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# Judaism without Ordinary Law: Toward a Broader View of Sanctification

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# Judaism without Ordinary Law: Toward a Broader View of Sanctification

BY JONATHAN R. COHEN

**I**n the second chapter of *Judaism as a Civilization*, Rabbi Mordecai M. Kaplan makes a remarkable assertion: “[T]he elimination of the civil code from Jewish life has, in fact, administered as severe a blow to Judaism as the destruction of the Jewish commonwealth” (Kaplan, 17).<sup>1</sup>

The political emancipation of the Jew, beginning in France in 1791 and then spreading elsewhere, both gave and took. With the granting of full civil rights to Jews came the loss of much of Jewish law as a functioning legal system, since the secular legal system replaced the Jewish legal system for most ordinary disputes. Functionally speaking, the basic law-in-practice as known by most Diaspora Jews, including American Jews, became the secular law.<sup>2</sup> If a neighbor damages your property or a business partner breaches a contract, your must sue them in the civil court to recover. Whether the neighbor or the business partner is a fellow Jew is essentially irrelevant. The operative law and the legal system that will address the dispute are secular ones. As a by-product of political emancipation,

Jewish law-in-function was essentially relegated to the ritual realm. This applied not simply to progressive or liberal branches of Judaism, but to traditional ones, too. As Kaplan wrote, “[T]he most important elements of Jewish law are as obsolete in Neo-Orthodoxy as they are in Reformism.” We learn that Neo-Orthodoxy accepts with equanimity the elimination of the whole civil code of Jewish law, and is content to confine the scope of Jewish law to ritual observance” (Kaplan, 157).<sup>3</sup>

## Differences in Gravity

Upon first reading Kaplan’s statements, I reacted strongly. While I suspected some hyperbole (could the replacement of much operative Jewish law with civil law really compare to the destruction of the Jewish commonwealth?),<sup>4</sup> Kaplan’s words struck a deep chord. As one who is both a law professor — a professor of American law and legal practice — and a Jew, I know how different the functioning of civil law can feel from that of ritual law.

Let me give two examples. My wife

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and I have had numerous discussions about *kashrut*, addressing “legal” questions such as what level of *hekhsher* to require of foods, what to say to dinner guests who wish to bring a dish to our home and so on. By contrast, I recall when serving as a law clerk to an appellate judge discussing with that judge whether a defendant’s conviction should be overturned for evidentiary error, a decision that would determine whether that person would spend the next decade in prison. My wife and I consider our *kashrut* decisions carefully. We attempt to articulate general principles underlying our decisions rather than deciding cases ad hoc. Yet, no matter how seriously we take them, the gravity of our *kashrut* decisions is simply of a different order of magnitude than a decision that determines whether a human being will remain incarcerated for much of his life.

As I pondered Kaplan’s words, my mind began turning his statements into questions. How has the relegation of Jewish law to the ritual realm affected the role of the rabbi? What does it mean that rabbis rarely serve as judges in real human disputes? How has this shift affected the lives of other Jews? For example, Jews wishing to work in the law-in-practice would have to undertake a secular rather than a religious legal training. How would that affect their lives? And what of the Jewish wisdom and lore contained in now largely inoperative sections of Jewish legal texts like the Talmud?<sup>25</sup> Would that rich knowledge also be lost as civil law replaced *halakhah* as operative law?

Numerous important questions arise, far too many to address here.

Rather, I shall confine myself to a single question: How has the restriction of operative Jewish law to the ritual realm influenced our understanding of sanctification?

## Visions of Sanctification

In response, I will suggest that restricting operative Jewish law to the ritual realm may have brought with it a narrowing of how we understand sanctification — a narrowing we should attempt to undo. Before explaining this, let me make a request by way of confession. Although I study Judaism seriously, I am not an expert in it. My primary expertise lies in American legal practice — specifically, in legal dispute resolution. That vantage point is of aid as I approach the question above, for it gives me an understanding of an ordinary functional legal system — that is, a legal system that exercises real power to resolve actual disputes. Yet as one not formally trained in either history or Jewish thought, it is with much humility that I approach the religious, historical question of how relegating operative Jewish law to the ritual realm may have influenced our understanding of sanctification. I ask that readers approach the statements below as hypotheses rather than as conclusions, and hope that, should they see fit, those versed in other fields will evaluate and, where appropriate, refute such speculations.

It may be helpful to begin by identifying two different, though not unrelated, visions of sanctification (*kedushah*).

The first vision is sanctification as separation from the ordinary, that

is, *kodesh* vs. *hol*. In the words of the Orthodox Union, “The basic meaning [of *kedushah*] is separation from the ‘general’ and dedication to the particular” (<http://www.ou.org/about/judaism/jl.htm>). This is the sense of holiness we usually have in mind when we think of Shabbat (as different from ordinary days), of *kashrut* (as dividing the kosher from the *treif*), and even of marriage (as separating a couple from participating in sexual relations with all others through *kedushin*). Separation lies at the core of such fundamental Jewish ritual building blocks. Further, much ritual effort is devoted to marking the lines of separation. Candles are lit at the beginning and end of Shabbat. Much energy is devoted to kashering a kitchen when moving into a new home. The wedding process is usually marked by a sense of ceremony, often with many guests invited.

The second vision is sanctification as elevating or improving. When we announce in the *Kedushah*, “Holy, Holy, Holy is the Lord of Hosts; the whole world is full of God’s glory,” it is not that we are seeing God as separate from our world. Rather, we are seeing God as permeating and elevating our world. Sanctification, in other words, can be viewed as a direction.

Often, the first vision of sanctification as separation and the second vision of sanctification as elevation exist simultaneously. Shabbat is a holy day not merely because it is a separate day, but because that separation is in the direction of elevation toward greater joy, fulfillment and rest. Even the solemn Yom Kippur — the holiest of days — is ultimately oriented toward elevation

(through *teshuvah*). Note, however, that this second vision of sanctification need not be tied to that of separation. It is possible to improve or elevate something without separating from it.

## Legal Implications

As mentioned, in the ritual realm, Jewish law centrally concerns itself with promoting sanctification through the process of separation. Jewish ritual law seeks to construct a world in which the holy is separated from the ordinary. Moreover, the fact that Jewish law provides the parameters of such ritualized activity helps to authenticate the religious foundation of such activity. Part of what helps the ordinary Jew to feel holiness through such rituals is that Jewish law provides for these rituals.

By contrast, in the non-ritual realm, separation is not the hallmark of sanctification. Though analysis and classification are of course important to non-ritual Jewish law, separation per se is not especially so. If one’s ox gores a neighbor’s ox, the central legal issue is not whether an ox is or is not a kosher animal. Rather, as with most types of ordinary law, the central legal question is what remedy should ensue.<sup>5</sup> Ordinary Jewish law does not pursue the construction of binary categories. Yet this does not mean that there is no sanctification to be found. Quite the reverse. Often, for people in the midst of conflict, great sanctity is experienced when that conflict is resolved, whether by mutual agreement or by a legal award. The critical point is that such sanctification — as with much of the sanctification in our world — is to be

found not by separating off from ordinary life, but by going through it. Indeed, were a comparison to be made, I suspect that such sanctification through ordinary life “exceeds” sanctification vs. ordinary life in importance. What we do on the six days of the week ultimately has more to say about whether we lead a sanctified life than what we do on Shabbat.

We can now see a root problem that may have arisen with the restriction of operative Jewish law to the ritual realm. Both because the basic forms of sanctification are different and because the imprimatur of Jewish legal authority no longer attaches to the ordinary realm, many Jews no longer recognize ordinary life as sacred, or at least as an activity that can be sanctified. For many Jews, the non-ritual realm has lost much of its religious significance.

Perhaps an example will help convey this. Recently, I presented a *d'var torah* to my havurah and shared the thesis of this essay. A mother responded with a story about her six-year-old daughter. Until this year, the girl had attended our community’s Jewish preschool, but had since switched to public school. After several weeks in public school, the daughter asked her mother (I paraphrase), “What does it mean to be Jewish in public school? Does being Jewish in public school mean keeping kosher and keeping Shabbat?” The girl’s questions focus upon ritual Jewish life. In one sense, no doubt, she is right: *Kashrut* and Shabbat are critical, distinctive aspects of being Jewish in the multicultural world of public school. Yet what about the matter of how one treats others? Is not that central to being

Jewish as well? Is not “Thou shalt not steal” (a commandment quite relevant to young children) among the Ten Commandments, along with keeping Shabbat? My point is that the girl’s questions may reflect a view of Judaism as restricted to ritual Judaism. If so, what a loss this is. If we cannot see the sacred in ordinary life, much of our vision of the sacred has been lost.

## Separation and the Sacred

I close with four final notes.

First, affirming the value of the sacred in ordinary life — the sacred through — is not to denigrate the importance of the ritual sacred. Separation — the sacred verse — is often sadly neglected. The pursuit of the sacred through should not come at the expense of the sacred vs. Indeed, the two are usually complementary. Experiencing the sanctity of Shabbat can help us pursue sanctity in the other days of the week, and vice versa. At a deep level, the dialectical construction of the sacred through vs. the sacred vs. may blur.

Second, much of the ritual sacred concerns either emotionally powerful life-cycle events (such as birth, bar/bat mitzvah, marriage, divorce and death) or emotionally powerful Jewish calendar events (such as holidays and Shabbat). Further, many but not all of these events are uplifting experiences. By contrast, the sacred through is often much more mundane. It concerns the challenges of ordinary life. Life can be unpleasant. Life can be boring. The sacred through focuses not upon the liminal, but upon the typical. Yet that is precisely why it is so important. It is

easy to sense holiness at the moment of a child's birth. It is harder when changing diapers. However, for every one birth, there are thousands of diapers to change. That is why finding holiness in the ordinary is essential.

Third, let me share a few brief thoughts about what one might call Jewish "sacred knowledge." Often, we think of Jewish sacred knowledge as knowledge about the ritual domains of Jewish life — to follow the questions of the six-year-old, knowledge about things like keeping Shabbat and *kashrut*. Yet knowledge about the nonritual domains of life — more specifically, knowledge about how to appreciate and elevate those domains — should also be viewed as sacred knowledge. Our respect for ritual knowledge, in other words, should not make us insensitive to the sacred value of other life knowledge. Before the functional restriction of Jewish knowledge to the ritual realm, such a prioritization of ritual knowledge over other sacred knowledge made little sense. There was no reason to give preference to knowledge of the laws of *kashrut* over knowledge of the laws of contracts, since both addressed operative law. It is critical that we respect sacred knowledge in both ritual and nonritual areas.

Fourth and finally, broadening our vision of the sacred may help Jews who live in a largely secular world have a greater sense of religiosity and perhaps even integration in their lives. In one of his final orations, Moses declares to the children of Israel, "This instruction (*mitzvah*) which I enjoin upon you this day is not hidden from you, nor is it far off. It is not in the heavens (*lo*

*ba-shamayim hi*), that you should say, 'Who shall go up for us to heaven, and bring it to us, that we may hear it, and do it?'" (Deuteronomy 30: 11-12)<sup>6</sup>

## Life of Torah

There are many lessons to be found in these lines. The rabbis, of course, used this passage as a proof text for their power to interpret and determine Jewish law, for the Torah was "not in the heavens" but here on earth (Babylonian Talmud, *Bava Metzi'a* 59b). Perhaps the simplest reading is that of rebuttal: Were Jews to assert that they could not follow the Jewish law because they could not obtain or understand it, such a claim would be false. Let me suggest a third reading — namely, that a life of Torah (and here I mean Torah in the broadest sense) can be all-enveloping. It is not "hidden" or "far off," but can guide and infuse life throughout, from birth to death, in things large and small. To borrow Abimelech's words to Abraham, it is the sense that "God is with you in everything that you do" (Genesis 21: 22).

## Recognizing Sanctification

With the functional constriction of Jewish law to the ritual, it is easy to relegate Torah and, with it, our sense of sanctification, to the ritual. Such is a great loss. Recognizing sanctification as not only separation but also elevation may help us see the possibility of pursuing sanctification throughout our lives. In other words, the legal constriction produced by history should not become a spiritual one as well.

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1. Kaplan's usage of "civil law," which I follow in this essay, is in the civil- vs.-religious sense, rather than the civil- vs.-criminal sense.

2. I do not here address the question of to what extent the lives of Israeli Jews are governed by Jewish law. Kaplan's view was that, even within the State of Israel, the effective scope of Jewish law was quite limited through the restriction of rabbinical courts to questions of personal status (e.g., marriage, conversion, etc.). See Mordecai M. Kaplan, *Questions Jews Ask: Reconstructionist Answers* (New York: Reconstructionist Press, 1956; 1972), 323. For secondary discussions of Kaplan's approach to Jewish law generally, see Ronald A. Brauner, ed., *Jewish Civilization: Essays and Studies: Jewish Law, Vol. 2* (Philadelphia: Reconstructionist Rabbinical College, 1981).

3. Observe that many of the subjects most contested among various branches of contemporary American Judaism (e.g., patrilineal descent, rabbinical ordination of women and gay marriage ceremonies) concern matters of ritual law. No great internecine battles are being waged over criminal penalties, tort damages, evidentiary standards and so forth.

4. In *Questions Jews Ask*, Kaplan later discusses this change in less dramatic terms. *Id.* at 323.

5. Consider, for example, the glorious Mishnaic passage proclaiming the worth, equality and uniqueness of every human life:

Therefore was the first man, Adam, created alone, to teach us that whoever destroys a single life, the Bible considers it as if he destroyed an entire world. . . . Furthermore, only one man, Adam, was created for the sake of peace among men, so that no one should say to his fellow, "My

father was greater than yours." . . . Also, man [was created singly] to show the greatness of the Holy One, Blessed be He, for if a man strikes many coins from one mold, they all resemble one another, but the King of Kings, the Holy One, Blessed be He, made each man in the image of Adam, and yet not one of them resembles his fellow. (*Sanhedrin* 4:5)

This passage is found, quite poignantly, as part of the instructions to given to witnesses before testifying in capital cases. With the relegation of Jewish law to the ritual realm, such a subject is no longer strictly "necessary." Perhaps this passage is sufficiently famous that it will not be "lost," but one senses the risk. Many Jewish legal texts contain much more than simply law. Without the need for the law, such "more" may be lost.

5. The question of what remedy should ensue is often far less salient when it comes to ritual law. Violations of ritual law may roughly be seen as violations between a person and God (*bein adam l'Makom*), while the violations of ordinary law are typically violations between a person and another person (*bein adam l'haveiro*). Though specifying remedies for ritual violations is, of course, possible (think of Leviticus' elaborate sacrificial system), generally speaking, the remedial focus is more immediate and clear for nonritual law than for ritual law. For non-ritual transgressions, there is often a present need for compensation of the injured party, as well as the risk of vigilantism should that need not be officially addressed.

6. Though *mitzvah* is in the singular, the sense in which it is normally understood is a broad one, a reading supported by the attendant text. See, e.g., Deuteronomy 29: 28, 30: 10 and 30: 16.

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