

Yeshiva University, Cardozo School of Law

## LARC @ Cardozo Law

---

Articles

Faculty

---

2004

### Suzanne Last Stone

Suzanne Last Stone

*Benjamin N. Cardozo School of Law*, [ssone@yu.edu](mailto:ssone@yu.edu)

Follow this and additional works at: <https://larc.cardozo.yu.edu/faculty-articles>



Part of the [Law Commons](#)

---

#### Recommended Citation

Suzanne L. Stone, *Suzanne Last Stone*, 38 Tradition 19 (2004).

Available at: <https://larc.cardozo.yu.edu/faculty-articles/411>

This Article is brought to you for free and open access by the Faculty at LARC @ Cardozo Law. It has been accepted for inclusion in Articles by an authorized administrator of LARC @ Cardozo Law. For more information, please contact [christine.george@yu.edu](mailto:christine.george@yu.edu), [ingrid.mattson@yu.edu](mailto:ingrid.mattson@yu.edu).

Suzanne Stone is a Professor of Law and Director of the Program in Jewish Law and Interdisciplinary Studies at Cardozo Law School. For 2005, she is the Caroline and Joseph Gruss Visiting Professor in Talmudic Civil Law at Harvard Law School.

## SUZANNE LAST STONE

This symposium asks us to consider whether halakhic values and principles require Orthodox Judaism to take on the role of a public, as opposed to a private, religion in American society. A public religion assumes a role in the political or civil life of the polity by engaging in political activities, in political society, or by participating in open debates about the common good in the undifferentiated sphere of civil society.<sup>1</sup> Until quite recently, a silent consensus existed between religions and constitutional theorists about the “wall of separation” and about “dialogic neutrality,” the banishing of religious language from public discourse in order to promote equal access to the public square. Both agreed that religion “should remain private and implicit, rather than public and explicit.”<sup>2</sup> Religious individuals could enter public life, but they did so as indistinguishable citizens. Today, the wall of separation is far more porous, and even constitutional theorists have come to see restrictions on the use of religious language in the public square as unfairly forcing citizens to abandon their religious identities in public. This has paved the way for a new form of public religion in American society, in which religions enter the public sphere as a corporate body, not as discrete individuals, and state their views in explicitly religious language. Should Orthodox Judaism assume this public role?

Of course, in the eyes of American society, Judaism, along with Catholicism and Protestantism, has already taken its place among the major public religions in America. Judaism’s inclusion in this trio, despite its minuscule size by comparison with the other two, is a tribute to the massive efforts of Jewish organizational life. But the general perception within American society that Judaism is already one of the three major “public religions” in the United States also stems from a subtler but no less critical factor. In the view of American society, a public religion is not only one that participates in the political sphere to further its own particular interests through coalitions and lobbying. A public religion contributes to the general welfare of the polity as a whole by freely

sharing its perspectives on public issues, public affairs, and the good of the commonwealth. It does so in order to create a better society, a society that will flourish and thrive if the perspective of the particular religion is brought to bear on the important issues of the day. American society assumes that Judaism, as the source of all three biblical religions, continues to be a repository of wisdom and a valuable moral and intellectual resource for civilization. It assumes that Judaism wishes to bring, and, indeed, already has brought, its sources of wisdom into the public square of ideas.

How did this perception come about? To a large extent, this perception follows from the early penetration of Reform Judaism into the public square. Reform Judaism not only redefined the mission of Judaism as social action; it also presented its social agenda, its “prophetic” mission, as the embodiment and sum content of Jewish teachings. Most Americans, including many non-Orthodox Jews, have an extremely vague sense of the sources of wisdom Judaism actually contains. Few are actually aware of the existence of the halakhic tradition, and even those who are aware of its existence lack a sense of its depth and scope. Even Jews who are aware of the immensity of learning within halakha rarely imagine that this tradition may speak to issues of the day. The myth of a shared Judeo-Christian tradition that pervades American culture stems from viewing Judaism as a biblical religion, primarily defined by Scripture, rather than by the talmudic tradition.

Public ignorance of the halakhic tradition persists to this day because American Orthodox Judaism, the only branch with serious knowledge of and deep commitment to the halakhic tradition, has not yet found its full public voice. Although the Orthodox community has very successfully entered political life, mobilizing institutional resources to help Orthodox Judaism thrive in America, it has neither entered into public intellectual and social debate in a serious and ongoing way, nor has it clarified internally whether halakhic perspectives should in fact be communicated to society at large. This absence of an audible public voice on the critical issues of the day deprives not only “others”—that is, our non-Jewish fellow citizens—of a halakhic perspective; it also deprives non-Orthodox Jews of access to the teachings of Judaism.

In what follows, I argue that a major obstacle to advancing Orthodox participation in the public square is the tendency to cast the issue almost exclusively in terms of political participation, rather than in terms of a more open-ended and collaborative process of intellectual and civil engagement. Yet Orthodox thought, in my view, compels par-

ticipation in the public square of ideas far more than it compels participation in the public square of politics.

## I

Nearly ten years ago, the Orthodox Forum sponsored a conference on Social Responsibility in Jewish Thought and Law.<sup>3</sup> In the introduction to the published proceedings, the editors of the volume stated the case for Orthodox Jewish participation in the public square. This topic, they wrote, “has special resonance for Jews who believe that integrating Judaism with general culture constitutes an ideal.” The editors introduced their case with a lengthy citation from a statement delivered by Rabbi Abraham Isaac Kook at the dedication of the Hebrew University in 1925. R. Kook noted that “[t]wo tendencies characterize Jewish spirituality.” The first is internally directed, and its highest concrete expression is in Torah institutions such as yeshivot. But, in addition to deepening the sacredness of Torah, R. Kook also referred to the dialectical process of *hotsa’at* and *hakhnasa*—the propagation and absorption of ideas. Jewish ideas and values should be propagated “from the private domain of Judaism into the public arena of the universe at large.” At the same time, Jews “absorb the general knowledge derived by the collective effort of all humanity, by adapting the good and useful aspects of general knowledge” to the private domain of Judaism. Ultimately, they return a synthesis of general knowledge and Torah values to the world at large.<sup>4</sup>

The editors noted that Orthodox efforts at integration have so far primarily consisted of *hakhnasa*, the absorption of ideas from general culture into Orthodox Judaism. Less attention has been paid to *hotsa’at*, the flow of ideas in the opposite direction, from Judaism to the outside world. It seemed obvious, however, that Orthodox thought, reflected in the writings of R. Samson Raphael Hirsch and R. Joseph B. Soloveitchik, as well as R. Kook, obligated Jews to convey Jewish ideas and values to the universe at large. Accordingly, they expected the conference to end with a call to the modern Orthodox community to engage in such social action. Instead, the papers delivered at the conference questioned whether such an obligation actually existed and raised a variety of problems that social action would engender.

Many of the papers produced for the conference focused on the problems posed by communal participation in the political sphere, as do most of the questions addressed to the participants in this symposium.

Indeed, much of the internal discussion within Orthodoxy about whether Orthodox Jews should bring halakhic viewpoints into the political sphere centers on the following sorts of questions: should Orthodox positions be reflected in legislation, through the drafting of bills, or through lobbying activities on pending legislation? Should Orthodox Jews engage in other forms of advocacy, such as the preparation of policy statements to governmental bodies? Should Orthodox Jews support or oppose political candidates based on the views he or she espouses; should Orthodoxy enter into alliances with other religious groups that share a policy position with us? This virtually exclusive focus on political participation is understandable. It stems in part from the increased professionalization of Orthodox Jewish life, its communal, organizational structure, and the fact that American Orthodox Jews are increasingly in positions of power, making public policy decisions for the nation, Jew and non-Jew alike.

Yet Orthodox thought as reflected in R. Kook's remarks does not address policy advocacy, policy planning, or legislation; it addresses the communication of Jewish teachings, ideas, and values. Moreover, political forms of participation raise a set of very difficult problems for Orthodox Judaism as a community that, in many respects, are unique to Orthodox Judaism. They have no clear counterparts in other religions that have assumed a public role in American society.

A major obstacle to political participation, as Rabbi J. David Bleich delineated in the conference proceedings, arises from the dual systems of obligation, one for Jews and the other for non-Jews, contained within halakha.<sup>5</sup> As is well known, the halakha contains two models of social and moral order. Torah law is particular, covenantal, and aspirational. Noahide law is universally obligatory and contains those obligations necessary to create a civilized and morally and politically well-ordered society. The presence of these two disparate systems of obligation raises several difficult questions for Orthodox participation in the political square. First, there is halakhic controversy over whether there is an obligation to disclose Noahide law to non-Jews. Second, Noahide law is also not well developed as of yet. Third, there is controversy over which system of obligation, Torah law or Noahide law, ought to govern in the American public sphere, which is comprised mostly of non-Jews. One can hardly advocate one public policy for Jews and another for non-Jews. Advocating the adoption of Torah law as a standard for public policy in a primarily non-Jewish society would impose a higher obligation on society than Jewish law itself deems necessary or even wise.

As the Ran observed, Torah law alone does not necessarily aim at or provide for a realistic, well-ordered political society. It aims to create an ideal society and its concerns are spiritual perfection.<sup>6</sup> Yet if Jews advocate, instead, the adoption of policies based on Noahide law, which reflects the halakhic standard of behavior for non-Jewish society, Jewish values may be adversely affected. Policies that are appropriate for non-Jews may be inappropriate for Jews. Policy planning requires the reconciliation of conflicts between the two systems, which may not always be possible.

Second, when formulating policy or legislation, one must offer a single and clear statement of *the* Jewish viewpoint on a complex public issue. Given the range of halakhic sources and the diversity of legitimate halakhic opinions, this is an exceedingly difficult end to achieve. Halakhic positions are rarely simple, clear, and univocal. Achieving consensus within the halakhic community on a complex public issue is rare. Moreover, the presentation of a halakhic perspective in the form of an “answer” necessarily raises the important question of the role of halakhic expertise and of *pesak* in the process of formulating such an answer.

## II

The focus on policy implementation, legislation, and policy advocacy is both premature and unduly narrow and restrictive. We first need to enter the public square of ideas. Rather than react to a specific request for *the* halakhic viewpoint about an issue already debated, formulated, and extensively analyzed in the general public sphere of society, the Orthodox Jewish community should participate from the beginning, directly and robustly, in current social and intellectual debates within civil society. In accordance with R. Kook’s model, we should absorb ideas from general society, consider how they challenge or modify our own assumptions, and then ascertain and communicate the perspectives of Torah law.

The process of *hakhnasa* and *hotsa’a*, as Rav Kook describes it, does not require the formulation of policy; rather, it requires the propagation of ideas and values. Moreover, the process of *hakhnasa* and *hotsa’a* does not require making choices between Noahide and Torah law; it assumes that both will be conveyed as part of the larger whole of Torah. The process of *hakhnasa* and *hotsa’a* does require, however, deeper engagement with Jewish and general sources, discussion,

debate, and study—among ourselves and with others outside the halakhic community who are engaged in the public intellectual and social arena. It requires moving internal debates from the cloistered environments of the synagogue, the yeshiva, and the university and into the larger setting of the public square of ideas. The goal is to add a critical, moral voice, based on the unique and aspirational perspective of Torah law, as well as to absorb the critical perspectives offered by political and ethical models in general society. General ethical and political concepts are not antithetical to halakha; they are part of halakha, properly conceived.

While this form of participation in civil society, in the public square of ideas, does not require us to formulate specific or single answers to contemporary controversial issues, it still raises the question about how the halakhic sources of our tradition are used. The model I advocate is one that takes the variety of normative Jewish views on how Jewish society itself ought to be governed and presents them as possible alternative models for general society, pointing out areas of similarity and difference with existing models in general society and explaining their respective underlying premises. Disparate views on capital punishment and collective punishment, for example, appear throughout the Talmud and medieval sources. Taken together, these disparate views have a discernable and stable set of concerns, many resting on premises that are thought provoking and relevant for general society to consider.

To be sure, excellent articles and papers have been published, and talks delivered, that do precisely this, many through the efforts of the Orthodox Forum. Still, they have not been done within an ongoing, organized, collaborative, institutional framework—which would increase the level of conversation and thought. Nor, for the most part, have they been done in a context that collaboratively engages the larger public sphere of general society. The public sphere today actively welcomes such engagement. The general culture in which we now live is far more interested in religion and its role in society than a mere forty years ago, and intellectual borders have expanded dramatically to encompass many traditions beyond the classical Western.

### III

Today, with the rise of religious civilizational identities, the pressing global political issue is the co-existence of religion with democracy. Can a religious state be democratic and, if so, what forms of democra-

cy are possible for religious traditions? These are neither theoretical issues nor issues of exclusively non-Jewish concern. Within the last decades, a Jewish state has emerged that is, for better or for worse, at the center of world politics and that is beset by internal divisions exacerbated by the absence of an adequate “Jewish” theory of democracy, civil society, and tolerance. Halakha itself must grapple with the contemporary challenges of democracy and pluralism. These questions are as relevant for American Jews as for Israelis. First, American Orthodox Jews, who have experienced life in a robust, pluralistic democracy over a long period of time, have a unique perspective to offer on this issue. Second, American Orthodox Jews themselves interact with others in the workplace, on campus, and in ordinary social life, exchanging views on the issues of the day. They, too, require a better sense of how halakha views the friendship of citizens and what norms of mutuality are appropriate in a mixed society.

Finally, we are seeing the transformation of the American public square itself “into a world domestic policy arena,” in which public issues become normative issues for all of humanity. The broader society in which American Orthodox Jews live is no longer confined to the American nation. With globalization, the bonds of solidarity have expanded to include all humanity, putting the question of human rights and obligations, world peace, and the fair distribution of world resources, at the fore of political life. With terrorism, the justness of preemptive wars and of collective punishment are matters of daily conversation. With the expansion of scientific-technological frontiers, giving humanity powers of self-creation and self-destruction, public policy now penetrates all spheres of life, including the most private. These momentous ethical issues demand religious reflection; they do not just affect the world out there, they affect us. They, too, are Jewish as well as general issues.

#### IV

Why the relative silence of American Orthodoxy in the pervasive debates within civil society about these issues? Are there reasons for this silence that would still counsel hesitation or is the silence a result of the peculiarities of the Orthodox Jewish condition that must be acknowledged and overcome?

One explanation is rooted in the sociology of the American Ortho-

dox community over the last decades. Participation at this level requires serious engagement with the world beyond our own borders and serious intellectual thought, the kind that modern orthodoxy alone aspires to do. Beginning in the mid-fifties, a strong interest in the application of the halakha to contemporary issues of public concern emerged. This was one of Yavneh's (the Orthodox college student association) chief missions. In 1955, it has been reported, R. Joseph B. Soloveitchik publicly pointed to the lack of serious reflection about halakhic perspectives on contemporary, controversial issues and cited the Harvard Divinity School's Institute of Social Ethics as a model,<sup>7</sup> a theme he pursued indirectly in his 1964 essay in this journal, "Confrontation."<sup>8</sup> But modern Orthodox energy these days seems redirected almost exclusively inward either to the pursuit of intensified Torah study, one of the two poles of Jewish spirituality that Rav Kook describes, or to internal controversial issues, such as women's role in Judaism.

Another reason lies in historical circumstances. Due to centuries of exile, and the late emancipation of Jews into political and civil society, which was punctuated by the Holocaust and the mobilizing of Jewish energy to reconstruct Jewish life, halakhic authorities had little reason to address issues of world concern rather than issues of exclusively Jewish concern. For most of the last two thousand years, the pressing challenge facing Jews was to protect the halakhic way of life for a minority within host states. The Rav, in "Confrontation," clarifies that "the limited role" Jews played in the "universal confrontation" of man with the world was a result of historical circumstance, not ideology, and, therefore, subject to change as historical circumstances change.<sup>9</sup> Yet, the historical developments of the last fifty years, the creation of a Jewish state, and the emergence of Orthodox Jews in America as full partners in a society no longer perceived as a host but, rather, as our own, have far preceded halakhic development of the sources that speak to the realities of this new age—an age of democracy, fellowship among citizens, war, and human rights. This state of affairs should be viewed as a challenge, rather than a barrier, to the dissemination of Jewish ideas on contemporary issues. The project of developing the relevant halakhic sources falls to this and succeeding generations.

Finally, one must confront the question whether Jews, indeed, have a halakhic obligation to convey Torah values and Jewish teachings to society at large. While modern Orthodox thought strongly points to the dissemination of halakhic values and ideas as both a spiritual ideal and a logical corollary of the halakha's own approach to religion as

inseparable from society and the public domain, the precise source of such an obligation is still unclear. Is this obligation rooted in halakha, hashkafa, or moral principles?

A strong argument can be made that Judaism's mission to the world is most authentically implemented by teaching through example.<sup>10</sup> With the creation of the state of Israel, teaching through example takes on a genuinely public dimension. In Israel, Jewish issues are nearly all public issues as well. There, Jews carry the burden of representing Judaism publicly before the world and serving as a model. This is the thrust of R. Kook's vision that the life lived by the Jewish people on its land will be a teaching for all humanity.<sup>11</sup> But Israel then becomes the exclusive center of the public dimension of Jewish life, while American Orthodoxy remains a private religion.

This split between the two communities with respect to the role of halakha in society is deeply unhealthy. It reduces American Orthodoxy to bystanders, rather than participants, in the development of halakha in society. Moreover, it deprives the Orthodox community in Israel of a halakhic perspective on contemporary issues in the public and global domain that is informed by a different social setting. American Orthodoxy, for example, has a long experience with democracy and with life within a pluralistic society. American Orthodoxy also still has the capacity to contemplate difficult issues relating to war and punishment, even in today's age of global terror, free from the overriding issues of security that pervade daily Israeli life. A major strength of the halakhic tradition historically has been the contribution made to it by diverse communities situated in different cultural and social settings.

Is there, however, a concrete halakhic obligation to go beyond the advocacy of Jewish interests for the sake of the Jewish community, and to enter the public sphere solely in order to better society? This is a difficult issue. Indeed, the very need for modern orthodoxy to further theorize about this issue is itself a reflection of the preoccupation until now with internal concerns. Some have argued that an halakhic obligation to teach Jewish values and ideas may stem from Maimonides's view that Jews are obligated to enforce Noahide law, although the issue is complex and disputed.<sup>12</sup> Rabbi Aharon Lichtenstein has reasoned that such an obligation may be inferred from the Talmud (*Shabbat* 54b), which refers to the command of *tokhaha*, and poses responsibility to rebuke family members and even fellow citizens, where the capacity to effect change exists.<sup>13</sup> The most compelling argument, in my view, derives from ethical obligations inherent in more general halakhic principles

that underlie specific norms. The principle of “*darkhei shalom*,” which promotes peaceful relations between groups in society, should be understood today not as an instrumental expression of Jewish self-interest—the need to fend off Gentile hatred—but, rather, as an ethical imperative that is rooted in reciprocity, mutuality, and gratitude.<sup>14</sup> This halakhic principle obligates us as individuals to work to better the society in which we have so flourished and to promote the peace of the city in which we dwell and thrive.

Whether we also are obligated to contribute to society not solely as individuals but as a community is another matter. In “Confrontation,” R. Soloveitchik speaks of a universal responsibility deriving from the charge to Adam and Eve and rooted in our identity as human beings.<sup>15</sup> This is a responsibility that devolves on each Jew as a citizen and need not have a special Jewish dimension. Yet, the Rav also seems to address, as Gerald Blidstein points out, the Jewish community as such, implying that “the Jew must answer to the human imperative both as individual and as community.”<sup>16</sup> A communal obligation clearly must have a Jewish dimension. This special Jewish dimension is discharged through the process of *hotsa’at*. Thus, we are obligated to contribute to society, not solely as individuals, but as a community as well, sharing sources of wisdom and critical reflection with all others with whom we dwell.

## NOTES

1. See Jose Casanova, *Public Religions in the Modern World*, Chicago, 1994.
2. Jose Casanova, “What is a Public Religion?” (unpublished paper).
3. See David Shatz, Chaim I. Waxman, and Nathan Diament, *Tikkun Olam: Social Responsibility in Jewish Thought and Law*, New Jersey, 1997.
4. The translation is Shnayer Z. Leiman’s from *Tradition* 29:1 (Fall, 1994).
5. See J. David Bleich, “*Tikkun Olam: Jewish Obligations to Non-Jewish Society*,” in *Tikkun Olam*, pp. 61-102.
6. See Rabbi Nissim Gerondi, *Derashot Ha-Ran*, Eleventh Homily.
7. Reported in Lawrence Grossman, “Mainstream Orthodoxy and the Public Square,” in Alan Mittleman, Jonathan D. Sarna and Robert Licht, *Jewish Polity and American Civil Society*, Lanham, 2002, pp. 289-90.
8. *Tradition* 6:2 (1964), pp. 5-29.
9. Although the Rav explicitly addressed technological advances, the context of his essay, as Gerald Blidstein points out, was development in the political and social spheres. See Gerald J. Blidstein, “*Tikkun Olam*” in *Tikkun Olam*, p. 19.
10. See Blidstein, pp. 22-25.

11. *Orot ha-Kodesh*, Jerusalem, 1963, 1:155.
12. See Laws of Kings, 8:10, and compare Bleich, *supra*, with Michael J. Broyde, "The Obligation of Jews to Seek Observance of Noahide Laws by Gentiles: A Theoretical Review," in *Tikkun Olam*, pp. 103-43.
13. Rabbi Aharon Lichtenstein, Audiotape, "The Interface of Religion with Politics" (1992), quoted in *Tikkun Olam*, p. 7.
14. See Blidstein, *supra*, pp. 6-39; and "Halakha and Democracy," *Tradition* 32:1 (1997).
15. "Confrontation," pp. 20-21.
16. Blidstein, *supra*, p. 20.