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978-1-107-02466-3 - Jewish Bioethics: Rabbinic Law and Theology in their Social and Historical Contexts

Yechiel Michael Barilan

Excerpt

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I

Introduction

JUDAISM, JEWISH LAW, AND ETHICS

The identity of the Jewish people is rooted in the Hebrew Bible. There, we find two master narratives. The first is about the direct relationship between God the Creator and humankind, culminating in the Covenant with Noah, which articulates a mutual commitment to procreation and respect for human life. God will not annihilate life, as happened in the deluge; humans and animals will not spill human blood, which is tantamount to offense against the image of God in each and every human being.¹ The Covenant is universalist, devoid of worship, ritual, dogmatic teachings (e.g., commitment to a specific conceptualization of the divinity), idiosyncratic taboos (such as the one on eating from the Tree of Knowledge²), and particularistic practices. The story of the Tower of Babel may indirectly explain why humanity has forgotten both God and the covenant and why the Bible shifts from the first, universalistic narrative, to the second, particularistic one.³

The second Biblical master narrative is about a special relationship that developed between God and one small Mediterranean clan, which ultimately became the Chosen People, the Nation of Israel, or the Jewish People. The founding father of this clan was Abraham, the Patriarch. God's angel gave the name Israel to Abraham's grandson, the Patriarch Jacob,⁴ whose twelve sons became the tribes of Israel. In a period of famine, the Israelites left Palestine and moved to Egypt. They did not assimilate culturally and ethnically there and later were enslaved by the Egyptians. God acted on his promise to the Patriarchs and redeemed Israel from Egypt, converting them to a monotheistic worship whose center is in the Land of Israel (Palestine). The Pentateuch, which comprises of the five books of Moses, holds a special theological and legal status because God

¹ Genesis 9. Barilan 2012, 28–39² Genesis 2:17³ Genesis 11:1–9.⁴ Genesis 32:28

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revealed it (at least parts thereof) in the Covenant of Sinai to Moses, the leader of the Exodus from Egypt.

In Judaism, *Torah* is a master concept pertaining to the Pentateuch, as well as to all the teachings of the rabbis and the works and insights of all devout learners, past and present. The traditional Jewish way of life is centered on the Torah – loving it, studying it, developing its insights and teachings, and living by its values, stories, and laws. According to the Jewish tradition, the commandments of God, His laws as prescribed in the Torah, are much more than mere instruments of regulation and worship. They are special benefits, gifted to Israel by God, tokens of the singular and irrevocable covenant He struck with the nation of Israel.⁵ Every Jew is expected to live “a life of Torah,” one that combines “love of Torah and fear of the Lord.”⁶ Engagement with the Torah is the ultimate human freedom and source of moral and spiritual growth.⁷ This process is inescapably interlinked with respect for a very detailed normative system that bears on every aspect of life – diet, agriculture, the Shabbat and festivities, three daily prayers, rituals of the lifecycle, sexual life, private and public law, and the administration of communities. Judaism is not a proselitizing religion. Although every human may freely choose to convert to Judaism, the Jewish religion expects non-Jews neither to convert nor to observe Jewish law. The non-Jew is expected to abide by the Covenant with Noah.

The Bible never offers explanations for its laws and instructions. Except for the Shabbat (the weekly day of rest), the annual festivities, and a few other laws, the Bible holds the justice and wisdom of the laws of the Torah as self-evident to the whole of humanity.⁸ This confidence has been lost. The first paragraph of the sixteenth-century codex of Jewish law, *Shulhan Arukh*, goads the reader to ignore those who ridicule life according to the Torah.⁹ The rabbis have tried neither to rationalize nor to medicalize religious law. Rather, recourse to rational justification as the basis of faith and practice characterized the “enlightened” or “Enlightenment” (*maskil*)¹⁰ Jew, even when he or she was observant of the traditional laws and ways of life.¹¹

Indeed, one may notice alternating tones in the Jewish sources. In certain periods and schools, the Jewish way of life is represented as wisdom to be appreciated and even learned by all of humanity;¹² alternatively, numerous teachings and practices are represented as meaningful only within the special, intimate relationship between God and Israel. Rather, the primary Jewish commitment to the Torah is derived from the Covenant of Sinai and not from the

⁵ M. *Makkot* 3:16.

⁶ From the prayer for the new month – חיים שיש בהם אהבת תורה ויראת שמיים.

⁷ M. *Avot* 6:2.

⁸ Deuteronomy 4:5–8.

⁹ *Orah Haim* 1:1, *Remma*; Cf. I Corinthians 1:23.

¹⁰ משכיל - literal meaning: educated, rationally inclined.

¹¹ Katz 1973, Chapter 4; Efron 2001, 190–195.

¹² Hirshman 1999.

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intrinsic rationality that God's ways and precepts might have. Observant Jews do not perceive a need to explain Jewish religious practices; they do feel strong responsibility for the conduct of other Jews, including the nonbelievers, an attitude that is associated with a lower level of tolerance of deviant individuals and communal practices. With the growth of secularization and assimilation, the rabbis had to find ways to communicate with Jews who were only ethnically Jewish but culturally integrated into the non-Jewish culture. In addition, the governance of intensive care, organ transplantation, infertility medicine, and other exploits of biomedicine cannot be carried out within the confines of the family and community. At least with regard to biomedicine, the Jewish way of life, especially Jewish law, *Halakhah*, must be expressed in words comprehensible to the lay public.

The Hebrew word for religious law is *Halakhah*,¹³ whose etymology is derived from *h-l-kh*¹⁴ – to walk. Whereas the etymology of *Torah* is “to show/ to teach,” *Halakhah* is about action – walking the ways of life according to the Revelation of the Torah, as interpreted by its loyal followers. Even when natural morality coincides with *Halakhah*, the prevalent opinion in the rabbinic literature is that all normative aspects of life are derivative from the positive law of the Torah and not from natural morality, which is embodied by the covenant with Noah.¹⁵ Rabbis have always been keen on avoiding conflicts and apparent conflicts between widely accepted fundamental moral norms and Jewish law. Sometimes rabbis have forbidden a practice that was licit according to Jewish law only because it was considered abominable by the gentiles (i.e., non-Jews). On other occasions, rabbis have prohibited a licit action by the standards of Jewish law out of fear of hostile reaction by gentiles who might interpret the practice as immoral or impolite.

In Judaism, there is no need for salvation of the soul, nor are there any sacraments. Life is a journey to be walked communally, along the “way” (i.e., according to *Halakhah*), in expectation of bliss in the afterlife, the redemption of the nation of Israel by the Messiah, and, ultimately, the uplifting of the whole of creation and the eventual resurrection of the dead. This way of life combines governance of society with issues of personal morality and ritual. *Halakhah* is always bifunctional. Fulfillment of the commandments of the Torah cultivates the virtues, and it also has beneficial, cosmic, salvific, and theurgic effects in the spiritual world. The laws of God regulate life and sanctify the person, the community, and, by extension, the whole of creation.

¹³ הלכה¹⁴ הלך¹⁵ Barilan 2004b; Last Stone 1991, Last Stone 1992–1993, 843–844. See Statman (2010) and the commentary contributions in the same issue for a well-referenced and updated discussion on the relationship between *Halakhah* and morality. Much of this discourse focuses on public and family law, not bioethics. It also tends to ignore communal law (*takkanot haKahal*) and specific bylaws, such as the sick care societies'. Hence, I do not engage myself directly with this body of literature.

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According to Maimonides, life according to *Halakhah*, sometimes with a little predilection to the more demanding side, is the virtuous life. The medieval stream of *Ashkenazi Hasidim* beheld the law as a minimal threshold of conduct, whereas God expects of people much higher standards of piety and social justice.¹⁶ Despite this enormous philosophical gap (let alone the differences in style, theology, and moral anthropology), both sources have contributed to the development of *Halakhah* and its tacit norms, such as those pertaining to acceptable arguments and opinions within its pluralist and multivocal discourse.

It may be generally stated that Jewish normative values may be characterized by a commitment to the laws of the Torah (positive law) and a few general moral precepts: neighborly love, which is considered the most fundamental one;¹⁷ respect for *imago Dei*; walking in God's ways¹⁸ – in imitation of God (which typically covers acts of charity [*Hessed*]¹⁹); and “do[ing] the right and the good”²⁰ and “in all thy ways acknowledg[ing] Him.”²¹ The last value is also known as “the way [to walk on] earth.”²² It encompasses what in Western ethics are called “the civic virtues” and sometimes prudence, politeness, and natural, universal, commonsense morality.²³ The rabbis stated that “there is no Torah without ‘the way [to walk on] earth’; there is no ‘way [to walk on] earth’ without Torah.”²⁴ Because this very maxim is part of the first Jewish code of law, it is evident that a dialectical interdependence of the Torah and morals (or some aspect of naturalist normativity) is part of the religious law.²⁵ Moreover, and especially in relation to medicine and other lay domains of life, *Halakhah* recognizes common professional and administrative standards, as well as the prevalent habits of well-ordered societies (or “decent societies”), as *Halakhah*-relevant standards; these are referred to as “the way of the world.”²⁶ These standards may include traffic laws, regulations of product safety, and informal habits, such as the circumstances in which people usually visit a hospital's emergency department.

Relying on the verse “Her ways are ways of pleasantness and all her paths are peace”²⁷ the Talmud rejects the use of noxious plants in a festivity ritual, even though they meet the criteria for use specified in the

¹⁶ Maimonides, Introduction to Gloss on M. Avot, chapter 4; Schweid 1989, chapter 4; Beer 1938.

¹⁷ T. *Yerushalmi*, *Nedarim*, 9:4; Barilan 2009.

¹⁸ Deuteronomy 28:9.

¹⁹ חסד

²⁰ Deuteronomy 6:18. See Nahmanides's gloss.

²¹ Proverbs 3:6.

²² דרך ארץ The etymology is derived from the expression “the way of the tree of life” – the way leading to the Torah, which is the Tree of Life (Midrash *Yalkut Shimoni* 3:43 on Genesis 3:24).

²³ M. *Avot*, chapter 3; *Masekhat Derekh Eretz*; T. *Berakhot*, 63a.

²⁴ M. *Avot*, 3:17.

²⁵ Kook 1985, 35 (*O'rot HaTorah* 12:2).

²⁶ דרכי של עולם

²⁷ Proverbs 3:17.

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Torah.²⁸ In his codex of law, Maimonides writes an unusually long explanation to the talmudic maxim, discussed in Chapter Two, that saving human life takes precedence over the observance of most religious laws. In addition to the talmudic explanation, Maimonides writes that this maxim reflects the fact that the Torah's laws are "mercy, charity and peace."^{29,30} I conjecture that because Jewish law, and especially Maimonides, advocates (whenever necessary) harsh measures in the name of public peace and order, the word "pleasantness" is omitted. Indeed, the "pleasantness" motif is hardly found in the premodern halakhic literature. It is not considered a halakhic maxim.³¹ Often, the rabbis and the communities vigorously suppressed deviance from religious practice. Much is still unknown about the differentiation of diversity from deviance occurs within a religious community.

An additional maxim is that "The laws of the kingdom are laws [of the Torah],"³² indicating a religious duty to observe the laws of the state, such as those concerning taxation, commerce, public order, and other aspects of secular life. Although some rabbinic authorities give this maxim the highest legal level in *Halakhah*, as if the law of the king is the law of the Torah, secular law has no power to overrule *Halakhah*. It is also evident that rabbis have bolstered this maxim's importance to show loyalty to the state, dispel anti-Semitism, and secure everybody against crime and anarchy.

Jewish religious literature appeared in the first few centuries before the current era. In it, we find diverse traditions that claim continuity with the Bible, each presenting its own interpretations, ideas, and idioms. The rabbinic branch is traceable to the *talmudic literature*, whose basis is the first codex of law, the *Mishnah*, which is a third-century compilation of teachings from the previous four centuries. The Talmud is actually two compilations of discussions based on the *Mishnah*'s text. The larger and more accessible compilation is the Babylonian Talmud, summarizing the scholarship of the rabbinic academies in Babylon; shorter and more difficult to read, the Palestinian Talmud (or *Yerushalmi*) summarizes the scholarship of Palestine in a terse, often obscure style. The Talmud contains legal, folkloric, theologic, esoteric, and allegorical discourses. Other compilations of biblical exegesis and legal deliberations are recognized as part of the talmudic literature (e.g., the *Tosefta*). The *Midrash* is a general name given to the hermeneutic sections in the talmudic literature, but these texts are less authoritative than the canonized Talmud. *Aggadah* is the name typically given to sections in the narrative and homiletic genres in the talmudic and immediate post-talmudic literature. Sometimes the terms *Midrash* and *Aggadah* overlap.

²⁸ *Sukkah* 3 2a–b.

²⁹ רחמים חסד ושלוה בעולם

³⁰ *Hilkhot Shabbat* 2:3.

³¹ See Elon, 1962, and Talmudic Encyclopedia, entry "*Darkhei No'am*."

³² T. Bava Batra 55a.

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A typical halakhic discussion begins with a relevant talmudic law or deliberation and then develops it by means of casuistry and with the aid of other relevant sources. *Halakhah*'s mode of reasoning prefers rational engagement with the formative sources, even if rather remote, to unmediated value inquiry or rule-based exposition of the case at hand. A notable example is the problem of disconnecting life support from terminally ill patients. The halakhic formative sources are a story on the second-century martyrdom of a rabbi and a medieval teaching regarding folk remedies. Even though the analogy of these sources to contemporary life support and terminal care is quite tenuous, these sources nevertheless serve as stepping-stones to the halakhic discourse. It may be concluded that *Halakhah*'s semantic and normative structure embodies positive law, not in the sense of subjugation to a centralized source of social power, but in the sense of acceptance of a sort of "language game" encompassing given assumptions (such as the primacy of talmudic laws and case discussions) and norms of reasoning and expression, of which critical rational deliberation is central. Such acceptance is a kind of "interpretative commitment" of community.³³

It is commonplace to identify the rabbis of the *Mishnah* with the pharisaic sages mentioned by Flavius and in early Christian writings. But we have to keep in mind that, in those days, the boundaries between the diverse social and religious groups and teachings were quite fluid and obscure. It may be more accurate to state that each generation of observant or "Orthodox" Jews professes commitment to life according to the Jewish law and values as prescribed by the talmudic literature and in continuity with the traditions of law and life handed down by the preceding generation of Orthodox Jewry. In Greek, the word *orthodox* means "the true way." According to the self-perception of Orthodox Jews, of all possible tracts that rabbinic Judaism could have taken, the only authentic way is the one traceable generation after generation, from contemporary Orthodox Jews back to the Talmud.

Most Jews living today would not agree. Many are merely secular; their religious awareness is too thin, or they are indifferent to the debate on "the right way" of religious Jewish life. In Israel, when secular Jews face a characteristically religious choice (e.g., marriage, burial), they usually default to the Orthodox way. Although Israeli society is divided into "religious" (usually meaning "Orthodox") and secular categories, outside of Israel, Jews who cultivate their religious or national identity are more likely to associate themselves with one of the two other major denominations of Judaism, who branched off the traditional communities during the nineteenth century. Reform Judaism finds in Jewish law a source of inspiration, rather than legal authority.³⁴ Conservative Judaism is committed to *Halakhah*, but its versions of *Halakhah* diverge from orthodoxy on issues such as the role of women in religious practice

³³ Cover 1983–1984, 7.

³⁴ In some countries, this stream is known as "progressive" or "liberal" Judaism.

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and the structure of prayer. Conservative Judaism is more open to modern sensibilities and more repudiating of those habits and practices entering religious life during the last few hundred years, mainly with regard to modern technology and through the influence of *Kabbalah* (Jewish mystical and esoteric traditions).

Electric light is a case in point. When this technology began spreading, rabbis debated whether switching on light bulbs violated the laws of the Shabbat. Ultimately, a consensus settled that, indeed, it did. But Conservative rabbis deferred, constructing their legal reasoning on the basis of talmudic texts, premodern authorities, and alternative halakhic conceptualizations of electricity and electric light. The Conservative rabbis' arguments are in line with some Orthodox rabbis' opinions on the matter, which were expressed a hundred years ago. However, today, no Orthodox rabbi questions this turn in the history of Jewish law. Rather, every rabbi or person endorsing the turning on and off of electricity on the Shabbat is automatically identified as non-Orthodox. The "orthodox" road on that matter has already been taken.

This road is mildly positivist.³⁵ While on it, it is quite difficult to ignore an explicit prohibition; but, conversely, as rabbi Lifshitz wrote in the first half of the nineteenth century, "Without a known reason to prohibit something, it is permitted without a need for justification."³⁶ Lifshitz wrote this at the height of the struggle with reformatory trends during the first halakhic response to technology and scientific medicine. His legal positivism is weak because Lifshitz does not explain what might be a "reason" to prohibit something. Additionally, rabbis often prohibit a practice in consideration of public morals while acting in their capacities as pastors and leaders and while being aware that the prohibition has no intrinsic halakhic basis. The Ultra-Orthodox ban on television is a case in point. Another factor accounting for the mildness of positivism in Jewish law is the law's own commitment to bend and stretch itself for the sake of accommodating human values and the law's tolerance of inaction in the rare situations in which law and morality collide.³⁷

³⁵ In legal positivism, the authority of the law is derived from its legitimization, the authority behind it, independently of the merit or demerit of the law's intentions, contents, or consequences. The law is socially "posited" – ordered, decided, practiced, and tolerated. In the rabbinic worldview, one is first committed holistically to the Torah and its norms regardless of the justification and value of any particular law or set of norms within it. Obedience to the internal conventions of *Halakhah* and its historical consolidation is one such set of norms. Within ordinary positivist structures, a practice that is not prohibited by law is legally permissible. There is no legal need to weigh the moral or prudential probity of that practice.

According to legal naturalism, in order to have a normative, action-guiding authority, the factual presumptions of the law (or legal ruling) must be scientifically valid, and there must be a rational moral justification to the law's content (or at least to obeying the law).

According to legal formalism, every inference of a legal decision must follow, as much as possible, a predetermined set of rules of reasoning (e.g., adherence to the "ways of induction from the Torah" (מידות שהתורה נדרשת בהן)).

³⁶ Gloss *Tif'e'et Israel* on M. *Ya'dayim* 4:3. See *Tosefta Sanhedrin* 7:4.

³⁷ Chapter Ten, last section.

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So-called Ultra-orthodox Jews (or *Haredim*) are marked by a stronger commitment to all aspects of traditional life, including cultural aspects not contained in *Halakhah*, such as wearing black clothes cut in the same style as those of their ancestors in Eastern Europe. In addition to increased self-awareness of cultural differentiation from others, including other religious Jews, Ultra-orthodox Jews tend to adopt more demanding interpretations of the law. Even when the law tends toward leniency, the Ultra-orthodox embrace the stricter minority opinion as a matter of supererogatory piety. Additionally, when lenient reading of the law is at risk of association with liberal social values, the Ultra-orthodox communities are likely to adhere to the more rigid codes of behavior. Many Ultra-orthodox circles are also opposed to Zionism.

The word “orthodox” was coined during the struggles of traditional Jews with both reformist and secular trends during the Enlightenment, but, even before this word was in use, rabbinic Judaism always had to define itself against heteronomic trends, such as Sabbatianism (seventeenth and eighteenth centuries), Karaites (early and High Middle Ages), and *minim* (the talmudic word for early Christians and gnostic sects). As an academic scholar and practicing physician, I find it inappropriate for me to assert either who represents “authentic Judaism” better or whether such judgment is at all meaningful. Hence, I prefer the term “rabbinic Judaism” to “orthodoxy.”

The fodder for bioethical discourse appeared only in the second half of the twentieth century – the ethics of scientific experimentation on humans, the use of life support machines, genomics, infertility treatments, and the administration of large-scale healthcare services. Thus, time has been too short for a consensus on these issues to consolidate within the rabbinic discourse and the Orthodox lifestyle. The *Halakhah* of bioethics is still raw and fresh, open to a broad variety of opinions. This situation renders rabbinic bioethics an especially stimulating field of inquiry, a mini-laboratory to explore the possibilities and limits of a very old and traditionalist system of religious law in its encounter with science, technology and multicultural democratic state apparatuses.

At the hub of Jewish law we find two post-talmudic codices of law. The first was written by Maimonides, in twelfth-century Egypt, under the name *Mishneh Torah* (“deputy of the Torah”). The later codex of law was written in sixteenth-century Palestine by a refugee from Spain who was closely associated with the emergent circle of Lurianic Kabbalah, Rabbi Yosef Karo. His contemporary, Rabbi Moshe Isserlish from Cracow, also known as *Remma*, inserted comments to Karo’s text, highlighting the opinions and practices common among Ashkenazi Jewry (i.e., the European communities whose origins are traceable to Medieval German Jewry). Since then, Karo’s text, along with Isserlish’s comments, is considered the most authoritative codex of law. It is called *Shulhan Arukh*.

Karo’s codex developed from his gloss on earlier codices, Maimonides’s *Mishneh Torah*, and the *Tur*, which was written by Rabbi Jacob (early fourteenth century), son of Rabbi Asher ben Yehi’el, also known as *Rosh* (1250–1327). In

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addition to Maimonides and *Rosh*, Karo relies heavily on Rabbi Isaac Alfasi (1013–1103). The *Tur* and *Shulhan Arukh* are comprised of four main sections – *Orah Haim* (on daily practice, Shabbat, and holidays), *Yo'reh De'ah* (on religious taboos, such as kosher food), *Ev'en HaE'zer* (family law), and *Hoshen Mishpat* (contract and criminal law).

Rabbinic books and treatises rarely stand alone as academic monographs. A book is either a gloss on an earlier canon (mainly the Pentateuch, Talmud, or one of the codices of law) or a collection of *responsa*, which are usually arranged thematically (e.g., following the four sections of the *Shulhan Arukh*). Many rabbinic works have been printed along with the text they interpret or follow. For example, the text of Alfasi (*Rif*) is found at the end of the books of the Talmud; and the gloss *Rashi* is located on the inner edge of the pages of the Talmud. In the rabbinic literature, rabbis may be referred to by name (e.g., Isserlish), by acronym (e.g., *Remma*), or metonymically, by the title of their most famous work (e.g., *Igrot Moshe*).

The *responsa* literature (*Shut*³⁸ is a Hebrew acronym) is comprised of published anthologies of practical questions brought before a rabbi and the answers given, usually in the form of a private letter. Each rabbi publishes his own collection of *responsa*, often with the help of disciples who selected, edited, and updated the original texts.

This and other genres of halakhic literature are hermetic but not esoteric discourses in jargonized Hebrew. It is hermetic because the rabbinic literature does not tend to make references to external works, such as in philosophy and science. It is not esoteric because the principles of halakhic argumentation are rational.

In the past century, a genre of rabbinic journals in an academic style has been flourishing. These journals use academic formats such as footnotes and interdisciplinary dialogues. Among these journals one may count *Assia* on *Halakhah* and medicine; *Tehumin*, which is dedicated to the convergence of technology, applied ethics, and Jewish law, and *Tradition*, which is broader in scope and is published in English in the United States.

In Israel, the state's system of rabbinic courts exercises jurisdiction over marriage, divorce, and related aspects of family law. The rulings of these courts are systematically archived and comprise a new trove of halakhic creativity whose impact on Jewish biomedical law is still underexplored.³⁹ Overall, the main corpus of evolving halakhic tradition is the sets of *responsa* published by individual rabbis, not rulings and guidelines signed by rabbinic courts, joint committees, and similar bodies.

A small genre of Jewish religious literature is dedicated to coping with illness, dying, and death. The first book of this kind, *To'rat HaAdam*,⁴⁰ was written by the halakhist and mystic Nahmanides, who lived in thirteenth-century Cataluña.

³⁸ שאלות ותשובות, שו"ת

³⁹ Westreich 1996.

⁴⁰ Nahmanides 1964.

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In parallel with the advent of Jewish burial and sick care societies in the early modern period, a genre of books containing special prayers, mystical teachings, descriptions of habits, and folk medicine has flourished.⁴¹ No comprehensive research has been done so far on this body of Jewish manuals of sick care. It is unclear why almost all of the books in this genre were not written by halakhists, let alone national-level authorities like Nahmanides. Perhaps this is because most such books were written by or in the name of the burial and sick care societies, articulating communal consensus on stock situations, rather than personal opinions and creative answers to complicated and unusual problems.

The halakhic literature mainly embodies the rabbis' role as legal rulers, decisors, or *poskim*. However, as we will see throughout the book, rabbis also act as judges, counselors, and public leaders. It is not easy to distinguish among these roles, which often overlap and metamorphose, even within the very same responsum. However, each role implies different conventions of style, reasoning, and normative authority.

Whereas secular law is a first-order normative system (i.e., it is deontic, telling people what is permitted and prohibited), *Halakhah* contains a second-order dimension, directing people's wishes and values. Hence, for example, we will see that *Halakhah* instructs patients who suffer to cling to life despite their agony; but *Halakhah* is also permissive with patients who suffer terribly and wish to die. The latter norm is of the first order, whereas the former is of the second order. First-order rulings fit the rabbis' role as decisors; second-order norms better fit their role as counselors.

Jewish law distinguishes between principled rulings, such as the public texts of the responsa, so-called *Halakhah*, and the counseling given to actual people who are about to act on the rabbi's ruling in a given circumstance – *halakhah le'ma'a'seh*.⁴² Hence, in Judaism, a certain gap, even if usually minor, exists between the formal law and what rabbis actually tell those who ask for their advice and directives. In medicine, however, the gap between formality and reality might be enormous. In *Halakhah*, situations labeled as “in case of need” or “in great necessity,”⁴³ such as occur in the dire straits of tough medical decision making, justify – indeed, may oblige – the stretching of the limits of the law or even creatively manipulating the law to meet pressing and fundamental human needs and respect human dignity. Some people might find this practice disrespectful of the law and see it as mere trickery, but the rabbis find in it the superiority of the value of neighborly love over all other normative tenets.⁴⁴ Within certain limits, God would rather bend the law than let a human being suffer. This tenet does not posit human values above the law; it is part of the law, and it has its own legal limits that must not be transgressed even in the face of

⁴¹ Goldberg 1996, 101–107.

⁴² הלכה למעשה

⁴³ צורך גדול

⁴⁴ Barilan 2009 in reference to T. *Yerushalmi*, Nedarim, 9:4