

HUMAN LAW AND DIVINE JUSTICE: TOWARDS THE INSTITUTIONALISATION OF *HALAKHAH*

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1. Introduction: Law, Religion and Institutionalisation

1.0. One may distinguish two models — “dualistic” and “monistic” — for the relationship between Human Law and Divine Justice in the Jewish tradition. Is human law conceived as a system, separate from the direct operation of divine justice, operating under delegated authority from God, and sharing significant elements in common with secular models of human justice (what I call the “dualistic” model), or is it to be regarded as an integral part of a single system of divine justice (the “monistic” model)? Deuteronomy 1:17 tells us that justice belongs to God; the Bible, moreover, is much concerned with the *direct* operation of divine justice. In modern scholarship, however, a dualistic answer is more often given (or assumed): direct divine justice comes into play only when, for some reason, the semi-autonomous system of divinely-mandated human justice fails.

1.1. In this context, we may distinguish the following:

Direct divine justice: God does justice by direct intervention, without involving any human agency. The dualistic approach tends to regard this as a purely theological matter, quite separate from divine justice as administered by humans. On the monistic model, on the other hand, we might wish to pursue substantive comparisons more rigorously, and ask about the relationship between the standards applied in direct divine justice, and those expected by human agencies applying divine law.

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Institutional divine justice: God directly intervenes within human adjudicatory processes, through institutions like the oracle or ordeal, or, less immediately, by sanctioning a false oath taken in his name. The dualistic model regards such procedures as a safety net: divine procedures are applied to remedy the shortcomings of human cognition – what I have termed the “functional model”. I question, however, whether this is a sufficient explanation.

Charismatic divine justice: God inspires the human judge to make a decision in accordance with divine justice. This appears to me to be the significance of the charge of Jehoshaphat to the judges he appoints, when he tells them that God will be “with them” (*imakhem*) in rendering judgement (*II Chron.* 19:4-7). It also explains why the majority of charges to judges in the Hebrew Bible do *not* refer them to written sources of law, but rather command them, more generally, to do justice, and avoid corruption and partiality (e.g. *Deut.* 16:18-20). Clearly, this reflects the monistic model.¹

Delegated divine justice: Here God does enact laws and authorises human judges to apply them in accordance with human understanding. Here (at last) we encounter the dualistic model.

1.2. The above presentation relates primarily to adjudication. But our conceptual distinction between legislation and adjudication is less pronounced in the Hebrew Bible, as the narratives of desert adjudication,² in particular, indicate. In the context of the enunciation of law, it is clear that the monistic model has preference: God legislates directly, through prophecy.

1.3. If we adopt a “monistic” model, we may be tempted to interpret some aspects of the practices of Jewish law as deliberate theological constructions, rather than the result of historical accident (particularly, the lack of legal sovereignty through most of the history of the Jewish people). This, I would suggest, is best represented in contemporary literature by the recent work of Jacob Neusner, as in his *The Theology*

¹ B.S. Jackson, *Wisdom-Laws: A Study of the Mishpatim of Exodus 21:1-22:16* (Oxford: Oxford University Press, 2006), 411-18.

² See further §3.1, below; *Wisdom-Laws*, *supra* n.1, at 425-30.

of the *Halakhah* (Leiden: Brill, 2001).³ If, on the other hand, we adopt a “dualistic” model, then the interpretation of the practices of Jewish law becomes far more open to secular models. Much modern scholarship on Jewish law follows this path, and the “Mishpat Ivri” movement, which seeks the incorporation of Jewish law within the law of the State of Israel, strongly advocates it for ideological reasons.

1.4. I shall not here attempt any full historical analysis of the relationship between the two models. I have argued that such “secular” law as we may identify with the origins of the *Mishpatim* of Exodus 21-22 was *weakly* institutionalised,⁴ and that it was precisely through its later association with divine justice that stronger forms of institutionalisation, associated *today* with secular positivism, ultimately emerged.⁵ We see this in a number of different respects: the processes of adjudication, the growth of jurisdiction, and in many cases the very force and meaning attributed to particular laws, and the standards applied in them. Of course, this is an attempt to represent the view of the biblical writers rather than to assert historical facts. As against the “dualistic” model of divine justice that dominates contemporary scholarship — the view that there are separate spheres of human law and divine justice, the latter intervening in the former only when something goes wrong — the biblical writers, in my view, largely promote the “monistic” model, encapsulated in the Deuteronomic claim (1:17): "כי המשפט לאלהים הוא", that justice is all or essentially divine, even when it *is* administered through human hands. It is, however, surely significant that the Hebrew Bible itself appears to suggest an historical development in this respect. The original form of adjudication applied by Moses was monistic: consultation of the oracle in all cases (Exod. 18:15, *lidrosh elohim*); only on the advice of Jethro was a system of delegation established, which arguably represented an early example of the dualistic model.⁶ We may regard the story of the oven of Okhnai (*B.M.* 59b) as

³ And at greater length in his *The Halakhah. An Encyclopaedia of the Law of Judaism* (Leiden: Brill, 2000), 5 vols. See my review essay, “On Neusner’s Theology of *Halakhah*”, *Diné Israel* 25 (2008), 257-92.

⁴ On the “self-executing” character of many of the norms of the *Mishpatim*, see *Wisdom-Laws*, *supra* n.1, at 29-35, 389-95 *et pass.*

⁵ See further Jackson, “Human Law and Divine Justice in the Methodological Maze of the *Mishpatim*”, in *The Boston 2004 Conference Volume*, ed. E. Dorff, *Jewish Law Association Studies* XVI (2007), 101-22.

⁶ *Wisdom-Laws*, *supra* n.1, at 422f.

representing the talmudic expression of the tension between the two models. Whether it represented a complete victory for the dualistic model, however, may be doubted, as some of my examples will suggest.

1.5. A related aspect of the historical relationship between Human Law and Divine Justice is the process of institutionalisation. We may ask whether social institutions — sets of behaviour patterns, of some degree of normativity (perhaps ‘customary’), understood by people in society as frameworks for understanding and regulating distinct areas of social life, and often relying on “self-executing” rules rather than judicial enforcement — became “legal” before they were reinforced and in some respects modified through religious influence, or was the very process of legal institutionalisation itself prompted, or at least aided, by the concept of divine law? I tend to the latter view. Divine justice is a metaphor. It commences from something that is known, something about human behaviour. It is then attributed to the divine, but that very attribution involves (in the modern jargon) “added value,” reflecting the power etc. understood to reside within the divine. When, in due course, the metaphor of divine behaviour itself becomes a model for humanity (in the form of delegated divine justice), aspects of that “added value” remain. In our context, a weakly institutionalised form of human law is attributed to God; its power is thereby enhanced; and once such divine justice becomes a model for human law, the strength of the human institution is itself thereby increased. I shall argue (§5, below) that the history of marriage and divorce in Jewish law provides an example of this process.

2. The role of prophecy⁷

2.1. The model of the “prophet like Moses” in Deut. 18 has both legislative and adjudicatory aspects. Both its identification (to whom did it apply?) and the interpretation of the extent of the prophet’s powers became matters of major controversy in second commonwealth times. This correlates with a vital theological issue: was the “prophet like Moses” an eschatological figure or not?

2.2. In the Hebrew Bible, not only is the status of Moses as the instrument of revelation that of a prophet (demonstrated by his

⁷ On this section, see further my *Essays on Halakhah in the New Testament* (Leiden: Brill, 2008), ch.2.

performance in Egypt of *otot umoftim*); later prophets have the capacity to reformulate the law, as seen in Jeremiah 34 in relation to liberation from slavery. Indeed, there is a talmudic source which suggests that it is of the essence of prophetic revelation that its formulation is unique: “I have a tradition from my grandfather’s house that the same communication is revealed to many prophets, but no two prophesy in the identical phraseology” (*Sanh.* 89a, attributed to Jehoshaphat, in debate with Ahab).

2.3. The model of the prophet-like-Moses appears to have been important to the sect of Qumran. Various indications suggest that the sect’s major leader, the *moreh hatsedek* (Teacher of Righteousness) was claiming a form of prophetic authority. He reformulated many of the rules, and restated them in a new collection (another *mishneh torah*). No embarrassment is apparent at Qumran in reformulating Biblical rules — nor even in offering an entirely new text in which they are systematised. There is also a second — more radical — use made of the prophet-like-Moses tradition at Qumran. The “original rules” (*hamishpatim harishonim*) of the Community are said to be applicable “until the coming of the prophet and the Messiahs of Aaron and Israel” (*IQS* 9:11). Clearly, this trio of eschatological figures would have the authority to abrogate the “original rules”. The identity of “the prophet” with the prophet-like-Moses has been plausibly claimed because of the discovery at Qumran of a collection of *testimonia* (proof-texts), found in one of the smaller fragments (*4QTest.*), which includes the text of Deuteronomy 18 on the prophet-like-Moses.

2.4. New Testament scholarship recognises that the model of the prophet like Moses is also attributed to Jesus. I have suggested that when Matthew has Jesus open the Sermon on the Mount with “Do not suppose that I have come to abolish the law and the prophets; I did not come to abolish, but to complete (*pleroun*: often translated “fulfil”)”, the phrase “the law and the prophets” may well be a specific reference to *Deut.* 18: it is the law *of* the prophet that Jesus claims here to fulfil. Jesus certainly seeks to reformulate the tradition, and on occasions authorises deviation from the law (citing precedents from the Hebrew Bible). Thus, in the controversy regarding plucking corn on the sabbath (*Matt.* 12:1-4, cf. *Mark* 2:23-26, *Luke* 6:1-4):

Once about that time Jesus went through the cornfields on the

Sabbath; and his disciples, feeling hungry, began to pluck some ears of corn and eat them. The Pharisees noticed this, and said to him, ‘Look, your disciples are doing something which is forbidden on the Sabbath.’ He answered, ‘Have you not read what David did when he and his men were hungry? He went into the House of God and ate the sacred bread, though neither he nor his men had a right to eat it, but only the priests.’

Again, the taking the ass at Bethphage (*Matt.* 21:1-5) falls within this pattern:

They were now nearing Jerusalem; and when they reached Bethphage at the Mount of Olives, Jesus sent two disciples with these instructions: ‘Go to the village opposite, where you will at once find a donkey tethered with her foal beside her; untie them, and bring them to me. If anyone speaks to you, say, “Our master needs them”; and he will let you take them at once.’ This was to fulfil the prophecy which says (*Zech.* 9:9), ‘Tell the daughter of Zion, “Here is your King, who comes to you in gentleness, riding on an ass, riding on the foal of a beast of burden.”’

Elsewhere, more radical claims are made, not merely to authorise suspension of the law on an *ad hoc* basis, but to amend it in perpetuity, and even to replace the old covenant with a new one — one in which, for example, circumcision would no longer be required of converts. Such claims, still made in the name of the prophet-like-Moses, were associated at Qumran with messianic and eschatological expectations. Recall also the temporal limitation of Jesus’ affirmation of the Law in the Sermon on the Mount: “so long as heaven and earth endure”, i.e. until the *eschaton*. John understands the prophet-like-Moses model in a similar way,⁸ and Peter, as recorded in *Acts* 3:22-23, explicitly uses *Deut.* 18 as a proof text in preaching the second coming of Jesus. Small wonder that this proved disturbing to the Rabbis.

2.5. The Rabbis were to identify at least three historical figures whom they considered to have possessed the authority of the prophet like Moses, and in each case they allude to a command by that prophet

⁸ 1:21, 6:14-15, 7:37-40.

contrary to the Mosaic law (*Sanhedrin* 89b): the first (even before Moses) is Abraham (called a *navi* in *Gen.* 20:7), who commanded the sacrifice of Isaac; the second, the prophet Micaiah, who ordered a colleague to smite him;⁹ the third (the *locus classicus*), the prophet Elijah, who ordered sacrifice outside the Temple:

Come and hear: *unto him ye shall Hearken*, even if he tells you “Transgress (*avor*) any of all the commandments of the Torah” as in the case, for instance, of Elijah on Mount Carmel,¹⁰ obey him in every respect in accordance with the needs of the hour.¹¹

The authority which the Rabbis ascribe to the prophet (and which they now appropriate for themselves, as the successors of the prophets) is limited to temporary suspension of the law. Not only does their interpretation reflect a non-eschatological model of the role of the prophet (and one compatible with a dualistic model of divine justice); it may well also reflect a reaction against the Christian use of the tradition, as suggested by the following formulation (*Sanh.* 90a):

Our Rabbis taught: if one prophesies so as to eradicate (*la'akor*) a law of the Torah, he is liable (to death); partially to confirm and partially to annul it, — R. Shimon exempts him. But as for idolatry, even if he said, ‘Serve it today and destroy it tomorrow,’ all declare him liable.

3. Institutional Divine Justice

3.1. Next, a closer look at the significance of “institutional divine justice” (1.1 above). I have argued that we need to supplement it with what I have called the “special interest model”.¹² In the five narratives of desert adjudication, a divine procedure appears to be used: most appear to involve (first instance) oracular determination¹³ — for which

⁹ *I Kings* 20:35-36. This, of the three examples, is the only one where the command of the prophet was disobeyed; the threatened divine punishment (here, attack by a lion) duly occurs.

¹⁰ Where he offered a sacrifice on an improvised altar (*I Kings* 18:31ff.), despite the prohibition against offering sacrifices outside the temple.

¹¹ *Yeb.* 90b, *Sifre ad Deut.* 18:15.

¹² See further *Wisdom-Laws, supra* n.1, at 398-403.

¹³ Explicitly, from the use of קרב in *Num.* 27:5 and לפרש להם על פי ה' in *Lev.* 24:12. The use of לא פרש in *Num.* 15:34f., followed directly by God's

Mosaic authority is thus claimed, despite the fact that this is a jurisdictional claim which *Exod.* 18 ultimately cedes. All involve matters that evoke clear divine interest. First, there is the case of the daughters of Zelophehad (*Num.* 27), with its concern for distribution of the promised land. The decision, in turn, prompts a second issue also related to that distribution: whether the daughters may marry outside their tribe, thus threatening the tribal allocation (*Num.* 36). Third, men who were unclean through contact with a corpse complain they could not keep the passover on the appointed day. Moses consults God, who institutes what has come to be termed *Pesah Shenit* in order to accommodate them (*Num.* 9:6-14). Fourth, there is the case of the man found gathering sticks on the sabbath day (*Num.* 15:32-36), where the issue appears to be not merely the precise nature of the sanction to be applied but rather whether gathering sticks constitutes “work” (מלאכה) and is thus a violation of the sabbath within the sense of *Exod.* 20:10. The fifth case is that of the blasphemer in *Lev.* 24. Here we have a combination of “functional” and “special interest” models: there is a genuine interpretive difficulty, in a matter reflecting the divine interest in the offence of blasphemy.

3.2. In the narrative of Akhan in *Josh.* 6-7, where initially there is *no* obvious suspect, the identification by the sacred procedure is followed by a confirmatory search (and confession). An initial search of the whole camp would no doubt have been cumbersome and inconvenient, but in principle it could have achieved the same result. There is, however, a reason for the use of a procedure of divine justice in this case: there is a divine interest at stake, the missing booty from Jericho, which had been declared *herem*.¹⁴

3.3. The form of institutional divine justice we find in the *sotah* procedure (*Num.* 5:11-30) clearly fits the “functional” model: the lack of human evidence is heavily stressed. But forbidden relationships are (as argued below) the earliest concern of divine law in the area of marriage and divorce.

(remedial) speech, may be taken to have the same implication. *Num.* 36:5 tells us that Moses ruled על פי ה', cf. *Lev.* 24:12.

¹⁴ Similarly, Saul's use of the oracle after Michmash (*I Sam.* 14:36ff.) relates not only to a decision whether or not to pursue war, but also to adjudication upon the effect of a curse (involving use of the divine name). Again, the use of the oracle in the choice of Israel's first king (*I Sam.* 10:20-23) involves divine legitimation of a partial transfer of divine authority.

4. Criminal law and Evidence

4.1. We tend to read the rabbinic sources on capital punishment as reflecting modern objections to the sanction, and often interpret the very strict rules of evidence as reflecting that (secular, humanistic) value. But capital punishment also clearly functions as a means of atonement, as stressed by Kirschenbaum and others,¹⁵ and there may well have been a feeling that it is the role principally of God to take a life for that purpose. Thus, the laws of evidence raise here just the same issue of whether the “functional” model of divine adjudication is adequate. But what, if any, is the form of *institutional divine justice* which applies here? Two indications have survived, both in the context of homicide which cannot be prosecuted because of evidentiary deficiencies.

4.2. The rabbis took a very strong line in interpreting the two or three witnesses requirement of *Deut.* 19:15 to mean direct eyewitness testimony, and in rejecting such eyewitness testimony as might conceivably be viewed as merely circumstantial evidence. Thus, we read in *Tosefta Sanhedrin* 8:3:

With what object is this said?¹⁶ In order that the witness should not (for example) bring forward as evidence: “We saw the defendant with a sword in his hand running after his fellow; the latter thereupon fled into a shop followed by the other; we went in after them and found the one slain, and in the hand of the murderer was a sword dripping blood.” And lest thou shouldst say: “If not he, who then did kill him?” (take warning from the example of) Shimon, the son of Shatah, who said, “May I not live to see the consolation if I once did not see a man with a sword in his hand running after his fellow; the latter thereupon went into a deserted building followed by the other; I entered after him and found the one slain and a sword in the hand of the

¹⁵ A. Kirschenbaum, “The Role of Punishment in Jewish Criminal Law: A Chapter in Rabbinic Penological Thought”, *The Jewish Law Annual* 9 (1991), 123-144; P. Segal, “Postbiblical Jewish Criminal Law and Theology”, *The Jewish Law Annual* 9 (1991), 107-121.

¹⁶ A comment, probably, on the warning given to the witnesses, according to *Mishnah Sanhedrin* 4:5, that they should not testify according to “merely your own opinion”: H. Danby, *Tractate Sanhedrin. Mishnah and Tosefta* (London: S.P.C.K., 1919), 78f.

murderer dripping blood. I said to him: Wicked man, who slew this one? May I not live to see the consolation if I did not see him; one of us two must have slain him. But what can I do to thee, since your condemnation cannot rest in my hands? For the Law says: AT THE MOUTH OF TWO WITNESSES, OR AT THE MOUTH OF THREE WITNESSES, SHALL HE WHO DIES BE PUT TO DEATH. But he who knows the thoughts, he exacts vengeance from the guilty; for the murderer did not stir from that place before the serpent bit him so that he died.

I would hazard the view that most modern, secular prosecuting authorities would be delighted to have such evidence at their disposal. There is, of course, a possibility that the victim tripped and fell on the sword of the pursuer at the moment they were out of view of the witnesses. But the modern secular standard of proof, as we express it in England, is “proof beyond reasonable doubt”. That is normally regarded as a standard which goes beyond that which is required in everyday, social intercourse.¹⁷ Nevertheless, this rule against circumstantial evidence in Jewish law might be regarded as excluding conviction even if the doubt is less than reasonable — merely a theoretical possibility. However, the talmudic passage does not leave the matter in limbo. We are told that in the earlier case involving Shimon ben Shetah (which also involved, we may note, a single witness) God intervened directly, in order to take the life of the murderer through a serpent bite. Significantly, this came to be thought of as a regular institution, rather than a one-off event: the “snake of the rabbis”, whose biblical source we shall encounter presently.¹⁸ This might be seen as a good example of the dualistic model, in that direct divine justice comes into play only when, for some reason, divinely-mandated human justice fails. However, so strict an interpretation of the evidentiary requirement means that direct divine justice in practice may prove to be the ‘default’.

¹⁷ To the extent that lawyers insist that a “not guilty” verdict does not mean proof of innocence, but only the absence of (the legal standard of) proof of guilt. See further my “Truth or Proof?: The Criminal Verdict”, *International Journal for the Semiotics of Law / Revue Internationale de Sémiotique Juridique* XI/33 (1998), 227-273.

¹⁸ *Infra*, §6.4.

4.3. The Mishnah (*Sanh.* 9:5(b)) also contemplates direct divine intervention in cases where human evidence is insufficient:

(As for) the slayer of a man without witnesses, they [the court] take him to a prison-cell and feed him with “the bread of adversity and the water of affliction”.

The “bread of adversity and the water of affliction” is in fact a quotation from Isaiah 30:20, where it appears in the context of divine justice. If the Mishnah had simply wished to say that in cases like this, there can be no capital punishment but only a period of imprisonment on a subsistence diet, they had no need to borrow the words of Isaiah. The fact that they did so indicates that they wished to import some special meaning from the original context.¹⁹ I take this meaning to be that the final “disposition” of the offender, the decision whether he will survive or die, will be that of God. This, again, might be taken to exemplify the dualistic model: recourse to a parallel (divine) system when the human system fails. Nevertheless, it is monistic insofar as the human authorities “assist” by imprisoning the offender and placing him on such a subsistence diet. Rabbinic interpretation of the Mishnah, moreover, could not believe that this was required where the homicide was entirely “without witnesses”, i.e. where there was no evidence at all. They interpreted it to mean that there were in fact witnesses, but they were ineligible for some technical reason. Indeed, *Tosefta Sanhedrin* 12:7 interprets the case as one where there was indeed full eyewitness testimony, but the witnesses had failed to persuade the offender to accept the “warning” (*hatra’ah*) which rabbinic law came to require as a further condition of application of the penalty:

If a man about to commit a crime be warned and he keep silent,

¹⁹ The problem was perceived also in an independent tradition which applies heavenly punishment to murder *shelo be’edim*. Both Onkelos and PT go out of their way to add it to their translations of *Gen.* 9:5–6. The translators were faced with a Biblical text which first stated that “I” (God) will seek vengeance from beast or man for the life of man, and then went on to add *shofekh dam ha’adam ba’adam damo yishafekh*. They understood *ba’adam* to mean “by man” (on the original meaning see Jackson, *Essays in Jewish and Comparative Legal History* (Leiden, E.J. Brill, 1975), 46; *Wisdom-Laws, supra* n.1, at 146 n.145), and so felt bound to explain the apparent contradiction with the preceding first person formulation.

or if, when he is warned, he shake his head, they are to warn him a first time and a second time, and the third time to take him to prison. Abba Shaul says: he is warned a third time; and on the fourth is taken to prison and fed with BREAD OF ANGUISH AND WATER OF AFFLICTION.

This case, then, differs from that of the pursuing witnesses in that here there was indeed sufficient eyewitness testimony to justify the human imposition of a sanction. What was lacking, however, was the advance acknowledgement of responsibility by the offender, and it is only when that is present that the rabbis regarded themselves as entitled to administer the death penalty. This is almost universally regarded as a technical device used by the rabbis in order virtually to eliminate capital punishment, which — as we know from other sources — had come into widespread, if not universal, disfavour.²⁰ However, we should consider the theological meaning of the death penalty in rabbinic thought, and not merely its penal and deterrent functions as conceived by secular societies. Neusner has argued that:

... the death penalty ... does not mark the utter annihilation of the person of the sinner or criminal. On the contrary, because he pays for his crime or sin in this life, he situates himself with all of the rest of supernatural Israel, ready for the final judgment ... the criminal, in God's image, after God's likeness, pays the penalty for his crime in this world but like the rest of Israel will stand in justice and, rehabilitated, will enjoy the world to come.²¹

If so, we may be tempted to propose a different interpretation for the institution of *hatra'ah*: where, at least, capital punishment is to be the result of human action (as opposed to that of the “snake of the rabbis”), there is a desire to ensure that the atoning function of the sanction will be accomplished. The institution of *hatra'ah* indicates at least that the offender has accepted responsibility for the consequences of his imminent action. Here, human law and divine

²⁰ *Mishnah Makkot* 1:10: “A Sanhedrin that puts a man to death once in seven years is called a murderous one. R. Eleazar ben Azariah says ‘Or even once in 70 years.’ R. Tarfon and R. Akiva said, ‘If we had been in the Sanhedrin no death sentence would ever have been passed’: Rabban Simeon b. Gamaliel said: ‘If so, they would have multiplied murderers in Israel.’”

²¹ J. Neusner, *The Theology of the Halakhah* (Leiden: Brill, 2001), 204, 206.

justice act in tandem, in order to effect a theological purpose. Surely this is closer to the monistic model.

4.4. The debates regarding talionic punishment may benefit from being revisited in the context of the present argument. Should we interpret the talionic laws in the light of the ancient Near Eastern codes, particularly Hammurabi and the Middle Assyrian Laws,²² or rather in the context of biblical literature? I have argued for the latter, in distinguishing two different formulae: the *tahat* formula and the *ka'asher* formula, the latter indicating qualitative equivalence, the former requiring also quantitative equivalence.²³ Both are found in biblical narrative as well as law, but the *ka'asher* formula appears to be more strongly associated with divine justice. In the latter context, talion appears (sometimes without the use of any formula at all) in some rather sophisticated forms. Take, for example, God's punishment of the people for following the pessimistic advice of the spies in *Num.* 14:28. God says to the rebels, through Moses: "As truly as I live, said the Lord, as you have spoken in my ears, so will I do to you", "כאשר דברתם באזני כן אעשה לכם". They are to die in the wilderness, and not inherit the promised land, since they themselves had said (*Num.* 14:2): "Would God that we had died in the land of Egypt! or would God we had died in this wilderness." We have here the use of the same formula with *כאשר*, *כן*, and *עשה* as in *Deut.* 19:19: "כאשר עשה כן" and *Lev.* 24:19: "ועשיתם לו כאשר זמם לעשות לאחיו" *יעשה לו*. In the patriarchal narratives Jacob is a deceiver (of Isaac) himself deceived (by Laban); the kidnapped Joseph turns, effectively, kidnapper (of Benjamin); his brothers, who put him into a *bor* (*Gen.* 37:22, 28, 29) are themselves threatened by him with imprisonment in a *bor*.²⁴ And many other examples could be cited. When the talionic formulae of the *Mishpatim* came to be viewed as divine justice to be administered by human hands, surely we must seek to take account of the "added value" the institution received as a prominent mode of divine justice. One aspect, I would suggest, is found in the Deuteronomic application of talion in the case of the *ed hamas* (the rabbinic *edim zomemim*), where both formulae are found.

²² LH 196, 197, 200; on MAL A50, see Jackson, *Essays*, *supra* n.19, at 96-98.

²³ Jackson, *Studies in the Semiotics of Biblical Law* (Sheffield, Sheffield Academic Press, 2000), 271-80; *Wisdom-Laws*, *supra* n.1, at 197-99.

²⁴ *Gen.* 42:16, though ultimately only Shimon suffers this fate: *Gen.* 42:18, 24; the Egyptian dungeon where Joseph was himself imprisoned is itself described as a *bor*: *Gen.* 41:14.

Notice how the *tahat* formula is introduced (*Deuteronomy* 19:21): “Your eye shall not pity; it shall be life for life, eye for eye, tooth for tooth, hand for hand, foot for foot.” The offence of the perjurer must be *visually manifest* on his body. No doubt this serves as a punishment for the offender, but the stress is laid upon the effects on the observer. They will continually be reminded of the offence: both of its iniquity and of the consequences of performing it. The didactic function of the law is reflected in the stress on the iconic representation of the offence, there as a visual representation for all to see, and not merely as a punishment for the offender.

5. The Institutionalisation of Marriage and Divorce²⁵

5.1. I turn to the history of marriage and divorce. Here, the rabbinic development greatly expands the scope of divine law from areas understood by the Hebrew Bible to be matters of divine interest (*arayot*) to more mundane areas of human interest — a development, we may suggest, from a monistic to a dualistic model of divine justice, the latter reflecting to a greater extent matters of concern to those entrusted with divine law in the capacity of delegates.

5.2. In the Hebrew Bible, both marriage and divorce are weakly institutionalised.²⁶ The laws set out to provide no account either of how marriage is entered into or how divorce is effected, although they mention both incidentally. The law is far more interested in prohibited relationships (whether marital or not). In the narratives, the emphasis is upon negotiations,²⁷ the entry into the husband’s premises²⁸ and the celebratory feast,²⁹ rather than upon any particular set of formalities. There is a wide variety of marital and quasi-marital arrangements, related to the particular social context in which the inter-family

²⁵ On this section, see further my *Essays*, *supra* n.7, at ch.8.

²⁶ See further “The “Institutions” of Marriage and Divorce in the Hebrew Bible,” in G. Brooke and C. Nihan, eds., *Studies in Biblical Law and its Reception* (Oxford: Oxford University Press, JSS Supplementary Series), forthcoming (pre-publication version available at <http://www.legaltheory.demon.co.uk/Marriage&Divorce.pdf>).

²⁷ Z.W. Falk, *Hebrew Law in Biblical Times* (Jerusalem: Wahrman Books, 1964), 134, on *Gen.* 34:8, *Judg.* 14:7, *1 Sam.* 25:39-40, *Cant.* 8:8.

²⁸ Falk, *supra* n.27, at 152, and his account at 140-142 of terminology suggestive of *in domum deductio* or consummation.

²⁹ E.g., *Gen.* 29:27-28, *Judg.* 14:12; Falk, *supra* n.27, at 152.

“alliance” is made.³⁰ Similarly, the laws refer only incidentally to the grounds for and procedure of divorce, while the narratives seem to know only of the simple social procedure of expulsion (used equally, I may add, for disinheritance³¹). Adultery is initially clearly a matter for self-help. Impliedly, the fate of the woman is left to the tender mercies of her offended husband: the wisdom writer in *Prov.* 6:32-35 advises the adulterer not to rely on the possibility of *kofer*, since the cuckolded husband may be too enraged by jealousy (קנאה) to accept it. This contrasts with the position in Deuteronomic law (22:22), where the death penalty, apparently mandatory and institutionally enforced, is applied to both partners. We may perhaps detect in this transition the influence of the divine metaphor of God’s marriage with Israel in Hosea,³² and the sanctions for adultery/idolatry in that context.³³ For

³⁰ See Jackson, *Wisdom-Laws*, *supra* n.1, at 93-102, 367-76; *idem*, “Gender Critical Observations on Tripartite Breeding Relationships in the Hebrew Bible”, in *A Question of Sex?: Gender and Difference in the Hebrew Bible and Related Literature*, ed. D. Rooke (Sheffield: Sheffield Phoenix Press, 2007), 39-52.

³¹ Note the ‘divorce’ terminology used to describe the disinheritance of Jephthah in *Judg.* 11, 2, 7: “And Gilead’s wife bore him sons; and his wife’s sons grew up, and they threw out (ויגרשו) Jephthah, and said to him, You shall not inherit (לא תנהל) in our father’s house; for you are the son of a strange woman ... And Jephthah said to the elders of Gilead, Did not you hate (שנאתם) me, and expel me from my father’s house (ותגרשוני)?”

³² Already in the 8th century, Hosea depicts the relationship between God and Israel in terms of a marriage where the wife has been unfaithful (but ultimately is forgiven and taken back). But though God’s relationship with Israel is here re-established through a *berit* (2:18) — and Hosea (4:2) appears to invoke the Decalogue prohibition of adultery — human marriage is not yet itself conceived in terms of a *berit*, and certainly not one with sacral connotations. For the latter conception, see Malachi, discussed in n. 34, *infra*.

³³ A similar argument may be applied to the sanctions for rape in *Deut.* 22:29: “because he has violated her; he may not put her away all his days.” This is one of only two situations where the Hebrew Bible makes a marriage indissoluble. Why? There is a hint of talionic punishment: he has overridden the will of the woman (or that of her father: J. Fleishman, “*Exodus* 22:15-16 and *Deuteronomy* 22:28-29 — Seduction and Rape? or Elopement and Abduction Marriage?”, in *The Jerusalem 2002 Conference Volume*, ed. H. Gamoran (Binghamton, NY: Global Academic Publishing, 2004), 65, and see Jackson, *Wisdom-Laws*, *supra* n.1, at 374) as to whether a marriage may be contracted; his will therefore is to be overridden as regards future termination of the marriage. And that talionic principle is in fact more characteristic of divine than of human justice.

God himself is described in the Decalogue prohibition of idolatry as אֱלֹהֵינוּ (Exod. 20:5), but the power of divine jealousy is of a different measure to that of man, notwithstanding the fact that God retains the power to forgive. This leads, in later sources,³⁴ to a more complete institutionalisation of both marriage and divorce, with a full set of rules for their institution, regulation and termination, and a conceptual construction of the relationship as *kiddushin*. However, this may well have been prompted by an eschatologically-informed institutionalisation of marriage and divorce, which we find at Qumran and in the New Testament.

5.3. Much of this pattern survives in Second Commonwealth sources, but is intensified by a combination of theological and social factors: on the one hand, eschatological thinking which sought to revive the perfection of the original creation (variously understood in the androgyny and “one flesh” doctrines³⁵); on the other, intense sectarian rivalry in which group identities found important expression in “holier than thou” claims regarding permissible sexual relationships. Three “levels” of holiness may be observed:

The other situation where the Hebrew Bible makes a marriage indissoluble is *Deut. 22:19*, where the husband has made a false accusation against his newly-wedded wife. Had the accusation succeeded, the marriage would have terminated (by the execution of the wife). Where it does not succeed, the husband (conversely) is not allowed to terminate the marriage (by divorce), in addition to the corporal and financial sanctions imposed on him.

³⁴ The use of the marriage metaphor, as we find it in Malachi, is significantly different from that of Hosea: here, the marriage itself is a covenant, and God is a witness to it (2:14). Malachi is often dated to the period of Ezra and Nehemiah, and it is there that we find, in the combination of political/judicial and religious authority enjoyed by Ezra, the most likely context for the beginnings of the sacralisation of the institution of marriage itself. With his combination of secular power and religious authority (though he is depicted as using here only the latter), Ezra bans intermarriage and requires the divorce of foreign wives.

³⁵ J.D.M. Derrett, “The Woman Taken in Adultery”, in his *Law in the New Testament* (London: Darton, Longman and Todd, 1970), 375 (reprinted from *NTS* 10 (1963), 1-26), stresses its application to any sexual relationship, not restricted to marriage: “This one flesh is made by nothing but sexual intercourse, and there is no sexual intercourse which does not make one flesh.”

- (a) The holiest state, some claimed, was that of celibacy, the closest replication of the original androgynous regime,³⁶ as found in some of the Qumran sources, *1 Cor.* 6 and *Matt.* 19:10-15. In discussing Paul's use of the "one flesh" doctrine in *1 Cor.* 6:16, Derrett observes: "In effect all Israel must practice the scrupulousness of the priests (Lev xxi.7, 13-15) ...".³⁷ The eschatological significance of such a standard derives from the fact that a version of the levitical rules is applied to the priesthood of Ezekiel's new temple.³⁸ Similarly, Fitzmyer takes Jesus' view of marriage as indissoluble as an extension of an Old Testament attitude towards members of priestly families who were to serve in the Jerusalem temple, and sees it as consistent with "other considerations of the Christian community as the temple in a new sense".³⁹ But celibacy was not an option for all, and pragmatic considerations (the uncertainty whether the eschaton would arrive in the present generation) also pointed to the need for some to continue to procreate.
- (b) Where this concession is granted, the relationship had to be exclusive. This view may well itself have a related theological basis, and should not be regarded merely as a "next best thing" to complete celibacy. The very notion

³⁶ On Second Commonwealth and rabbinic views of the original creation as androgynous, see D. Daube, *The New Testament and Rabbinic Judaism* (London: Athlone Press, 1956), 80f.; P. Winter, "Sadoqite Fragments IC 20, 21 and the Exegesis of Genesis I 27 in late Judaism", *ZAW* 68 (1956), 72.

³⁷ 1970:374. The standard in *Lev.* 21:13-15 is that expected of the High Priest: "And he shall take a wife in her virginity (*bivtuleyhah*). A widow, or one divorced, or a woman who has been defiled (*xalalah*), or a harlot (*zonah*), these he shall not marry; but he shall take to wife a virgin of his own people (*betulah me'amav*), that he may not profane his children among his people; for I am the LORD who sanctify him."

³⁸ A. Isaksson, *Marriage and Ministry in the New Temple* (Lund: Gleerup, 1965), 147, 199, argues that in *Matt.* 19 Jesus was dependent, in particular, on *Ezek.* 44:22.

³⁹ J.A. Fitzmyer, "The Matthaean Divorce Texts and Some New Palestinian Evidence", in *To Advance the Gospels. New Testament Studies* (Grand Rapids: Eerdmans, 1998, 2nd ed.), 79-111, at 101 (originally published in *Theological Studies* 37 (1976), 197-226), broadly approving the approach of Isaksson, *supra* n.38, and citing *2 Cor.* 6:14-7:1; *1 Cor.* 3:16-17; *Eph.* 2:18-22; see also Fitzmyer, 102, on *1 Pet.* 2:5, 9.

that the original androgynous creation is replicated for Christians in the eschatological age by a union (albeit spiritual) with Christ, evokes the prophetic marriage metaphor of the Hebrew Bible. Such a union has a conceptual permanence in that one of its parties, God, is permanent.⁴⁰ Such a marriage was in principle indissoluble even by death,⁴¹ hence the hostility to even “consecutive polygamy”, as found in CD IV:20f., and some Pauline sources.⁴² As regards divorce, the implication from בַּחֲיֵיהֶם in the strictures of CD IV:20f. against those “who take two wives *in their* (masc.) *lives*” gains some support from a rabbinic source.⁴³ The emphasis of the Gospels, in line with Biblical tradition (and arguably the focus of the “one flesh” doctrine itself), was on the adulterous character of the second union (a forbidden relationship) and remarriage,⁴⁴ rather than the divorce itself; it was in the context of sectarian discipline (and in radical opposition not merely to Jewish but even more to pagan divorce practices) that the ideal of indissoluble marriage generated a principled opposition to divorce itself.⁴⁵ We may speculate that this had an impact also in juridifying (perhaps anachronistically) the halakhic position (as found in the appendix to Gittin).⁴⁶ At the same time the (originally private, or social) horror of resuming a relationship with an adulteress (now even *without* an intermediate marriage) solidified into a formal ban on resumption of relations with an adulterous wife, but this status of “prohibited” woman naturally led to the view that

⁴⁰ Cf. Jackson, *supra* n.23, at 169 on the relationship between God’s permanent entitlement in *Lev.* 3:16-17 and the permanence of law.

⁴¹ See particularly *I Cor.* 7:10-11; *Matt.* 5:32a.

⁴² *I Tim.* 3:1-2, *I Cor.* 7:39; *Rom.* 7:2-3, discussed in my *Essays, supra* n. 7, at 219-22.

⁴³ Daube, *supra* n.36, at 82f., finds evidence in *Kidd.* 2b that R. Shimon ben Yoḥai used the androgyny doctrine in voicing disapproval of divorce.

⁴⁴ See my *Essays, supra* n. 7, at 196-207, on the Synoptics.

⁴⁵ *I Cor.* 7:10-11.

⁴⁶ *M. Gitt.* 9:10, as discussed in my *Essays, supra* n. 7, at 194f., 205-08; I reply to the contrary views of Vered Noam, “Divorce in Qumran in Light of Early Halakhah”, *JJS* LVI/2 (2005), 206-223, in my forthcoming “Marriage and Divorce: From Social Institution to Halakhic Norms”, in *The Dead Sea Scrolls. Texts and Context*, ed. C. Hempel (Leiden: Brill, 2010), 339-64.

such a wife ought to be divorced.⁴⁷ All this applied to both man and woman: the original androgynous state was incompatible with any conceptual distinction between male and female. Thus a once married but divorced man committed adultery if he took up a second relationship even with a virgin female.⁴⁸

- (c) A third standard is also found. For those for whom it was not possible to comply with the full logic of the creation model(s), monogamous marriage was prescribed,⁴⁹ without banning a second marriage after the death of a spouse. Within the Pauline church, it seems, this differentiation may have marked the superior holiness of bishops and elders (just as higher standards had been required of the priests in the Hebrew Bible); there are indications of such internal hierarchisation also at Qumran.⁵⁰ Pragmatic factors also played a role: successive marriages might be necessary for the king, in the interests of the eschatological leadership,⁵¹ the taint of a previous divorce might have to be excused in new entrants to the church, at least in circumstances where it was required by the convert's former marital regime;⁵² and in "mixed marriages" it might be necessary to tolerate divorce of the

⁴⁷ *Essays, supra* n. 7, at 208-10.

⁴⁸ *Matt.* 19:9, *Mark* 10:11, *Luke* 16:18.

⁴⁹ *Essays, supra* n. 7, at 219-222.

⁵⁰ According to the War Scroll, males from the age of 25, Isaksson argues, were expected to be celibate, in order not to be disqualified from serving in the (imminent, eschatological) holy war: soldiers must go to battle in a state of purity, not having had relations with women the previous night. However, those between 20 and 25 did not go to war, and for them, Isaksson argues (1965:55f.), marriage was permissible: see Isaksson, *supra* n.38, at 55f. See further *Essays, supra* n. 7, at 182f., and on the marital rules applicable to the king, 173, 179, 181. L.H. Schiffman, "Laws Pertaining to Women in the Temple Scroll", in D. Dimant and U. Rappaport, eds., *The Dead Sea Scrolls: Forty Years of Research* (Leiden: E.J. Brill, 1992), 214f., notes that the Temple Scroll seeks to make the king like a High Priest, who may not marry a non-Israelite.

⁵¹ If the king were to die without issue, the eschatological leadership would disappear with him. Hence, he is not to divorce his wife: "for she alone shall be with him all the days of her life" and if she does die, he is to take a new wife (*Temple Scroll* 57:15-19): *Essays, supra* n.7, at 181.

⁵² *Essays, supra* n.7, at 219, 223.

believer by the unbeliever.⁵³ In all these cases, there was some theological, as well as practical, warrant for the compromise.

6. Contract and Torts

6.1. Finally, some aspects of divine justice in the civil law (in modern terms: contract and torts) — areas where we might perhaps expect the least interest from the perspective of divine law. I start with two paragraphs of the *Mishpatim*: the shepherding and deposit laws.

6.2. The liabilities of a shepherd is a topic on which the ancient Near East has left a wealth of information about contractual practice,⁵⁴ which may well provide useful background information against which to interpret the arrangements entered into by Jacob with Laban.⁵⁵ But in deciding whether they (or the ancient Near Eastern code provisions) prompted the legal institutionalisation of shepherding in *Exod.* 22:9-12, we must also take into account the prophetic use of shepherding (like that of marriage) as a metaphor of the relationship between God and Israel, particularly that in Ezekiel 34, which provides a detailed account of the different standards of bad (human) shepherds and the good (divine) shepherd. What do we gain from viewing *Exod.* 22:9-12 against this background? Human shepherds are now expected to be good (in not misappropriating the sheep) and careful (in guarding against theft), but not exemplary (in intervening against wild animals). Divine justice here provides a supererogatory standard, which puts the law in its proper place (as Jesus and the Rabbis equally appreciated). Indeed, this may prove relevant also to our understanding of the Jacob-Laban dispute, where the narrator was aware of this

⁵³ *Essays, supra* n.7, at 222f.

⁵⁴ See J.J. Finkelstein, "An Old Babylonian Herding Contract and Genesis 31:38f.," *Journal of the American Oriental Society* 88 (1968), 30-36; J.N. Postgate, "Some Old Babylonian Shepherds and their Flocks," *Journal of Semitic Studies* 20/1 (1975), 1-18; M.A. Morrison, "Evidence for Herdsmen and Animal Husbandry in the Nuzi Documents," *Studies on the Civilization and Culture of Nuzi and the Hurrians in Honor of Ernest R. Lacheman on his Seventy-Fifth Birthday*, eds. M.A. Morrison and D.I. Owen (Winona Lake: Eisenbrauns, 1981), 257-96.

⁵⁵ See further my *Wisdom-Laws, supra* n.7, at 352f., 358, 365.

supererogatory standard and has Jacob claim to have complied with it.⁵⁶

In the law on shepherding, as it now stands,⁵⁷ there is an instance of institutional divine justice, in the form of the exculpatory oath taken where the animal has died or been “broken” (*nishbar*) or “driven away” (*nishbah*): *Exod.* 22:9 (MT). Here, too, there is a hint of the “divine interest” model. The (natural) death of the animal appears now to be conceived as a divine interest: we find an association of divine providence with bodily integrity in *Psalms* 34:19-20, where the same verb, *shavar*, is used: “Many are the afflictions of the righteous; but the Lord delivers him out of them all. He keeps all his bones; not one of them is broken (*nishbarah*).” The “divine interest” in this case thus resides in the role of providence in the fate of the animal. The same idea underlies *Exod.* 21:13, והאלהים אנה לידו, where the victim is human. Nor are such ideas absent from the ancient Near East: LH 266 allows the herdsman to “purge (himself) before a god” where “the finger of a god touches or a lion kills (a beast) in the fold”.

6.3. Similar issues arise in the paragraph on the law of deposit (*Exod.* 22:6-7). Both Philo and Josephus see a divine interest here. Philo (*DSL* iv.30-33) describes the receiver as accepting “something sacred” (λαβὼν ὡς ἱερὸν χρῆμα). Josephus is to similar effect (*Ant.* iv.285-286): “Let the receiver of a deposit esteem it worthy of custody as of some sacred and divine object (ὡςπερ ἱερὸν τι καὶ θεῖος χρῆμα).” If the issue in the deposit law of *Exod.* 22:6-7 were merely one of evidentiary difficulty, surely the first step would have been to search the depositee’s premises.⁵⁸

6.4. Finally, a rabbinic application of divine justice in the law of torts (*B.K.* 55b):⁵⁹

It was taught: R. Joshua said: There are four acts for which the

⁵⁶ See particularly *Gen.* 31:39: “That which was torn by wild beasts (טרפה) I did not bring to you (לא הבאתי),” and compare the terminology with *Exod.* 22:12: יבאהו עד טרפה.

⁵⁷ I argue in *Wisdom-Laws*, *supra* n.7, at 354-59, that the oath is not original.

⁵⁸ As argued above (§3.2) in relation to Akhan’s misappropriation of the *herem*.

⁵⁹ See further Jackson, “The Fence-Breaker and the *actio de pastu pecoris* in Early Jewish Law”, *Journal of Jewish Studies* 25 (1974), 123-136, reprinted in *Essays*, *supra* n.19, at 250-67.

offender is exempt from the judgments of man but liable to the judgments of Heaven. They are these: To break down a fence in front of a neighbour's animal [so that it gets out and does damage]; to bend over a neighbour's standing corn in front of a fire; to hire false witnesses to give evidence; and to know of evidence in favour of another and not to testify on his behalf.

We may ask why the fence-breaker (הפורץ גדר), exempt as he was by human law, was threatened with divine judgment. The simple answer, that the threat of divine punishment if the offender did not pay up simply reflects his moral guilt, is not entirely satisfactory. Whatever the later situation, the tannaitic sources are careful in their use of the concept of divine justice. We may appropriately apply here the methodology used in relation to *M. Sanh.* 9:5, in seeking the basis for dealing in this way with the *poretz geder* on the basis of biblical sources.⁶⁰ In two of the biblical bases of *poretz geder*, *Isa.* 5:5 and *Ps.* 80:13, the breaking of the fence around the vineyard is a figurative expression of divine punishment of Israel. But there is also another, which was demonstrably influential in post-biblical times. Stressing the need for wisdom, *Eccles.* 10:8 observes that he who breaks down a fence may be bitten by a snake, *uforetz gader yishkhenu nahash*. The snake-bite was taken as a divine punishment, and by amoraic times was regarded as the “snake of the Rabbis” (seen above in *Tosefta Sanhedrin* 8:3), divine punishment for breach of rabbinic ordinances (*bSheb.* 110a). Indeed, *Eccles. Rabbah* (10:11) observes: “Never does a snake bite ... or a lion tear [its prey] ... or a government interfere in men's lives unless incited to do so from on high.” “Breaking the fence” also became a proverbial expression for various types of transgression.⁶¹ The concept of breaking the fence was applied also to disturbances of the natural order. Commenting on *Job* 1:9-10, R. Yose bar Ḥanina observed that the herds of Job *parezu gedero shel ha'olam*,

⁶⁰ All the cases adduced in the talmudic sugya deserve careful study in this respect. The Gemara itself asks why the four cases of the *baraita* were singled out, and brings (but rejects) arguments against liability by the laws of heaven for each of them. In fact, all four cases have firm biblical roots. *Hasokher* is based on *Exod.* 23:1 (arg., from *Mekhilta* and *Mekhilta deRabbi Shimon ad loc.*, *Pes.* 118a, *Makk.* 23a); *hayode'a* on *Lev.* 5:1; *hakovesh* on *Deut.* 24:19. In all of these there is something in the biblical formulation to suggest divine jurisdiction. Possibly, the grouping of the four was suggested by *Hos.* 4:2.

⁶¹ An extended usage of “fencing the breach” is to be found already in the Bible itself: *Isa.* 58:12, *Ezek.* 22:30, *Amos* 9:11.

in that whereas normally (*minhago shel olam*) wolves killed goats, Job's goats killed wolves (*B.B.* 15b).

7. Two Concluding Questions

7.1. We may wonder whether the closer integration of law and narrative in the Hebrew Bible than in rabbinic sources, and the particular roles of prophets in the former, is another reflection of the movement from a monistic to a dualistic model of divine justice. The story of Nathan's parable is clearly an example of a narrative which reflects the prophetic role as a mediator of (here) divine adjudication. The most developed parable in the New Testament is that of the prodigal son (*Luke* 15:11-32), where a "halakhic" issue (the effect of an "advance" on the ultimate distribution of an estate) is used as a medium for the pronouncement by a prophet (Jesus) of a divine message about both forgiveness and the relationship between Israel and the new church.⁶²

7.2. A final aspect of the relationship between institutionalization and the religious character of Jewish law relates to modalities. I have argued previously⁶³ that the *halakhah* rejects the sufficiency of the three deontic modalities so beloved of modern logicians of law. For

⁶² See my *Essays, supra* n.7, at ch.6, where I argue that there are three levels to the parable, which correlate in a sophisticated fashion:

- (a) The original division did not affect after-acquired property. The returning prodigal thus retains an expectation of inheritance in the residual estate, whether we follow the mishnaic law of advances or accept that the prodigal was originally disinherited — since such a disinheritance could be reversed. Whether and what further he will inherit remains to be seen (thus favouring the view that he was, initially, disinherited).
- (b) The younger son may or may not have genuinely repented at this stage, but there is an expectation that he will, and for that reason he is reintegrated into the family. Again, the message is: wait and see whether the repentance is genuine.
- (c) The father reassures the older son that the return of the prodigal is no threat to him in his father's affections, or (at least as regards the original division) materially. He does not reject the older son. The ultimate relationship between Israel and the new Church is thus deferred; for the moment, at least, an inclusive message is conveyed.

⁶³ "Judaism as a Religious Legal System", in *Religion, Laws and Tradition. Comparative Studies in Religious Law*, ed. A. Huxley (London: RoutledgeCurzon, 2002), 34-48, at 43f.

the rabbinic structure implies that behaviour may be recommended (conversely, discouraged), as well as required, permitted or prohibited. Indeed, Islamic law explicitly adopts such a fivefold classification of modalities.⁶⁴ Jewish law does not systematise the matter in this way; nevertheless, institutions such as *middat ḥasidut* clearly imply the existence of such a wider range of modalities. Divine justice may be expected to be more modulated than (secular) human justice. In integrating within the *halakhah* the modalities beyond those recognised by deontic logic (and later rabbinic law arguably goes even further), the message is conveyed that it seeks to imitate divine justice to the maximum possible extent. May we conclude that this feature, too, favours the monistic rather than the dualistic model? At the very least, we must take it to reflect the fact that important traces of the monistic model survive even when (with the demise of the institutions most directly associated with the monistic model: prophecy, priesthood, the original *semikhah*) the dualistic model comes to predominate.

Interestingly, this issue exercised the Israel Supreme Court in a 1977 tort case.⁶⁵ It illustrates the tensions resulting from incorporation of a non-positivist religious system within a positivist secular system. The facts were as follows. A man employed as a watchman had lost a son in an automobile accident. He had used a lawyer to sue the driver responsible for the accident. The driver had been acquitted of the criminal charges, and the compensation paid by his insurance company fell far below the amount expected by the father. The latter was dissatisfied at the performance of his lawyer. He became mentally depressed, and began to drink heavily. In his employment as a watchman, he was in possession of a gun provided by his employer. He used the gun to shoot and kill his lawyer. The lawyer's widow then sued the employer of the watchman. The

⁶⁴ See, e.g., Robert Brunschvig, "Logic and Law in Classical Islam", in *Logic in Classical Islamic Culture*, ed. G.E. Grunebaum (Wiesbaden: Harrassowitz, 1970), 11: "The five *ahkam* or principal juridical types that the classical doctrine retained, according perhaps to a Stoic precedent, completing them when required with subdivisions and intermediate shadings, range from the obligatory to the forbidden by way of the recommended, the permissible, and the disapproved." See also his remarks in "Hermeneutique Normative dans le Judaïsme et dans l'Islam", *Accademia Nazionale dei Lincei, Rendiconti della Classe di Scienze morali, storiche e filologiche*, Ser. VIII vol. XXX, fasc 5-6, pp.1-20 (May-June 1975), at 5.

⁶⁵ *Kitan v. Weiss*, C.A. 350/77, 33(2) P.D. 785; see D.B. Sinclair, "Beyond the Letter of the Law", *The Jewish Law Annual* 6 (1987), 203-206.

District Court awarded her damages. The employer appealed, on the grounds that there was no sufficient causal connection between the employer's allowing the watchman to keep possession of the gun, and his use of it to kill the lawyer. The Supreme Court upheld the appeal.

Justice Menachem Elon noted that the employer in the case had offered to make a voluntary payment to the widow of the employee, and observed that this type of offer corresponded to the halakhic institution of behaviour "beyond the letter of the law" (*lifnim mishurat hadin*). He referred to the talmudic sugya on *dine shamayyim* (in which the *baraita* discussed in §6.4 occurs), taken to be concerned with indirect causation in tort. For Elon:

... there is a special reciprocal tie between law and morality ... which finds its expression in the fact that from time to time Jewish law, functioning as a legal system, itself impels recourse to a moral imperative for which there is no court sanction, and in doing so sometimes prepares the way for conversion of the moral imperative into a fully sanctioned norm.

In so arguing, Justice Elon was going beyond the deontic modalities with which secular, positivist legal systems are familiar. He was advocating supererogatory action: payment of compensation which was not required by the law. The role of the judge was not simply to sit by as a neutral, and say that such a payment was permitted, but that it was a purely private matter between the parties. Rather, he saw the role of the judge as one of active persuasion to the parties to do that which the *halakhah* viewed as the "recommended" behaviour. And this, in a case where the religious courts had no jurisdiction (unless the parties voluntarily went to them, as arbitral bodies — which had not occurred in this case). His approach, however, was severely criticised by Justice Shamgar, who took it to represent a systematic blurring of the border between law and morality, which was totally unacceptable in a system of positive law such as that of the State of Israel. If the "dualistic" model is one of delegation, its application by the *mishpat ivri* movement in Israel clearly prompts the question: "who, in the context of the legal system of the State of Israel — and even after the *Hok Yesodot HaMishpat* — is the delegator?" At root, so it seems, Justice Elon would appear to regard the *halakhah* as providing the *Grundnorm* for the secular State, rather than the secular state providing the *Grundnorm* for incorporation of the *halakhah*.