# Jewish Law: A Brief Account

Jewish law may be the best-recorded legal system in the history of the world; there are hundreds of thousands, perhaps millions, of pages of surviving primary sources covering about twenty-five hundred years. They include scriptures, compilations of legal rules, treatises, and *responsa*―the equivalent of cases[[1]](#footnote-1). This chapter provides only a brief account, based mostly on one medieval source, Maimonides’ *Mishnah Torah,* and one modern source, *Jewish Law: History, Sources, Principles* by Menachem Elon.

## History

The dynasty of kings of Israel of whom Solomon and David are the most famous was ended and the first Temple destroyed by the Babylonians in 586 B.C. After the end of the Babylonian captivity, Israel was under Persian and then Greek (Seleucid) rule, with local power in the hands of successive pairs of religious authorities. The Maccabean revolt against the Seleucids, 167-160 B.C., reestablished Israel as an independent kingdom with its own king.

After the Roman conquest in 63 B.C. the kingdom of Israel ceased to exist as an independent state, becoming subject to first indirect and then direct Roman rule. The second Temple, which played an important role in legal and religious matters, was destroyed by the Romans in 70 A.D. The Bar Kochba revolt of 132-136 A.D. resulted in many Jews being killed, emigrating, or being sold into slavery, ending the role of Israel as the effective center of Judaism. Thereafter, until the establishment of the State of Israel in the 20th century, the Jewish population consisted of dispersed communities living under the authority of non-Jewish rulers.[[2]](#footnote-2)

Such communities were subject from time to time to persecution or even expulsion. But for the most part, they enjoyed judicial autonomy. Gentile rulers, Christian and Muslim, found it convenient to subcontract the job of ruling―and taxing―their Jewish subjects to the local Jewish authorities. The ruler set the total tax burden to be imposed on the community, the local authorities were responsible for allocating it among the residents and settling disputes among the community’s members. Thus Jews in the diaspora lived largely under Jewish law.

In some cases the delegation of authority seems to have been carried to extraordinary lengths. Under Jewish law informing, giving Gentiles information about a fellow Jew injurious to him, was a crime. At some times and places, informing three times was a capital offense. Someone convicted of a capital crime was executed by the mundane authorities. It follows, if Elon’s account of the situation in Spain is correct, that under some circumstances the Gentile authorities were willing to execute a Jew for the crime of betraying information about other Jews. Betraying it, presumably, to the Gentile authorities.

“If the guilt of the informer is proved by two witnesses, he shall receive one hundred lashes for the first offense and be banished from the place of the offense, in accordance with the decision of the rabbi, the judges, and the communal leaders; for a third offense, the Court Rabbi may order him to be put to death, in accordance with Jewish law, through the legal officials of the king [[3]](#footnote-3)

This situation was ended by the emancipation, the freeing of European Jews from legal restrictions, beginning in Europe in the late eighteenth century. Increasingly, Jewish inhabitants of European states were treated as ordinary citizens subject to the same laws as everyone else. Jewish law remained relevant to issues such as marriage, divorce, and dietary rules but became increasingly irrelevant to most of the ordinary subjects of civil and criminal law.

## Problems of Divine Law

Jewish law was, in theory, based on a single unchangeable source―the Torah, aka the Pentateuch, the first five books of the Old Testament. Basing the law in this way rather than on custom, precedent, or legislation raised two problems shared with other legal systems similarly based, including *Fiqh* (Islamic Jurisprudence) and American Constitutional law.

One was the problem of legal uniformity: If judges, who were also legal scholars, disagreed about the meaning of the possibly ambiguous text, how were their disagreements to be settled? In a system that views law as the creation of a legislature, king, or court of last resort, the same authority that made the law can settle disagreements about it. That does not work for a legal system viewed not as created but as discovered, deduced from divinely inspired sources. No scientist believes that whether a scientific theory is true can be determined by majority vote, that if enough scientists had disagreed with Newton stones would have fallen up instead of down. No more can an Islamic legal scholar believe that whether a *hadith*, a tradition of the prophet, is true or spurious is determined by majority vote of the scholars of tradition or a Jewish sage hold a corresponding belief with regard to an interpretation of the *Torah*. Yet, in order for a legal system to function, there must be some way of determining what the law is.

A second problem was how to change the law. If legal authorities[[4]](#footnote-4) concluded that some of the divinely inspired rules were mistakes or had been rendered obsolete by changed circumstances, how could they be revised? The history of Jewish law is in large part the history of solutions to those two problems.

### The Problem of Legal Uniformity

The initial solution to the problem of legal uniformity was a simple one. Truth is not determined by majority vote but law can be. Basing their view on a verse in the Torah advising people, if there were disagreements about difficult legal issues, to accept the view of the majority, the legal scholars took the position that the interpretation to be followed by judges was determined by the view of the majority of legal scholars. Starting in 191 B.C., this doctrine was implemented through the Great Sanhedrin, a combined legislature/supreme court made up of a fixed number of legal authorities. Disputed questions of law reached it through a series of lower courts to be decided by a majority vote of its members. Judges who disagreed were free to continue to argue for their position but required to judge cases according to the majority view.[[5]](#footnote-5) With the demise of the Great Sanhedrin―its last official judgment was given in 358 A.D.―the doctrine that the law was in accord with the views of the majority was implemented through less clearly defined reputational mechanisms.

Defining law by the views of the current majority―one part of the doctrine as it developed was that the law was in accord with the views of the later, hence in the limit still living, authorities―created a tension between law and religion. If a legal scholar disagreed with the majority view on what made food pure or impure, was he obliged to consume offered food that, in his view, God forbade him to eat? To destroy food that, in his view, was entirely kosher?

Raban Gamliel accepted the testimony of witnesses with regard to when the New Moon for the month of Tishrei appeared. R' Yehoshua and R' Dosa, observing the New Moon on the following night, rejected R' Gamliel's establishment of when the month of Tishrei began. As a result, this would have prompted followers of the dissident Rabbis to observe the High Holidays on different days than the followers of the official calendar. R Gamliel ordered R' Yehoshua to appear before him on the day R' Yehoshua deemed Yom Kippur with his walking staff, wearing leather sandals, and carrying his money purse. i.e., publicly treating the day R' Yehoshua proclaimed Yom Kippur as a non-holiday. R' Yehoshua accepted the verdict and appeared before R' Gamliel as specified. R' Gamliel comes forth and embraces him and calls him “My master and my disciple, My master in wisdom, but my disciple for you must accept my words.”[[6]](#footnote-6)

It is more important that there be a single answer than that the answer be correct and it is the view of the majority faction–Gamliel was the head of the Great Sanhedrin–that prevails.

That case involved a factual disagreement. The same issue for legal disagreements arose in the disputes between the schools of Hillel and Shammai, two prominent legal scholars who, in the first century B.C., taught different interpretations of the law, a disagreement continued by their students through several generations.

For some time the two schools, while debating their views at length―sometimes with one persuading the other, sometimes not―maintained amicable relations. Members of each were willing to eat in the houses of members of the other school and to marry their daughters, despite potential problems with differing views on ritual purity, the law of marriage and divorce, and similar issues.

Both the final breakdown of toleration and the policy of preferring legal uniformity over religious truth are summed up in the Talmudic account of the debate between Rabbi Eliezer, a leading figure viewed as sympathetic to the school of Shammai, and the sages, led by Rabbi Joshua, over the oven of Akhnai. An object of clay such as an oven that had been rendered impure, polluted through some agency such as contact with a corpse, could be purified by being broken up. The question was whether a clay oven that had been broken up and then reassembled with sand between the pieces was ritually pure or impure.[[7]](#footnote-7)

After R. Eliezer had brought out multiple arguments for his position without persuading his opponents, he finally put the question to God. “If the Halakhah is in accord with me, let this carob tree prove it.” The carob tree promptly uprooted itself and was moved 100 cubits away―by some sources 400 cubits. R. Joshua's reply? “No proof can be brought from a carob tree.”

The debate continued and R. Eliezer produced two more miracles in support of his position; R. Joshua remained unconvinced. Finally, Eliezer called out for more direct support, and a heavenly voice responded: “Why do you debate with Rabbi Eliezer, seeing that in all matters the *Halakhah* is in accord with him.”

R. Joshua replied, “It is not in heaven.” His position was summed up by another Rabbi as “The *Torah* has already been given at Mount Sinai. We pay no attention to a heavenly voice because You have already written in the *Torah* at Mount Sinai, 'Follow the Majority.'” The law had been entrusted to the care of man. It was no longer God's view that mattered but the view of the human sages, not objective truth but a human decision rule. God's view might determine what was true but the view of men, halakhic authorities, determined what was law.

A third Rabbi, wanting a view of the story from the other side, asked the prophet Elijah what God had been doing in heaven during the debate. “He smiled, saying, 'My children have bested me. My children have bested me.'“

The sages, unconvinced by either arguments or miracles, put Eliezer under ban, excommunicated him. In the talmudic account, the ban on R. Eliezer has catastrophic consequences. A third of the wheat crop, a third of the barley crop, and a third of the olive crop are destroyed, followed by additional signals of divine wrath. A gigantic wave almost sinks the ship carrying Rabbi Gamliel, the head of the Great Sanhedrin and a leader of the majority faction; he saves himself by informing God that what was done with regard to R. Eliezer was not for his own honor or that of his kindred but to preserve the people of Israel.

R. Eliezer’s wife is also the sister of R. Gamliel. She forbids her husband from falling on his face in petitionary prayer. Eventually, when she is distracted, he does―and Gamliel promptly dies.[[8]](#footnote-8)

A second story describes how the conflict between the two schools was finally ended―by a heavenly voice that said “the words of both are the words of the living God, but the law is in accordance with the school of Hillel.”[[9]](#footnote-9)

Seen from inside the belief system, the story of the oven of Akhnai suffers from a consistency problem: Why did the sages not take God's word for which side of the argument was right and change their vote accordingly? Seen from the outside, however, the story can be interpreted as the solution to a serious danger. The basis of Jewish law was supposed to be divine authority transmitted through the prophet Moses. What prevented a charismatic leader who claimed to speak for God from setting himself up as a new final authority on the law? Real miracles are in scarce supply but apparent miracles may not be.[[10]](#footnote-10) Hence the story can be seen not only as the justification for the suppression of the school of Shammai but as a prophylactic measure to prevent future splits due to charismatic leaders.[[11]](#footnote-11)

There is an interesting parallel between the conflict between the two schools of Jewish law, ending in the victory of one of them, and the development of Muslim law almost a thousand years later. In the early centuries of Islam, Sunni legal scholars divided themselves into four schools of law named after, and to some degree based on the teaching of, four of the early legal scholars. The schools differed in details of legal interpretation but regarded each other as mutually orthodox―and still do.

While the Great Sanhedrin functioned, it provided a mechanism for settling disputes over the law. For some centuries thereafter, the prestige of the Babylonian academies was sufficient to provide a substitute. As that declined, the problem reappeared.

One solution to the problem of legal diversity was the development of geographical schools. Judges in France mostly went by the legal opinion of whoever was currently the most prominent legal scholar among French Jews, and similarly in the other centers. Many legal authorities produced books summing up their views; judges in one area might decide to accept the conclusions of one such book as their law, judges in another area decide to accept another. Eventually a broader split developed between Ashkenazim, mostly in Europe, and Sephardim, mostly, after the expulsion from Spain in 1492, in North Africa and the Middle East.[[12]](#footnote-12)

Such a book might, like the *Mishnah*, cite arguments for alternative interpretations of the law from a variety of sages, possibly giving the author’s opinion on which was to be preferred, leaving the judge free to choose among them. It might, like the *Mishnah Torah* of Maimonides, give to each question only one answer, leaving a judge to either accept that answer or research alternative views on his own. The argument for doing it that way was that few judges had the abilities needed to extract an answer from the enormous and disorganized mass of halakhic scholarship. The argument for reporting multiple views was that Maimonides was no more an authority than other great scholars of the past, so a judge should look at all of their opinions, not just his.

The eventual solution was to do both. Joseph Caro wrote one volume, the *Bet Yosef*, that provided multiple arguments from different authorities and a second and shorter volume, the *Shulhan Arukh*, the “Set Table,” that gave only the conclusions.[[13]](#footnote-13) A judge could look up the answer to any legal problem in the *Shulhan Arukh* and, if unhappy with it, go to the *Bet Yosef* to see the variant opinions of other authorities.

To reach the conclusions presented in the second book Caro should, with infinite time and knowledge, have gone through the entire literature relevant to each legal question and worked out for himself the right answer to each. Recognizing that doing that was beyond his powers, he took a short cut. He selected three scholars whom he considered the leading authorities, Maimonides among them. On any question where at least two of the three agreed on an answer, he accepted it. Where no two agreed, he extended his search to a few slightly lower-level authorities and based his conclusion on their views as well.[[14]](#footnote-14)

Caro’s work was based primarily on Sephardic authorities. Another scholar, Moses Isserles, wrote a supplement to the *Shulhan Arukh* giving the conclusions of the Ashkenazi authorities where they differed from those of the Sephardic. He called it the *Mappah*, the “Tablecloth” on Caro’s table. The two works, along with some additional commentary on the *Shulhan Arukh*, eventually became and still remain the standard sources of Rabbinic law for most of the diaspora. It did not fully solve the problem of legal uniformity, both because a few areas failed to accept Caro’s work and because it was still possible for a judge to reject Caro’s conclusion in favor of the view of one of the authorities that he had rejected. But it provided a single source that, for most questions, gave answers that most judges were willing to accept.

One problem raised by legal diversity, starting in about the 13th century, was an argument that could be offered by the defendant in a case–a *Kim Li* plea. In order for the court to punish him it had to be certain that he was guilty. Even if the facts of the case were clear, there might remain legal uncertainty. So long as at least one of the recognized authorities, living or dead, supported a reading of the law under which the defendant was innocent there was reasonable doubt, hence he could not be convicted.[[15]](#footnote-15) The need to resolve that problem was one argument in favor of recording and teaching the law in the form of an unambiguous account of what the rules were rather than an account of arguments for and against alternative interpretations.

### The Problem of Legislation

A second problem faced by a system based on a fixed and authoritative legal text is how to change rules unsuited to current conditions or add new rules to deal with issues not covered in the original. The biblical answer is clear: no commandment is to be removed,[[16]](#footnote-16) no commandment is to be added,[[17]](#footnote-17) the law must remain as God made it.

The first and simplest solution to this problem was interpretation (*Midrash*). Much of the text was arguably ambiguous, so scholars could and did interpret it to fit what they believed it ought to say. Since the text itself authorized the scholars to resolve ambiguity by majority vote, they could reasonably claim that they were not modifying Torah but obeying it. Over time, elaborate rules of interpretation developed, some of which made it possible to read into details of the wording of biblical verses additional commands.

Support for this practice was provided by the doctrine of the oral Torah. This, it was held, was a supplement to the written Torah transmitted by God to Moses on Mount Sinai and from Moses in a chain of oral transmission down to later scholars. The oral Torah provided, among other things, interpretations of the text of the written Torah. Hence scholars could defend on its basis interpretations that could not have been plausibly derived from the actual language of the text.[[18]](#footnote-18)

Consider the case of the disobedient son. The Torah prescribes death by stoning for a son who defies his parents. Some legal authorities chose to read into the wording of the biblical verse requirements that could not in practice be satisfied―for instance that the mother and father bringing the accusation must have identical voices and be identical in appearance. Maimonides argued that a boy below the age of thirteen could not be held responsible, that a boy of thirteen might impregnate a woman, a fact that would be known in another three months or so, at which point he would be a father not a son, hence that the prescription could only apply to a boy aged more than thirteen and less than thirteen and a quarter.[[19]](#footnote-19) In his view, supported by a passage in the Babylonian Talmud, the combined effect of the restrictions that could be read into the biblical passage was that the stated rule never had been and never would be applied.[[20]](#footnote-20)

The next step was to interpret Torah[[21]](#footnote-21) as authorizing not merely interpretation but rabbinic legislation, including legislation permitting acts forbidden by the Torah or forbidding acts permitted, even required, by the Torah. A variety of arguments were offered for the appropriateness of such legislation. They included the claim that additional prohibitions constructed a fence around the Torah, preventing people from doing things even close to what was forbidden, and thus made forbidden acts less likely. Also the argument from necessity, that “It is better [one letter of] the Torah should be uprooted so that the [entire] Torah will not be forgotten by Israel.” Also the claim that the legislation in question was only temporary.[[22]](#footnote-22) The prohibition against adding to or subtracting from the rules of the Torah was held to imply only that other legislation was on a lower level, did not claim the same biblical authority as the law of the Torah. Such legislation however could and did authorize the performance of acts forbidden by biblical law[[23]](#footnote-23) and the omission of acts required by it.[[24]](#footnote-24)

Under biblical law, all debts were to be cancelled every seventh year. This raised a problem for someone who wanted to borrow money in the sixth year from a lender who could not expect ever to get it back. The problem was recognized in the original text, which urged lenders to lend to their fellows even in the sixth year. It was eventually dealt with by Hillel, who constructed a legal form, *Prosbul*, which permitted the creation of a debt immune from cancellation in the seventh year.[[25]](#footnote-25)

The Torah forbids Jews from lending to other Jews at interest. Contractual forms were designed to evade that restriction in substance while obeying it in form. Rules about the sharing of profit between partners one of whom contributed capital and one labor were developed in part in an attempt to control such evasions.[[26]](#footnote-26)

The result of these developments was a legal system based in theory on Torah but in fact largely on rabbinic interpretations of Torah, many of them far from the literal meaning of the text,[[27]](#footnote-27) and rabbinic legislation, some of it in direct violation of the text.[[28]](#footnote-28)

While law existed in the written Torah and the teaching and writing of legal scholars, there was no written code, at least none that we know of, until the production of the *Mishnah* in about 200 A.D. Unlike a modern law code, the *Mishnah* did not state what the law actually was. Instead it offered arguments attributed to sages of the past for alternative interpretations of the law, rather like a modern case book. Some later scholars believed that Rabbi Judah haNasi, the author of the *Mishnah*, signaled which of the interpretations he thought correct by the way in which he referred to them.[[29]](#footnote-29) Others disagreed.

The *Mishnah* was followed by several centuries of scholarship and debate, mostly in the Babylonian academies but also in centers of Jewish learning elsewhere, especially in Israel, over its meaning and implications. The record of those debates, along with the *Mishnah* itself, made up the two Talmuds―the Babylonian Talmud, produced in the Babylonian academies, and the shorter, less complete and less authoritative Jerusalem Talmud.

One might expect several centuries of argument over the meaning of a law code to result in some degree of clarification, but the actual result was the opposite. The Mishnah is ambiguous because it reports the different views of different sages. The Talmud adds additional ambiguity by presenting variant interpretations of those views.

Consider the question of tort liability when someone stumbles over a pot left in the public path.

*Mishnah*: If someone leaves a jug in a public place and someone else comes along, stumbles over it, and breaks it, he [the one who breaks it] is not liable; if he [the one who breaks it] is injured by it, the owner of the jug is liable for the injury.[[30]](#footnote-30)

*Babylonian Talmud*: “It was said in the school of Rav in the name of Rav: “[The *mishnah* is referring to a case where] he filled the entire public area with jugs [and, therefore, the passerby who broke the jug is not liable as he had no alternative but to do so in order to proceed].”

Samuel said: “The reference is to a dark place [The *mishnah* is referring to a special situation―a dark place where a traveler could not see what is lying in the street].”

R. Johanan said: “The reference is to a corner [the special circumstance is that the jug was placed in the intersection of two streets, and when the traveler turned the corner he did not see the jug and broke it.]”[[31]](#footnote-31)

All three conclude that the traveler normally is liable for the damage, in direct contradiction to the plain language of the *Mishnah* which they interpret as applying only to a special case.

Once the Talmud was complete, legal scholarship was built on top of three layers. The first was the *Torah*. That was followed by rabbinic legislation and commentary and interpretation based on the *Torah*, culminating in the *Mishnah*. That was followed by commentary on the *Mishnah*, culminating in the *Talmud*. Scholarship thereafter consisted largely of commentary on the *Talmud*, which had the previous two layers embedded in it, along with additional legislation. Further layers were added as one or another work based on those sources―the *Mishneh Torah* of Maimonides is one example―itself became the subject of further commentary.

## Communal Authority

Over time a further issue arose in the communities of the diaspora―communal legislation. Both biblical and rabbinic law applied to all Jews everywhere. If the special circumstances of a community required special legal rules, how were they to be produced? If the community did not contain a sufficient number of individuals learned in the law, who was to produce them?

The solution was to hold that the communal authorities could function both as a court and as a legislature. One basis for that claim was the argument that, back when the kingdom of Israel existed, there was legislation by the king as well as by the scholarly authorities and that the communal authorities had inherited the king’s authority. The authority of the king was justified, in the view of some legal authorities, by the passage in Torah warning the Israelites about all the terrible things that a king would do if they had one:

And he said, This will be the manner of the king that shall reign over you: He will take your sons, and appoint them for himself, for his chariots, and to be his horsemen; and some shall run before his chariots. And he will appoint him captains over thousands, and captains over fifties; and will set them to ear his ground, and to reap his harvest, and to make his instruments of war, and instruments of his chariots. And he will take your daughters to be confectionaries, and to be cooks, and to be bakers. And he will take your fields, and your vineyards, and your oliveyards, even the best of them, and give them to his servants. And he will take the tenth of your seed, and of your vineyards, and give to his officers, and to his servants. And he will take your menservants, and your maidservants, and your goodliest young men, and your asses, and put them to his work. He will take the tenth of your sheep: and ye shall be his servants. And ye shall cry out in that day because of your king which ye shall have chosen you; and the LORD will not hear you in that day. [[32]](#footnote-32)

That was taken as implying that all of those things were things the king was entitled to do.[[33]](#footnote-33)

It was further argued that since royal legislation was independent of the whole system of Torah, Great Sanhedrin, and rabbinic law, communal legislation need not be restricted by, even consistent with, either *Torah* or rabbinic law. It was sufficient that it be in the (vaguely defined) spirit of Jewish law. A second and perhaps more telling justification was that the communal regulations were necessary for the survival of the Jewish community in an environment very different from that in which the religious law had developed.

How far the argument was carried varied from time to time and place to place. According to one version, if there was at least one legal scholar in the community the communal authorities could legislate only with his approval.[[34]](#footnote-34) If there were none, they had a free hand.

A further distinction had to do with what the limits were. It was argued that the communal authorities had a free hand with regard to *mammon*, laws dealing with the relation between man and man, such as tort, crime, and contract. The rules of *mammon* could be modified for themselves by the parties to a contract, so if the community was thought of as bound by a sort of social contract unanimously assented to, it too could modify those rules for its members. But humans had no power to modify their obligations to God, hence the community was not free with regard to *issur*, religious law.[[35]](#footnote-35)

Some legal authorities held that the communal authorities could forbid what religious law permitted but could not permit what it forbade or forbid what it required. In practice, at least in matters of *mammon*, that restriction was frequently violated. Thus, for instance, courts enforcing secular rules were able to accept witnesses not acceptable under religious law,[[36]](#footnote-36) such as those related to a judge or one of the parties―arguably necessary in a small community where practically everyone was related to everyone else. Courts were permitted to impose the death penalty without satisfying the extremely restrictive conditions of religious law, such as the requirement that in order for the defendant to be liable to capital punishment he must be shown to have been told, independently by two different people, that what he was about to do was a capital offense.[[37]](#footnote-37) Courts were permitted to imprison debtors for failure to pay their debts, something explicitly forbidden under religious law. The final result was to add, on top of the Talmud and interpretation thereof by legal scholars, a final layer of communal law, varying from community to community.

Attempts by the communal authorities to revise marriage law provide an example of the problems arising from the limited nature of their authority. Under biblical law, marriage required only the assent of the parties, two witnesses, a written contract, and the giving of a ring or similar token by groom to bride.[[38]](#footnote-38) In many of the communities of the diaspora these requirements were seen as inadequate. The solution was to supplement the requirements of biblical law with additional requirements of communal law.

This raised a problem. Suppose a marriage took place that was legal under biblical law, illegal under communal law. The communal authorities held that the bride was not married and so free to marry someone else. But under biblical law she was married; for her to marry someone else was a violation of *Issur*, religious law, which the communal authorities had no power to change.

One solution was to argue that while the marriage was *Issur*, the wedding ring, being a piece of property, was *mammon*. If a marriage was celebrated without satisfying the requirements of the communal authorities, the ring was forfeit to them. Since the groom did not own the ring the requirements of biblical marriage had not been satisfied, hence the bride was not married and was free to marry someone else.

What I find interesting about this solution, other than its ingenuity and somewhat dubious logic, is the reluctance of the communal authorities who offered it to follow through in practice on their legal theory. Over time, fewer and fewer held that it was an appropriate solution to marriages they disapproved of.[[39]](#footnote-39)

One possible reason is that marriage law was an issue that cut across communities. Suppose a woman whose marriage had been declared non-existent under the doctrine went on to marry a second husband, this time from a community that did not accept the legitimacy of retroactive communal cancellation. Once the fact came out, he would discover that his marriage was in violation of the law, any children *momzers*―children of a couple who not only were not married to each other but could not have been. And if the bride and the first groom were of different communities, the bride’s community would have had no authority over the groom’s ring, creating problems unless most or all communities in the region agreed on the rules.[[40]](#footnote-40)

Perhaps to avoid this problem, communal authorities fell back on a solution arguably more consistent with biblical law. A marriage under conditions in violation of the communal rules was still a marriage but, like almost any other marriage, could be ended by a divorce. A divorce required the assent of the husband, but that assent could be compelled by imprisonment, flogging, and similar methods.[[41]](#footnote-41) Once the divorce was given, the wife was free under biblical law to marry in any community. The same solution made it possible for courts to decide that a divorce could be claimed by a wife as well as given by a husband. The wife could not divorce her husband but she could persuade a court to compel her husband to divorce her.

### Controlling Whom Your Daughter Marries: Two Legal Systems

Why were the communal authorities so interested in expanding the biblical requirements for marriage? Responsa refer to women married by trickery or fraud, but an alternative explanation is suggested by some of the surviving accounts:

…but what is not good are the tales God’s people spread about, and their gossip and complaints against the young man, Naḥshon, concerning whom there are rumors spreading through the Jewish community that he married her in the dead of a dark night in the presence of two competent witnesses and with the consent of that young woman. …

She herself stated to the court during her interrogation that, looking through the window, she saw two or three men with Naḥshon, the groom … This being so, she was married in the presence of two witnesses … Consequently her contention that she was only jesting is not credible, because it is not a frivolous matter to lower down a crimson cord from the window to get the ring, considering the tenor of what they were saying at the time this was done. (Resp. Naḥalat Ya’akov #57, responsum written in 1615. Elon /872-3)

Since the first man did negotiate a marriage to her, perhaps the girl agreed to the marriage even though she later threw away the ring as directed by her mother; … (Resp. raban, IH, III, P. 47b (ed. Jerusalem) Elon p. 848-9) 12th century.

Both these accounts and the form of some of the communal restrictions suggest that the restrictions were intended to increase parental control over their daughters’ marriage. There are obvious reasons why parents would want such control. The biblical rules, which set twelve years and six months plus signs of puberty[[42]](#footnote-42) as the age of female adulthood and required nothing beyond two witnesses, consent, and the transfer of some item of value from groom to bride with the appropriate words, provided them no way of getting it.

The issue struck me as interesting in part because I had come across it before in the very different context of Anglo-American common law. I quote from my *Law’s Order*:

A few years back, while investigating the history of punitive damages, I stumbled across an odd and interesting bit of nineteenth-century law. In both England and America, when a man discovered that his daughter had been seduced he could sue the seducer―even if the daughter was an adult. The grounds on which he sued were that he, the father, had been deprived of the daughter’s services. Suits for seduction were thus treated as a special case of the doctrine under which a master could sue for injuries to his servant.

In one case a judge held that it was sufficient basis for the action if the daughter occasionally acted as hostess at her father’s tea parties. Once the father had standing to sue as a master deprived of his servant’s services he could base his claim not on the actual value of the services but on the reputational injuries suffered by the family as a result of the seduction.

The obvious question is why, given that seduction was considered a wrongful act, the law took such a roundabout approach to dealing with it. The explanation I found in the legal literature was that one party to an illegal act cannot sue another for damages associated with the act. If you and I rob a bank and you drop the loot on the way out, I am not entitled to collect damages for your negligence. Fornication was illegal, hence a seduced woman was party to an illegal act, hence she could not sue for damages. So the law substituted the legal fiction of the father suing as a master deprived of his daughter’s services.

It occurred to me at the time that there was another, and perhaps more plausible, explanation. In traditional societies, including eighteenth- and nineteenth-century England, fathers attempt to control whom their daughters marry. One tactic available to a daughter who disagrees with her father’s choice is to allow herself to be “seduced” by the man she wants to marry, in the expectation that her father, faced with a fait accompli and possibly a pregnancy, will give his consent. That tactic appears explicitly in Casanova’s Memoires, which provide a vivid and detailed first hand account of life in eighteenth-century Europe.[[43]](#footnote-43)

A legal doctrine that gave the daughter the right to sue would make the daughter’s tactic less risky by making it possible for her to punish a seducer who refused to marry her. A legal doctrine that gave the father control over the action gave him a threat that could be used to discourage unacceptable suitors.[[44]](#footnote-44)

## Explanations of What May Not Be Obvious

There are a number of features of the legal system that may seem puzzling to a modern reader. They include:

### The Burden of Proof and the role of Oaths

Burden of proof is a familiar issue in our legal system, but Jewish law adds an additional complication in the form of oaths. The pattern appears in many places; the following is an example.

Jacob says “I am missing a cow and I suspect that Isaac stole it.” Isaac denies stealing it and there are no witnesses or other evidence. Jacob 's case is dismissed by the court.

Jacob says “I am missing a cow and I saw Isaac steal it.” Isaac denies stealing; again there are no other witnesses. It is still a “he said/he said” case, but Jacob is now making a claim certain rather than a claim uncertain; if Jacob is an honest man Isaac is a thief, which was not true in the previous case. The rule this time is that Isaac may “swear and be quit.” If he is willing to swear to his innocence in the prescribed form, Jacob 's case is dismissed. If, however, Isaac is unwilling to swear, Jacob prevails; Isaac is found guilty and owes damages.

Shift the facts to make Jacob’s case a little stronger, and now it is Jacob who swears and takes. If he is willing to swear that what he says is true, he wins the case. If he is unwilling to swear, he loses. Shift the facts even further, perhaps by adding two witnesses to the act, and Jacob prevails even without swearing.

A further complication, in some but not all cases, is for the party who is obligated to swear to be given the option of shifting the oath. Instead of Jacob swearing to the truth of his claims he requires Isaac to swear to the truth of his. If Isaac does so, he prevails. A suspect party, one who is known to have sworn falsely in the past or to have violated any of various rules of religious law, is not permitted to swear and so loses in a case where his oath is required for him to prevail.[[45]](#footnote-45)

This suggests one way in which requirements such as the *kashrut* rules, rules determining what a religious Jew is or is not permitted to eat, may serve a secular purpose. Careful observance of such rules is evidence that the observer believes in the religion, since he is willing to bear substantial costs in order to conform to its requirements. The fact that he believes in the religion means that he will be reluctant to swear falsely, for fear of supernatural punishment. Hence the requirements provide courts with a lie detector, very useful in settling disputes.

The treatment of these cases in Maimonides suggests two things. First, parties are reluctant to swear falsely, so the willingness to swear provides some evidence of the truth of what they swear to. Second, parties may be reluctant to swear even to what they believe is true, perhaps because they are afraid that if they have made a mistake they will be subject to supernatural punishment or that, if the court mistakenly concludes that they were lying, they will not have the option of swearing in some later and more important case. Oaths play a similar role in other legal systems as well, including Islamic, Romani and Plains Indian law.

“The main part is the enumeration of all the terrible misfortunes which would befall on a perjurer and his entire family should he fail to tell the truth.” (Marushiakova and Popov 207 p. 89, describing oaths among the Romani).

### Legal Inertia: Letting the Money Lie Where it Falls

Sometimes the just resolution of a legal dispute is unclear. A tortfeasor owes damages to his victim but it is not certain whether the case belongs in a category that implies half damages or quarter damages. The document describing the amount of a loan is worded ambiguously due to careless drafting. What is the court to do?

The court awards the smaller sum, on the theory that it is not entitled to force someone to give something up unless it has clear proof that he is obliged to, hence it can force the defendant to pay a quarter but not a half, the debtor to pay only the smaller amount consistent with the document. If, however, the plaintiff has seized property of the defendant worth half damages or the lender has seized property corresponding to the reading of the document more favorable to him, the court will not force him to give any of it back.

That seems odd to a modern reader, but it makes logical sense. The court is not sure the defendant owes more than a quarter, so will not force him to pay more than a quarter. The court is not sure the plaintiff is entitled to less than a half, so if he has taken half the court will not make him give any of it back. It is no more illogical than a modern court that is confident that one or the other of two suspects is guilty of a crime but acquits both on the grounds that neither can be shown guilty beyond a reasonable doubt.

That feature of the law suggests that the rules we see may have been constructed on top of a system in which parties vindicated their rights themselves rather than relying on courts to do it for them, what I describe in chapter XX[Feud] as a feud system. Additional evidence appears in criminal law. Where a killer’s offense is ruled capital it is the avenger of blood, the kinsman of the victim, who is supposed to execute him. If it is less than capital, the avenger of blood is still in some circumstances entitled to avenge the killing.

### Guaranteeing Debts and Uncertain Ownership

A debt can be guaranteed with a pledge―the modern practice of pawning property. It can be hypothecated, guaranteed with the equivalent of a mortgage against a specific piece of property. But the default rule is that a debt is guaranteed by all of the owner's property, initially only his real property but in later law movable property as well.

The effect of that rule runs through substantial parts of the law. Abraham borrows a hundred zuz from Rueben. Abraham subsequently sells a field he owns to Isaac. When the debt comes due, Abraham tells Rueben that he does not have the money to pay it. Rueben goes to court to claim property of Abraham’s worth a hundred zuz, only to discover that Abraham’s remaining property is worth only fifty. He claims that and in addition claims from Isaac the field that Abraham sold him, or at least fifty zuz worth of it. The field was encumbered, hence Abraham could not give Isaac clear title to it.

Isaac, having lost the field he paid Abraham for, now has the right to demand his money back. But he won't get it if, as the sequence implies, Abraham at this point has neither money nor property.

One implication is that it matters when money was borrowed and when land was sold. Land that was sold before the debt was incurred is not encumbered; land sold afterwards is. Another implication is the opportunity for putative creditor and putative debtor to collude in order to swindle a third party purchaser.

*Abraham sells his field to Isaac and then conceals his assets. Rueben claims that Abraham previously owed him money. Rueben has no documentary evidence of the debt―but Abraham does not contest it. If the court believes the claim, Rueben now can seize the field that Abraham sold Isaac, leaving Rueben and Abraham together in possession of both the field and the money paid for it.*

Because of such possibilities, the court may be reluctant to accept the existence of an undocumented debt even if both putative creditor and putative debtor support it.

A somewhat similar fraud occurs in modern Internet law. Paul puts up a web page critical of Eugene. Eugene, or a reputation management firm acting for him, commences a legal action for defamation, naming Alexander as defendant. Alexander agrees to an injunction forbidding him from defaming Eugene. The court, not knowing that the page was put up by Paul not Alexander, issues the injunction. Eugene, or a firm acting for him, shows that injunction to Google and asks it to deindex the page supposedly containing the defamation. Google does so.[[46]](#footnote-46) Someone using Google to search for information about Eugene will no longer find it.

## Legal Substance

This chapter so far has focused almost entirely on how the law developed and was justified. Readers interested in the substance of the law can find a detailed account in the *Mishnah Torah* of Maimonides. Volume 4 covers marriage law, volumes 11-14 cover other topics of a modern law code including tort, criminal, contract, and property law, evidence and punishments. Most of the rest of the other volumes deal with religious law. The following sections sketch a few parts of the law.

### Tithes and Heave Offerings [Cut this?]

Under religious law, producers of agricultural produce are supposed to pay a heave offering, from 1/40th to 1/60th of the crop, to be given to the priests. The heave offering can only be consumed by priests or their families. They are also supposed to give a tithe, ten percent of the crop, to the Levites–a tribe of hereditary semi-priests. The Levites in turn are required to give the priests a heave offering from that tithe. The producer is then supposed to give a second tenth either (depending on what the year is in the seven year sequence) to the poor or to himself. In the latter case he is required to consume it in Jerusalem, with the alternative of selling the produce and using the money to buy something else to be consumed in Jerusalem.

This set of rules shows up indirectly in at least two contexts. One is the discussion of under what circumstances the daughter of a priest is permitted to eat heave offering. This is a marker of her status, whether a member of her father's family, of her husband's, who may not be a priest, or her son's after her husband has died or divorced her. One also gets discussions of the obligations of someone who buys or is given produce without knowing whether or not the obligatory transfers have been made from it.

### *Momsers* and Bastards [Cut this?]

The Hebrew “*momser*” is sometimes translated as “bastard” and has that meaning in some modern contexts. In Jewish law, however, it meant someone whose parents not only were not married but could not be. One example would be the child of an incestuous union. Another would be a child produced by his mother's adultery. His father could not have married his mother because she was already married; Jewish law permitted multiple wives but not multiple husbands. A third would be the child of a man by his wife's sister; the law did not permit a man to be married to two sisters. A bastard who was not a *momser*, the child of a couple who were not married but could have been, had the same legal rights as the child of a married couple.

### I Know I Have a Wife Around Here Somewhere

You appoint an agent to find you a suitable wife and betroth you to her. He goes off, doesn’t come back, turns out to have died. You now have a problem. He may have completed his mission, in which case you are now betrothed–but you don’t know to whom. A betrothal in that system is in effect a marriage, although one not yet consummated, and can only be ended by death or divorce.

Why is this a problem? Jewish law permitted a man to marry more than one wife, but not two wives who were sisters or mother and daughter. The solution, assuming that further enquiry neither locates a putative wife or demonstrates that there is not one, is simple. You are free to marry, but only a woman who has no unmarried sister, mother or daughter to whom you might, for all you know, already be married.[[47]](#footnote-47)

And if you think that is an odd problem to worry about, take a look at Maimonides’ elaborate discussions of the legal implications of circumstances in which it is unclear which child belongs to which mother.

“If five women, each having an assured son, betake themselves jointly to the same secret place and there give birth to five other sons, who then become confused with each other; and if these confused sons grow up, take wives, and die, … .” [[48]](#footnote-48)

The context is levirate marriage, the requirement that the widow of a man who has died without issue be married to one of his brothers in order that he may father a child on her who will be considered the son of her first husband or else go through a special ceremony to free them from the obligation. If someone dies, and it is not known which of five different men is his brother, … .

### Tort

Jewish law classifies torts by analogy to four examples: The goring ox, the grazing ox, the pit, fire.[[49]](#footnote-49)

Consider an ox that gores another animal. Under ordinary circumstances, the owner of the ox owes half the damage done to the injured animal, up to the value of the animal that did the goring; the assumption is that the owner could not have anticipated the act and so is not fully liable. If, however, the ox has gored repeatedly in the past, the owner has been forewarned of the danger and so is liable for the full amount of the damages–the equivalent of negligence in Anglo-American common law. And there are five species, including wolf and lion, for which the owner is considered automatically forewarned, hence always responsible for the full damage. The modern equivalent is strict liability for ultrahazardous activities­–such as keeping a pet lion.

If the ox does damage by grazing on someone else’s crop or stepping on someone else’s property and injuring it, the owner is liable for the full amount of the damage; those are things oxen normally do, hence the owner is automatically forewarned. That does not apply if the ox is on his owner’s property, the public road, or a courtyard used by both parties. But even in such places the owner is liable if the ox gores, kicks, or bites–for half damage if he is not forewarned, full damage if he is.

A pit, unlike an ox, is a fixed hazard. The rule on liability by the owner depends on whether the damage suffered by falling into a pit was predictable. There is no liability if an animal falls into a shallow pit and somehow dies but there is liability for injury due to falling into such a pit.

The fourth category is fire, a hazard that spreads. If the fire starts on your property, the basic rule, as in much of modern tort law, is negligence; you are not liable if you took what should have been adequate precautions. If you are responsible for kindling a fire on someone else’s property, on the other hand, you will be liable for the damage whether or not you were negligent.

### Theft and Robbery

Jewish law distinguishes between theft (secret taking) and robbery (open taking). A thief owes the victim twice the value of what was taken[[50]](#footnote-50) unless he confesses voluntarily, in which case he is only obliged to pay the value.

A steals something from B, sells it to C. When the theft is discovered, who has what rights to the property?

The simple answer is that B gets the property back but must compensate C for what he paid for it; it is then up to B to sue A to get his money back. This does not apply if A is a notorious thief, presumably because C should have realized that he was buying stolen property. In that case B gets the property back from C and it is up to C to sue A to try to get his money back. Nor does it apply if the owner has given up hope of getting back his property; in that situation the buyer gets good title to the stolen property. If the thief was notorious, the buyer must compensate the original owner for the value of the property, but not otherwise.

One interesting feature of these rules is that the thief owes compensation but does not receive any other punishment, except in the special case where he is a minor or slave. Not only is there no additional punishment, Maimonides describes situations where the thief has improved the stolen property and is entitled to compensation for doing so.

Perhaps more surprising from the modern perspective, the penalty for a robber is merely the obligation to return what he has taken; unlike the thief, he does not have to pay twice its value.[[51]](#footnote-51) This has one possible downside; on a strict reading of biblical law, a robber who has stolen a rafter and built it into a building must pull down the building in order to return the rafter to its owner. Rabbinic law modified that rule “for the benefit of penitents” to permit the robber in that case to simply repay the value of what he took.

### Wounding

Maimonides begins the chapter “On Wounding and Damaging” by listing five effects of an injury that require compensation: Damages, pain, medical treatment, enforced idleness, and humiliation. As the chapter goes on he describes under what circumstances the person responsible for the wounding owes compensation for some or all of those categories and how the compensation is to be calculated. For instance:

“How are damages determined? If one cuts off another’s hand or foot, we determine–as if he were a slave being sold in the market–how much the injured man was worth previously and how much he is worth now. The offender must then pay the amount by which he has diminished the other’s value, for when scripture says, *an eye for an eye …* it is known from tradition that the word translated *for* signifies payment of monetary compensation.”

And, in a passage anticipating by seven centuries the principle of subjective value in modern economics:

“How is pain assessed in a case where one has deprived another of a limb? If one cuts off another’s hand or his finger, we estimate how much more a person of his status would be willing to pay for having his limb removed by means of a drug than for having it cut off with a sword, should the king decree that his hand or his foot be cut off. The difference thus estimated is what the offender must pay for the pain.”

Maimonides also considered the situation where the whole was less than the sum of the parts. If a man suffered a sequence of injuries for each of which he was owed damages, the total was capped at the value of his life.

The difference between intentional injury and accidental injury, crime and tort in our system,[[52]](#footnote-52) seems to have been of only secondary importance to Maimonides. Intentional injury makes the party liable for all five effects but so do some (but not all) forms of accidental injury. What we think of as criminal punishments appear to come in only when for some reason a damage payment is not owed. Thus “If one gives another a blow which does not injure him to the extent of a pěrutah (a coin of small value), he incurs flogging, for there is no compensation in this case (to exempt him on the grounds) that the negative commandment is rectified by monetary compensation.”

### Murder

Ordinary murder is a capital offense not redeemable by a money payment, but there are possible complications. Someone who kills indirectly, for instance by hiring an assassin, is not subject to the death penalty under religious law, although a king of Israel may put him to death by royal decree for the good of society or the court as an emergency measure. [[53]](#footnote-53)

“If the king does not kill them, and the needs of the time do not demand their death as a preventive measure, it is nevertheless the duty of the court to flog them almost to the point of death, to imprison them in a fortress or prison for many years, and to inflict every punishment on them in order to frighten and terrify other wicked persons, lest such a case become a pitfall and a snare, enticing one to say, ‘I will arrange to kill my enemy in a round-about way, as did So-and-So; then I will be acquitted.’”[[54]](#footnote-54)

One of my favorite bits of legal logic concerns someone dying of a fatal organic disease. Maimonides starts by saying that the killer of such a person is legally exempt–although, of course, one must be very sure that the disease is incurable and fatal. He goes on to add that if someone suffering from such a disease kills he is to be put to death, provided he is so considerate as to do the killing in the presence of a court.

What if he doesn’t? Convicting him then depends on witnesses. Witnesses can only be trusted in a capital case if they themselves are at risk of punishment if their testimony is false. In this case conspiring to use false testimony to convict someone who is innocent would result in no legal penalty, since the victim would be someone dying of a fatal organic disease and there is no penalty for killing such a person. Since the witnesses are at no risk of being put to death if their testimony is false their testimony cannot be trusted. Since their testimony cannot be trusted, there is no way of convicting the murderer. So someone dying of a fatal organic disease can commit murder with impunity, providing he takes care not to do it in the middle of the courtroom.

Personally, after reading how the court is to deal with a different sort of rules lawyer, I don’t think I’d try it.

Maimonides goes on to describe in some detail the rules associated with the avenger of blood, the heir of a killer’s victim, and the cities of refuge–of which, like kings of Israel, there had been none for more than a thousand years. A killer was supposed to go to one of the cities of refuge, be brought from there to the court of the city where the killing occurred, tried and, if guilty of deliberate murder, put to death by the avenger of blood. If found guilty of unintentional killing he was to be sent back to the city of refuge to remain there until the high priest, also nonexistent in Maimonides' day, died. En route to or from the city of refuge he could be killed by the avenger of blood without penalty.[[55]](#footnote-55)

All of which looks rather like the remnant of a pre-existing feud system untidily integrated into its replacement.[[56]](#footnote-56) We will see something similar in the next chapter, when we look at how murder is treated under Islamic law.

Another similarity to later Islamic law is in the treatment of non-Jews under Jewish rule. Rabbinic law specifies in some detail what laws are or are not binding on them. If two heathens come to court and both request that their dispute be adjudicated under Jewish law it is done. But if either of them prefers, the case is decided under heathen law. Some constraints that apply to Jews are not binding on heathens, some other constraints are binding only on heathens. A heathen and a Jew are not permitted to marry. Unlike the situation in Islamic law, the restriction applies both to a Jewish woman marrying a non-Jewish man and to a Jewish man marrying a non-Jewish woman. Just as in Islamic law, conversion is not required but is irreversible.[[57]](#footnote-57)

1. Responsa were replies by legal experts, initially the *geonim*, the heads of the Babylonian academy, to questions sent to them. Elon quotes an estimate that several hundred thousand survive. [↑](#footnote-ref-1)
2. One exception may be the Khazar kingdom, where the royalty and nobility are said to have converted to Judaism sometime between 740 and 920 A.D. [↑](#footnote-ref-2)
3. From the enactments of Valladolid. (1432) Elon Vol. II p. 803.

   Assuming this is true, it resembles a feature of Chinese law. Reporting one’s father’s crimes to the Imperial authorities resulted in the son being punished–by the Imperial authorities.

   Elon p. 695 mentions a Jew accused of being an informer and slanderer tried by a Jewish court in Aragon which had jurisdiction over criminal cases by virtue of the Royal Warrant.

   “As we have seen, the Spanish Jewish center enjoyed wide criminal jurisdiction–even including the power to inflict capital punishment–over a long period; and for a limited time such jurisdiction existed also in Poland … .” Elon Vol. II p. 697. [↑](#footnote-ref-3)
4. I am using “legal authorities” for what Elon refers to as “halakhic authorities,” individuals considered to be expert in Jewish law. The term is not limited to those with an official position, although many, perhaps most, halakhic authorities were judges, members of the Great Sanhedrin, high priests, or rabbis. As will become clear, a good deal of Jewish law, especially after the destruction of the Temple and the Kingdom of Israel, came out of a reputational system rather than a system of formal authority. [↑](#footnote-ref-4)
5. Maimonides, Book XIV, Treatise 3 chapter 3 pp. 143-150 discusses the issue of the rebellious elder, a legal authority who insists on judging cases according to his view of the law after it had been rejected by the majority. He argues that almost any mistaken ruling could lead an innocent person to violate Jewish law, for instance by marrying a woman who had been betrothed with money awarded in a mistaken judgement, making the money, hence the betrothal, hence the marriage, hence intercourse with the supposed but not actual wife, illegitimate. He concludes that practically any refusal to accept the view of the majority could be treated as a capital offense although the authorities might choose to impose a lower penalty such as a ban. [↑](#footnote-ref-5)
6. Account by Harold Feld (personal communication) based on the Talmud, Rosh Hashannah Chapter 2:8-9. [↑](#footnote-ref-6)
7. The story is discussed in Elon Vol. I pp. 261-3, Vol. III pp. 1068-9. [↑](#footnote-ref-7)
8. Precisely what the implication of this part of the story is intended to be is unclear, at least to this reader. For a more detailed account and discussion, see: http://daviddfriedman.blogspot.com/2010/07/furnace-of-akhnai-story-and-puzzle.html. [↑](#footnote-ref-8)
9. The source for this is the Jerusalem Talmud. It may occur to those suspicious of history written by the winners―the Talmud was produced after the triumph of Hillel over Shammai―to wonder how it is that a divine voice in support of Eliezer, hence of Shammai, is rejected with “It is not in Heaven,” but a divine voice in favor of Hillel settles the matter. Elon defends the outcome on the grounds that it produced uniformity in what the law was but preserved multiple opinions of what it should be, allowing future improvements. Elon Vol. 3 p. 1067. [↑](#footnote-ref-9)
10. Jewish examples would include Shabbatai Tzvi in the 17th century, who claimed to be the Jewish Messiah, and the Ba'al Shem Tove, founder of the Chassidic movement in the eighteenth century. A similar Islamic figure viewed by some as a saint, by others as a charlatan, was Hallaj (Husayn ibn Mansur 858 - 922 AD). For a sympathetic view, see *Mohammed’s People* pp. 522-554. For an account of him as a fraud, see Margoliouth 1922, pp. 91-93.

    For a thirteenth-century Muslim comment on the issue: “When we see someone in this Community who claims to be able to guide others to Allah, but is remiss in but one rule of the Sacred Law–even if he manifests miracles that stagger the mind–asserting that his shortcoming is a special dispensation for him, we do not even turn to look at him, for such a person is not a sheikh, nor is he speaking the truth, for no one is entrusted with the secrets of Allah Most High save one in whom the ordinances of the Sacred Law are preserved. (Muhyiddin ibn al-Arabi, *Jami’karamat al-awliya’,* quoted in Keller 2009 p. 164.) [↑](#footnote-ref-10)
11. Maimonides: “if a man will arise, whether from among the Gentiles or among the Jews, and make a sign or wonder and say that God sent him to add or delete a commandment or to give any of the commandments an interpretation that we have not heard from Moses…, he is a false prophet.” Quoted in Elon p. 264 from Mishnah Torah, Tesodei ha-Torah 9:1.

    “The *sifra* comments as follows on the last verse in the Book of Leviticus (namely, “These are the commandments that the Lord gave Moses for the Israelite people on Mt. Sinai”): ‘These are the commandments’–a prophet is no longer authorized to introduce anything new.” Elon Vol. I p. 243. [↑](#footnote-ref-11)
12. “Within a few years, *Bet Yosef*, together with the *Shulhan Arukh*, became the authoritative and binding code of the *Halakhah* throughout the eastern diaspora except for Yemen, where the Jewish community generally followed the law as set forth by Maimonides.” Elon??? [↑](#footnote-ref-12)
13. There is a partial translation of the Shulchan Arach at http://www.shulchanarach.com/. [↑](#footnote-ref-13)
14. Elon Vol. III pp. 1317-19. [↑](#footnote-ref-14)
15. Elon Vol. III pp. 1282-3. [↑](#footnote-ref-15)
16. *Bal tigra* (“you shall not take away”), the prohibition (Deut. 4:2, 13:1) against taking away from any commandments (*mizvot*) set forth in the *Torah*. [↑](#footnote-ref-16)
17. *Bal tosif* (“you shall not add”) the prohibition (Deut. 4:2, 13:1) against adding to the commandments (*mizvot*) set forth in the *Torah*.” [↑](#footnote-ref-17)
18. The Sadducees rejected the idea of the oral Torah, holding that law was derived only from the written text. They lost out to the Pharisees, disappearing by about 70 A.D. Their position was later revived by the Karaites. [↑](#footnote-ref-18)
19. Maimonides XIV, Treatise 3 chapter 7, 157-161. [↑](#footnote-ref-19)
20. “There never has been a boy declared to be a disobedient and rebellious son, and there never will be. Why then was the law written? So that you may study it and receive a reward… .” Babylonian Talmud: Sanhedrin 71A. [↑](#footnote-ref-20)
21. Deuteronomy 17:8-11. “You shall act in accordance with the instructions given you and the ruling handed down to you; you must not deviate from the verdict that they announce to you either to the right or to the left.” Here “they” are taken to be the sages, the halakhic authorities.

    One response to a similar argument used to justify communal legislation in the 14th century was to distinguish between the power to interpret ambiguity in *Torah* and the power to set aside a rule of the *Torah*. It was a good point, given that *Torah* explicitly forbade the later activity, but raised about fifteen hundred years too late. [↑](#footnote-ref-21)
22. *Hora'at sha'ah* (“a directive for the hour”) a temporary legislative measure permitting conduct forbidden by the Torah when such legislation is a necessary precaution to restore people to the observance of the faith. Some legislation originally adopted or justified as a temporary measure has become an established part of Jewish law. [↑](#footnote-ref-22)
23. *Le-migdar milta* (“to safeguard the matter”) the principle that authorizes the halackhic authorities, as a protective measure, to adopt enactments in the field of criminal law that prescribe action the Torah prohibits. [↑](#footnote-ref-23)
24. *Shev ve-al ta’aseh* (“sit and do not do”) a category of legislation directing that an affirmative precept, obligatory according to Biblical law, not be performed. [↑](#footnote-ref-24)
25. Elon Vol. 2 pp. 511-513, 561. [↑](#footnote-ref-25)
26. See Maimonides, *Mishnah Torah 12 (The Book of Acquisitions)*, Chapter VI and VII. For a discussion of some of the ways of evading the restriction and attempts to limit them, see the Wikipedia article on Loans and Interest in Judaism. [↑](#footnote-ref-26)
27. For example, “It is a time to act for the Lord, for they have violated your Torah.” (Psalms 119:126) was interpreted as authorizing the violation of Torah when it was necessary to act for the lord.

    The best defense of such interpretation I have seen, from inside the belief system, was provided by an online correspondent: “The Perfect One Who made the Law also made the loopholes.” [↑](#footnote-ref-27)
28. Much of this parallels later developments in Islamic law. There too a legal code nominally built on an unchangeable text, the Koran and *Hadith*, was the product of extensive interpretation supplemented by rules created by secular authorities. [↑](#footnote-ref-28)
29. Elon pp. 1057-1072, in particular p. 1060. [↑](#footnote-ref-29)
30. Mishnah. Baba Qamma 3:1. [↑](#footnote-ref-30)
31. Babylonian Talmud, Tractate Bava Kamma 27a-b. [↑](#footnote-ref-31)
32. [I Samuel 8] For commentary derived largely from this passage, see Maimonides XIV treatise 5 chapter 4 pp. 214-16. For an explanation of why an enumeration of the powers of a king took the form of a warning against having one, Maimonides XIV treatise 5 chapter 1, p. 207.

    On the other hand, Elon, discussing an incident in scripture, writes: “Thus, even a king punishing conspirators against his throne was bound to observe the basic principles of Jewish law, from which his rank gave him no privilege to deviate.” Vol. III, p. 1026 [↑](#footnote-ref-32)
33. “Rav and Samuel disagree as to whether the statement in the Book of Samuel describes the king’s rights or whether the prophet was merely trying to frighten the populace against having a king.” TB Sanhedrin 20b. Elon p. 1024 fn 20.8. [↑](#footnote-ref-33)
34. Elon Vol. II p. 714. [↑](#footnote-ref-34)
35. Elon vol. II pp. 707-8. [↑](#footnote-ref-35)
36. Elon Vol. II pp. 737-9. [↑](#footnote-ref-36)
37. Maimonides argues that all of these were within the power of the king of Israel: Maimonides XIV, treatise 5, chapter 3, p. 214. [↑](#footnote-ref-37)
38. Instead of giving a ring, the marriage could be effected by sexual intercourse, an option that was generally disfavored―and raised a problem for the approach adopted by some communal authorities and described below. For their approach to dealing with it, and the *issur*/*mammon* issue more generally, see Elon Vol. II pp. 851-2.

    Marriage under Jewish law involved two steps. The first, usually translated “betrothal” or “espousal,” was a binding agreement effected by a writ, money, or intercourse, after which the couple were considered married and separation required a *get*, a bill of divorce. The wife was expected to remain in her father’s house and not have intercourse with her husband until the marriage, which occurred when she entered the bridal chamber of his house and had intercourse with him. For details see Maimonides Vol. IV Treatise 1. [↑](#footnote-ref-38)
39. Elon Vol. II pp. 676-7, 712, 846-8, 859, 878. [↑](#footnote-ref-39)
40. Elon pp. 867-8. [↑](#footnote-ref-40)
41. I am oversimplifying a little. A compelled divorce, like a contract under duress, was not legitimate and so did not take effect. But that was held not to apply to legal compulsion. [↑](#footnote-ref-41)
42. Signs of puberty were defined as two public hairs, although there were alternative forms of evidence. A girl became a *naara*, maiden, no longer a child but not yet with full legal rights of adulthood, at twelve years and a day (and signs of puberty). Six months later she became an adult (*bogeret).* Her father no longer had the right to betroth her or accept an offer of marriage on her behalf. [↑](#footnote-ref-42)
43. Giacomo Casanova, *History of my Life*, Volume Three, p. 271, Willard R. Trask tr., Harcourt, Brace & World, N.Y. 1967. [↑](#footnote-ref-43)
44. For the same issue in medieval England: “Whereas rape appeals were brought only by the aggrieved woman herself, ravishment actions were brought by husbands, fathers, and lords. Ravishment was the tort of abducting and/or raping a woman, and such claims became common around the turn of the fourteenth century. Such suits sometimes arose out of a woman's marriage contrary to the will of her father or her desertion of her husband in order to abscond with a lover. In such situations, vesting the right to bring ravishment actions in fathers and husbands gave men additional power over women. In contrast, the requirement that the female victim bring a rape appeal made it nearly impossible for an appeal to be used to thwart her choice of husband or lover.” Klerman 2002, *p. 313.* [↑](#footnote-ref-44)
45. “He who is suspect with regard to an oath may not be subjected to an oath … . … Also, he who is incompetent as a witness by reason of a transgression he has committed, whether the incompetence be pentateuchal, as in the case of usurers, those who eat meat of animals not slaughtered in accordance with the rules of the ritual, or robbers, or whether the incompetence be Rabbinical, as in the case of dice players or pigeon flyers, is deemed suspect with regard to an oath and may not be subjected thereto.” Maimonides, Bk XIII, Treatise 4, Chapter II, p. 196. [↑](#footnote-ref-45)
46. My description simplifies and merges elements of two versions of the fraud, one initially reported on the Volokh Conspiracy blog, the [other](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/10/31/lawsuit-against-lawyers-who-allegedly-filed-improper-lawsuits-aimed-at-getting-internet-criticism-deindexed-by-google/?utm_term=.5949c7b7570e) the subject of a lawsuit against the perpetrators. [↑](#footnote-ref-46)
47. Maimonides, *The Book of Women*, Treatise I Chapter IX part 6 p. 53. [↑](#footnote-ref-47)
48. Maimonides, *The Book of Women*, Treatise III Chapter VIII part 10 pp. 322-323. [↑](#footnote-ref-48)
49. In each of these cases, Maimonides provides a detailed discussion covering a wide range of variant situations; I am reporting only on the simplest version of the relevant rules. [↑](#footnote-ref-49)
50. Unless it was a sheep, taken and butchered, for which he owes four times the value, or an ox, for which he owes five times–in both cases due to text in the Torah. A minor or a slave who steals owes only the value of what he stole and a minor who steals something and loses it owes nothing. Both the minor and the slave, however, are subject to corporal punishment. [↑](#footnote-ref-50)
51. One explanation might be that the probability of apprehending the thief is lower, hence the punishment must be higher to deter. Alternatively, the fact that something was taken openly might imply that the taker believed he had a claim to it, making the case a dispute over ownership rather than a straightforward robbery. [↑](#footnote-ref-51)
52. A tort can be intentional, but we usually treat a deliberate attack that wounds as a crime. Maimonides includes it in the same book as an injury due to a straying ox or the injury done by a man who is blown off a roof by the wind and wounds someone or damages something as a result. [↑](#footnote-ref-52)
53. The treatise contains an extensive discussion of the rights of the (in Maimonides time and for the previous millennium, nonexistent) king of Israel. Maimonides writes: “…so that this compendium would include all the laws of the Torah of Moses, our teacher, whether or not they have practical relevance in this time of exile.” (Maimonides *Sefer ha-Mizvot*, Introduction, p. 1b.)

    “Maimonides aspired to restore the scope of the *Halakhah* to its ancient glory–as in the Mishnah–and included in his code (the *Mishnah Torah*) the entire *corpus juris* of Jewish law. His work, however, remains an isolated effort; both before and after him, codification has been limited to the portions of the law that have practical relevance.” Elon Vol. III p. 1095.

    Some passages explicitly anticipate the revival of the kingdom of Israel. (Maimonides XIV treatise 5 chapter 11, pp. 238-40). [↑](#footnote-ref-53)
54. Maimonides Book XI, pp. 199-200. [↑](#footnote-ref-54)
55. I am oversimplifying; there were three different sorts of unintentional killers and the rule I describe applied to only one of them. [↑](#footnote-ref-55)
56. Another example: “Because once the death sentence has been passed on him, he is accounted as dead, and one who slays him is not liable.” Maimonides XIV treatise 4 chapter 7, p. 160. That looks very much like outlawry in the Icelandic system. [↑](#footnote-ref-56)
57. For details see Maimonides XIV, pp. 230-238. [↑](#footnote-ref-57)