

A.J.S. / vol. 12:2 / F. 1987

RELIGIOUS LAW AND CHANGE: THE MEDIEVAL ASHKENAZIC EXAMPLE

by

HAYM SOLOVEITCHIK

If law is conceived of, as religious law must be, as a revelation of the divine will, then any attempt to align that will with human wants, any attempt to have reality control rather than to be itself controlled by the divine norm, is an act of blasphemy and is inconceivable to a God-fearing man. As the Middle Ages was an age of faith among Jews no less than among Christians and Muslims, the unalignability, the "nonadaptability" if you wish, of religious law is a premise which must underlie all our investiga-

The first half of this article is a condensed version of a paper given at the Annual Convention of the Association of American Law Schools, Houston, Texas, Dec. 28, 1976, entitled "The Tosafist Conception of Law." The essay here presented was a lecture delivered at the Center for Israeli and Jewish Studies of Columbia University, Dec. 7, 1982. The lecture is printed as delivered, and no attempt has been made to alter the oral, if you wish the rhetorical, nature of the presentation. I would like to thank Professors J. Katz, Y. Sussman, and I. Ta-Shema for commenting on the paper.

tions and understanding of the history of Halakhah in the Middle Ages. Yet the contention of this paper is that at times the very intensity of religious conviction and observance can be conducive to a radical transformation of religious law, and that the very depth of religious attachment can play a supportive role in deflecting the divine norm from the path of its immanent development, and bring it into line with the needs and practices of the time.

A few prefatory remarks may, however, be in order before beginning the argument. First, the subject of the lecture is conscious change, reinterpretation of set purpose to achieve a given goal. Second, our subject is not the responsa literature. We will not deal with actual judicial rulings, a sphere where there has always been a strong interplay between circumstances and legal principles, but rather with the theoretical writings of the Halakhah, a literature which one might expect to be most immune to pressure. Our remarks will center about the classic supercommentary on the Talmud, i.e., the work of the tosafists, the great series of Franco-German glosses composed in the twelfth and thirteenth centuries, printed alongside of the Talmud in every edition of that work, and indissolubly associated with every attempt to understand that complex corpus, from the Middle Ages to the present day. So central are works of the tosafists that one may well paraphrase Whitehead and say that all subsequent halakhic thinking has been a series of footnotes to the Tosafot. Which brings me to the third and final point by way of introduction. Medieval halakhic thought, in fact medieval Jewish culture generally, can be divided roughly into four units. There is the culture of Muslim Spain, which begins to flourish in the mid-tenth century, and is then annihilated in one fell swoop by the Almohads in the 1140s; its greatest product, Maimonides, flees as a boy from Cordoba to settle eventually in Egypt. The second culture is the North European one, centered in France and Germany and usually called Ashkenaz. The third is that of Provence, located roughly in what is now called the French Riviera, a culture apart, both in Jewish and general history, from the one of northern France, at least until the thirteenth century. And finally, there is the halakhic thought of Christian Spain, which begins with the Reconquista in the late twelfth century and achieves great heights, possibly the greatest intellectual heights of the Jewish Middle Ages, in the thirteenth and fourteenth centuries. It is these four separate cultures (the two Spains—Muslim and Christian, Provence, and Ashkenaz) which form the foci of the lecture. My remarks will be directed towards drawing out the uniqueness of the approach to certain problems of law and reality of the Franco-German

(Ashkenazic) culture, in contrast to the responses of the other three cultures, cultures no less creative, no less daring than that of Franco-Germany, but ones which chose, in the inevitable clash between need and theory, a path wholly different from that of the Ashkenazic community.

* * *

Anyone who has studied the writings of the tosafists will have noticed that often when they introduce a radical and occasionally unconvincing interpretation of a talmudic passage, they conclude with "and therefore we may allow this or that practice." If one takes the Tosafot on the printed page of the Talmud, this is most noticeable in the tractate of *'Avodah Zarah*, but if one studies other works of the school, such as the *Sefer Ravyah* or the *'Or Zaru'a*, or uses earlier Tosafot, such as those of R. Samson of Sens or R. Judah of Paris, one will perceive that in other areas the seemingly neutral words of the printed Tosafot have on many occasions a similar purpose in mind.

Many have inferred, and reasonably so, that as the tosafists were not only scholars but also communal leaders (in this community religious and lay leadership were intertwined), like all true leaders they shaped the law to meet the needs of their people.¹ It was noted, however, that often the practices referred to were actually ones of long-standing, and that the remarks of the tosafists do not constitute any innovation but are rather a ratification of the status quo.² Furthermore, detailed study will show that often the practices referred to were ones that were not under heavy economic or social pressure. A good many of the practices allowed by the tosafists certainly were products of such pressures (especially those in the areas of trade or business), but others were not at all. A few that were legitimized were even contrary to the material interests of the community. And so the question presents itself (and I emphasize that we are here dealing with commentaries and theoretical writings): What legitimized, in the eyes of the tosafists, this radical reinterpretation?³ "Reinterpretation" actually is a misleading term. More accurately, one should ask what led them to read the Talmud, to perceive the Talmud, in a fashion which can only be construed as a justification

1. E. E. Urbach, *Ba'alei ha-Tosafot*, rev. ed. (Jerusalem, 1980) *passim*; Schalom Albeck, "Yahas shel Rabbenu Tam li-ve'ayot zeman," *Zion* 19 (1954): 103-141.

2. Jacob Katz in *Kiryat Sefer* 31 (1956): 12-13.

3. See the important remarks of H. H. Ben-Sasson in *Behinot* 9 (1957): 46-49.

of the status quo? And we are not dealing with a few isolated instances. There are numerous occasions—indeed, in the field of *yeyn nesekh* (the injunction of drinking wine touched by gentiles) or *hilkhot 'avodah zarah* (especially Jewish-gentile commercial relations), entire *areas* of tal-mudics—in which one may say, without fear of exaggeration, that the tosa-fists have overtly fashioned the law so as to align it better with regnant practice and need.⁴

Perhaps we can best understand this phenomenon if we follow a course of reasoning which may well have occurred to the Ashkenazic community. Jewish law has very stringent regulations regarding rules of martyrdom. In a few extreme instances martyrdom is absolutely mandatory. In those cases where it is not mandatory, it is forbidden, and most probably one who suffers voluntary martyrdom should be viewed as having committed suicide.⁵ Life is not optional in Judaism. And one knows of no allowance for committing suicide to avoid forced conversion. Yet from numerous crusade chronicles, both Jewish and Christian, it is perfectly clear that the Ashkenazic community, men, women, and children, did not all abide by these regulations. Scholars and simple folk, they committed suicide rather than have baptism forced upon them, rather than be dipped in what they called “contaminated waters.” And let it be noted that we are not dealing with instances of mass hysteria, but with a pattern of conduct persisting over the course of centuries. They went yet further. Parents slaughtered their own

4. Haym Soloveitchik. *Minhag, Mešrut ve-Halakhah be-Mahshavtam shel Ba'alei ha-Tosafot: Yeyn Nesekh, Nituah le-Dugma* (M.A. thesis; Jerusalem, 1967); Albeck, “Yehaso”; Jacob Katz, *Bein Yehudim le-Goyim* (Jerusalem, 1960), chap. 3.

5. See *Mishneh Torah, Yesodei ha-Torah* V:1–5.

I have adopted, both from conviction and for presentational purposes, the Maimonidean position on voluntary martyrdom as being the straight and simple interpretation of the halakhah (just as יעבור ואל יעבור expresses an imperative, so similarly does its companion statement, יעבור ואל ייהרג). And indeed a reading of the Semaq (below, n. 8) would indicate just how aware was R. Isaac of Corbeil of the cogency of this argument. Opinions, however, can legitimately differ on this matter. The question here addressed is not the legal validity of the positions adopted, but of the mind-frame that shaped those positions. Murder of one's children to avoid baptism is legally inadmissible, yet it is evident that this practice of centuries possessed the full tacit approval of the tosa-fists (see below n. 8). A culture which assents to child murder as preferable to baptism is one which, I believe, will inevitably view voluntary martyrdom as permissible, indeed commendable. Be that as it may, my argument is made on the basis of child murder rather than voluntary martyrdom. (Josephus' account of Masada has recently generated a considerable literature on suicide; see L. Feldman, *Josephus and Modern Scholarship* [Berlin, 1984], pp. 779–780. For our purposes, see below, n. 8.)

children to prevent them from falling into Christian hands and being raised as Christians, and even recited a blessing on the murder of themselves and of their own children, as they would on the performance of other divine commandments, such as the eating of *mašot* on Passover night.⁶ One of the most tragic documents which has come down to us from the Jewish Middle Ages is an inquiry sent to the great Rabbi Maier of Rothenburg (d. 1293) as to what penance a man must do who slaughtered his children as a pogrom was in progress, in order to prevent them from falling into Christian hands, and then failed in his own attempt at suicide. Rabbi Maier was hard put to find a reply.⁷

The magnitude of this halakhic breach is enormous. Whether one is permitted to suffer voluntary martyrdom is highly questionable; suicide is forbidden beyond question, and the permissibility of murder needs no discussion. Thus if the law were to be followed, the scholars of these communities would have had to rule that all the martyrs—*qedoshim*, or “holy ones,” as they were called—were not only not “holy,” but were “self-killers,” and murderers; that not only should they not be buried with honor, but perhaps they should even be denied burial, or at best be buried in the far end of the cemetery where the most vile criminals are interred. Such a conclusion, needless to say, was an emotional impossibility, and we need not be surprised if the Franco-German community evolved, in the course of time, a doctrine of the permissibility of voluntary martyrdom, and even one allowing suicide. They did this by scrounging all the canonized and semi-canonized literature for supportive tales and hortatory aggadah, all of

6. *Gezerot Ashkenaz ve-Sarfat*, ed. A. Haberman (Jerusalem, 1945). The English translation is that of Shlomo Eidelberg, *The Jews and the Crusades: The Hebrew Chroniclers of the First and Second Crusades* (Madison, 1977). See now Robert Chazan's translation in his *European Jewry and the First Crusade* (UCLA, 1987), pp. 223–297. Suicide and slaughter of children are attested to by Albert of Aix, *Recueil des historiens des croisades, Histoire Occidentaux*, vol. 4 (Paris, 1879), p. 293 (bk. I, chap. 27). Reciting of blessing, *Gezerot*, pp. 41, 45, 46, 78, 96 (see also pp. 62, 113). See Shraga Abramson, “Nusakh berakhah 'al kiddush ha-shem,” *Torah Shebe'al Peh* 14 (1972): 159–163. I have found no evidence for viewing this as a later exaggeration (cf. Yiśhak Baer, Introduction to *Gezerot*, p. 4). On the radically different responses to martyrdom and conversion on the part of the Spanish community, see G. D. Cohen. “Messianic Postures of Ashkenazim and Sepharadim,” in *Studies of the Leo Baeck Institute*, ed. M. Kreutzberger (New York, 1967), pp. 115–158. See also Bernard Lewis, *Jews in Islam* (Princeton, 1984), pp. 82–84.

7. *Teshubot, Pesaqim u-Minhagim shel R. Maier of Rothenburg*, ed. I. Z. Cahana, 2 (Jerusalem, 1960), sec. 59.

dubious legal worth. But by massing them together, Ashkenazic scholars produced, with a few deft twists, a tenable, if not quite persuasive, case for the permissibility of suicide in times of religious persecution. For murder of one's children few could find a defense, and almost all passed that over in audible silence.⁸

8. See reference in Katz, *Bein Yehudim*, p. 91, n. 8, to which may now be added: *Tosafot Sens*, 'Avodah Zarah 18a, s.v. *mutav*, in *Shittat ha-Qadmonim 'al 'Avodah Zarah*, ed. Y. Blau (New York, 1969); *Gilyonei Tosafot*, cited in *Hiddushei ha-Ritva 'al 'Avodah Zarah* (Jerusalem: Mosad ha-Rav Kook, 1978) 18a, s.v. *ha*; *Semaq Zurich* (Jerusalem, 1973), Imp. 3, 6; *Arugat ha-Bosem*, ed. E. E. Urbach, 1 (Jerusalem, 1939), p. 122; *Tosafot ha-Shalem 'al ha-Torah*, ed. E. Y. Gliss (Jerusalem, 1982), to Gen 9:5 (*Orhot Hayyim* II, ed. Mosheh Schlesinger, 1, pp. 26–27).

Significantly, this defense is made by no less a figure than Rabbenu Tam; and the striking formulation of the Tosafot (*A.Z.* 18a), מצוה להלך בעצמו, which might be suspect as being a later heightening of a more measured formulation by possibly the greatest talmudist of the time, is confirmed by the Tosafot of Ri's son, R. Elhanan, the earliest and most direct "reportatio" of the Dampierre academy: סברא הוא דשרי ומצוה הוא . . . סברא ואומר ר' יעקב . . . סברא can either be deductive, inductive, or axiomatic. Clearly no principle has been stated from which this conclusion has been deduced, nor can this conclusion be inferred from the facts. (Indeed to the extent that there are talmudic data, they point to the opposite conclusion, as the very existence—or the very necessity, one should say—of the Tosafot *ad loc.* indicates.) Clearly suicide is simply axiomatic to Rabbenu Tam. Similarly, when argument is made from *ben sorer u-moreh*, which, as is well known, *l'o haya ve-l'o nivv'a*, no legal argument is being advanced but a religious truism asserted. The same holds true for citing tales of R. Judah Hasid and *midrashim* on legal issues of life and death.

Subsequent formulations abated the imperative nature of suicide, but almost all asserted that it was permissible and that those who did so act were *qedoshim*. The defense for murdering children is far more muted. It is absent in the classic works of Ashkenaz but found in scholia. Ritva assumes Rabbenu Tam to be of this opinion, though the text of the *Gilyonei Tosafot* is far from clear on the matter. Indeed, as all other reports of Rabbenu Tam's doctrine confine it to suicide, and to suicide alone, the concluding remarks לעצמי או לעצמי אחר would appear to be those of the *Gilyonei Tosafot*. R. Moses of Zurich attributes such a defense to Ravyah. Be that as it may, the practice clearly had popular rabbinic sanction. Needless to say, differing voices on so traumatic an issue were heard, as the passage in the *Tosafot ha-Shalem* indicates, but the protests are anonymous or from men of no consequence (מהר"ש ב"ר אברהם המכונה ארכמן).

R. Solomon Luria saw Ri of Dampierre as opposing suicide (*Yam shel Shlomoh*, *Bava Qama* 8:59), but this is highly questionable. Logically, if suicide is not permitted as an escape from fear, then whether that fear is of murder or of baptism should make no difference. The very essence of the Ashkenazic position, however, was that baptism did make a difference. Significantly, Ri is never mentioned in contemporary sources as differing with the regnant opinion. We possess, moreover, two direct reports of Ri's teachings on this subject (*Tosafot R. Elhanan* and *Tosafot Sens* on 'Avodah Zarah 18a), and no demurral is there registered against his uncle's doctrine. Just how deep feelings ran may be seen from the *Yam shel Shlomoh* itself. R. Solomon combats at length, and with all his characteristic power, the acceptance of suicide as a legitimate alternative to baptism and then concludes by stating that it is permissible to set one's house on fire, engulfing both oneself and one's family in the flames, in order to avoid baptism.

What had taken place was that law and logic had led men to an emotionally intolerable conclusion, one which denied their deepest feelings and, more significantly, their deepest religious intuitions, and so the law was reinterpreted. Let us carry this process a step further. Suppose that in the study of talmudic texts the new dialectical method which had emerged in the twelfth century discovered, with its freshly found acuteness, that a number of the practices in the realm of *kashrut*, for example, or in the realm of Sabbath observance, had been in egregious error. Suppose that some practices of centuries, rooted in a monotextual understanding of the Talmud, were now subjected to the harsh glare of dialectic, with its sweeping collation and sharp distinctions, and that these practices were now weighed and found wanting—as wanting they would be found to be. Yet the people who had lived by these practices, who had shaped their lives in the Law's accord, were the very same ones who had gone willingly, indeed avidly, to their death, who had lived a life of intense religious observance, climaxed by their giving the ultimate measure of devotion. These same people were now to be shown to have lived out their lives in sin, to have desecrated the Sabbath, to have eaten nonkosher food to have drunk nonkosher wine, to have poured out their hearts in improper and meaningless prayers. Could such a conclusion be accepted by these communities? The answer again is no. And so a similar process of reinterpretation began, of justifying the past in light of and by means of the intellectual tools of the present.

The process we have described is, of course, a schematic one and has been used primarily as an expository device. Self-images are seldom the products of simple linear thinking. But what we have unquestionably before us is the way a community's self-image can change the course of its legal thought. The Franco-German community was permeated by a profound sense of its own religiosity, of the rightness of its traditions, and could not imagine any sharp difference between its practices and the law which its

By remaining in the house until the flames reach him, this person would be legally passive, allowing himself and his family to be killed rather than actively taking life. (Note 27 in the printed *Semaq Zurich* is not part of the text itself and is not found in other MSS of the work. It is written in a different hand, as are all the other sundry notes. It claims that a lengthy discussion of the slaughter of children is to be found in the *Mordecai* on 'Avodah Zarah. I have not found any such discussion either in the printed *Mordecai* or in fifteen of the sixteen MSS of that work on file at the Institute of Microfilmed Hebrew Manuscripts of the National and University Library in Jerusalem. [MS Vatican Ebr. 141 was not available.]

members studied and observed with such devotion.⁹ The Provencal Jewish community and the Spanish ones, on the other hand, wrestling as they were with, or with what they perceived to be, widespread religious laxity,¹⁰ had no such self-image, and it never occurred to the scholars of these communities, many of whom were in every sense the intellectual heirs of the French tosafists, to seek to align their people's practices with the written word. Or, more accurately, they never imagined that contemporary conduct was informative of talmudic Law, that the deeds of the common folk were revelatory of the Divine intent. The Franco-German community in its state of intense religiosity saw the word of God as being, as it were, incarnated in two forms: first, in the canonized literature (i.e., the Talmud); second, in the life of its people. If the new dialectical method, with its sweeping collation of the most varied sources, with its constant juxtaposition of contradictory passages, discovered that among the contradictions uncovered was one, not simply between a passage in the first volume of the Talmud and another passage in the last, but between a passage in the Talmud and the practice of a God-fearing community, to the tosafists the problem was one and the same. The resolutive tool of dialectic was and is distinction, and whether the conflict was between two passages in the law, or between life and law, to the tosafists the problems were one and the result the same—a radical interpretation of the Halakhah.

This self-image is unique to the Ashkenazic community and was not shared by other European Jewish communities in the medieval world. But

9. See above n. 4 and Jacob Katz, "Ma'ariv bi-zemano u-shelo bi-zemano," *Zion* 35 (1971): 35–60, and now Alan Mintz, *Hurban: Responses to Catastrophe in Hebrew Literature* (New York, 1984), pp. 84–108.

I do not perceive a similar attitude reflected in the responsum of R. Hai Gaon (*Oṣar ha-Geonim, Rosh ha-Shanah*, ed. B. M. Levin [Jerusalem, 1938], pp. 60–68). First, the thrust there is polemical, a defense of rabbinic traditions about shofar blowing against Karaite criticism. More significantly, I have not discovered any systematic reworking of *areas* in the halakhah of *issur we-heter* in the writings of the geonim so as to align them with communal practice. Intellectual history is the study of the actual intellectual work of a period, not of occasional proclamations. This is a point which cannot be overemphasized. The geonim did revise extensively commercial law. This area, however, creates no legal or religious problems, for *hefṣer beit-din hefṣer*. No such rule obtains in the area of ritual law, and *minhag* can never cancel out an unquestionable *issur*. It is in this area that the communal self-image must arise, systematically raising common practice to the level of a quasi-text, and thus allowing its integration into the halakhic process.

10. Yīshak Baer, *A History of the Jews in Christian Spain*, vol. 1 (Philadelphia, 1966), pp. 236–261 and *passim*.

its origins elude us. The crusade experience, while strongly reinforcing this image, did not in itself create it. It is reflected already in the earliest writings issuing from the Rhineland, those of Rabbenu Gershom Ma'or Ha-Golah.¹¹ Coeval with its literary remains, the source of this self-image perforce lies beyond the realm of documentation and decipherment. But that which sustained this image falls within this realm, and now demands our attention.

Clearly, so large a topic exceeds the format of a lecture, and it would be a bold man indeed who would claim to know in full what nurtures and sustains a collective psyche. I would simply like to draw attention to four factors which possibly were conducive to this Ashkenazic mentality.

First, the simplicity of religious beliefs. The Ashkenazic community never developed, possibly never wrote, a line of religious philosophy. This is bad for philosophy, but good for religiosity, if religiosity is defined, as Geartz once did, as "being held by religious ideas rather than holding them." For religious philosophy is an act of justification. It seeks to make the beliefs and practices of a religion comprehensible in the terms of another system. Implicit in the act of translation is the assumption that the categories of the other system are the dominant ones. They are the notions which yield comprehension and bestow value. Otherwise why translate? The surrounding civilization had made few cultural inroads. And even at the point of direct encounter, that of Christian-Jewish polemics, the issues were exegetical, not philosophical.¹² One problem did arise, that of anthropomor-

11. Haym Soloveitchik, "Pawnbroking: A Study in *Ribbit* and of the Halakhah in Exile," *Proceedings of the American Academy for Jewish Research* 38–39 (1972): 235–239, esp. p. 239.

12. Note the absence of Ashkenazic writers in Daniel Lasker's *Jewish Philosophical Polemics Against Christianity in the Middle Ages* (New York: Ktav, 1977). Contrast this with David Berger's *The Jewish-Christian Debate in the High Middle Ages* (Philadelphia, 1979). Whether philosophy played the major corrosive role in Spain that Y. Baer attributed to it is an open question. Certainly it did not help. For bibliography on this issue, see B. Septimus, "Narboni and Shem Tov on Martyrdom," in *Studies in Medieval Jewish History and Literature*, ed. I. Twersky (Cambridge, Mass., 1984), p. 447, n. 1. (My remarks are confined to the twelfth and thirteenth centuries, the period of the *Ba'alei ha-Tosafot*, which in Germany comes effectively to an end in 1303 with the emigration of R. Asher and decisively to an end in France with the expulsion of 1306. I must, however, register here my misgivings about the exaggerated implications that have been drawn from E. Kupfer's article "Le-demutah ha-tarbutit shel yahudut ashkenaz be-me'ot ha-arb'a 'esreh ve-ha-hamesh 'esreh," *Tarbiz* 42 [1973]: 113–147. My own study has confirmed what I initially heard from Professor M. Breuer: an examination of the origins of the individuals involved, and of their concentration in one culturally unique city, Prague, would mitigate considerably the far-reaching conclusions that have been drawn

phism, but significantly this is of internal rather than external origin. We have, however, no way of knowing on which side of the matter the bulk of the community—scholars and simple people alike—stood. Indeed, the total silence in all other sources on, what to our way of thinking is, a fundamental theological issue, the absence of any attempt to marshal support, political or rabbinic, against positions which to each side were the rankest heresy, makes one suspect that the celebrated controversy between R. Moses Taku and the Pietists¹³ was, if not quite “a tempest in a teapot,” then an in-house affair, and that most people knew little and cared less one way or the other. When they prayed, they prayed to the God of their fathers—as most men do.

Correlative with this simplicity was the absence of religious alternatives. Conversion as a cultural phenomenon was not perceived as being an actuality. People did convert—a good number of them.¹⁴ Some from conviction, some from desire for advancement, and some, possibly most, from sheer weariness. But at no time did the tosafists see the ground being eroded from under the feet of Judaism.¹⁵ The basic allegiance of the populace was unquestioned, and this finds expression in the historiography of the period.

from the material published by Kupfer, H. H. Ben-Sasson's position on the extent of the currents of philosophical speculation in Germany at the end of the fourteenth and through the fifteenth century [in *Peraqim be-Toldot ha-Yehudim be-Yemei ha-Beinayim* (Tel Aviv, 1962), pp. 205–206, and in *Trial and Achievements: Currents in Jewish History* (Jerusalem, 1974), p. 155] may be in need of some modification but has not, to my mind, been effectively shaken.)

13. *Ketav Tamim* in *Osar Nehmad* 4 (1860): 54–90. For literature and discussion, see Joseph Dan's introduction to *Ketav Tamim MS Paris H 711* (Jerusalem: Mercas Dinur, 1984).

14. E.g., references given by Katz, *Bein Yehudim*, chap. 6; S. W. Baron, *A Social and Religious History of the Jews*, vol. 5 (Philadelphia, 1957), pp. 112–114, 340–341; Robert Chazan, *Medieval Jewry in Northern France* (Maryland, 1973), pp. 146–147, 189–190, 195–196. (I personally would take with some discount the reports of sixteenth-century chroniclers, such as Ibn Yahya and Usque, who, fresh from the Spanish trauma, wrote of the 1182 expulsion by Philip II, “ורובם המירו.” No contemporary source records this, and the Latin sources cited by Chazan specifically state that few converted [see also Abraham David, “Mi'f'alo ha-Historiografi shel Gedalyah Ibn Yahya” (Ph.D. diss., Hebrew University, 1976), p. 335, n. 11].)

15. The report of R. Judah of Gerona expressed vividly the Ashkenazic viewpoint about the inherent improbability of voluntary conversion to Christianity (*Teshuvot Rashba*, VII, 179): עור מפ' הר' יונה ז"ל פסק בענין יין נסך. ששמע לפסק לחכמי צרפת כי משומד לע"ז והוא הולך ממקום למקום, ובעיר אחת הוא מאמין בע"ז בפני גוים, ובעיר אחרת נכנס בבית ישראל ואומר שהוא יהודי, ואין אנו יודעים אם הוא יהודי אם לאו.

הפסק כן הוא, יען שהוא אומר לנו שהוא יהודי אינו עושה יין נסך, והטעם כי הע"ז מלחא דמסתבר הוא שיהיה שקר וכשהוא אומר שמאמין כן הוא עושה להנאת יצרו הרע ואינו מאמינו בלבד, וכשהוא אומר לנו שהוא יהודי הוא אומר בלב שלם מפני שאמונתו היא אמונה ישרה וטובה ונכונה ואמתית ומלחא דמסתברא היא.

For all their vividness, the crusade chronicles are hortatory; they describe martyrdom so as to induce emulation. Yet despite their desire to emphasize and extol, and by so doing to educate and inspire, there are repeated accounts of apostasy—in Kerpen and Geldern, in Mors and Treves, a large number in Metz; and in the venerable city of Regensburg, the entire community went, albeit unwillingly, to the baptismal font.¹⁶ To the narrators, to the several narrators—and the spread both in persons and in time is significant—such events were forced, momentary lapses, moments to be pitied rather than to be feared.¹⁷ It never occurred to the chroniclers that what had transpired was a result of anything other than overwhelming duress.

When a person harbors within him conflicting sentiments, and an overwhelming force emerges from without, question will inevitably arise (and insoluble it will remain) to what extent the individual was simply a victim of circumstances and to what extent his conduct was a consequence of his inner ambiguities. Such a question, which arose constantly in Spain, haunted its history, and still hovers over its historiography,¹⁸ never raised its head in Ashkenaz. *All*, to the chroniclers, was the result of outside circumstances,¹⁹ and, as the fidelity of the converts was unquestioned, no ill word

Not all would go this distance and turn this perspective into an absolute legal presumption. There are all types of people, and specific cases should be treated individually, especially in such weighty matters as *'agunah* (*Mordecai, Ketuvot*, sec. 306). (Attention to both these sources was drawn by E. E. Urbach, *Ba'alei ha-Tosafot*, p. 243.)

16. *Gezerot*, pp. 25, 43, 51, 56, 73, 80, 94, 95–96. See now R. Chazan, *European Jewry* (above n. 6) pp. 99–136.

17. The considerable effort that has been expended over the past century in determining the priority of the several chronicles, their common or different sources, and the roles of the different editors is a consequence of their sharing a common view, and a common religious and historical outlook. All chronicles being of the same hue, differentiation has had to be made on the basis of minor cracks in the narrative and variations in historical detail and emphases. (For the literature, see Yosef Hacker, “Le-gezerot tatnu,” *Zion* 31 [1966]: 233, n. 1, to which one should add the recent research of Robert Chazan in *Revue des études juives* 133 [1974]: 235–254, and in *AJS Review* 3 [1978]: 79–99.)

18. See Y. H. Yerushalmi, *From Spanish Court to Italian Ghetto* (New York, 1971), pp. 21–42, for full discussion.

19. See now Mintz, *Hurban*, chap. 2, especially pp. 90–92. The chroniclers' view of *anusim* differs little from that of Rashi (*Teshuvot Rashi*, ed. I. Elfenbein [New York, 1943], no. 168). (Note the tone of the query and that of the reply.) See also R. Asher in *Zikhron Yehudah* (Berlin, 1846), fols. 50v–51v. (It should be noted that R. Asher's opponents did not question the unfaltering allegiance of the *anusim* but rather his assumption that every infraction committed during their enforced Christianity was a consequence of direct duress and that they were, therefore,

was to be uttered against them (המדבר עליהם רעה, כאילו מדברו!) פני השכינה).²⁰ It furthermore never occurred to any of the chroniclers that in recording these lapses, in praising the religious observance of the apostates during the period of the enforced Christianity,²¹ in emphasizing that those who failed the test were beyond rebuke, it never occurred to them that they might awaken in the minds of their readers the notion that there existed in times of persecution, if not a viable, at least a tolerable alternative to excruciating martyrdom. Rightly or wrongly, the Ashkenazic community was convinced of the basic loyalty of its people, and that, irrespective of what individuals might do, the community as a whole would stick fast to the course, even if it meant their physical doom.

Thirdly, there is an ongoing and ever-broadening acceptance of the Law by the people. It is in the tosafist period that the Jewish kitchen was fettered. As a result of the dialectical approach, conclusion after conclusion was being drawn from the Talmud and the religious norm expanded to undreamt-of frontiers. It was during the tosafist period that the few lines in the Talmud about salting meat were transformed into much (though not all) of that comprehensive set of regulations that confronts us in the *She'arei Dura*; and the few pages, half-pages in *Kol ha-Basar* yielded up the complex halakhic universe of *Basar be-Halav*.

But in saying this, are we not assuming that this theoretical efflorescence was swiftly translated into practice? That Jewish life in the time of R. Moses Isserles was effectively regulated by tosafist thought is unquestioned. But what evidence have we of contemporary conduct?

Unquestionably the great men of Dampierre thought their words of practical significance, and R. Baruch of Worms, possibly at R. Isaac's request, wrote the *Sefer ha-Terumah*.²² When the itinerant preacher R.

legally spotless. His opponents contended that the *anusim* occasionally breached the law—to which they aspired to return and subsequently did—either out of fatigue or convenience. And this had legal repercussions.)

20. *Gezerot*, pp. 56–57 and passim.

21. *Ibid.* ותעה נאה לנו לספר בשבב האנוסים. Christian chroniclers confirm the fact that most converts returned to the fold. Sources are excerpted in Aronius, *Regesten*, nos. 189, 202, 203, 206, 218. Dinur, *Yisrael be-Golah*, II, 1: pp. 31, 43–45. Baron, *Social and Religious History*, vol. 4 (1957), p. 284, n. 12, and p. 293, n. 21. (Let me be clear. I am not stating that all three chronicles describe specific conversions in different cities to the same degree, but this is a function of the respective degrees of historical detail and geographic emphasis of the several narratives. All, however, speak openly and unabashedly about conversion.)

22. Urbach, *Ba'alei ha-Tosafot*, p. 349.

Moses of Coucy decided to put into writing what he had preached, what he put down was pure tosafist doctrine (laced with considerable Maimonideanisms),²³ as did R. Isaac of Corbeil in his *Semaq*, the most copied and annotated Ashkenazic code of the Middle Ages.

We come closer to the popular when we turn to the host of tiny handbooks found primarily in manuscript (and most probably destined to remain there). In the absence of any authoritative code before the latter half of the thirteenth century, scholars or would-be scholars would compile for his own use a little compendium of some three or four pages on *yeyn nesekh* or some aspect of kashrut or Sabbath observance. These works are bereft of any value, but they amply demonstrate that the conception of Talmud even in the mind of the most mediocre writer was wholly a tosafist one. If people thought like a tosafist, they were likely to act like one.

Any doubts on the matter are laid to rest by the responsa literature. I do not refer to simple statements of “and we follow Rabbenu Tam's opinion.” Such a simplistic approach towards the history of halakhic praxis would not get us far. I refer to the fact that numerous queries would make no sense unless one assumed that this doctrine of Rabbenu Tam or that one of Ri was common practice, and many replies would be incomprehensible without the assumption that Raban's doctrine or that of R. Simha held sway in a certain region. It is still difficult to chart the pattern of penetration—which doctrines penetrated *when* and *how* quickly—but that the contemporary tosafist thought was percolating downward is the ineluctable conclusion of any study of the unarticulated assumptions of the literature of the period. The academies were not speaking to themselves. The contours of religious conduct were being effectively shaped by tosafist thought, and the people were slowly but surely accepting an ongoing thickening of the heavenly yoke.

Fourthly, there was a refusal of the people to maximize their allowances. Given the centrality and omnipresence of wine in medieval society, the injunction against *yeyn nesekh* was an enormous economic burden. Moreover, *yeyn nesekh* had long been considered a classic example of *insolentia Judaeorum*. One of the earliest anti-Jewish (possibly anti-Semitic) tracts written in the Middle Ages, that of Agobard of Lyons, mentions with bitterness the fact that gentile touch defiled liquids and made them unfit for

23. *Semaq*, Imp. 3. (In the Venice 1546 edition, which is frequently photo-offset, it is found at fol. 96d.)

Jewish consumption. From privilegia granting to the Jews the right to sell their wine, one can see how deeply resented was the implied Jewish superiority assumed to be contained in this injunction. No less a person than Innocent III lashed out at this presumptuousness. Gentile goodwill was needed by all; *yeyn nesekh* was an omnipresent irritant, and Jews had much to gain by its allowance.²⁴ Occasion presented itself to the tosafists to wipe *yeyn nesekh* from the books, but the idea was rejected with shock.²⁵ Spanish Jewry, for example, were lax in their observance of this injunction,²⁶ and made attempts to rid themselves of this annoying restraint. I have found, however, no evidence for anything similar in France or Germany.

I have chosen *yeyn nesekh* as illustration, for it constitutes an entire injunctive area, and its costs were dramatic. But there are numerous issues in other areas where practice was *far more conservative* than theory. And this is significant both psychologically and religiously. Every restriction is an added burden, and a host of voluntarily assumed burdens can create the image of a people struggling to live its religious life amid a recalcitrant reality. To entertain the idea that this endeavor might end in failure is a

24. J. P. Migne, *Patrologiae cursus completus: Series Latina*, 104:826, 117:170; Aronius, *Regesten*, p. 90; Robert Hoening, "Zur Geschichte der Juden Deutschlands im Mittelalter," *Zeitschrift für die Geschichte der Juden in Deutschland* 1 (1887): 141; Solomon Grayzel, *The Church and the Jews in the XIIIth Century*, rev. ed. (New York, 1966), pp. 73, 127-128. See also *Speculum* 42 (1967): 343.

25. Tosafot, 'Avodah Zarah 57b, s.v. *le-apuqei*. See Haym Soloveitchik, *Minhag, Meṣiut*, chap. 3. The German Pietists were unabashed in their criticism of the shortcomings of their people, yet no mention is to be found in *Sefer Hasidim* of drinking *yeyn nesekh*. There were, of course, people who drank, as there were those who transgressed other injunctions, but *yeyn nesekh* is mentioned in only three of some seventy penitentials (MSS Vatican Heb. 183, fol. 177v; Munich Heb. 232, fol. 22v; Parma, De Rossi, 1048, fol. 17v). A more accurate gauge would be to say that it is wholly absent in the HTR genre, found in one contaminated text of the HTRB group, and in two of the three MSS of the IT genre. On this classification and for the list of MSS, see Ivan Marcus, "Hasidei Ashkenaz Private Penitentials: An Introduction and Descriptive Catalogue of Their Manuscripts and Early Editions," in *Studies in Jewish Mysticism*, ed. Joseph Dan and Frank Talmage (Cambridge, Mass., 1982), pp. 57-83. The text of MS Vatican Heb. 183 was published in typescript by Yosef Hacker, *Be'ayot Nivharot be-Heqer Yahadut Ashkenaz*, vol. 1 (Jerusalem: Akademon, 1974), p. 41.

26. E.g., Maimonides, *Hilkhot Ma'akhalot 'Asurot* 11:10; *Teshuvot ha-Rambam*, ed. Yehoshua Blau, vol. 2 (Jerusalem, 1960), p. 269; Abraham b. Nathan Ha-Yarhi, *Sefer ha-Manhig*, ed. Isaac Rafael, vol. 2 (Jerusalem, 1978), p. 660. More qualifiedly, *Teshuvot Rivash*, III, no. 180; *Teshuvot Tashbeṣ*, I, no. 29. (*Teshuvot Rashba*, IV, no. 189 [I, nos. 717, 813] and *Teshuvot Tashbeṣ*, I, no. 85, cannot be cited as evidence of actual practice. *Teshuvot Rashba*, VII, no. 526, is not by Rashba but is a series of collected excerpts from 'Orhot Hayyim, II.)

psychological impossibility for many, and some halakhists will see in the people's need a divine mandate for action, and in the course of time the intractable will be rendered permissible.

I have used the phrase "divine mandate" advisedly. The oft-cited words of Rabbenu Tam, the greatest tosafist (d. 1171), are without parallel in medieval literature for their explicitness. He proclaimed that he was openly embarking upon a radical judicial construction in order to alleviate Jewish economic plight: נראה בעיני היתר גמור ומצוה מן המוכרח לתת מצייה לבני ברייה ("I deem it perfectly permissible, indeed a divine mandate, so as to provide sustenance for my co-religionists"). These famous words were addressed not simply to the public at large—they had reasonably sufficient allowances at their disposal—but to a group of *âmes d'élites* who refused to avail themselves of previous legal fictions which had unfettered intra-Jewish credit, and were eking out their living faithful to the old injunctive teachings of the Rhineland, and this in a period, the mid-twelfth century, when moneylending was fast becoming the staff of Jewish life. It is *their* plight which inspired this unprecedented boldness, and it is to overcome *their* hesitancy in availing themselves of existing allowances that that impatient genius wrote at uncharacteristic length, emphasizing that this was no abstract allowance on his part, but that he himself had personally so ruled in cases involving members of his own family, and concluded: ולמען דעת כל אדם שהוא היתר גמור הארכתי בדבר ("I have dwelt on this arrangement at length so that *everyone* should know that it is *fully* permissible").²⁷

27. *Or Zaru'a, Bava Meṣia*, sec. 202. I must here modify the assessment I made in "Pawn-broking: A Study in *Ribbit*," p. 251. I did not then notice the insistently suasive element in Rabbenu Tam's declaration: his emphasis that he *himself* ruled thus, in cases involving members of *his own* family. And finally, I missed the significance of the two words כל and גמור in his concluding remarks cited in the text. People in search of an allowance needn't be assured that it is היתר גמור; the word *mutar* from the lips of Rabbenu Tam would have more than sufficed. Nor would they be interested in knowing whether the respondent himself practiced these allowances. The entire thrust of the declaration now seems to me to be aimed at the group which still abided by the century-long tradition of the Rhineland, which had now received new and emphatic validation by Rabbenu Tam's elder brother, Rashbam (*ibid.*, pp. 241-242). To be sure, Rabbenu Tam's sweeping allowance answered a general need by removing the highly inconvenient restrictions still present in Rashi's legal fiction (and I have no doubt that Rabbenu Tam was fully aware of this). This, however, does not now seem to me to be the motivating force behind Tam's declaration, and certainly it is not the general audience that he is here primarily addressing, but rather one which he strongly feels needs persuading. To sum up, I would say that his doctrine abolishing the law of *le-humra* (*ibid.*, p. 252) was indeed motivated by the desire to unfetter completely intra-Jewish credit by use of the gentile strawman. To most people

On another level the refusal of the people to maximize their allowances may be taken as the workings of a religious intuition alongside of which the written word pales.²⁸

This final point is an important one, and it can perhaps best be brought by making it more contemporary. I remember my own shock when, after studying *Yoreh De'ah*, I realized that there is no need for separate milk and meat dishtowels, separate dishracks or cabinets, and that if food is served cold, there is no need for separate dishware altogether. Again, there is all the difference in the world between not having *hamesh* in the house (כל יראה וכל ימצא) and the house being what we call *pesahidig*.²⁹

The simple truth is that the traditional Jewish kitchen and pre-Passover preparations have little to do with halakhic dictates. They have been immeasurably and unrecognizably amplified by popular religious intuition. We all know this, but our religious sense, our religious experience belies this knowledge, and our instincts reject this fact out of hand. To serve cold cuts on a "dairy" dish is *treif*—everything in *Yoreh De'ah* to the contrary notwithstanding.

The prevalent has not here expanded the normative, it *is* the normative, and anything less is inconceivable. Once the existing becomes identified with the appropriate (as it does in any vibrant traditional society), this identity can easily spill over and legitimize practices that fall beyond the halakhic perimeter. But legitimacy there beckons only because at the halakhic center the prevalent, the accepted, the traditional is far richer and "righter" than the skeletal written word. The greater the increment of religion as practiced over religion as known, the broader and richer the domain of religion as

an allowance by Rabbenu Tam sufficed. Others felt his doctrine too radical and without sufficient basis, and if rejecting it entailed major financial losses, so be it. It is to this group that Rabbenu Tam addressed his famous declaration, though of course it had implications for all. And in time the doctrine of *silluq* became the standard form of intra-Jewish credit.

28. This lecture was written in 1982. Since then Jacob Katz has traced the presence and complexities of what he terms "ritual instinct" in his superb *Goy shel Shabbat* (Jerusalem, 1984).

29. I am using the traditional East European kitchen as an expositional device and am not here claiming that Eastern Europe reproduced the cultural milieu of Ashkenaz that I have attempted to outline in this paper. (There are certain similarities and filiations, and these have been set forth in a paper delivered at the Kotlar Institute for the Study of Contemporary Judaism of Bar-Ilan University. This, however, is a wholly separate issue and is neither related to nor in any way implied by our argument here.)

experienced over religion as prescribed, the greater the confidence in the religious intuition of the people.

But in talking about religious simplicity, undivided allegiance, thickening of the heavenly yoke, refusal to maximize allowances, have we not forgotten that there were murderers, lechers, apostates, informers, thieves, Sabbath violators in Ashkenaz, no less than in Sefarad? There was hardly a charge leveled in Spain, except perhaps that of religious skepticism, that did not find its counterpart in Germany. Have we not painted an idealized portrait of Ashkenaz? Or, if our analysis is correct, did not Ashkenaz have an idealized image of itself?

Frankly, one is hard-pressed to answer that question. For like most large questions, it is actually composed of a number of smaller, subtler ones. When is an unreflecting faith "religiosity," and when is it philistinism? When is cowering before a hideous death simply a failure of nerve, and when does it betoken a weakness of the spirit? When is a series of breaches—just that, and when does it signify erosion? When does a mute cry for help arise from an inability to cope, and when from a lack of will to cope? When is a refusal to live life as freely and fully as sanctioned by the law a mark of religious intuition, and when is it a misplaced, foolish piety? In each case the line between the alternatives is too fine for me, at least, to perceive it from a distance of over half a millennium. Perhaps these questions *are* best left to the judgment of contemporaries.

Whether Ashkenaz was right in her pride or Sefarad wrong in her sense of guilt, I cannot say. I believe that we can say that their different self-images shaped in many areas the respective courses of their halakhic thought.