularized religious practices that have been legislated and contrast them with the way Mishpat Ivri has been received. As will be shown, the relationship between religious and secular symbols is an evolving one, sometimes consciously and other times unconsciously. The belief in whether any given symbol or law is religious or cultural depends on the way it has been interpreted in Jewish culture. Thus, one finds that in Israel, a country that defines itself as “the nation state of the Jewish people,” what one group may define a legally codified religious symbol is, in fact, considered by the majority of Jews to be only a cultural symbol.  

For example, Daphne Barak-Erez, now a Supreme Court Justice, has shown that the legislation against pork in the 1950s and 1960s in Israel began as a unified movement by both religious and secular parties, which culminated in the passage of the Local Authorities (Special Enablement) Law of 1956 and the Pig-Raising Prohibition Law of 1962. It had wide Jewish support with the exception of the most extreme segment of secular Jews, who viewed it as a type of religious coercion. Most importantly, the justification for the law was not religious, but cultural, as “these prohibitions were intended to reflect a cultural sense of the abhorrence of pigs that had evolved through the long history of Jewish persecution . . . the ban was thus a legal norm intended to reflect a shared cultural characteristic rather than to merely enforce a particular religious doctrine.” Indeed, the average secular MK only began to consider pork legislation religious coercion after 1977.

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202 It goes without saying that this is only from the perspective of Jewish citizens of Israel. Citizens of other religions would most likely see all of these laws as religious.

203 Local Authorities (Special Enablement) Law, 11 LSI 16 (1956) (Isr.). The law enabled local governments to ban the sale of pig.


205 Id. 5–6, 44 (detailing the proponents of the pig banning bill’s arguments).
when the right wing Likud and its coalition government, comprised mostly ultra-Orthodox Jews, started creating other types of religious legislation.\textsuperscript{206}

It is important to note that while pig is forbidden under traditional Jewish law, the Torah merely lists it with other animals that must be avoided.\textsuperscript{207} It was only through the specific association of Jews as avoiding pigs that it came to be a symbol of Jewish persecution in the post-Biblical era. As a result, proponents of the ban pointed to the Bible, Apocrypha, and the Jewish diasporic experience to justify banning pig; not to show that it was a divinely mandated law, but that the pig as a symbol seared a hole in the cultural memory\textsuperscript{208} of the Jewish people, compelling it to be shunned as taboo in the Jewish state.\textsuperscript{209}

This blurring of cultural and religious law is not solely an Israeli phenomenon. Many of the substantive due process cases in the United States have their roots in religious law.\textsuperscript{210} For example, Washington \textit{v.} Glucksberg’s\textsuperscript{211} ban on assisted suicide and the still

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\textsuperscript{206} \textit{Id.} at 75–76. Currently, the law is that bylaws against the sale of pork depends on the characteristic of the neighborhood. If a majority would be offended by sale of pig it is allowed, if they would not it is not allowed. See HCJ 953/01 Solodkin v. Beit Shemesh Municipality PD 38(5) 395 [2004] (Isr.); see generally \textsc{Barak-Erez, supra} note 204, at 97–100 (discussing the Solodkin case).

\textsuperscript{207} See Leviticus 11:4–11:7 (listing forbidden animals for consumption); \textsc{Mary Douglas, Purity and Danger} (1966) (discussing the symbolism of taboo in the Bible); \textsc{Jonathan Klawans, Purity, Sacrifice, and the Temple: Symbolism and Supercessionism in the Study of Ancient Judaism} 17–49 (2006) (describing various approaches to cultic symbolism in Judaism).

\textsuperscript{208} For studies on Jewish cultural memory, see \textsc{Yosef Hayim Yerushalmi, Zakhor: Jewish History and Jewish Memory} (1982) (discussing the role and eventual disappearance of Jewish cultural memory); see also \textsc{Assmann, supra} note 16, at 28 (discussing mnemohistory, reception history, as it relates to the Exodus tradition). Other Israeli examples include the transformation of the holiday of Hanukkah, which the Talmud and traditional Jews understand to be a divine miracle, into a Zionist symbol of Jewish self rule. See generally \textsc{Eleizer Dan-Yehia, Hanukkah and The Myth of The Maccabees In Zionist Ideology and In Israeli Society}, 34 \textsc{Jewish J. of Sociology} 5 (1992) (discussing the role of Hannukah in early Zionist ideology); see also \textsc{Yael Zerubavel, The Death of Memory and the Memory of Death: Masada and the Holocaust as Historical Metaphor}, 45 \textsc{Representations} 72, 72–100 (1994) (exploring the cultural meaning and interpretation of Masada and the Holocaust in Israel).

\textsuperscript{209} See \textsc{Barak-Erez, supra} note 204, at 15–27 (detailing the history of pig as taboo in Jewish and Israeli culture).

\textsuperscript{210} See generally \textsc{Andrew H. Friedman, Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage, 35 How. L. J.} 173 (1991-1992) (detailing the religious backgrounds of bans against same-sex marriage and gay rights).

\textsuperscript{211} 521 U.S. 702 (1997); see also \textsc{John C. Toro, The Charade of Tradition-Based
current ban on polygamous marriage enshrine originally religious laws in a secular society. Yet the legal standard for a fundamental right under the Fourteenth Amendment is not whether Judeo-Christian tradition allows it, but whether those practices are “deeply rooted in the nation’s history and tradition.” Additionally, many states still have “blue laws” that forbid certain actions on Sunday, as that is the Christian Sabbath. Such secularization of religiously inspired law became part and parcel of Americana, not through constant ecclesiastical command, but through cultural practice.

The legislation against pig in Israel is part of a larger narrative – the creation of an Israeli national identity, which began with David Ben Gurion’s movement known as “statism.” After independence, one major challenge facing the leaders of nascent Israel was bringing groups of Jews together who came from all different parts of the world. Through statism and the use of traditional reli-

Substantive Due Process, 4 N.Y.U. J.L. & Liberty 172, 185 (2009) (“Whereas the ancients were largely tolerant of suicide, St. Augustine’s interpretation of the Fifth Commandment dramatically changed the way European societies viewed the matter. Having begun its historical inquiry with thirteenth century thought, it is no wonder that the Court held that the right to physician-assisted suicide is not deeply rooted in history and tradition.”). The Catholic Church lists the prohibition of murder as the Fifth Commandment, whereas Judaism lists it as the Sixth. id. at 185 n.58.

212 See, e.g., Reynolds v. United States, 98 U.S. 145 (1878); see also Casey E. Faucon, Polygamy After Windsor: What’s Religion Got to Do with It?, 9 Harv. L. & Pol’y Rev. 471, 478 (2015) (“With respect to marriage formation, however, this has not been the case. Civil marriage laws are based heavily off of a Judeo-Christian, Westernized version of monogamous marriage.”).

213 See, e.g., Glucksberg, supra note 211 at 720 (describing the test for substantive due process cases).


215 National identity has been argued to be an “imagined community” because, “members of even the smallest nation will never know most of their fellow-members, meet them or even hear of them, yet in the minds of each lives the image of their communion.” BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 6 (revised ed. 2006).

216 CHARLES S. LIEBMAN & ELIEZER DON-YEHA, CIVIL RELIGION IN ISRAEL: TRADITIONAL JUDAISM AND POLITICAL CULTURE IN THE JEWISH STATE 84, 402–03 (1983) (“statism affirms the centrality of state interests and the centralization of power at the expense of nongovernmental groups and institutions . . . statism gives rise to values and symbols that point to the state, legitimate it, and mobilize the population to serve its goals.”). On the general statism movement in Israel, see generally COHEN, supra note 19, at 201–59 (detailing the statist program in the first few decades of Israel).
gious symbols, Ben Gurion attempted to create a “civil religion”\textsuperscript{217} that would fashion a unified identity for Israelis. In order to accomplish this, the leaders of Israel attempted to transvalue\textsuperscript{218} religious symbols into a civil religion. For example, the menorah, originally a ritual object in the Tabernacle and Temple\textsuperscript{219}, was chosen as the symbol of Israel because it signaled the restoration of Jewish sovereignty.\textsuperscript{220} Bible study groups were created and encouraged by Prime Minister Ben Gurion, not because of its religious divinity, but because of its historical and spiritual significance of the Jewish people.\textsuperscript{221} Additionally, practices such as not driving on Yom Kippur and circumcision are practiced by many secular Israeli Jews, even though no law compels it.\textsuperscript{222}

As with the substantive due process cases in the United States,\textsuperscript{223} once religiously rooted cultural practices no longer hold a majority of the public’s approbation,\textsuperscript{224} albeit for different reasons. In America, the change is due to social factors. For example, views about sexuality and privacy, as well as increased visibility of gay and lesbian people, has led to a dramatic change in the way people view marriage.\textsuperscript{225} In Israel, the change is mostly due to politics. After the rise of Likud in 1977, the ultra-Orthodox parties started to legislate religiously based laws, which caused the average secular Israeli to shun any traditionally based law.\textsuperscript{226}

\textsuperscript{217} See Liebman, supra note 216, at 4 (“Civil religion embodies characteristics of traditional religion – it projects a meaning system, expressed with symbols – but at its core stands a corporate entity rather that a transcendent power, even if it also refers to transcendent reality or even a supernatural power.”).

\textsuperscript{218} Id. at 19. (“Transvaluation means retaining the form of the symbol but interpreting it to have a meaning other than the traditional meaning.”).

\textsuperscript{219} See Exodus 25:31-40 (describing the Menorah).

\textsuperscript{220} See Liebman, supra note 216, at 108-09.

\textsuperscript{221} Id. at 112.

\textsuperscript{222} See Barak-Erez, supra note 204, at 6.

\textsuperscript{223} See, e.g., Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that there is a fundamental right under the Due Process Clause to same-sex marriage); Lawrence v. Texas, 539 U.S. 558, 560, 123 S. Ct. 2472, 2475, 156 L. Ed. 2d 508 (2003) (holding that sodomy laws violate the Due Process Clause of the Fourteenth Amendment).


\textsuperscript{225} See Omar G. Encarnación, Gay Rights: Why Democracy Matters, 25 J. OF DEMOCRACY 90, 94 (2014) (arguing that global gains in the gay rights movement is a result of international socialization, policy diffusion, and increased visibility).

\textsuperscript{226} See Barak-Erez, supra note 204 (detailing the effect of the rise of Likud in 1977).
What still needs to be explained, however, is if secular Zionists adapted parts of Jewish tradition to create a civil religion at the dawn of the state, and many of those traditional cultural rites are still observed, why has Mishpat Ivri, which also transvalues religious law into secular law, not been used more? The answer cannot be that Mishpat Ivri is coercive, as both Jewish law and a ban on pig are, albeit the former affects many more aspects of life than the latter. Nor is it due to the post-1977 backlash against religious coercion, as Mishpat Ivri has historically been underutilized, whereas legislation against pig had broad support that eventually waned. Rather, the answer appears to lie in the general belief that Jewish law is, and always must be, religious – it is untransvaluable. As shown in this article, throughout its history, Mishpat Ivri has been attacked as incompatible with living in a secular society precisely because it is religious.227 It comes as no surprise, then, that one of the critics of the latest proposed amendment to the Foundations of Law Act writes, “[i]t’s difficult to understand why the sponsors of the bill think it appropriate for a democratic country to adopt the principles of ancient religious law. Why should the entire Israeli population, a large portion of whom are not religious and some also not Jewish, be subject to Jewish religious law?”228 Nowhere is there a discussion of Elon’s distinctions or even Barak’s universal law in Jewish garb. It seems then that these critics see secular Jewish law as an oxymoron – one cannot possibly separate the wheat from the chaff, and seeing that Israel is a democratic state, the two cannot possibly co-exist.

8. CONCLUSION

The firestorm that erupted in Israel with the nation-state bill touched off a debate over what it means to be a “Jewish and democratic state.” In this article, I have tried to use the debates over Mishpat Ivri to show that the specific legal culture of Israel skews towards the democratic, Herzlian side, which interprets Israel to be a Western style democracy that is governed by Jews. This domi-
nant legal culture, embodied by Aharon Barak, attempts to downplay Jewish aspects in jurisprudence as much as possible, even going so far as to water down Jewish law to universal norms. Those who are closer to the Ahad Ha’am end of the spectrum, such as Justice Elon, have, and for the foreseeable future will remain, to be in the minority. While the Westernized legal approach in Israel is the result of many internal factors, including the rise of Likud in 1977, the fact remains that even before then only certain Israeli symbols, which find their roots in Jewish religion, were transvalued and able to be reconciled with a democratic state. Jewish law, even in secular form, was, and currently is, viewed by a majority of Israelis and, by extension, the legal culture, as conflicting with being a Western style democracy. In the end, while the Basic Laws unequivocally say that Israel is both Jewish and a democracy, the leading lights of Israel’s legal culture do not believe that those two can exist harmoniously without one giving way to the other.