

# On Neusner's Theology of *Halakhah*

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## 1. Introduction

Scholars of *halakhah* (as indeed of secular legal systems) tend to be specialists, focusing their attentions on particular areas of law (sometimes defined in terms of the divisions of the *Shulhan Arukh*). “Jewish law” scholarship has concentrated on “civil” rather than “religious” law: i.e., those areas of law which have equivalents in secular legal systems. The Israeli *mishpat ivri* movement has a particular ideological reason for this: to foster incorporation of those areas of *halakhah* into the law of the State of Israel. At its worst, this can entail a “reduction” of halakhic categories to their secular counterparts. In varying measures, however, Jewish law scholars seek to take account of the religious character of their subject matter.<sup>1</sup>

In these volumes (published by Brill),<sup>2</sup> Jacob Neusner adopts a radically different approach. He provides an account of the foundations of the *halakhah* as a whole, and offers a theological interpretation of its message. His overall claim is most succinctly expressed thus: “Israel in the Land... reconstructs Eden by recapitulating creation and its requirements” (vol.I, p.19). More specifically, he defines the theology of the *Halakhah* in terms of the following three propositions (*Theology* xxix): “[1] As recapitulated by the Halakhah, Scripture’s account of Eden portrays not an event but a condition. ‘Eden’ stands for Man and God dwelling together. [2] Restoring that condition, the Halakhah sets forth the norms for a society formed by Israel in the Land that is worthy of God’s presence in this Eden. [3] The Halakhah systematizes the laws of the sanctification of the social order that God himself has revealed to Israel at Sinai in the Torah, and theology states the results of reading those laws – that religion’s story – philosophically.”<sup>3</sup>

As important, however, is the particular theological message Neusner seeks to demonstrate for almost every individual tractate. In so doing, he endorses no distinction, in either principle or practice, between the “religious” and “civil” parts of the *halakhah*: all equally manifest (whether explicitly or implicitly<sup>4</sup>) theological messages, and it is often crucial to see the inter-relationship of those theological messages in order to achieve a proper understanding. His comparison of *qiddushin* to the selection of an animal for (a specific) sacrifice (IV:294), discussed further below, provides a striking example.

This endeavour resonates with a trend in the theoretical analysis of legal reasoning in modern jurisprudence, where “holistic” approaches treat the values of and principles inferred from the positive law as essential components of the legal system itself, as well as using them for the purposes of finding solutions to difficult cases. In this context, I have had occasion to describe the approach of Ronald Dworkin, who seeks the underlying political philosophy of the system as a whole<sup>5</sup> and

regards principles inferred from one area of law as relevant in principle to problems in substantively quite unrelated areas,<sup>6</sup> as manifesting a “hermeneutic holism of truly rabbinical proportions”.<sup>7</sup>

I have no hesitation in endorsing the value of Neusner’s enterprise. Its ambition is breathtaking, and its implementation is at its lowest stimulating and very frequently stunning. Only a man of Neusner’s energy and intellectual curiosity could have contemplated it. Once again, Neusner’s legendary speed has produced a work whose virtues make its inevitable shortcomings<sup>8</sup> pale into insignificance. Any attempt to reduce even the “civil” areas of *halakhah* to purely secular categories (other than for non-academic purposes) is shown to be misguided, and the need to take account, even here, of the thinking behind the rabbinic elaboration of ritual law is well established.

Neusner does not seek to conceal limitations in his arguments;<sup>9</sup> he is concerned to make the strongest possible case for his model, without claiming that it is watertight or incapable of improvement. Indeed, while claiming to provide: “a religious commentary to the Halakhah of the Oral Torah, the first complete, encompassing one of its type ever undertaken” (III:xiii), he invites others to offer alternatives (*Theology* xxxviii-ix). That is hardly likely, as he well knows. Indeed, only someone who has studied the entire *halakhah* could provide a well-founded overall evaluation of Neusner’s *oeuvre*. Others, such as the present writer, can do no more than raise questions and offer glosses and annotations, from a rather “partial” perspective (in both senses of the word).

Neusner’s claim that his enterprise is unique<sup>10</sup> is well-founded, if the enterprise is strictly defined in terms of his methodology. He seeks systematically<sup>11</sup> (tractate by tractate) to identify and translate the “foundational texts” (of Mishnah, Tosefta, and the Talmudim<sup>12</sup>) of the *halakhah*, but within them he limits himself to statements of “normative” *halakhah*, defined as possessing the following traits (*Theology* xxxii): “[1] it will be anonymous or marked as unanimous opinion and so entirely unchallenged; [2] it will prove coherent to other statements on the same subject; [3] it will define the premise of making certain connections or it will emerge as a result of making said connection, and/or [4] it will be presented as the regnant opinion when conflicting opinions register, *e.g.*, as the opening proposition, or as the climactic statement; or in some other significant way signals will be given to accord privilege to the statement cited or alluded to in these pages as representative of the structure and system of Rabbinic Judaism seen whole, in proportion, as a coherent statement.” He then seeks to outline the problematics of these texts and provide a religious interpretation of their concerns (“what issue of transcendent consequence is at stake”: I:35-36).<sup>13</sup> Yet the essence of this enterprise appears not entirely unrelated to that of Maimonides, in those sections of the *Guide* in which he discusses the *ta’amei hamitsvot*. While Maimonides,<sup>14</sup> like Neusner,<sup>15</sup> accepts that the “details” of the *halakhah* may be (theologically) indifferent,<sup>16</sup> Maimonides’ approach differs radically from that of Neusner in that he adopts a classification of the *halakhah* which accepts in principle that different considerations apply in the search for their underlying rationality. Thus, in *Guide* III.35 he divides the commandments into fourteen classes, subsequently devoting a chapter to each.<sup>17</sup> Granted, Maimonides’ classification is based primarily on different

forms of *utility*, which is not necessarily inconsistent with a different account of theological *meaning*. The question which arises, however, is whether either account can be complete on its own, or whether there is a need to integrate a number of different perspectives.

Neusner insists that he is here providing a theological<sup>18</sup> rather than an historical account (even though at one point he locates it historically as a response to Pauline theology: *Theology* xv-xvi). The particular historical account which he here eschews is the internal history and meanings of the individual documents (to which a veritable library of his writings is already devoted).<sup>19</sup> But there are other historical issues to which (from Neusner's own account) greater attention deserves to be paid.

Neusner's theology itself makes use of the following time-frame:

1. Creation<sup>20</sup> and Eden (taken to represent a perfect natural and social order,<sup>21</sup> against which humanity rebelled);
2. Entry to the Land (the second chance, also wasted);<sup>22</sup>
3. The "here and now"<sup>23</sup> (involving at least the possibility of Israel's partial restoration to the land);
4. The "end of days" (involving Israel's complete restoration to the land);<sup>24</sup>
5. The messianic age.

Of these, the last is discounted:<sup>25</sup> the object of the *halakhah* is to provide a programme modelled upon 1 and 2, for implementation in 3 and 4. The relationship between 1 and 2 is one of recapitulation,<sup>26</sup> but with the difference that Israel enters the land with the Torah.<sup>27</sup> As for that between 3 and 4, there is a tension between the claim that the *halakhah* is intended for implementation in the "here and now" and the understanding of the *halakhah* as an ideal programme for the future.<sup>28</sup> Insofar as it is the former, not only do historical conditions clearly prevent some aspects from being implemented, but halakhic values themselves minimise some institutions. Thus Neusner's account of Yevamoth stresses the privileging of *yibbum* over *halitsah*.<sup>29</sup> That may be the ideal, to be implemented in an ideal age (and indeed more compatible with an era of restoration than one of *galut*<sup>30</sup>). But for the "here and now", *halitsah* already becomes the preferred option in some talmudic sources.<sup>31</sup> If, then, there is a distinction between the "here and now" and the period of restoration, must not the historical conditions of the "here and now" be relevant to that distinction?

In one major respect, Neusner presents the distinction between the "here and now" and the "end of days" as both halakhically and theologically significant. The latter is the period when the individual Israelite, whose sin has been expiated in the "here and now" (particularly, by capital punishment) will be resurrected along with all other Israelites and inherit the world to come.<sup>32</sup> However, the collective entity "Israel" has no bodily manifestation which suffers death and cannot thus be a candidate for resurrection (III.316-17): hence, its punishment and reward (notably, in the forms of exile and restoration: III.317-18) are not marked by the temporal division between the "here and now" and the "end of days": the collective entity "Israel" is enduring, as is its reward/punishment. (Neusner avoids locating the modern State of Israel within this theological structure.)

A comparable issue arises from Neusner's account of Jewish-Gentile relations, as it emerges both from his general conception of the relationship of the *halakhah* (addressed to an exclusively internal audience and concerned with "interiorities", even when Jewish relations with gentiles are concerned<sup>33</sup>) to the *aggadah*<sup>34</sup> (not addressed to an exclusively internal audience and concerned with wider issues<sup>35</sup>), and in his interpretation of tractate *Avodah Zarah*. In the latter, he contrasts an ("ideal", i.e., stereotyped) image of gentiles as idolaters prone to violence and sexual license, who (if they did not convert) should be avoided like the plague,<sup>36</sup> with an empirical or pragmatic approach, which recognised that in the "here and now" Jews did in fact live cheek by jowl with gentiles and sought to facilitate such co-existence.<sup>37</sup>

In these contexts the relationship between Neusner's theological account and that of *mishpat ivri* might appear in a somewhat different light. For *mishpat ivri* seeks to address the "here and now" through models which take account of co-existence with gentile law not only in issues prompted by conflicting jurisdictions, but also in historical terms: what is the historical relationship between the *halakhah* and gentile (or secular) law, as regards both particular institutions and legal thought in general. Such questions may themselves be posed in theological terms, as will be argued later.

If there is a fault to be found in Neusner's approach, it is that of occasional overstatement,<sup>38</sup> sometimes in the form of too rigid binary oppositional thinking: x completely excludes its opposite, y. His opposition between the theological and the historical (here, including the juridical) is a case in point. The attempt to view the meaning of halakhic institutions exclusively in terms of Neusner's theological structure succeeds better in some areas than in others. I shall seek to exemplify this, as well as much of the foregoing, by examining Neusner's account of three areas: what lawyers would term (a) criminal law, (b) marriage and divorce, (c) civil law (primarily, that of Baba Qamma-Baba Batra).

## 2. Criminal Law

The concern of the *halakhah's* criminal law (*dine nefashot* and *dine kenasot*) is not primarily with either deterrence or retribution: it is with expiation of sin, in preparation for the final (divine) judgment. As Neusner puts it (III:227): "The most profound question facing Israelite thinkers concerns the fate of the Israelite at the hands of the perfectly just and profoundly merciful God. Since essential to their thought is the conviction that all creatures are answerable to their Creator, and absolutely critical to their system is the fact that at the end of days the dead are raised for eternal life, the criminal justice system encompasses deep thought on the interplay of God's justice and God's mercy: how are these reconciled in the case of the sinner or criminal?" They are reconciled by the notion that humanly (where appropriate) administered punishment functions as expiation.<sup>39</sup>

Even so, contingent historical factors impinge: administration of the death penalty requires a court of 23, and those 23 must be appropriately qualified (by *semikhah*). What happens (in the "here and now") when the convening of such a court is no longer possible, because of lack of autonomy, lack of numbers, and/or doubts about the continuity of authentic (original) *semikhah*? Or when, even absent such con-

siderations, the very administration of capital punishment falls into disfavour?<sup>40</sup> It has, indeed, been common to view the rabbinic law of criminal evidence – and not least the institution of *hatra'ah*<sup>41</sup> – as reflecting just such historical contingencies,<sup>42</sup> rather than (as Neusner views them) manifestations of perfect (divinely conceived) justice. On either analysis, there is likely to result a cohort of (for example) murderers who do not benefit from the expiation of capital punishment. It is in this context, perhaps, that *Sanh.* 9:5 should be viewed:

“He who kills someone not before witnesses they put him in prison and feed him the bread of adversity and the water of affliction” (III.202).

It is quite possible that the *lehem tsar umayyim lahatz*, being an allusion to *Isaiah* 30:20, should be viewed as a form of divine death penalty.<sup>43</sup> It would thus serve as a functional equivalent (if not a form) of *karet*: God (being omniscient<sup>44</sup>) does (if appropriate) take the killer's life in the “here and now”, so that this killer too benefits from expiation in this world.<sup>45</sup>

This interpretation of *M. Sanh.* 9:5 would fit with the dominant view of the role of forms of divine intervention in the legal system which we find in the Bible. I have termed it the “functional” view of divine adjudication, and have argued that, at the very least, it needs to be supplemented by a “special (divine) interest” model.<sup>46</sup> Interestingly, Neusner's account of the role of such divine intervention, as it appears in the *halakhah* (particularly in *Keritot*) is very close to that “special (divine) interest” model. He writes (III:299, *cf. Theology* 201):

“Sins or crimes that affect the social order, that endanger the health of the commonwealth, come to trial in the court conducted by sages and are penalized in palpable and material ways: death, flogging, and the like. Here God does not intervene, because man bears responsibility for this-worldly transactions. But just as man shortens the life of the criminal or sinner in the matters specified in Sanhedrin and exacts physical penalty in the matters covered by Makkot (not to mention Shebuot, where specified), so God shortens the life of the criminal or sinner in matters of particular concern to God. These are matters that, strictly speaking, concern only God and not the Israelite commonwealth at large: sex, food, the Temple and its cult, the laws of proper conduct on specified occasions. Where the community does not and cannot supervise, God takes over. Israel does Israel's business, God does God's. For both the upshot is the same: sin or crime is not indelible. An act of rebellion is expiated through life's breath, an act of inadvertent transgression through the blood of the sacrificial beast, with the same result: all Israel, however they have conducted themselves in their span of time on earth, will enjoy a portion in the world to come: all but the specified handful, enter to eternal life beyond the grave.”

Yet the proposition “Where the community does not and cannot supervise, God takes over” would itself partially cover the case in *Sanh.* 9:5. It is “partial” because divine intervention here depends upon prior human action: the accused must be placed by human agency in prison and fed the subsistence diet; it is only then that God decides whether he will survive at all. Yet there is a substantial internal historical question here: what criteria must be satisfied before the court places the accused

in such jeopardy? The mishnaic text says simply that he kills “without witnesses”. Does that mean “without any witnesses”, “with only one witness”, “without two reliable/credible witnesses”? On one’s answer to this question depends the relative contributions of human and divine agencies to the resolution of such cases. Suffice it to say that the answer of the Tosefta (of which there is no hint in the Mishnah) is that the accused is put in such jeopardy only if there were indeed two witnesses against him, but capital punishment is still unavailable to the *bet din* because of the absence of *hatra’ah*.<sup>47</sup> That must result in divine adjudication in the here and now in the vast majority of cases, even where there is real evidence against the accused. In the absence of evidence sufficient to invoke the procedure of *Sanh.* 9:5, the question of the form of divine adjudication still remains.

Some similar issues arise from Neusner’s analysis of *Sotah* – where, Neusner notes, “the metaphor of Eden does not impinge; the woman accused of unfaithfulness is never compared to Eve” (*Theology* 107). There, we start with a *biblical* institution which appears to threaten injustice:<sup>48</sup> the subjection of the woman, whether guilty or innocent, to a horrifying ordeal on the basis of no more than jealous suspicion on the part of her husband.<sup>49</sup> Some might view this as the reason why the ordeal fell out of use.<sup>50</sup> Neusner, however, stresses the halakhic interpretation which effectively restricts the institution to cases where the woman does appear to have a case to answer.<sup>51</sup> Indeed, the institution as a whole is transformed, through halakhic theology, from one which threatens injustice into one which (to a unique extent<sup>52</sup>) manifests the perfection of divine justice.<sup>53</sup> That perfection is expressed in two ways: (1) the precise talionic form which punishment takes if the woman is guilty;<sup>54</sup> (2) the (equally precise?<sup>55</sup>) talionic form which reward takes if the woman is innocent.<sup>56</sup>

### 3. Marriage and Divorce

While the legal historical and theological approaches to the criminal law might appear largely complementary, more substantial problems emerge when we turn to *Nashim*. Here the oft-repeated view that Jewish marriage is purely contractual, in contrast to the ‘sacramental’ concept of Christianity,<sup>57</sup> is (by implication) strongly rejected by Neusner, for whom the Jewish marriage is certainly (in various senses) ‘made in heaven’: heaven confirms *qiddushin*, *ketubbot* and *gittin* and changes status as recognised in heaven, so that the “earthly deed and the heavenly perspective correlate”.<sup>58</sup> One might therefore have expected the Edenic model (if not the ‘one flesh’ argument) to figure large in Neusner’s analysis. But this is not what he finds in the sources: “Israel forms the counterpart to Adam and Eve, but only at a few points is the metaphor articulated” (*Theology* 87). Rather, *Nashim* in general and *Qiddushin* in particular “invokes a different metaphor: Israel is comparable to that other animate being that is sanctified to God, the offering on the altar. The governing focus of the Halakhah is the act of sanctification, in the model of an animal for use at the altar, of a woman for the bed of a man”.<sup>59</sup> Indeed, “... let there be no mincing of words, the woman suitable to the man at hand compares with the beast suitable to the altar. The offering consecrated for the altar then supplies the other component of the same governing analogy. She must not exhibit

genealogical blemishes, any more than the animal consecrated to the altar may bear physical ones. She must be suitable for marriage to the priest (or Levite, or Israelite, as the case requires), in accord with the Torah's definition of the correct genealogy and status of a woman for marriage into the priesthood. And the rest follows."<sup>60</sup>

This is Neusner's striking answer to the question why the language of sanctification (*qiddushin*) is used to denote the marital relationship.<sup>61</sup> He is, however, at pains to stress one important limitation of the analogy: the woman, unlike the animal sacrifice, possesses intentionality (if not autonomy),<sup>62</sup> and must consent to her reservation to her husband in the marital relationship.<sup>63</sup> But the language of marriage-formation (more precisely, betrothal) itself also invokes a different halakhic metaphor: that of *qinyan*. As Neusner himself puts it: "The problematic of the halakhah of Qiddushin, the sanctification of a particular woman for a particular man, emerges in the intersection of the language of acquisition with the language of sanctification" (IV:288-89). It may be that the opening language of the tractate, *ha'ishah niqnit*, is glossed already in the Tosefta by the use of *mequdeshet*, in both the oral formula and its consequence.<sup>64</sup> But the three possible procedures for constituting betrothal – *kesef, shtar, bi'ah* – are clearly an adaptation of the modes of acquisition of slaves and land – *kesef, shtar, hazaqah* – as is clear from the continuation of this same chapter of the Mishnah (*M. Qidd.* 1:2-5). At the very least, we have a combination of ritual and civil analogies at the basis of the halakhic conception of *qiddushin*. Neusner recognises this, but stresses the difference in the effects of these different forms of acquisition. Not only does the woman have to consent. In addition, "The unique relationship of the woman to the man finds its counterpart in the unique relationship of the animal designated ("consecrated") to the altar by a farmer in expiation of a particular sin. That animal could serve only as a sin-offering, and it could expiate only the particular sin the farmer had in mind to atone. But that intense specificity cannot characterize, *e.g.*, possession of a given slave, who could be rented out to others, or title to a particular piece of real estate, available for sharecropping" (*Theology* 91-92). Moreover, Neusner privileges the transcendental effects of the transaction: "The act of betrothal forms a particular detail of the larger theory of how a man acquires title to, or possession of, persons or property of various classifications. That is the this-worldly side of the halakhah; the transcendent part emerges with the result: the sanctification of the relationship between a particular woman and a particular man, so that she is consecrated to him and to no other" (IV:271).

A particular problem arises with the *ketubah*. A maximal theological interpretation of its significance (and that of the tractate that bears its name) would claim (a) that it has a transcendent significance (which, for coherence, would itself evoke Eden) and (b) that it is viewed by the foundational *halakhah* as a necessary component of *qiddushin*. Neusner does indeed strive to make such a case. Despite the mundane content of the *ketubah*, designed to secure the financial position of the wife on termination of the marriage,<sup>65</sup> he argues that it "serves to define the interior dimensions of Eden, explains what makes the groom into Adam and the bride into Eve, specifies the worldly meanings of paradise", in that "if you want to know Eden, come to the Israelite household, where the woman is fairly and considerately provided for, and where the man's obligation to found a household in Israel is diligently carried out

by the wife.”<sup>66</sup> But this, we may note, represents a reversal of the model: the *ketubah* does not evoke Eden; rather, Eden is reconstructed on the basis of the *ketubah*. A supplementary argument, albeit one with an aggadic basis,<sup>67</sup> relies upon the (temporal) closeness<sup>68</sup> in the marriage ceremony of the reading of the *ketubah* to both the *qinyan* and the *shivah berakhot*, which do explicitly evoke Eden.<sup>69</sup> In antiquity, however, the elements of the (modern) marriage ceremony were temporally divided, *qiddushin* customarily taking place a year before *nissu'in*,<sup>70</sup> and while there is evidence that the *ketubah* was entered into already at the time of *qiddushin*,<sup>71</sup> at least six<sup>72</sup> of the “seven blessings” (and in particular the one on which Neusner relies as evoking Eden) were undoubtedly part of the marital feast which celebrated the *nissu'in*.<sup>73</sup>

The second leg of the maximal theological interpretation is also problematic. While Neusner argues that the *ketubah* itself is “integral” to the sanctification process<sup>74</sup> and indeed “effects sanctification”,<sup>75</sup> there is good evidence that it in fact became mandatory only in the Middle Ages.<sup>76</sup> If so, it can hardly have had a constitutive role according to the foundational *halakhah*.<sup>77</sup> Indeed, this is supported by other historical considerations. The origin of the *ketubah* and its various clauses has received considerable impetus in recent years from the discovery (in caves near the Dead Sea) of *ketubot* (some in Greek) and allied documents from the first and early second centuries (particularly the Bar Kochba period), from which it appears that even the *tenai'in bet din* of *M. Ket.* 4:7-10<sup>78</sup> are based on earlier notarial practice, which itself was not averse to incorporating clauses known from the Greco-Egyptian environment.<sup>79</sup>

A further argument, if well-founded, would address both aspects of the maximal theological interpretation: Neusner seeks to equate<sup>80</sup> the written *ketubah* with the oral formula of *qiddushin*<sup>81</sup> (attested in the Tosefta<sup>82</sup>), and to attribute to it the theological significance of an *imitatio* of the divine speech acts of creation. Thus, “Words exercise the power to sanctify through the articulation of will. When they speak and things come about, man and woman act like God, who through language confirms that his deed represents his will and through language sanctifies the result. Specifically, God creates and sanctifies the world with words, and, like God, man or woman sanctifies himself or herself with words” (IV:418), though elsewhere he comes close to accepting that the function of the *ketubah* is primarily that of evidencing the oral declaration.<sup>83</sup> I suppose it might be argued (though Neusner does not) that the written *torah* is in fact Israel's *ketubah*, consequent upon a divine speech act. But it would be more natural to associate such a speech act with the prophetic marriage metaphor<sup>84</sup> (whose language<sup>85</sup> is itself evoked in the *sheva berakhot*) rather than creation. Indeed, we may ask whether a maximal theological interpretation of the *ketubah* is really needed.<sup>86</sup> For its rejection, as will be argued presently, does not entail the abandonment of *any* theological interpretation of the *ketubah*, and its replacement by a purely legal historical account based on secular models.

If marriages are made in heaven, so too are divorces. But what precisely is the role of heaven in *Gittin*? Here, there is no doubt that delivery of the written document is constitutive of the divorce,<sup>87</sup> a distinction from the *ketubah* which Neusner comes close to accepting<sup>88</sup> (despite claiming a form of equivalence between the two documents<sup>89</sup>).

Does that constitutive function entail a different role for heaven? There is no reason to object to the formulation that the document “is ratified in Heaven as an act consequential in the sight of God”,<sup>90</sup> or even to the claim (IV:503) that Heaven’s concern with the change in the woman’s status as holy expresses itself “in the valid preparation of the document itself”. But does it follow, as Neusner maintains, that the witnesses to the *get* “stand as Heaven’s surrogates”, through whose declaration (“Before us it was written and before us it was signed”) “Heaven has been informed of the change of intention on the part of the husband, releasing the wife from her status of sanctification to him”?<sup>91</sup> Surely God does not need to be informed by the witnesses?<sup>92</sup> Is it not sufficient to claim that “the change in intentionality must be attested on earth in behalf of Heaven” (*id.*)?

The role of the scribe, and the rules relating to scribal errors (e.g., as to dating or location<sup>93</sup>) in the document, are also given a theological meaning: “... the scribe possesses no intentionality in the transaction... The very role accorded to the scribe, not to the contracting parties, underscores the position of the Halakhah. It is that intentionality not confirmed by the correct deeds in the end does not suffice. The scribe’s errors stand athwart the realization of the intentionality of the husband and the participation (where possible) of the wife; but the scribe obviously did not intend to make mistakes... In a legal system that has made a heavy investment in the priority of intentionality and the power of will, the statement made by the Halakhah of Gittin sounds a much-needed note of warning. Good will and proper intentionality do not govern when facts intervene.”<sup>94</sup> But this (the relation between *verba* and *voluntas*) is a characteristic of formal requirements in many legal systems.<sup>95</sup>

Neusner rightly stresses that *halakhah* (in contrast to the written Torah) grants a role to the wife’s intentionality in accepting the *get* (subject, of course, to those situations in which the *halakhah* allows her to be coerced): not only must she “play a fully conscious role in the transaction” (IV:501); she has “the right to dictate the conditions of delivery” (IV:469, 501) and thus “accedes to the process of deconsecration” (IV:503). This does not, however, amount to a requirement of intentionality equivalent to that of the husband: “when the man forms the intention of removing from her the status of sanctification (with her full knowledge, if not with her consent), and when that intention is realized in an appropriately prepared and delivered document, particular to the woman at hand, then the status of sanctification is removed from the woman” (IV:580-81). Thus, he concludes: “The bed is sanctified by the man’s intention, together with the woman’s acquiescence, ratified by a deed. It is desanctified by [1] the man’s intention, communicated to a fully-sentient woman, ratified by the deed of drawing up and delivering the properly witnessed document of divorce... [2] by the death of the husband...” (IV:583).

#### 4. Civil Law

For Neusner, *Nezikin* (the *Seder*) comprises two subsystems, of which the first “presents rules for the normal conduct of civil society. These cover commerce, trade, real estate, and other matters of everyday intercourse, as well as mishaps, such as damages by chattels and

persons, fraud, overcharge, interest, and the like, in that same context of everyday social life.” (I.28). This would appear an unlikely starting point for a theological interpretation, and indeed much of the concern of *mishpat ivri* has been with this subject-matter, viewed historically and in comparison with other (mainly secular) systems of law.

Neusner, however, injects here a particular value, derived from his theological reading: if the distribution of resources both in Eden<sup>96</sup> and on entry to the land<sup>97</sup> was perfect, then distributive justice entails not a dynamic economy but rather a static one, whose aim is preservation of the status quo: “What the Israelite government, within the Mishnaic fantasy, is supposed to do is to preserve a perfect, steady-state society. That state of perfection which, within the same fantasy, the society to begin with everywhere attains and expresses forms the goal of the system throughout: no change anywhere from a perfect balance, proportion, and arrangement of the social order, its goods and services, responsibilities and benefits.”<sup>98</sup> Neusner highlights five aspects wherein “the law expresses its obsession with the perfect stasis of Israelite society” (*id.*): “First of all, one of the ongoing principles of the law, expressed in one tractate after another, is that people are to follow and maintain the prevailing practice of their locale. Second, the purpose of civil penalties is to restore the injured party to his prior condition, so far as this is possible, rather than merely to penalize the aggressor. Third, there is the conception of true value, meaning that a given object has an intrinsic worth, which, in the course of a transaction, must be paid. In this way the seller does not leave the transaction any richer than when he entered it, or the buyer any poorer (parallel to penalties for damages). Fourth, there can be no usury, a biblical prohibition adopted and vastly enriched in the Mishnaic thought, for money (“coins”) is what it is. Any pretense that it has become more than what it was violates, in its way, the conception of true value. Fifth, when real estate is divided, it must be done with full attention to the rights of all concerned, so that, once more, one party does not gain at the expense of the other.”<sup>99</sup>

Again, we may have problems in applying this equally to the “here and now” and the idealised period of Israel’s restoration, despite Neusner’s claim that it is here, in Baba Qamma-Baba Batra, that “restorationist theology makes its deepest impact upon the halakhah” (III:158). The historical record of the Hebrew Bible itself attests to conditions of economic inequality (and debt-slavery) – resulting sometimes from famine<sup>100</sup> or war<sup>101</sup> rather than economic exploitation and usury.<sup>102</sup> No doubt Neusner has such phenomena in mind when he refers (above) to “the Mishnaic fantasy”. Even so, he maintains: “The halakhah before us takes as its task the work of defining how, in full realization in the here and now, Israel’s interior relationships may conform to the principles of perfection embodied in Eden in the beginning, and in the Land of Israel at the end” (III:162).

The relationship between legal-historical and theological explanation arises particularly acutely in the context of the civil law, since it is here that the parallels with other legal systems, and the possibility of foreign influence, arise most sharply. A good example comes from the structure of remedies for civil harm (“torts”) in Baba Qamma. Neusner himself accepts that “preserving the status quo in a world of perfect order” is too general for the purpose (being applicable also elsewhere),

and insufficiently specific to explain the particular message of the tractate (III:44-45). To the question: “are we able to ask the cases of Baba Qamma to exemplify a recurrent and deeper question treated in them *in nuce?*” (III:46), he initially gives a negative answer. Indeed, “Neither the order of the topics nor the character of the problems worked out in connection therewith provides a positive response. Ox, pit, crop-destroying beast, fire – why that order and not pit, fire, ox, crop-destroying beast?”<sup>103</sup>

Later, however, he locates the unifying problematic of Baba Qamma in the relationship between causation and responsibility (in terms of fault): “The whole of Baba Qamma takes up the results of wicked intentionality, an act of will that takes the form of malice, on the one side, or flagrant neglect of one’s duties, on the other” (III:160); “Specifically, in accord with the halakhah of Baba Qamma man undertakes to assume responsibility for what he does, always in just proportion to causation... the laws of Baba Qamma form a massive essay upon the interplay of causation and responsibility: what one can have prevented but through negligence (in varying measure depending on context) has allowed to take place, he is deemed in that same measure to have caused. And for that, he is held in that same measure to make amends”.<sup>104</sup>

This, indeed, is very much the focus of tort laws to modern times, both in the decisions of courts and theorising about them, and Neusner makes a valiant attempt to identify the relevant variables (voluntary v. involuntary action; foreseeable v. not foreseeable consequences; preventable v. not preventable events) and to synthesise the applicable principles. Indeed, he envisages the construction of a “cubic grid, with, in theory, nine gradations of blame and responsibility and consequent culpability” (III:166-167). But there is a missing element here, which legal historians are apt to stress. Early tort law frequently adopts forms of “strict liability” (liability without fault) based upon ownership or control of the immediate cause of harm. *Exod.* 21:35, where an ox which is *tam* kills another such ox, resulting (according to the *halakhah*) in payment of half-damages, is a case in point. It is far from clear that such cases can be integrated into Neusner’s scheme. Indeed, both here and in respect of the liability of the *shomrim*,<sup>105</sup> it is possible to trace, from tannaitic to amoraic strata, the development of the very concept of negligence. The present writer has noted parallel sets of remedies in Jewish, Roman and early English law,<sup>106</sup> all of which retain for a long time a principle of liability based on ownership – albeit liability more financially limited than in cases based in negligence.<sup>107</sup> On the other hand, Shalom Albeck has (controversially) sought to reduce the whole law to grades of *peshi’ah*,<sup>108</sup> more in line with Neusner’s approach. This is not the place to rehearse the details of these arguments. Suffice it to maintain that they have a contribution to make to our understanding of the material; theology cannot take us the whole way.

But legal historical analysis cannot take us the whole way either, and Neusner shows the added value which integration of a theological approach can bring: “The religious dimension of the matter emerges when we explain why the halakhah makes the statement that it does. That statement, set forth in a few words, holds that in a society ordered by God’s justice – as Israelite society is supposed to be – man will acknowledge his responsibility and bear the consequences of his ac-

tions.<sup>109</sup> The negative here makes all the difference. What will Israelite man not do? He will not deny or dissimulate. He will not blame others but take no blame himself.”<sup>110</sup>

At III:163-164, Neusner seeks to relate the first *kelal* of *M. Baba Qamma* 1:2 to this: “I can think of no more direct response to “the woman... the snake...” than the language, “In the case of anything of which I am liable to take care, I am deemed to render possible whatever damage it may do... In Eden it was before God that man was ashamed, and, in Israel, it is with one’s fellow Israelite that man shows he has learned the lesson of Adam’s denial. That is what is at stake in those eloquent, implacable words, which Adam should have said but Israel now does say: In the case of anything of which I am liable to take care, I am deemed to render possible whatever damage it may do.” Neusner’s translation of the *kelal* concurs essentially with that of Danby: “If I am answerable for the care of a thing, it is I that render possible the injury it may do.” But his argument really requires the *kelal* to mean (or at least to imply): “In the case of anything of which I am liable to take care, I am responsible to make good whatever damage it may do.” Such a translation is not impossible; it depends on the precise semantic value here of *hikhsharti*. More problematic is the apparent tautology of the *kelal*: the very fact that I am “liable to take care” of something surely implies already *both* the possibility that it may cause damage and my responsibility (in principle) for such damage. One traditional answer to this problem is that the *shemirah* of *kol shehavti bishmirato* refers to the care undertaken to the owner, while the *nezek* for which the *kelal* then states responsibility is that to a third party. If so, the *kelal* does not really refer to the *avot nezikin* of *Baba Qamma* but rather to the four *shomrim* of *M. Baba Metsi’a* 8:7 (quite possible, given the view that the three *Babas* originally formed a single tractate). Might Neusner relate even such a reading to Eden, on the grounds that Adam was more like a *shomer* than an owner?

## 5. Conclusion

In conclusion, it may be appropriate briefly to direct attention to two major themes which inform a great deal of Neusner’s overall analysis, and to suggest one area which might fruitfully be explored further.

The first is the role of intentionality.<sup>111</sup> We have seen that it marks the halakhic responsibilities of humanity, and is taken to do so as an aspect of *imitatio dei*. In fact, we encounter in Neusner’s analysis a range of different forms of intentionality: e.g. distinctions between inadvertence and deliberation (III:297-298), between foresight and intentionality (IV:422), between consent and acquiescence.<sup>112</sup> And no doubt there are others. But this prompts a question. Do we find this full range also manifest in divine action?<sup>113</sup> And what does the answer tell us about the inter-relationship of models of the human and the divine? Is it possible that we can have access to models of the divine (and particularly to the workings of the divine mind) other than through human categories (*hatorah nikhtevet bilshon benei adam*)?

A second overriding theme, allowing of no procrastination, is that of death.<sup>114</sup> Here, the theological approach brooks no challenge. This is of concern not only in respect of punishment and reward, as noted above in s.II; since death, whatever the circumstances in which it occurs,

has implications for purity,<sup>115</sup> the realms of ritual and civil law are necessarily connected.

One area which might fruitfully be explored further is what this writer has termed the “jurisprudence of revelation”.<sup>116</sup> For it would assist in addressing a recurrent issue in this review: is it necessary to seek all (theological) explanation in substantive theological terms? Should we exclude the possibility of theological *authorisation* of non-theological reasoning in some areas (such, indeed, as might legitimate incorporation of external sources<sup>117</sup>)? The formative *halakhah* already recognises a hierarchy of subject areas: human agreement (a form of intentionality) is capable of overriding *Torah* law in *dine mammonot* but not elsewhere.<sup>118</sup> If so, must not the theology of *dine mammonot* be somewhat weaker than elsewhere? And even from a purely internal point of view, cannot performance of a *mitsvah* be viewed as bringing its own reward (in terms of the personal satisfaction of the performer), precisely because it is perceived to be a *mitsvah*, a divine command, and without reference to any further theological explanation?<sup>119</sup>

## NOTES

- \* I am grateful to Jacob Neusner for encouraging me to undertake this study, and facilitating it by providing computer files of much of the material here discussed.
- 1 See, e.g., Peretz Segal, *Postbiblical Jewish Criminal Law and Theology*, IX THE JEWISH LAW ANNUAL 107-121 (1991); Aaron Kirschenbaum, *The Role of Punishment in Jewish Criminal Law: A Chapter in Rabbinic Penological Thought*, IX THE JEWISH LAW ANNUAL 123-143 (1991).
  - 2 I-V JACOB NEUSNER, THE HALAKHAH: AN ENCYCLOPAEDIA OF THE LAW OF JUDAISM (2000) [hereinafter cited by volume and page number]; JACOB NEUSNER, THE THEOLOGY OF THE HALAKHAH (2001) [hereinafter cited as *Theology* and page number].
  - 3 See also III:xii-xiii.
  - 4 *Theology* xxxiv: "... I ask about the religious meaning of the Halakhah and propose to set forth a well-constructed structure and system of ideas implicit therein." Cf. xxxvii.
  - 5 Ronald Dworkin, *No Right Answer?*, in LAW, MORALITY AND SOCIETY 58-84, 75 (P.M.S. Hacker and J. Raz eds., 1977).
  - 6 *Id.* at 83-84; see also B.S. JACKSON, SEMIOTICS AND LEGAL THEORY 223 (Routledge & Kegan Paul 1985) (quoting R. DWORKIN, TAKING RIGHTS SERIOUSLY 116 (Duckworth 1978): "[T]he law may not be a seamless web, but the plaintiff is entitled to ask Hercules to treat it as if it were"). Duckworth is perhaps the only publisher retained in the citations!
  - 7 B.S. Jackson, *Historical Observations on the Relationship Between Letter and Spirit*, 4 LAW AND RELIGION 101, 110 (R.D. O'Dair and A.D.E. Lewis eds., 2001); *idem*, *A Semiotic Perspective on the Comparison of Analogical Reasoning in Secular and Religious Legal Systems*, in PLURALISM IN LAW 295, 322 (A. Soeteman ed., 2001) (quoting Dworkin's description of his Hercules as a "lawyer of superhuman skill, learning, patience and acumen" (Dworkin, *supra* note 6, at 105)).
  - 8 Neusner rarely seeks to take account of the work of others, and does not cross-reference his interpretations to the texts he provides. While often the implied cross-reference is obvious, inevitably this is not always the case. The copy editing could have been better. Normally, this does not prejudice the reader, but errors in citation (e.g., at III:102, Exod 22:8-14 (Massoretic Text) is wrongly cited as Exod 7:15ff.) should have been caught. The ff. is in the original of Neusner, and so must be retained
  - 9 E.g., the exclusion of four of the 63 tractates (Avot, Eduyyot, Qinnim, Middot: for the reasons, see I:23 note 16-17; cf. *Theology* xli note 16-17) and the occasional rearrangement of material where the original sequence falls short of fully reflecting the model. See, in this regard, his comments on the relationship of tractates, topics and category-formations at *Theology* xxxix-xl. The allocation of tractates to *Sedarim*, or their order within *Sedarim*, is treated as less significant: thus *Keritot* is treated in the context of *Nezikin*, and within *Nashim* the positions of *Qiddushin* and *Yevamoth* are transposed. On the ordering within *Sanhedrin*, with particular reference to Mishnah 9:6-7, see III:206.
  - 10 See *Theology* xxxv, where he accepts that some others have sought to introduce "into the analysis of the character of the Halakhah the questions of religious belief", but he distinguishes himself from them in his insistence on order as against episode, and in his claim of consistency and coherence against those "who see only random details". At n. 7, he cites J.B. Soloveitchik as an example of those "who see meaning but no structure, details but no whole"; Soloveitchik "expounded the Halakhah for its religious meaning but did not attempt a systematic composition of the whole. His is a Halakhic theology without the logos." Nevertheless, Soloveitchik's general theological framework for the *halakhah* is worth comparing with that of Neusner. For a summary of his position, see B.S. Jackson, *Internal and External Comparisons of Religious Law: Reflections from Jewish Law*, in A FRESH START FOR COMPARATIVE LEGAL STUDIES? A COLLECTIVE REVIEW OF PATRICK GLENN'S LEGAL TRADITIONS OF THE WORLD (N.H.D. Foster ed., 2nd ed., 2005) = 1/1 *Journal of Comparative Law* 177-99, 193-96 (2006).
  - 11 *Theology* xvi: "... the Halakhah has rarely found itself represented as cogent to begin with. Its natural disciplines of intellect favour atomistic exegesis,

- on the one hand, and episodic comparison and contrast on the other... It has rarely been *systematically* represented, as I propose to do, in a cogent and continuous, coherent account.”
- 12 See *Theology* xxxiii, where Neusner claims that relatively little is added to the foundational agenda of Mishnah and Tosefta by the two Talmudim. In fact, the mishnaic texts which Neusner provides comprise almost the entire Mishnah, only a handful of *mishnayot* being omitted completely in each tractate (though many mishnayot are only partially represented, following the criteria of normativity noted above; for some examples, see notes 39, 42 below). The tannaitic midrashim are excluded from this corpus (although not infrequently cited for comparative purposes in the interpretive discussion) since they “cannot be characterized as purely-Halakhic; they organize their discourse around the passages of the Torah” (I:21, note 12). Nevertheless, he argues at IV:458 that “Sifré to Numbers... takes up the Mishnah’s proposition concerning Numbers 5:23ff., that, when God punishes, he starts with that with which the transgression commenced, which sages see as a mark of the precision of divine justice.”
  - 13 See I:36-38 (for Neusner’s own description of his methodological steps).
  - 14 *Guide* III.26: “The generalities of the *commandments* necessarily have a cause and have been given because of a certain utility; their details are that in regard to which it was said of the commandments that they were given merely for the sake of commanding something... For instance the killing of animals because of the necessity of having good food is manifestly useful...But the prescription that they should be killed through having the upper and not the lower part of their throat cut, and having their esophagus and windpipe severed at one particular place is, like other prescriptions of the same kind, imposed with a view to *purifying the people*... The true reality of particulars of commandments is illustrated by the sacrifices. The offering of sacrifices has in itself a great and manifest utility, as I shall make clear. But no cause will ever be found for the fact that one particular sacrifice consists in a *lamb* and another in a *ram* and that the number of the victims should be one particular number. Accordingly, in my opinion, all those who occupy themselves with finding causes for something of these particulars are stricken with a prolonged madness in the course of which they do not put an end to an incongruity, but rather increase the number of incongruities.” THE GUIDE OF THE PERPLEXED § III, at 508, 509 (S. Pines trans., 1963).
  - 15 I:7: “Exegesis of the law in detail does not define an important area of academic interest”; cf. I:39 for a topical account, not a line-by-line exposition; cf. I:45 (“Since my program requires presentation of the fundamentals of the Halakhah, but not all of the secondary and tertiary amplifications, it suffices to deal with the main points pertinent to each topic”). But see *Theology* xii-xiii: “In constructing a cogent system articulated principally in details, the sages of the Halakhah translate narrative and exhortation and episodic law into a fully integrated design of Israel’s social order.”
  - 16 Cf. the Aristotelian distinction: “Of political justice part is natural, part legal – natural, that which everywhere has the same force and does not exist by people’s thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent, e.g. that a prisoner’s ransom shall be a mina, or that a goat and not two sheep shall be sacrificed...” (*Nik. Eth.* 1134b, translated Ross, p.124).
  - 17 Division of commandments: (1) fundamental opinions (*hilkhot yesodei halakhot*), ch.36; (2) idolatry, ch.37; (3) the improvement of moral qualities, ch.38; (4) laws mitigating economic inequalities, ch.39; (5) civil wrongs, ch.40; (6) wrongs visited by penal sanctions, ch.41; (7) property relations (including inheritance), ch.42; (8) days when work is forbidden, ch.43; (9) worship, ch.44; (10) the sanctuary, ch.45; (11) sacrifices, ch.46; (12) clean and unclean things, ch.47; (13) dietary laws, ch.48; (14) sexual unions (including circumcision) ch.49.
  - 18 Which he uses normally as synonymous with “religious”, but occasionally (e.g., I:44) in opposition to it.
  - 19 See *Theology* xxxiii note 4; III:xi-xii note 1.
  - 20 I.e. God’s act of creation, used as a model of a constitutive speech act in marriage: see, e.g., *Theology* xcvi: “God acts by speaking, as in creation...”, and further IV:418, quoted below, at p.?. Add cross-reference to final pagination. The concept of *imitatio dei* is used in a variety of ways to stress the theological basis of the *halakhah*. See, e.g., III:266: “In taking the oath,

man is like God; God binds himself by an oath, so does man. There is one difference between God and man. God supervises man. God needs no supervision; he is truth.”

- 21 See I:13f; *Theology* xiii.
- 22 *Theology* x: “The land of Israel stands for the new Eden. Just as Adam entered perfect world but lost it, so Israel was given a perfect world – in repose at the moment of Israel’s entry – but sinning against God, lost it. The story told from Joshua through Kings matches the story told in Genesis.” At *Theology* xvii, he argues: “... the Torah’s own hermeneutics – set forth in the narrative order from Genesis to Kings – turns out to guide the reading of the Halakhic component of the Torah as well.” See also CALUM CARMICHAEL, *ILLUMINATING LEVITICUS* viii (2006), for a more recent argument (in a rather different sense) that the (biblical) legal rules “are the literary forms that reveal a thorough redaction of the history that is recounted in Genesis–2 Kings.”
- 23 At *Theology* xxx, Neusner describes the *Halakhah* as “a detailed plan for the sanctification of Israel in the here and now, leading to its salvation at the end of days”.
- 24 *Theology* xii: “Educated by the Torah to exercise freedom of will to accord with God’s will, repentant, regenerate Israel may regain Eden. *That is both now, temporally, on sacred occasions and also in the end of days*” (emphasis supplied).
- 25 *Theology* liii-iv: “...Speaking in monumental dimensions, the *Halakhah* makes a teleological, but not a messianic, statement. And the promise of the *Halakhah* speaks to not Israel’s messianic so much as to its restorationist aspiration: to form Eden not in time past nor in time future but in the here and now of everyday Israel, but this time we shall do it right.” For a messianic reading of the Mishnah, see BEN ZION WACHOLDER, *MESSIANISM AND MISHNAH: TIME AND PLACE IN THE EARLY HALAKHAH* (1979).
- 26 I:19: “Israel in the Land moreover reconstructs Eden by recapitulating creation and its requirements.”
- 27 *Theology* x: “The difference, however, is that Israel has what Adam did not, which is the Torah.”
- 28 By restoration to the land, Neusner appears to mean an ultimate global restoration, and not the modern creation of the State of Israel.
- 29 IV:573: “... the surviving brother’s refusal receives scant attention; we have no halakhah that dictates a ritual for him to follow in declining to due [sic] his duty to his household, and the halakhah that does define the rite of removing the shoe is secondary and derivative, making no important points on its own.”
- 30 The reasoning for the institution in *Deut* 15:6, stressing preservation of the “name” of the deceased, may be compared to that of the plea of the daughters of Zelophehad in *Num* 27:4, which in context (*cf.* the mentioning of Zelophehad’s family situation in the pre-entry census in *Num* 26:33) is clearly concerned primarily with succession to the allotted portion of the promised land.
- 31 See M. Elon, *Priority between Levirate Marriage and Halizah*, in 11 *ENCYCLOPEDIA JUDAICA* 125-26 (1973).
- 32 III:314-15. See *infra* section 2 of this article.
- 33 On *avodah zarah* in this context, see III:353.
- 34 This is not the occasion to discuss in any detail Neusner’s conception of the relationship of *halakhah* and *aggadah*, which he addresses more systematically in other publications. Suffice it to say that while he seeks in the present work to distinguish the two modes of discourse, he also provides data illustrating the occasional integration within the halakhic texts of aggadic argument (in the form of arguments based on biblical narrative): see, e.g., Tosefta Sotah 4:17-18 at IV:462.
- 35 E.g., III:231: “... when the *aggadah* makes its statement, it speaks in generalities, and, further, it addresses the world at large. It is the *halakhah* that formulates the matter not only in specificities but well within the limits of holy Israel.”
- 36 E.g. III:323: “In reflecting upon relationships with the gentiles, meaning, idolaters, the Oral Torah moreover takes for granted a number of facts. These turn out to yield a single generalization: gentiles are assumed routinely to practice bestiality, murder, and fornication. Further negative stereotypes concerning idolaters occur.” Cf. III:356.

- 37 III:322f: "... gentiles live side by side (whether or not in the Land of Israel) with Israelites, and Israelites have to sort out the complex problems of co-existence with idolatry... Not only so, but the Oral Torah uses the occasion of idolatry to contemplate a condition entirely beyond the imagination of Scripture, which is the hegemony of idolatrous nations and the subjugation of holy Israel."
- 38 A recurrent example is the claim that a particular religious message could only have been communicated in the way we find it expressed in the concrete provisions of the *halakhah*, or could not have been better expressed. See, e.g., III:230, 271, 291-92, 298, 319-20; *Theology* 107, 110, 206, 209.
- 39 This is not ignored by writers in the *mishpat ivri* tradition. See especially Segal, *supra* note 1, on the relationship between the death penalty and the laws of atonement and sacrifice, and Kirschenbaum, *supra* note 1, on the sacral, mystical and educational roles of punishment.
- 40 *Makk.* 1:10: "A Sanhedrin which imposes the death penalty once in seven years is called murderous; R. Eliezer b. Azariah says: Once in seventy years." At III:214 Neusner includes (and thus regards as normative) the anonymous evaluation, but not that of R. Eliezer b. Azariah, in accordance with his definition of normative *halakhah* noted in section I above.
- 41 See III:196, where Neusner includes *Tos. Sanh.* 11:2: "If they warn him and he was silent, or if they warn him and he nods his head even though he says, 'I know' – he is exempt – unless he will say, 'I know it, and it is with that very stipulation that I am doing what I am doing!'" He does not however include the basic *hatra'ah* requirement, first found in the opening of *Tos. Sanh.* 11:2, which he renders in his Tosefta translation (11.1, B) as: "they convict him only on the testimony of witnesses, after warning, and after they inform him that [what he is going to do] subjects him to liability to the death penalty in court": see JACOB NEUSNER, THE TOSEFTA, TRANSLATED FROM THE HEBREW, FOURTH DIVISION: NEZIQIN 232 (1981).
- 42 Thus, Kirschenbaum commences his article, *supra* note 1, with the observation: "The impracticality of the classical Jewish law and its helplessness in coping with social problems involving crime and punishment are proverbial."
- 43 B.S. Jackson, *The Practice of Justice in Jewish Law*, 4 DAIMON 31, 37-39 (2004). I took a different view in ESSAYS IN JEWISH AND COMPARATIVE LEGAL HISTORY 187-93 (1975) [hereinafter Jackson, ESSAYS], while noting (at 192, in discussing Neusner's position in 8 REVUE DE QUMRAN 205-07 (1973)) that a divine death penalty (through the *nahash shel rabbanim*) is found in a case of evidentiary insufficiency in *Sanh.* 8:3, at the conclusion of the narrative of Shimon b. Shetah, who observed – on his own – highly incriminating evidence of a murder, but not the actual striking of the blow. See also 4 DAIMON 36-37 (2004). Cf. III:187, where Neusner includes the opening of this Tosefta, but not the narrative and thus not the claim of direct divine punishment.
- 44 Cf. III:299; *Theology* 201, on "God's power to know precisely what man intends".
- 45 Whether a similar analysis can be applied to the sanctions of the post-talmudic "alternative" system of criminal law, developed under the authority of *dine malkhut* (on which see Kirschenbaum, *supra* note 1, at 133-38), is a question which cannot be pursued in the present context.
- 46 See B.S. JACKSON, WISDOM-LAWS: A STUDY OF THE MISHPATIM OF EXODUS 21:1-22:16 at 398-403 (2006) [hereinafter JACKSON, WISDOM-LAWS].
- 47 *Sanh.* 12:7, where there is in fact an attempted *hatra'ah* (indeed, three such attempts), but the accused fails to respond as required; he either stays silent or merely nods his head. See Neusner III:203; Jackson, ESSAYS, *supra* note 44, at 188, noting that Talmud Babli, *Sanh.* 81b, attributes the interpretation of *shelo be'edim* in the Mishnah as "without a warning" (*simple*) to Samuel, in parallel to alternative formal defects suggested by Rav and R. Hisda.
- 48 *Theology* 107: "The injustice done to the innocent wife, required, in line with Numbers 5, by the husband's whim to undergo the humiliating ordeal of the bitter water, serves as the Halakhah's occasion to make its definitive statement that God's justice is perfect."
- 49 Indeed, the biblical text appears to go out of its way to stress the absence

- of evidence against the accused wife: *Num* 5:13: "... and it is hidden from the eyes of her husband, and she is undetected though she has defiled herself, and there is no witness against her, since she was not taken in the act..."
- 50 IV:450. *See*, however, *M. Sof.* 9:9: "When adulterers became many, the ordeal of the bitter water was cancelled. And Rabban Yohanan b. Zakkai cancelled it, since it is said, 'I will not punish your daughters when they commit whoredom, nor your daughters-in-law when they commit adultery, for they themselves go apart with whores' (Hosea 4:14)."
- 51 IV:452-53, *Cf. Theology* 107.
- 52 *Theology* 107: "God's justice is perfect: the wicked get their exact punishment, the righteous, their precise reward. For the sages that statement becomes possible only here." Here, Neusner's claim appears less rhetorical than elsewhere (*supra*, note 37), in that the biblical text itself contemplates both divine punishment and divine reward.
- 53 IV:426-27, 455.
- 54 IV:456, quoting *M. Sotah* 1:7: "By that same measure by which a man metes out [to others], do they mete out to him: She primped herself for sin, the Omnipresent made her repulsive. She exposed herself for sin, the Omnipresent exposed her."
- 55 Particularly precise if one interprets the biblical text (as some do) as implying that the husband's suspicions are raised by a pregnancy on the part of his wife, for which he thinks he is not responsible.
- 56 IV:426: "Justice in the here and now counts only when the righteous also receive what is coming to them. Scripture's casual remark that the woman found innocent will bear more children provokes elaborate demonstration, out of the established facts of history that Scripture supplies, that both righteous and wicked are subject to God's flawless and exact justice."
- 57 *See*, however, the discussion of the relationship in D. DAUBE, *THE NEW TESTAMENT AND RABBINIC JUDAISM* 368-69 (Arno, 1973) (1956), noting the assumption of many Rabbis that the *shekhinah* was present throughout married life (*Sotah* 17a); *see also* MICHAEL L. SATLOW, *JEWISH MARRIAGE IN ANTIQUITY* xx (2001), arguing that the rabbis took wedding customs which were similar to those of non-Jews, discarded some of them, and turned them into rituals, this being the beginning of a process that would culminate in the elaborate, "sacramental" marriages of the Middle Ages and even today. He also argues for conceptual differences between Palestinian and Babylonian conceptions of marriage in the talmudic period.
- 58 I:27-28. On the nature of the heavenly confirmation in *Gittin*, *see.g* "If marriages are made in heaven..."
- 59 *See* *Theology* 87. Even more specifically at IV:298: "Particular points of comparison emerge in the very language commonly used for both animals for the altar and women for men. That is, a woman is consecrated to a particular man, just as an animal is consecrated to the altar for the expiation of a particular inadvertent sin that has been carried out by a particular person. A sin-offering consecrated for a particular person and a specific action he has inadvertently performed proves null if it is used for another offering than the designated class, another person, or another sin by the same person. A woman consecrated for a particular man is subject to exactly the same considerations of sanctification (*mutatis mutandis*). In both cases the relationship is one of consecration, meaning, differentiation from all secular purposes and designated for a sacred function or task." But is the 'use' of the married woman differentiated from *all* secular purposes?
- 60 IV:293. *See also* IV:290-91, 502, *Theology* 112.
- 61 The prophetic use of the marriage metaphor in describing the relationship of God and Israel does not appear to be considered.
- 62 IV:295-96: "The householder (and his male equivalents within other social structures) is possessed of an autonomous will, like God's and in contest with God's. The woman's autonomy is limited by her father's, then her husband's will."
- 63 IV:294-95. *Cf. Theology* 112.
- 64 *M. Qidd.* 1:1; *Tos. Qidd.* 1:1: "*ve'amar lah hare at mequdeshet... hari zo mequdeshet.*" Two other possible formulae are given in the *Tosefta*, but neither uses the verb *qanah*.
- 65 *See* IV:342, where Neusner notes that collection of the marriage-settlement may be complicated by the existence of other claims to the husband's

- property. The general charge over the husband's estate, to secure payment of the *ketubah* (the first of the *tena'in bet din*, *M. Ket.* 4:7) is included (IV:313), but not (conformably with Neusner's criteria) the historical traditions regarding the origins of that clause. On the latter (*Ket.* 12:1; *y. Ket.* 8:11 (32b), *b. Ket.* 82b), see B.S. Jackson, *Problems in the Development of the Ketubah Payment: The Shimon ben Shetah Tradition*, in *RABBINIC LAW IN ITS ROMAN AND NEAR EASTERN CONTEXT* 199-225 (C. Hezser ed., 2003).
- 66 *Theology* 98. Indeed, "Sex is part of paradise... How better define Eden than the marital relationship where obligations such as these are honored".
- 67 IV:347: "What, finally, defines the religious meaning of the *Ketubah* in particular, and what statement did sages choose to make through the halakhah of *Ketubot* and only there?... To understand the entire implicit statement made by sages through the halakhah, we have to revert to the liturgical statement of the aggadic view of Man and Woman in consecrated union...."
- 68 IV:349: "... everyone knows that the *Ketubah* is read just moments before we evoke Adam and Eve in Eden and Israel's future return to the Land, its Eden."
- 69 IV:347-8. They include: "Grant perfect joy to these loving companions, as You did to the first man and woman in the Garden of Eden. Praised are You, O Lord, who grants the joy of bride and groom" and conclude with *yotser ha'adam*. See IV:34.
- 70 Z.W. FALK, *JEWISH MATRIMONIAL LAW IN THE MIDDLE AGES* 35 (1966), dates the separation to the eleventh century. However, the two could be combined even in antiquity, where there was special reason to do so: see 2 ZE'EV W. FALK, *INTRODUCTION TO JEWISH LAW OF THE SECOND COMMONWEALTH*, 280-81 (1978), on *Tobit* 7:12-14.
- 71 As attested, e.g., by the account of the Alexandrian *ketubah* on which Hillel was asked to adjudicate: *Tos. Ket.* 4:9, on which see R. Katzoff, *Philo and Hillel on Violation of Betrothal in Alexandria*, *THE JEWS IN THE HELLENISTIC-ROMAN WORLD: STUDIES IN MEMORY OF MENACHEM STERN* 39\*-57\* (I.M. Gafni, A. Oppenheimer, D.R. Schwartz eds., 1996).
- 72 Ben-Zion Schereschewsky, *Marriage*, in 11 *ENCYCLOPEDIA JUDAICA* 1032, 1038-39 (1973), writes: "In the talmudic period – and presumably for a considerable time before then – the marriage ceremony was in two parts. The first, called *kiddushin* or *erusin*... was effected by the bridegroom handing over in the presence of two witnesses any object of value (more than a *perutah*) to the bride and reciting the marriage formula, "Behold, you are consecrated unto me with this ring according to the law of Moses and Israel." On this occasion two benedictions were recited, one over wine and the other for the actual act. The second reads: "Blessed art Thou, O Lord our God, King of the universe, who has hallowed us by Thy commandments, and hast given us command concerning forbidden marriages; who hast disallowed unto us those that are betrothed (to us – variant in some rites), but hast sanctioned unto us such as are wedded to us by the rite of the nuptial canopy and the sacred covenant of wedlock. Blessed art Thou, O Lord, who hallowest Thy people Israel by the rite of the nuptial canopy and the sacred covenant of wedlock" (Hertz, *Prayer*, 1011). This benediction is already recorded in the Talmud (*Ket.* 7b), and since cohabitation of the bride and groom was forbidden until the second ceremony, the *nissu'in*..., which in the case of a virgin usually took place a year later, it appears that the benediction was in fact a warning to the betrothed couple not to cohabit until that ceremony." On the distinction between *berakhot ha-nissu'in* and *berakhot ha-erusin* and the relationship of the *ketubah* to them, see also *id.* 10.926f.
- 73 Cf. Falk, *JEWISH MATRIMONIAL LAW* 36 (*supra* note 70).
- 74 IV:344; cf. *Theology* 94-95.
- 75 IV:342-43: "Not all formulaic writings effect sanctification; this one does." The supporting argument draws parallels from *oral* declarations. On the attempt to equate written documents and oral declarations, see below, *p.??*. para beginning "A further argument, if well-founded ..."
- 76 Otherwise, there would hardly have been any need for communal enactments making its absence a cause for annulment. This is ascribed first by Rav Hai Gaon to Rav Judah Gaon in S. ASSAF, *TESHUVOT HAGAONIM* (1942), #113; translated in M. Elon, 2 *JEWISH LAW, HISTORY, SOURCES, PRINCIPLES* 657 (1994); see also Shlomo Riskin, *HAFKA'AT KID-*

- DUSHIN: TOWARDS SOLVING THE AGUNA PROBLEM IN OUR TIME, 36(4) *TRADITION* 1-36, 19-20 (2002); *see also* Hebrew version (with slight differences): HAFKA'AT KIDDUSHIN – PITARON LE'AGINUT, in 22 *TECHUMIN*, 191-209 (2002) ; *see also* B.S. Jackson, *Agunah and the Problem of Authority: Directions for Future Research*, 1 *MELILAH* '4.2.1, at 39-40 (2004).
- 77 Cf. L.M. EPSTEIN, *THE JEWISH MARRIAGE CONTRACT: A STUDY IN THE STATUS OF THE WOMAN IN JEWISH LAW* 5 (1927), arguing that despite inclusion in the *ketubah* of the clause: “be thou my wife according to the law of Moses and Israel...”, the *ketubah* was not constitutive of the marriage, and the marriage was valid even if the *ketubah* was not; *see also* R. Katzoff, *Review of Cotton and Yardeni: Aramaic, Hebrew and Greek Documents from Nahal Hever*, 19 *SCRIPTA CLASSICA ISRAELICA* 316-327, 325-26 (2000), on the views of R. Meir in *B.K.* 89a and *Ket.* 57a, contrasting that of R. Judah and others; *see also* D. Piattelli, *The Marriage Contract and Bill of Divorce in Ancient Hebrew Law*, 4 *THE JEWISH LAW ANNUAL* 66, 74 (1981), who notes that there are ancient Near Eastern laws (Eshnunna §§27 and 28, Hammurabi §§128) which do “seem willing to affirm the principle that unless a contract was drawn up the woman cannot be considered as a lawful wife”. But this is not determinative of the position in early Jewish law: the *ketubah* makes no appearance in the Hebrew Bible.
- 78 Despite his apparent claims for the constitutive status of the *ketubah*, Neusner recognises (IV:341) that “unlike the writ of divorce, the marriage-settlement or *Ketubah* is effective even if the document is not written out; it is an unstated condition “imposed by the court,” meaning, valid even when not documented.”
- 79 *See* B.S. Jackson, *How Jewish is Jewish Family Law?*, LV/2 *JOURNAL OF JEWISH STUDIES* 201-229, 220-21 (2004); *see also* B.S. Jackson, *Some Reflections on Family Law in the Papyri*, in *THE JERUSALEM 2002 CONFERENCE VOLUME* 141-77, 169-70 note 102 (H. Gamoran ed., 2004). On notarial practice as a source of Papyrus Yadin 18, *see* Lewis N., Katzoff R. and Greenfield J.C., *Papyrus Yadin 18*, 37 *ISRAEL EXPLORATION JOURNAL* § II, at 229-50, at 247 (1987), concluding that the draftsman here worked from handbooks of notarial practice but chose from the models available in those handbooks the clauses with which he could express his essentially Jewish conception.
- 80 IV:383: “The fact is, the halakhah recognizes no important difference in substance between stating a certain formula and writing down a certain formula into a document. In either case, the relationship of a woman to the generality of mankind is drastically restricted.”
- 81 IV:344; *cf.* *Theology* 94-95: “... the *Ketubah* represents the formula of sanctification” (emphasis supplied); *see also* IV:342-43. Elsewhere, Neusner attributes an almost magical quality to the constitutive function of the speech act: “The vow in general, and the vow to be a Nazirite in particular, share the principle that words enchant, affect relationships, effect change in the world” (IV:383, *cf.* IV:414). We may compare Hägerström’s analysis of Roman speech acts, as creating a metaphysical *vinculum iuris*: *see* B.S. JACKSON, *MAKING SENSE IN JURISPRUDENCE* 131-33 (1996). Neusner offers a more conventional theological interpretation at III:265, where he writes: “...to language sages impute remarkable power, specifically the capacity to change a transaction, through intangible but powerful formulations, by the introduction of an interest on God’s part into an arrangement otherwise between men alone”.
- 82 *See* IV:272, Neusner’s translation to *Tos. Qiddushin* 1:1: “A woman is acquired [as a wife] in three ways, and acquires herself to be a free agent in two ways. She is acquired through money, a writ, and sexual intercourse [M. Qid. 1:1A-B]. By money – how so? [If] he gave her money or something worth money, saying to her, “Lo, you are consecrated to me,” “Lo, you are betrothed to me,” “Lo, you are a wife to me,” lo, this one is consecrated. But [if] she gave him money or something worth money and said to him, “Lo, I am betrothed to you,” “Lo, I am sanctified to you,” “Lo, I am a wife to you,” she is not consecrated.”
- 83 IV:346-47: “Man speaks but then confirms in writing the announced intention:... the document lends palpability to the intention, not so much confirming it as realizing it in an exact sense of the word, just as much as the statement in connection with a specific animal accomplishes the same goal.” A more traditional account would view the required “palpability” of the transaction as residing in the (witnessed) *at of hare at mekudeshet*.

- 84 *Hosea* 2:21-22 and the *formula negativa* in *Hos.* 2:4. See also *Ezek.* 16:8.
- 85 *Isa.* 61:10, 62:5.
- 86 Indeed, Neusner comes close at IV:348-49 to conceding the secular, functional role of the *ketubah* (taken in isolation). He further observes at IV:350: “The Halakhah for the interiority of Israel’s being, with its attention to the workaday details of documents, turns the Ketubah into not only a transformative formulary, but also a powerful, wry commentary to what is truly at stake. Most formularies turn the secular into the sacred. The Ketubah turns the sacred on high into the sacred here on earth, identifying the dimensions of consecration that take the measure of the marriage.”
- 87 At IV:498 Neusner compares, in this respect, the *get shihrur* of the slave. For historical comparison of the *get* and *get shihrur*, and the necessity for and constitutive effect of the latter, see also Daniela Piattelli, *Get and Get Shihrur*, in THE TOURO CONFERENCE VOLUME 93-99, 96-97 (B.S. Jackson ed., 1985), discussing *Gitt.* 49b.
- 88 IV:340-41f.: “... the legal relationship that the Ketubah establishes does not depend upon the jot and tittle of the document; in this regard the divorce-document, the *Get*, differs radically. ...the Ketubah forms only one component of a composite of transactions that accomplish a single coherent goal.”
- 89 IV:470; cf. *Theology* 111.
- 90 IV:470, 580-81; cf. *Theology* 111.
- 91 IV:504, 580-81; cf. *Theology* 113-14.
- 92 See Neusner IV:506; cf. *Theology* 116: “When God oversees this holy relationship, he does not wish it to be confused with any other. That is why, when God is informed of the change of intentionality that has brought about the consecration of the woman to the man, he must be given exact information.”
- 93 In this context, Neusner maintains, the scribe “has the power to nullify even the effect of the intentionality of the husband” (IV:505, cf. *Theology* 115). That is true, in the sense that “if the scribe made a mistake... the transaction is null”. It should not be read as meaning that the scribe has a heavenly authorisation to deny the parties a *get*. He does not really exercise a “power” here; rather, he simply fails to comply with the formalities necessary to produce a valid *get*. At IV:506-07, Neusner rightly points to the fact that the wife may, as a result, emerge as the “victim of circumstances quite in contradiction to anybody’s will”, where she acts in good faith on a document which turns out to be formally defective.
- 94 IV:507; cf. *Theology* 117.
- 95 Neusner, *id.*, seeks to relate it to “the generative myth of the Torah, where to begin with the power of man to form and exercise intentionality is set forth” but where the “man and the woman enter the excuses that they gave way to the will of another, so their actions should be set aside” (resulting in divine punishment): “... what matters in the end is the deed, not only the intention. To say, in the end Adam and Eve did bite into the apple, would overstate matters, but not by much.”
- 96 However, the appeal to Eden in this context places more stress on the putting right of the sin which provoked expulsion: “correct the error of Eden.” See III:168, where Neusner argues that it is particularly in cases of damages and injury that “Israel shows how, unlike Adam and Eve, through the instruction of the Torah, Israel has learned what it means to take responsibility for injury and damage to others.” If so, it appears that the sin in Eden, expressed in the accusation: “Did you eat of the tree from which I had forbidden you to eat?” is conceived as a form of theft. At first sight, that may appear a somewhat trivialising interpretation. As such, it only adds force to Neusner’s argument that the sin in Eden was conceived as residing at least as much in the denial of responsibility. It seems, moreover, that the Adamic family did not learn its lesson: immediately after the expulsion from Eden, Cain too seeks to deny responsibility for an even greater wrongdoing.
- 97 III:1: “... the goal of the system of civil law is the recovery of the just order that characterized Israel upon entry into the Land. The law aims at the preservation of the established wholeness, balance, proportion, and stability of the social economy realized at that moment.”
- 98 I.30. See also III:162.
- 99 Space precludes comment on the detail. Suffice to raise a doubt regarding the third principle, underlying the institution of *ona’ah* (“overcharge”). At

- III:102 Neusner writes in this context: “Objects (but not slaves, commercial paper, or real estate) have a true, or intrinsic, value, as distinct from a market value. What an informed seller and a willing buyer agree as the price of an object is measured against the true value of the object, and if too great a divergence – more than a sixth – from that true value marks an exchange, fraud results; it may be fraud committed by buyer, if too little is paid, or by seller, if too much.” This is hardly “fraud” in the legal sense. More important, the permissible variation of a sixth hardly manifests a desire for stasis in the absolute sense which Neusner suggests in his more general formulations. Moreover, it is far from clear that this permitted variation is indeed from a “true value” (however that might be ascertained) rather than from the current market value. There are important issues of essentialism to be addressed here – and elsewhere (e.g. III:349-50, on the halakhic construction of the gentiles). Comparison may be made with the Brisk school, on which see C. Saiman, *Legal Theology: The Turn to Conceptualism in Nineteenth-Century Jewish Law*, 21 JOURNAL OF LAW AND RELIGION 39-100 (2005-06).
- 100 *Amos* 8:6 (cf. *V.:*11); *Neh.* 5:4 5.
- 101 *Jer.* 34:9 (in the context of the siege of Jerusalem): see JACKSON, WISDOM-LAWS, *supra* note 46, at 88 note 46 and literature there cited.
- 102 *2 Kgs* 4:1; *Isa* 50:1; *Amos* 2:6 7; *Prov* 22:27; as well as the context implied by the legal sources: *Exod* 21:2-11; *Deut* 15:12-18; *Lev* 25:39-42.
- 103 Oddly – since he sees the tractate as unusually influenced by the biblical *fontes* – he does not recognise that the order is itself a reflection of that of the paragraphs of the *mishpatim*: Ox (commencing *Exod.* 21:28), pit (*Exod.* 21:33-34), crop-destroying beast (*Exod.* 22:4 MT), fire (*Exod.* 22:4 MT). See D. Daube, *The Civil Law of the Mishnah: The Arrangement of the Three Gates*, in [1 TALMUDIC LAW] COLLECTED WORKS OF DAVID DAUBE 257-304 (C.M. Carmichael, ed., 2nd ed. 1992).
- 104 III:163; cf. *Theology* 213-14.
- 105 D. Daube, *Negligence in the Early Talmudic Law of Contract*, in COLLECTED WORKS, *supra* note 104, at 305-32.
- 106 B.S. JACKSON, STUDIES IN THE SEMIOTICS OF BIBLICAL LAW 190-93 (2000).
- 107 Thus, liability for *tam* is limited to half-damages; liability in the Roman *actio de pauperie* could be limited by noxal surrender (whereas the application of the negligence-based remedy, under the *lex Aquilia*, could not); and there are indications of something comparable to noxal surrender in the pre-history of the English *scienter* remedy (derived ultimately from Exodus). See B.S. Jackson, *Liability for Animals in Roman Law: An Historical Sketch*, 37 THE CAMBRIDGE LAW JOURNAL 122-143 (1978); *On the Origins of Scienter*, xvi, 94 THE LAW QUARTERLY REVIEW 85-102 (1978); *Travels and Travails of the Goring Ox: The Biblical Text in British Sources*, in STUDIES IN BIBLE AND THE ANCIENT NEAR EAST PRESENTED TO S.E. LOEWENSTAMM 41-56 (Y. Avishur & J. Blau eds., 1978). There is a similar structural similarity between the liabilities attributed by Roman and Rabbinic law to bailees (*shomrim*): see JACKSON, WISDOM-LAWS, *supra* note 46, at 332-37.
- 108 S. ALBECK, PESHER DINEI HANEZIKIN BATALMUD (1965).
- 109 The present writer has stressed what may be the social origins of such an approach: early Biblical law endorses the values of Proverbs 25:7-9, in urging avoidance of the law courts, and private settlement of disputes on the basis of norms not requiring third party intervention. See most recently and systematically in JACKSON, WISDOM-LAWS, *supra* note 46, at 29-39, 389-95.
- 110 III:167; cf. *Theology* 214. It is here, in particular, that the values of the civil law address the error of Eden, that of denial of responsibility.
- 111 A particularly interesting argument, which cannot be pursued here, concerns the survival and redirection of the deceased husband’s intentionality in the context of Yevamoth. See IV:509-10, 581-83.
- 112 Thus: “The bed is sanctified by the man’s intention, together with the woman’s acquiescence, ratified by a deed. It is desanctified by... the man’s intention...” (IV:583), while the wife “accedes to the process of deconsecration” (IV:503).
- 113 The distinction between deliberation and acquiescence, for example, is surely crucial to any holocaust theology.
- 114 See, e.g., *Theology* xii: “... the struggle between life and death, begun with

Man's exile and the advent of death, goes on, as Chapters Six through Nine explain, from now to the end of days. It is embodied in the material forces of pollution marshaled by death, opposed by the Israelite in a constant state of alertness to contamination round about. Israel struggles for purity and against death."

- 115 See III:356: "The law of uncleanness bears its theological counterpart in the lore of death and resurrection, a single theology animating both"; see also *Theology* 93: "...the governing conception is, Israel's life is extended, in procreation, and sustained, in nourishment, through acts of sanctification; it is threatened through acts of uncleanness, adultery, on the one side, the forces of uncleanness analogous to death, on the other"; see also *Theology* 375, 379-80.
- 116 B.S. Jackson, *Mishpat Ivri, Halakhah and Legal Philosophy: Agunah and the Theory of "Legal Sources"*, 1 JSIJ – JEWISH STUDIES, AN INTERNET JOURNAL (2002), at <http://www.biu.ac.il/JS/JSIJ/1-2002/Jackson.pdf>.
- 117 The Talmud itself recognises at least *dina demalkhuta dina*: *Ned.* 28a; *Gitt.* 10b; *B.K.* 113a; *B.B.* 54b, 55a.
- 118 *Kid.* 3:8: "This is the principle: Contracting out of a Law contained in the Torah as to a monetary matter is valid, but as to a nonmonetary matter is void." See III:171, where in the context of *Baba Metsi'a* and *Baba Batra*, Neusner himself attaches great importance to the topic of the limits of human intentionality, in the face of competing considerations, especially divine law: "Israel in its interior arrangements is to hold in the balance [1] personal will, [2] the Torah's law, and [3] the long-standing customary requirements of enduring order."
- 119 See Jackson, *supra* note 11, at 183: "The *halakhah*, for example, has an elaborate body of property and commercial law. Suppose that property is transferred through an ordinary transaction of sale, involving transfer of title by one of the processes known as *kinyan*. From a comparative law point of view, we might say that there is nothing particularly religious about this. The individual has fulfilled the conditions of a rule which, should the matter ever be disputed, will be recognised and applied by the public institutions of that system. But put that proposition to the observant Jew, not versed in law or legal philosophy. What might he or she say? "I have performed a *mitsvah*: I have done God's will, and I thereby derive an inner religious satisfaction from so doing." In short, there is a private religious experience bound up with this very mundane, secular act." Of course, Neusner is seeking explanations at the level of theological dogma, not religious experience.