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THREE ASPECTS OF THE RABBINATE: COMPENSATION, COMPETITION AND TENURE

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Translations of passages from the Bible and Talmud, based on THE HOLY SCRIPTURES (Jewish Publication Society 1917) and THE BABYLONIAN TALMUD (I. Epstein ed., Soncino Press 1935-1948), respectively, have sometimes been modified by the author. Other translations are by the author unless otherwise noted.

I. INTRODUCTION

Who is the ideal scholar? In the Jewish tradition, law, history, and religion combine to provide an unequivocal answer. The ideal scholar is a person motivated solely by love of God who devotes himself to studying and teaching the Torah for its own sake, expecting no compensation in this world but surely receiving a reward in the world to come. The practical problems inherent in this approach are obvious, for the scholar must still somehow support himself and his family. But as an ideal, a legal norm that requires divorcing devotion to Torah from material gain has evident religious appeal. It posits that the persons best qualified to occupy themselves with Torah and exercise spiritual authority over the community are those who are least concerned with matters of material advancement, including their own.

This Article traces the history of this principle in Jewish law and documents a striking departure from the classic ideal. In the end, accepting compensation became the norm for rabbis, teachers, and scholars. For, while calling upon its sages to study and teach the Torah without compensation, at the same time Jewish law never endorsed asceticism as a way of life even for them. It never permitted the sages to withdraw from the world, shun its concerns, choose to live in poverty, and renounce family obligations. It never sanctioned the formation of monastic orders that would have made this possible. Instead, Jewish law created for its scholars, with their consuming passion for the Torah, a deep conflict between their desire to meditate on the Law day and night, on the one hand, and the mundane necessities of seeking a livelihood and supporting a family, on the other.

This Article assesses how the authorities of Jewish law adjusted these two compelling needs, in the process defining the material contours of the rabbinate. Part II presents the controversy between those who wished to uphold the classic ideal and those who held the times demanded a change, arguing that a full-time salaried rabbinate was urgently required to minister to the needs of the Jewish people. Parts III and IV explore the ways this rabbinate, once salaries were sanctioned, insulated its material gains from competitors and strove to secure the benefits of office for life. Together these developments tell a story of flexibility in Jewish law and of change responsive to historical circumstances that ultimately, although sometimes reluctantly, laid the foundation for the modern professional rabbinate.

II. COMPENSATION

A. *"A Spade for Digging"*

The principle that scholars must refrain from using their knowledge of the Torah to derive inappropriate worldly benefits was given its classic formulation in antiquity by Rabbi Zadok. In the Mishnah, he admonishes his colleagues never to use the Torah "as a crown for self-glorification nor as a spade for digging."[1] Both tangible and intangible benefits are forbidden. A scholar may neither display his knowledge of the Torah as one might wear a crown, seeking honor and acclaim for his learning, nor use his knowledge of the Torah as a spade, a tool to extract material profits and amass wealth. Hillel added a cautionary addendum to Rabbi Zadok's maxim. A scholar that makes a worldly profit from his knowledge of Torah will perish from the world.[2]

That it is proper for scholars to divorce their knowledge of Torah from material gain has an unimpeachable Biblical source in Moses. In his farewell address to the Israelites Moses said, "Behold, I have taught you statutes and ordinances, even as the Lord my God commanded me . . . ."[3] Rabbinic commentators focused on the phrase, "even as the Lord my God commanded me," asking why Moses included it in his address. Surely he could not have been seeking to reassure the people as to the source of his teachings, for the Israelites would never have suspected Moses of teaching them laws he had received from any source other than God.[4] Instead, the phrase was intended to teach something about the manner in which they should transmit the law to future generations. As Moses was privileged to learn the Torah directly from God free of charge, so he instructed the nation and so they must instruct future generations. At Mount Sinai, Moses had learned by example from God that teaching Torah to others must be performed without asking for or receiving compensation.[5]

The Talmud is replete with stories of the hardships endured by learned men who sought their livelihoods apart from their calling as scholars and teachers. These sages engaged in a wide variety of secular trades and occupations as farmers, woodchoppers, tanners, laundrymen, sandal-makers, carpenters, wine-tasters, water-carriers, and tailors.[6] In part, their dual status reflected the nature of their ancient society in which roles were not specialized and functions overlapped. It also reflected the stratum of society from which the sages were primarily drawn. Their strain of Judaism was a popular movement that attracted both its adherents and leaders largely from the ranks

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1. MISHNAH, *Avot* 4:5.
2. *Id.*
3. *Deuteronomy* 4:5.
4. RABBI YOM TOV LIPPMAN HELLER, *Tosafot Yom Tov*, *Avot* 4:5, Pt. 16.
5. TALMUD, *Nedarim* 37a; MISHNEH TORAH, *Talmud Torah* 1:7.
6. For passages in the Talmud that cite these scholars and their occupations, see 10 THE JEWISH ENCYCLOPEDIA 294 (1964).

of the common folk. But their situation can also be attributed at least in part to their taking to heart the admonition against using one's knowledge of Torah for material gain.

There were, however, darker sides to the matter. A gap developed between scholars who were well-to-do and those who were not.[7] Some of the latter were forced by their circumstances to consider extreme measures to support themselves and their families.[8] In addition, the prohibition on earning a living from the Torah impeded the development of a full-time professional rabbinate. By definition, the sage who was true to his calling could spend only part of the day studying Torah, for the rest of the day he would have to earn a living.[9] Further, it seemed to some that only those who were blessed with wealth and who employed workers to earn a living for them were entitled to become scholars. In this vein, the School of Shammai held that one may teach only the student who is wise, meek, of distinguished ancestry, and rich.[10] The School of Hillel countered that one may teach everyone.[11]

It became clear even in Talmudic times that some accommodation would have to be made for the material needs of the scholar or the position of Shammai's school, that only the wealthy should be taught, would become the norm by default. The result was a patchwork of preferences and exemptions for the sage that, while falling short of a steady salary, tended to improve his

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7. TALMUD, *Berakhot* 28a (This passage relates an occasion on which Rabban Gamaliel, the distinguished leader of the assembly of scholars, visited Rabbi Joshua to apologize for a wrong. Upon seeing that the walls of his house were black, Rabban Gamaliel said, "It is apparent you are a smith." Rabbi Joshua replied, "Alas for the generation of which you are the leader, seeing that you know nothing of the troubles of the scholars, their struggles to support and sustain themselves."). In subsequent generations, poor scholars were supported in their vocation by Rabban Gamaliel's successors, the *nesi'im*, or Patriarchs of the Jews in the Roman period. *See* E.E. URBACH, 1 THE SAGES 601 (I. Abrahams trans., 1975).

8. TALMUD, *Bava Bathra* 174b (This passage relates the case of a poor scholar who considered divorcing his wife for the sole purpose of enabling her to collect her marriage settlement from its guarantor, her father; he then intended to remarry her and live off the proceeds of the settlement while continuing his studies. He was dissuaded from this course of conduct only upon learning that as a descendant of priests, he would be prohibited from remarrying his former wife once she became a divorcee.). For a discussion of the legal underpinnings of this case, see S. Shilo, *Circumvention of the Law in Talmudic Literature*, 8 SHENATON HA-MISHPAT HA-IVRI, 309, 338-39 (5741) (Heb.).

9. Maimonides embraced this concept as an ideal, recommending that one work three hours a day and study Torah for nine. MISHNEH TORAH, *Talmud Torah* 1:12; *see infra* Part II.B.

10. THE FATHERS ACCORDING TO RABBI NATHAN (AVOT DE-RABBI NATAN) 26 (Judah Goldin trans., Yale Judaica Series 1955) [hereinafter AVOT DE-RABBI NATAN]. For the suggestion that the Hebrew text of Beth Shammai's statement should contain the word *kasher* ("fit") in place of *ashir* ("rich"), see GEDALYAHU ALON, JEWS, JUDAISM AND THE CLASSICAL WORLD 440-41 n.12 (Israel Abrahams trans., 1977).

11. AVOT DE-RABBI NATAN, *supra* note 10, at 26.

material situation. A scholar was exempt from communal taxation.[12] If he engaged in trade, he was entitled to priority in the marketplace.[13] He opened his stall first, and other merchants selling similar wares could not open until he sold out his stock. This ensured him the best price for his merchandise and also permitted him to return to his scholarly pursuits early in the day. A scholar called away from his work to judge a case might ask the litigants to supply someone to continue his labor while he was involved in their litigation.[14] Returning a scholar's lost articles of property was a priority.[15] If a sage became engaged in litigation, his case was moved to the head of the court's docket and tried first.[16] Disciples were required to perform personal services for their teacher, relieving him of the need to hire servants.[17] Wealthy merchants were encouraged to take on scholars as silent partners in their businesses, invest their assets, and share the profits with them.[18] The merchant's reward would be to share by association in the scholar's honor and prestige.[19] And a scholar might always marry into a wealthy family. Fathers were encouraged to marry off their daughters to worthy scholars, provide them with large dowries, and augment the settlement with generous bequests.[20]

Was the scholar who took advantage of these preferences using the Torah as a spade for digging? Any scholar who felt this way might decline to accept them, which was considered a mark of piety.[21] But in each case, a basis for the preference was found that allowed the scholar to benefit from it without violating the letter, if not the spirit, of Rabbi Zadok's maxim. Scholars were exempt from taxation just as priests were exempt from the yearly half shekel contribution all other Jews were required to donate to the Temple.[22] Regarding the market priority, this was a custom that ordinary

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12. TALMUD, *Bava Bathra* 7b-8a ("Rabbi Nahman ben Rabbi Hisda levied a poll tax on the Rabbis. Said Rabbi Nahman ben Isaac to him: You have transgressed against the Law, the Prophets and the Writings.").

13. *Id.* 7b-8a and 22a.

14. TALMUD, *Ketubot* 105a.

15. TALMUD, *Bava Metzia* 33a.

16. TALMUD, *Shevuot* 30a-b.

17. TALMUD, *Ketubot* 96a ("All manner of service that a slave must render to his master a student must render to his teacher, except that of taking off his shoe.").

18. TALMUD, *Berakhot* 34b.

19. TALMUD, *Pesahim* 53b ("Whoever casts merchandise into the pockets of scholars will be privileged to sit in the Heavenly Academy . . . .").

20. TALMUD, *Pesahim* 49a ("Our Rabbis taught: Let a man always sell all he has and marry the daughter of a scholar, and marry his daughter to a scholar.").

21. RABBI OBADIAH BARTENURA, COMMENTARY ON THE MISHNAH, *Avot* 4:5 (end); RABBI JOEL SIRKES, RESPONSA, No. 52.

22. MAIMONIDES, COMMENTARY ON THE MISHNAH, *Avot* 4:7, at 291 (J. Kapah ed., 1963) [hereinafter MAIMONIDES, COMMENTARY ON THE MISHNAH]. The obligation to contribute half a shekel annually to a fund for the upkeep of the Temple service is imposed by *Exodus* 30:11-16 on "every man"; there is no express exemption for priests. The priests, however, claimed they

merchants sometimes extended to each other out of honor and respect, even when the honoree was not a learned individual. Why then should it not be available as a matter of course to the scholar-merchant?[23] Accepting personal service and household help from one's disciples was a way of teaching them humility and fear of Heaven.[24] Furthermore, the Torah commands all Jews to "cleave unto the Lord,"[25] yet how is this possible for the Torah states that "the Lord your God is a devouring fire"?[26] The answer is to cleave unto the Lord's scholars by marrying off one's daughters to them, engaging in trade on their behalf, and generally putting one's assets at their disposal.[27] In addition, justification was found that permitted elementary school teachers to be paid. They could accept a fee for "babysitting" their charges, that is, guarding their students of tender years against harm during school hours, totally apart from any services performed in teaching them.[28]

Harder to reconcile with the ideal of uncompensated service was the practice of a judge named Karna who collected a coin of equal value from each litigant and then pronounced his verdict.[29] In the Talmud's discussion of this practice there follows a string of objections, each of which is surmounted in turn. Was Karna violating the prohibition on judges' taking bribes? No, for he had no intention of perverting justice by rendering an unjust verdict. But is it not prohibited for a judge to receive a gift even when he renders a righteous judgment? Karna was not receiving a gift but compensation. How then was his verdict valid, for is it not the rule that the verdict of a judge who receives compensation for judging is invalid? Karna did not receive compensation for his judging but rather to replace the earnings he lost from

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were exempt from this obligation. MISHNAH, *Shekalim* 1:4. In his code, Maimonides ruled against the priests on this point, but he also ruled, "for the sake of peace," that their property, unlike the property of ordinary Israelites, was exempt from distraint for failure to make a timely contribution. MISHNEH TORAH, *Shekalim* 1:7 and 10. Priests could, however, be dunned regularly until they paid. *Id.*

Apart from the half-shekel levy, priests were exempt from taxes at least from the period of Ezra (c. 5th century B.C.E.) and onwards under a mandate of the Persian king Artaxerxes recorded in the Bible: "Also we announce to you, that touching any of the priests and Levites . . . it shall not be lawful to impose tribute, impost, or toll upon them." *Ezra* 7:24. Persian policy was generally tolerant of native cults, and the tax exemption for priests was one aspect of this policy. *See* JOHN BRIGHT, A HISTORY OF ISRAEL 343-44, 370-71 (1960). The tax exemption for scholars recognized by Jewish law may have its origins in this provision, with scholars succeeding to some of the functions and privileges of the priests after the destruction of the Temple in Jerusalem in 70 C.E. RABBI YOM TOV LIPPMAN HELLER, *Tosafot Yom Tov, Avot* 4:5, Pt. 18.

23. MAIMONIDES, COMMENTARY ON THE MISHNAH, *supra* note 22, *Avot* 4:7, at 291.
24. TALMUD, *Ketubot* 96a.
25. *Deuteronomy* 4:4.
26. *Id.* 4:24.
27. TALMUD, *Ketubot* 111b.
28. TALMUD, *Nedarim* 37a.
29. TALMUD, *Ketubot* 105a.

his secular profession during the hours he was engaged as a judge. But have we not learned that a judge who accepts such compensation is contemptible? That epithet does not apply to Karna, but only to the judge who accepts such compensation where the losses from his secular occupation are not proven. In Karna's case, the losses he incurred from suspending his secular occupation were proven. Karna was engaged by the wine merchants in his locality as a quality control expert. He could determine by smelling the vats of wine which would age well and should be held back for sale at a later date and which would age poorly and should be sold at once. He was very much in demand in his profession and had employment every day, so that whenever he was called upon to act as a judge he incurred a proven monetary loss.[30] The Talmud depicts Karna as a very discerning individual with a nose for truth as well as a nose for wine; hence the heavy demands on his time.

Later commentators saw in Karna's example a solution to the problem of judges and teachers of the priests in Jerusalem who received salaries from the Temple treasury.[31] Like Karna, they received a "suspension fee,"[32] a payment to recoup the earnings they lost when they suspended their secular trades in order to have the time to judge or teach, as the case may be.[33] Thus, their salaries were not impermissible payments for judging or teaching per se, but rather compensation for their inability to earn their livelihoods from their usual employment while so engaged.

However deft were the verbal formulations used to justify the scholar's preferences, exemptions, and fees, by the end of the Talmudic period Rabbi Zadok's ideal of uncompensated Torah service was very much attenuated, much like a common law rule riddled with exceptions. In fact, virtually all of the principles that in the coming centuries were to work a complete reversal of the ideal were already in place.

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30. RASHI, *Ketubot* 105a.

31. TALMUD, *Ketubot* 105a (referring to certain civil law judges in Jerusalem who were paid a salary from the Temple treasury and, if the amount was insufficient to cover their living expenses, were given an increase even if they objected); *id.* 106a (referring to certain learned men who tutored the priests and received a salary from the Temple treasury).

32. Heb. *sekhar battalah*; *see* 23 THE TALMUD OF THE LAND OF ISRAEL: NEDARIM (TALMUD YERUSHALMI) 4:4 (Jacob Neusner trans., Univ. of Chicago Press 1985) [hereinafter TALMUD YERUSHALMI, NEDARIM]. For a related concept, the *sekhar tirha* ("fee for trouble"), see Richard Rheins, *The Professionalization of the Rabbinate in the Talmud and the Halakhic Commentaries of Rambam and Karo, in* RABBINIC-LAY RELATIONS IN JEWISH LAW 27, 30-32 (W. Jacob and M. Zemer eds., 1993) (citing passages that permitted scholars to accept a fee, not for performing a religious duty, but for the physical toil and trouble involved in preparing to do so, for example, handling large animals before inspecting them for blemishes that would disqualify them as sacrifices).

33. RASHI, *Ketubot* 105a, s.v. *notlin sekharum*; *Tosafot*, ad. loc., s.v. *gozrei gezerot.*

B. *"The Way of Torah Is Bread with Salt"*

A powerful reaffirmation of the classic ideal came some five centuries after the close of the Talmud, in the life and person of Moses Maimonides.[34] He was uncompromising in his condemnation of the Torah sage who was able to earn a living by labor but chose instead to support himself with donations from the public. In his view, such an individual profanes the name of God, despises the Torah, extinguishes the light of faith, causes harm to himself, and removes his life from the world to come, for it is forbidden to profit materially from words of Torah in this world.[35]

Maimonides himself was the foremost exemplar of his own philosophy. During the early decades of his life he lived as a silent partner off the earnings of the family's business in precious gems conducted by his brother David.[36] After David was lost at sea, Maimonides employed his extensive knowledge of medicine to earn his living as a physician. His skill in the healing arts and his friendship with the vizier led to his appointment as a physician to the Sultan's court in Egypt.[37] All the while, he ministered to the religious needs of the Jewish community in Egypt without receiving compensation from them.

Maimonides extolled as paradigms of virtue his scholarly forebears, the choppers of wood and drawers of water, who despite material hardship and physical disability, combined the study of Torah with labor.[38] Their decision to engage in labor to support themselves was not undertaken in the face of an indifferent public unconcerned about their material well-being, for had the sages asked for communal support for themselves and their schools, the public would have responded generously, filling their coffers with gold and precious stones.[39] But the sages of old refrained from asking, for they had concluded correctly that deriving material gain from knowledge of the Torah is prohibited by the Torah.

For Maimonides, earning one's living by ordinary labor is a mark of excellence in every man, including the sage.[40] Ideally, his study of the Torah should occur at fixed times while the pursuit of his trade should occupy only the remaining hours of the day, for accumulating great wealth is inconsistent with a life dedicated to Torah.[41] The way of Torah is to eat bread with salt, drink water in small measures, sleep on the ground, and endure the hardships

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34. Maimonides, also known by the Hebrew acronym of his name as Rambam, lived from 1135-1204.

35. MISHNEH TORAH, *Talmud Torah* 3:10.

36. JACOB S. MINKIN, THE WORLD OF MOSES MAIMONIDES 36 (1957).

37. *Id.* at 44-45.

38. MISHNEH TORAH, *Talmud Torah* 1:9.

39. MAIMONIDES, COMMENTARY ON THE MISHNAH, *supra* note 22, *Avot* 4:7, at 288-91.

40. MISHNEH TORAH, *Talmud Torah* 3:11.

41. *Id.* 3:7.

of life while toiling to perfect one's knowledge of the Torah.[42] Rewards are sure to follow, but in the world to come.[43]

In Maimonides' view, those who had succeeded in convincing the public in his day that it is their duty to support Torah scholars with donations made a fundamental error. They took isolated exceptions to the rule—the cases of scholars who were too ill or old to work at a secular trade and hence forced to accept charity to survive—and turned them into a permissive norm for all to follow.[44] This is error, for a scholar who is able to work and earn a living apart from the Torah must do so.[45]

Although inconsistent with his overall view of the matter, Maimonides nonetheless endorsed the priorities and exemptions of the scholar which had solid roots in Talmudic jurisprudence, each with its own justification.[46] He ruled that scholars were exempt from taxes and from communal work obligations,[47] entitled to priority in the marketplace and the courthouse,[48] and should have their lost articles restored first.[49] Where it is the custom of the country to pay elementary school teachers a salary, they may accept it, but only for teaching youngsters the Bible, not the oral law.[50] He approved of the arrangement whereby a scholar placed his assets with an individual who utilized them on the scholar's behalf.[51] But these preferences and their rationales never coalesced in Maimonides' thinking into a broad justification for rabbinic compensation in general.

The suspension fee also failed to obtain Maimonides' endorsement as a way to compensate rabbis, scholars, and teachers. In his commentary on the

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42. *Id.* 3:6; *see* MISHNAH, *Avot* 6:4.

43. MISHNEH TORAH, *Talmud Torah* 3:11.

44. MAIMONIDES, COMMENTARY ON THE MISHNAH, *supra* note 22, *Avot* 4:17, at 289.

45. *Id.* at 290.

46. *See supra* notes 12-33 and accompanying text.

47. MISHNEH TORAH, *Talmud Torah* 6:10.

48. *Id.*

49. *Id.* 5:1.

50. *Id.* 1:7. Maimonides here presents the view that the Mosaic stricture against accepting a stipend for teaching excludes the teaching of Scripture, construing Moses's reference to the "statutes and ordinances" he learned from God gratis as a reference to the Oral Law and not the Written Law (the Pentateuch). *See* TALMUD YERUSHALMI, NEDARIM, *supra* note 32, 4:4 ("Statutes and ordinances [i.e. the Oral Law] must you teach without pay, but you need not teach Scripture and translation without pay.") The parallel passage in the Babylonian Talmud, *Nedarim* 37a, continues with a query, "Then should not Scripture too be unremunerated?"—for Moses also learned the Written Law at Sinai. There follow two answers, "Rab said: The fee is for guarding [the children]. Rabbi Johanan maintained: The fee is for the teaching of the accentuation [of the Biblical text, which is post-Mosaic]." Many authorities cite these answers as the reasons for permitting teachers of young children to receive salaries. *E.g.*, RABBI OBADIAH BARTENURA, COMMENTARY ON THE MISHNAH, *Avot* 4:5; *see supra* note 28 and accompanying text.

51. MAIMONIDES, COMMENTARY ON THE MISHNAH, *supra* note 22, *Avot* 4:7, at 291.

Mishnah, Maimonides discusses Karna's case,[52] but interestingly, he recites the facts differently from the way they are presented in the Talmud.[53] In his rendition of the facts, Maimonides cites Karna as offering the litigants who requested his services two options, only one of which involves paying him a fee. According to Maimonides, Karna asked the litigants either to supply someone to do his work while he was judging their case or to pay him the earnings he would forgo.[54] By contrast, in the Talmud, Karna requested the suspension fee only, while it is another sage, Rav Huna by name, who asked litigants to provide someone to irrigate his fields while he was trying their case.[55] It is extremely unlikely that Karna would have or could have requested someone to perform his work for him because his profession, as we saw previously,[56] as a quality control expert for wine merchants, was highly specialized, unlike irrigating fields, a task which any fit individual could perform. It was unlikely that a suitable replacement for Karna with his expertise could ever be found, which explains why Karna himself was so much in demand that he had work every day.[57] Either Maimonides melded the two cases or felt Rav Huna's practice implicitly would have been acceptable to Karna.[58] In any case, Maimonides weakens the force of Karna's practice as a precedent by stating an acceptable alternative that does not involve paying him a fee. In his Code, Maimonides cites his version of Karna's practice in his treatise on courts and judges as a practice acceptable for judges,[59] but there is no mention of the suspension fee in his treatise on Torah scholars and teachers, an omission commentators noted and rectified in their own works.[60]

Maimonides anticipated that the majority, or perhaps even all, of his colleagues would find fault with his position condemning rabbinic compensation.[61] In this he was correct. We turn to the critique of Maimonides' position in the following sections of Part II.

C. *"From Zion Our Creator Fixed Compensation"*

In the generation following Maimonides' death, the tension between the classic ideal that he championed and the hard realities facing the Jewish communities in Europe, was already evident. Early in the thirteenth century, one Rabbi Eliezer of Bohemia sent a letter to a colleague, Rabbi Judah ben

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52. *See supra* notes 29-30 and accompanying text.

53. *See* TALMUD, *Ketubot* 105a.

54. MAIMONIDES, COMMENTARY ON THE MISHNAH, *supra* note 22, *Avot* 4:7, at 289.

55. TALMUD, *Ketubot* 105a.

56. *See supra* notes 29-30 and accompanying text.

57. *See* RASHI, *Ketubot* 105a.

58. Kapah suggests Maimonides might have had a different text of the *Talmud.* MAIMONIDES, COMMENTARY ON THE MISHNAH, *supra* note 22, *Avot* 4:7, at 289.

59. MISHNEH TORAH, *Sanhedrin* 23:5.

60. *See, e.g.*, JOSEF KARO, KESEF MISHNAH, *Talmud Torah* 3:10.

61. MAIMONIDES, COMMENTARY ON THE MISHNAH, *supra* note 22, *Avot* 4:7, at 288.

Samuel Ha-Hasid (d. 1217).[62] The letter concerned a practice certain Jewish communities had instituted by which they collected a fee from the guests at wedding banquets for a fund to compensate the town's cantor. Similar collections were undertaken on the holidays of Purim and Simhat Torah. Rabbi Judah, espousing the traditional view of the matter, opposed the practice as a form of imposition that lacked a proper legal foundation. Rabbi Eliezer wrote his colleague to try to persuade him to withdraw his opposition before knowledge of his views led to communal harm. If his opposition to the collections became widely known, Rabbi Eliezer feared that some members of the public would rely on it as grounds for refusing to contribute their share of the assessments. This would deprive many communities of the means to compensate their cantors for they had no other source of funds, and no one was going to subject himself to serving as a cantor without the prospect of adequate compensation. Rabbi Eliezer wrote:

> If you eliminate the collections at wedding feasts, Purim and Simhat Torah, then in most places in Poland, Russia and Hungary where, because of their poverty, they lack Torah scholars and have to engage whatever intelligent individual they may find as their cantor, preacher and teacher, and make assurances to him based on these [collections]—if you eliminate them, their compensation will be inadequate and they will vacate their posts, leaving the communities without Torah, without prayer, and without a teacher of righteousness.[63]

Rabbi Eliezer viewed the collections as a continuation of the half shekel levy ordained by the Bible for the upkeep of the Temple.[64] But what authorized religious functionaries such as cantors to accept compensation? Rabbi Eliezer suggested a Biblical antecedent to justify their fees. "From Zion our Creator fixed compensation for the caretakers of His sanctuary," he wrote.[65] For although priestly service in the Holy Temple in Jerusalem was beloved in the eyes of all, the priests and Levites were not commanded to serve gratuitously. On the contrary, the Torah ordained an elaborate system of tithes and gifts for the Levites and priests, portions of sacred things they were entitled to consume, for, according to the Torah, "it is your reward for your service in the Tabernacle."[66]

In our days, Rabbi Eliezer wrote, we offer prayers in synagogues in the place of sacrifices in the Temple. Prayer requires a quorum of ten and a quorum requires the services of a cantor, for without a cantor prayer lacks that

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62. The letter was published around the year 1260 by Rabbi Isaac ben Moses of Vienna (c. 1200-1270) in his compendium of halakhic commentary, rulings, and correspondence known as *Or Zaru'a*, No. 113.

63. *Id.*

64. *Exodus* 30:11-16; *see supra* note 22 and accompanying text.

65. *Or Zaru'a*, No. 113.

66. *Numbers* 18:31.

beauty which is pleasing to the Creator. Because no one will serve as a cantor in our day without compensation, and communal collections are needed to raise funds for this purpose, it follows that such collections should not be condemned. He therefore urged his colleague to withdraw his objections before they led to communal harm.

Rabbi Eliezer's brief letter is an important contribution to the debate over compensation. That the synagogue service stands in place of the Temple cult is a well-accepted notion in Judaism; his citation of biblically ordained levitical tithes and priestly gifts as a precedent for compensating synagogue personnel is therefore strong and compelling. At the same time, he refrained from mentioning any of the traditional arguments against compensation. Further, he extended the discussion beyond the matter at hand, fees for cantors, and applied his analysis to all necessary religious functionaries, including teachers and preachers. Most significantly, he grounded his reversal of the traditional approach on the pressing needs of the Jewish community of his day, a time when no one would come forward to serve in a religious capacity without adequate compensation. In his brief letter which does not mention Maimonides by name, Rabbi Eliezer anticipated most of the major points Maimonides' critics would make in disputing his views.

D. *"Nowadays the Prince of Forgetfulness Reigns"*

Maimonides' attack on rabbinic compensation was a rear guard action that failed to persuade his colleagues or to dissuade them from taking fees. While most of his critics simply overruled him *sub rosa*, relying on the scholar's traditional exemptions and priorities as a way to make the rabbinate their profession and to receive compensation for their endeavors, others penned point by point refutations of his sources and reasoning.

Among Maimonides' major disputants on this point was the chief rabbi of Algiers, Rabbi Simon ben Zemah Duran.[67] In some respects, their lives and careers paralleled each other with surprising symmetry; in other respects, their circumstances veered in opposite directions. Like Maimonides a century earlier, Duran was forced to flee with his family from anti-Jewish persecution in Spain and settled in North Africa. Also like his predecessor, Duran was schooled in both rabbinics and secular knowledge, including medicine. But in Algiers, Duran found an impoverished Jewish community much different from the Jewish community in Egypt. Unlike Maimonides, he was unable to earn a living as a physician, for the populace relied on folk remedies for healing rather than doctors.[68]

At the same time, the Jewish community recognized Duran's learning. They were anxious to engage him as their rabbi and to compensate him for his service. Here, Maimonides' rulings created an impasse for Duran. Algerian Jewry regarded the *Rambam* as their foremost authority, and his

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67. Duran, sometimes referred to by the Hebrew acronym *Tashbetz*, lived from 1361 to 1444.

68. I. EPSTEIN, THE RESPONSA OF RABBI SIMON BEN ZEMAH DURAN 7-9 (1930).

uncompromising position on rabbinic compensation seemed to bar Duran's engagement.[69] Nor was there any support to be found in Maimonides' code for the notion that Duran could be compensated for his lost earnings as a physician, earnings he would surely be unable to recoup if he were engaged full time as the chief rabbi of Algiers. In the end, the community adopted this rationale as the basis for paying him a salary.[70]

In part to justify his salary, Duran published an extensive tract refuting Maimonides' position.[71] But the scope of his argument extended well beyond his own arrangement in Algiers. Duran developed and presented a series of legal and policy rationales that, in his view, would permit Jewish communities to pay salaries to their rabbis and permit the rabbis in good conscience to accept them. He clearly perceived, as Maimonides did not, that Israel now required the services of a full-time professional rabbinate and that this would not be possible without compensation for its practitioners.

Duran's arguments had a large and durable impact and, in an indirect way, infiltrated Maimonides' code. Rabbi Josef Karo, author of the foremost commentary on the code, adopted Duran's views on this issue. In his comments on the passage in which Maimonides condemns scholars who accept compensation, Karo engages in an energetic refutation of Maimonides' position that tracks Duran's arguments closely.[72] Because Karo's commentary is printed in all standard editions of *Mishneh Torah*, Duran's arguments are thus available to anyone who consults Maimonides' code on this point.

For his critics, Maimonides had idealized the ancient sages, painting an inaccurate portrait of their times to accord with his view that compensation was forbidden. If the Talmud depicts the great sages of yore as performing menial labor, such as Hillel as a chopper of wood, then surely the depiction can apply only to their student days before their merit as scholars became apparent.[73] But it was impossible for Maimonides' critics to believe that once a sage such as Hillel had acquired the full measure of his wisdom and begun teaching Israel, he continued to earn his living as a woodchopper.[74]

Rather, they held, it had always been the case, even in Talmudic times, that the community supported its scholars with funds to ensure their

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69. *Id.* at 12.

70. Duran's salary was collected from each Jewish household by special assessment on a weekly or monthly basis and paid monthly according to the lunar calendar, so that in leap years Duran received a thirteenth payment. *Id.* at 35.

71. DURAN, *Tashbetz* I:142-48.

72. JOSEF KARO, KESEF MISHNAH, *Talmud Torah* 3:10.

73. DURAN, *Tashbetz* I:147.

74. JOSEF KARO, KESEF MISHNAH, *Talmud Torah* 3:10. In defense of Maimonides' position, it is equally hard to reconcile Hillel's statement that one who makes a worldly profit out of the words of the Torah will perish from the world, MISHNAH, *Avot* 4:5, with the supposition that he himself accepted compensation for imparting his knowledge of the Torah to others.

livelihoods.[75] It is a positive commandment, a *mitzvah*, imposed on the community as a whole to honor the scholars and students in their midst and to maintain them at a comfortable level of support.[76] This certainty of communal support for life comprises one of the glories of Torah above all other professions, for while the ability to perform labor wanes with old age and leaves the laborer destitute, the Torah provides an honorable living to its practitioners even in their declining years.[77] The practice of supporting scholars and their academies continued long after the close of the Talmud, making it a legitimate custom in Israel that has the force of law, especially in a case such as this where the *halakha* is, at best, uncertain.[78]

If in days of yore the sages declined compensation and engaged in secular labor, they did so as an act of piety to fulfill the scriptural verse, "By the sweat of your brow shall you eat bread."[79] In those days, the nation received competent religious guidance from these part-time scholars because the ancients had the ability to perform labor and study Torah and to succeed at both. But not all generations are alike in this ability. Nowadays the prince of forgetfulness reigns, even among great scholars, and anyone who tries to occupy himself with both scholarship and a secular occupation succeeds at neither.[80] For this reason today's sages must guide their conduct by the commands of a different verse, the one that requires them to meditate on the Torah "day and night,"[81] that is, full time. They must forgo all secular

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75. To prove that students and scholars were maintained by the community in the Talmudic era, Duran cited *Gittin* 60b which mentions a "*shipura*" whose custody passed from one principal of the academy to his successor. Adopting the interpretation of Rav Sherira Gaon (10th cent.) for this uncertain term, he explained it as a community collection box for donations to support the students at the academy. DURAN, *Tashbetz* I:142; *see* RASHI, *Gittin* 60b.

76. DURAN, *Tashbetz* I:142. Duran supported his position with a stipulation in the *Talmud* that the High Priest was to exceed his fellows in splendor, strength, wisdom, and riches; and if he was lacking in the latter quality, his fellow priests were to endow him with their wealth. TALMUD, *Yoma* 18a; TALMUD, *Horayot* 9a. From this, he drew an analogy—just as fellow priests are required to endow a High Priest who is needy, so too are all Israel obligated to enrich a scholar in their midst. DURAN, *Tashbetz* I:142. The admonition against accepting fees for teaching, attributed to Moses in TALMUD, *Nedarim* 37a, Duran regarded as merely a *midrash* having lesser authority as a legal norm than a clear-cut halakhic pronouncement. DURAN, *Tashbetz* I:147.

77. DURAN, *Tashbetz* I:142.

78. *Id.* ("The custom of Israel is Torah."); JOSEF KARO, KESEF MISHNAH, *Talmud Torah* 3:10 ("In a case where the *halakha* you have received is unclear, follow the custom.").

79. *Genesis* 3:19.

80. DURAN, *Tashbetz* I:147, based on TALMUD, *Berakhot* 35b ("See what a difference there is between prior generations and later ones. Prior generations made their Torah study fixed and their work occasional and succeeded at both; later generations made their Torah study occasional and their work fixed and succeeded at neither."). Duran conceded that Maimonides was an exception. *Id.*

81. *Joshua* 1:8.

employment and accept compensation from the community to make the Torah their sole profession.[82]

Further, the functions the Torah sage is called upon to perform had changed over the course of time. While retaining the roles of teacher and religious authority, he had in many locations acquired the functions of a community administrator, sharing responsibility with town councilors for community-wide services as diverse as charity, education, discipline, rule-making, and relations with government officials.

This new role has two implications bearing on his compensation. First, the rabbi is entitled to compensation for his communal service the same as anyone who renders a service that benefits the community as a whole.[83] Second, he should receive compensation at a generous level that exceeds his mere subsistence requirements. As a leader of the Jewish community, he must present himself in public with the stature and dignity that befit his high communal position, appearing like a grandee rather than a simple laborer, both to represent the Jews appropriately vis-à-vis the gentile population and to elicit respect from the ordinary Jews who must obey his edicts.[84]

Maimonides' opponents also took issue with him over the tenor of public opinion. He believed that the sight of Torah sages receiving fees for their services would debase Torah in the public's eyes, making Torah appear like all other occupations, merely a way to earn a living.[85] For his critics, it was more degrading for Torah sages to appear before the public as menial laborers or ordinary tradesmen. If the public observed them in the market-place struggling to earn a living, they would not respect them as communal leaders nor obey their religious admonitions.[86]

Maimonides' critics acknowledged a small kernel of truth remaining in his position, a pious sentiment firmly rooted in Jewish tradition that all could agree to. No one should *embark upon* a career as a teacher or scholar with the deliberate purpose of earning a living from knowledge of the Torah.[87] This was using the Torah as a spade for digging, condemned by Rabbi Zadok in the Mishnah.[88] When, however, one has commenced his studies with all the proper motivations and pursued the knowledge of Torah for its own sake,

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82. DURAN, *Tashbetz* I:147.

83. JOSEF KARO, KESEF MISHNAH, *Talmud Torah* 3:10 (citing the Talmud's case of learned men in the Temple who tutored the priests in the laws governing the sacrificial rites, their proper performance benefiting the nation as a whole).

84. DURAN, *Tashbetz* I:148; *see also* RABBI ISAAC ABRABANEL, ABRABANEL ON PIRKEI AVOT, *Nahalat Avot* 4:6, at 246-47 (Abraham Chill trans., 1991); RABBI OBADIAH BARTENURO, COMMENTARY ON THE MISHNAH, *Avot* 4:5; RABBI JOEL SIRKES, RESPONSA, No. 52.

85. MAIMONIDES, COMMENTARY ON THE MISHNAH, *supra* note 22, *Avot* 4:7, at 289.

86. DURAN, *Tashbetz* I:147; ABRABANEL, *supra* note 84, at 246-47.

87. DURAN, *Tashbetz* I:147; JOSEF KARO, KESEF MISHNAH, *Talmud Torah* 3:10; RABBI JOEL SIRKES, RESPONSA, No. 52.

88. MISHNAH, *Avot* 4:5; *see* RABBI JOEL SIRKES, RESPONSA, No. 52.

then rewards were sure to follow[89] and there is no impropriety in accepting them.[90]

Duran and Karo argued that the sage who accepts compensation has no cause to believe that he is acting in a manner that is less than completely righteous for, in their view, the very definition of piety had changed in the course of time. If in former times declining compensation and working at a trade were considered pious, at present a life devoted solely to Torah is considered a pious and righteous life.[91] The times demand it. This generation is governed by the Biblical verse that is the clarion call to radical change in Jewish law, "It is a time to act for the Lord—They have annulled your Torah."[92] Thus, even if the sages, both before Maimonides and after, who accepted compensation to make the Torah their profession were annulling one principle of Jewish law, they were justified in doing so for they acted to preserve the rest, lest the Torah be forgotten in Israel.[93]

E. *The Variety of Rabbinic Emoluments*

With a full complement of arguments on behalf of compensation, Duran and others laid a solid legal foundation for the economic well-being of the rabbinate. By the fifteenth century, it had become the norm for Ashkenazic Jewry to compensate its rabbis.[94] The practice was already established in Sephardic Jewry.[95] At the very least, a community could pay its rabbi a salary and he could accept it as long as the parties regarded the payments as a suspension fee, compensation for wages the scholar lost from not pursuing a secular occupation.

This suspension fee differed in material respects from its Talmudic antecedent. In the Talmud, the ordinary wage earner received a suspension fee when he was called away upon occasion from his everyday employment to judge a case. He was allowed to recoup his proven lost wages. The judge who took a "suspension fee" without demonstrating his actual losses was considered contemptible. By contrast, the suspension fee that underlay the rabbinic salary was paid to someone who had no other employment to suspend and hence no lost earnings. It is true that had the individual avoided the rabbinate as his profession and engaged in a secular occupation, he would surely have received wages, but their amount was entirely a matter of

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89. TALMUD, *Nedarim* 62a ("[O]ne should not say, I will read Scripture that I may be called a Sage; I will study, that I may be called Rabbi . . . but learn out of love, and honour will come in the end . . . .").

90. DURAN, *Tashbetz* I:147; JOSEF KARO, KESEF MISHNAH, *Talmud Torah* 3:10.

91. DURAN, *Tashbetz* I:147.

92. *Psalms* 119:126.

93. JOSEF KARO, KESEF MISHNAH, *Talmud Torah* 3:10.

94. 2 SALO BARON, THE JEWISH COMMUNITY 81 (1942).

95. *See* 2 S.D. GOITEIN, A MEDITERRANEAN SOCIETY 121-22 (1971).

speculation and could not possibly be proven.[96] The availability of the suspension fee as a matter-of-course made it possible to enter the rabbinate directly as a career without first engaging in or even preparing for any other profession.[97] In short, the suspension fee had been transformed from the Talmud's measure of actual economic loss into a legal fiction used to justify rabbinic salaries whose propriety remained subject to question.

Despite the stated justification for his salary, the incumbent was still free to engage in a secular trade while maintaining his position as rabbi. This was sometimes a necessity, for in all but the largest Jewish communities the rabbi's salary was low[98] and payment was liable to be interrupted when community elders found themselves short of funds.[99]

Some trades happened to be particularly suitable for scholars. A rabbi might be employed as the community's scribe, notary, and archivist, copying books and deeds, issuing official documents, taking minutes at council meetings, and keeping the community's records.[100] A rabbi engaged in moneylending or pawnbroking would be occupied in business affairs for only a brief period each day, freeing the remainder of his time for rabbinic pursuits just as Maimonides had recommended.[101] The rabbi who served as a

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96. *See* RABBI MEIR BEN ISAAC KATZENELLENBOGEN (Maharam Padua, 1482-1565), RESPONSA, No. 40 (end) (denying claim to past compensation on the suspension fee rationale where claimant had no known secular work in his town and hence his losses could not be proven).

97. Perhaps Maimonides anticipated this development and therefore refrained from any mention of the suspension fee in his treatise on Torah scholars. *See supra* notes 52-60 and accompanying text.

98. BARON, *supra* note 94, at 81-82 (stating that small and insecure salaries were typical). The author also observes, "The smallest rabbinic income . . . compared favorably with the extremely low median income of the mass." *Id.* at 92.

In his study of the Italian rabbinate during the Renaissance, Robert Bonfil found that Italian rabbis had other employment and sources of income, so that the small rabbinic salaries they received were in fact suspension fees, intended as payments to cover the income they lost during the short periods of time when they suspended their gainful employment to execute their communal duties. ROBERT BONFIL, RABBIS AND JEWISH COMMUNITIES IN RENAISSANCE ITALY 163 (Jonathan Chipman trans., Albert H. Friedlander et al. eds., 1990). By contrast, Emanuel Etkes, in his study of the Lithuanian rabbinate three centuries later, found that when rabbis were not involved in community affairs, they engaged in nonremunerative study of Torah for its own sake. Emanuel Etkes, *The Relationship Between Talmudic Scholarship and the Institution of the Rabbinate in Nineteenth-Century Lithuanian Jewry, in* SCHOLARS AND SCHOLARSHIP 107, 115-16 (Leo Landman ed., 1990). They had no secular employment and no income apart from their rabbinic salaries which were "extremely meager." *Id.* at 115-16.

99. *See, e.g.*, Etkes, *supra* note 98, at 117-19 (discussing the case of a rabbi whose salary was suspended for forty weeks and who went on strike, refusing to issue halakhic rulings, until payments were resumed).

100. On the activities of Jewish scribes, see BARON, *supra* note 94, at 110-13.

101. *See* MISHNEH TORAH, *Talmud Torah* 1:12.

matchmaker enjoyed a natural advantage over his competitors, for as principal of an academy he was acquainted personally with many eligible bachelors.[102]

Nor did the availability of salaries put an end to the scholar's traditional preferences and exemptions. Their impact was cumulative. The salaried rabbi was still entitled to priority in the marketplace if he engaged in trade, enabling him to sell out his wares before anyone else.[103] In some communities, the rabbi was granted a monopoly for the sale of certain commodities in order to supplement his income.[104] In addition, the tax exemption for scholars was retained as an important benefit of the profession.[105] The rabbi's share of government levies would be apportioned among the town's other residents and paid by them.[106]

In most communities, in addition to his salary, the rabbi collected a fee for his services. Like the cantor who sang at a wedding and the sexton who arranged the hall, the rabbi received a fee for presiding.[107] The fees were not free-will donations, but were assessed according to a graduated rate schedule adopted by ordinance in each community and stipulated in the rabbi's contract.[108]

Civil litigations tried according to Jewish law also generated substantial revenues for the rabbis who presided.[109] In many cases, these fees were the main source of the rabbi's income, exceeding the amount he received as his salary.[110] This fee base was enhanced by a prohibition under Jewish law against litigating a lawsuit between Jews in the gentile courts.[111]

A rabbi might also accept the voluntary donations and gifts of his congregants. Some scholars became wealthy from this generosity and it

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102. BARON, *supra* note 94, at 81.

103. SHULHAN ARUKH, *Yoreh Deah* 243:4 and *Hoshen Mishpat* 156:5 (Rema).

104. Etkes, *supra* note 98, at 120 (citing salt and yeast monopolies).

105. SHULHAN ARUKH, *Yoreh Deah* 243:2.

106. BARON, *supra* note 94, at 80; *see* SHULHAN ARUKH, *Yoreh Deah* 243:2.

107. *See* BARON, *supra* note 94, at 82-83 (citing practice in Poland where rabbi who performed a marriage received 1.6% of the value of the bride's dowry and remitted half to the chief rabbi of Poland; also discussing fee schedule mandating graduated payments for other rabbinic functions such as arranging a divorce, administering an oath to a widow, and delivering a sermon).

108. For examples of two rabbinic contracts stipulating fees in addition to salary, see SIMON SCHWARZFUCHS, A CONCISE HISTORY OF THE RABBINATE 19-21 (1993) (contract of Rabbi M. Todros Spira of Friedburg dated 1575; author labels this the oldest extant rabbinic contract) & 51-53 (contract of Rabbi Asher Loeb, also known as *Shaagat Aryeh*, of Metz, France, dated 1765).

109. BARON, *supra* note 94, at 84 (citing the fees paid to rabbis in Hamburg as eight schillings for the examination of each witness and four marks for rendering judgment, payable one-half by each party).

110. *Id.*

111. On the origins and enforcement of this prohibition, see M. Elon, *The Sources and Nature of Jewish Law and Its Application in the State of Israel*, 2 ISRAEL L. REV. 515, 524-27 (1967).

became an issue in the ethical literature of the day to determine the point at which a scholar should stop accepting gifts because his endowment had grown sufficiently large.[112]

On the whole, the availability of compensation increased public respect for the rabbinate and raised the social status of rabbis,[113] confirming the view of Maimonides' critics in this regard.[114] Ironically, in certain circles it had the opposite effect. Earnest students at some Talmudic academies frowned on the salaried rabbinate.[115] They believed it detracted from the classic ideal of uncompensated devotion to Torah for its own sake, and accepted paid positions only when economic necessity forced them to do so.[116]

It was perhaps inevitable that the availability of compensation would create problems alongside the benefits it conferred. Problems arose that were much more serious than the bruised idealism of youth. Rabbis competed with each other for appointment in lucrative divorce matters and litigations.[117] There was turnover as incumbents vacated one post to secure another with a higher salary.[118] Some communities sold rabbinic appointments to unqualified persons.[119] The purchaser then treated the post purely as an

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112. JACOB KATZ, TRADITION AND CRISIS: JEWISH SOCIETY AT THE END OF THE MIDDLE AGES 176, 334 n.15 (Bernard Dov Cooperman trans., 1993).

113. *Id.* at 74-75.

For some students of the rabbinate, the impact of compensation on public perceptions of the rabbinate was not positive. In this vein Schwarzfuchs writes, "From the moment the rabbinate became professionalized and salaried it lost much of its prestige and could no longer claim leadership of the community." SCHWARZFUCHS, *supra* note 108, at 19. This assessment is overblown. Clearly, rabbis who engaged in abuses relating to their compensation discredited themselves and some notable battles between rabbis competing for the same post impacted quite negatively on the communities involved. Etkes is closer to the mark when he writes: "It is clear that *this competition* affected the status and prestige of the rabbis." Etkes, *supra* note 98, at 121 (emphasis added). It was not compensation *per se*, but the manner in which some rabbis sought to obtain it that brought dishonor to some. But on the whole, Katz's assessment of the matter must be correct for in most societies, public prestige and social status are linked in some measure to a degree of success in the economic sphere. It would be surprising indeed if Jewish society were different. Further, given its intimate association with Torah scholarship and Jewish law, the traditional rabbinate as a whole could never lose its claim to leadership of the Jewish community, whatever might be the shortcomings of individual rabbis.

114. *See supra* notes 85-86 and accompanying text.

115. Etkes, *supra* note 98, at 111-16.

116. *Id.* at 115.

117. *See* KATZ, *supra* note 112, at 74, 93-94, 99, 305 n.2, 307 n.20 (citing eras of intense economic competition among rabbis who strove for appointment in lucrative divorce cases and litigations, and instances in which towns competed to extend their jurisdictions to surrounding rural villages as a way to increase the material base available to support their rabbinates).

118. SCHWARZFUCHS, *supra* note 108, at 56-57; *see also* Etkes, *supra* note 98, at 121.

119. KATZ, *supra* note 112, at 74.

investment and looked to his rabbinic fees for an adequate return.[120] There were individuals who acquired rabbinic titles not to practice but only to take advantage of the tax exemption.[121]

The most serious problems arose when two rabbis competed for the same appointment. Entire Jewish communities could be riven into factions supporting the rival candidates.[122] These controversies, which could last for years, sometimes required the intervention of eminent outside halakhic authorities to resolve them, and always left a legacy of bitterness, no matter which candidate ultimately prevailed.[123] Rabbis now competed for the scarce material resources of the Jewish communities.[124] We consider this competition and the attempts to regulate it in Part III of this Article.

III. COMPETITION

A. *"These Fees Embarrass Us"*

Having won the right to support themselves as rabbis and scholars, incumbents tended to regard newcomers as interlopers who imperiled their livelihoods. A rabbi might come to occupy his position with varying degrees of deliberate formal involvement by the community. At one extreme, a rabbinic scholar, young or old, might arrive uninvited and unannounced in a new place of residence. In the course of time, as his qualifications became known to the residents and they increasingly consulted him on matters of Jewish law, he might come to occupy a *de facto* position as their religious authority by common consent without any formal appointment. At the other extreme, after due deliberation and a vote by the community at large, or its board of electors,[125] a community might issue a formal invitation to one of a number of scholars it had considered to serve as its religious leader. Once the incumbent had become established in a town by either method, common

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120. *Id.*

121. BARON, *supra* note 94, at 80-81.

122. *See, e.g.*, ERIC ZIMMER, HARMONY AND DISCORD 123-28 (1970). In his study of the Lithuanian rabbinate in the 19th century, Etkes found "sharp, and at times, unrestrained, competition over rabbinic offices in general, and over those which were considered prestigious and lucrative in particular." Etkes, *supra* note 98, at 121.

123. *See, e.g.*, Etkes, *supra* note 98, at 121-23 (discussing the dispute over the rabbinate in Riga resolved by the eminent Rabbi Isaac Elhanan Spector in 1882, much to the chagrin and disappointment of the losing candidate who wrote, "The shame I suffered because of this cannot be described in words").

124. *See* SHULHAN ARUKH, *Orah Hayyim* 53:24, where the following rule is laid down: If a community needs to hire both a rabbi and a cantor but does not have the resources to pay salaries to both, then if the candidate for rabbi is a prominent scholar, great in wisdom of the Torah and an expert in deciding matters, it should hire the rabbi; but if the candidate for rabbi is ordinary, then it should hire the cantor.

125. For a discussion of the electoral process as it related to rabbinic appointments, see KATZ, *supra* note 112, at 72-74.

consent or formal appointment, then whether a newcomer was at liberty to repeat the process required answers to two separate questions under Jewish law. First, could the newcomer take up residence in a town already served by a rabbi? Second, could he practice as a rabbi in the town, accepting fees for his services?

Both questions were answered in the affirmative in the mid-fifteenth century by two prominent authorities, Rabbi Jacob Weil of Erfurt and Rabbi Israel Isserlein, head of the Talmudical academy in Neustadt. The two were consulted by the elders of the Jewish community of Regensburg (Ratisbon) about a troubling situation that had arisen in their town. In 1454, Rabbi Israel Bruna immigrated to Regensburg upon leaving his rabbinic post in Brunn when the Jews were expelled from the city. Upon arrival, Rabbi Israel intended to continue his rabbinic practice, but a venerable sage who lived in Regensburg, Rabbi Anshel, attempted to prevent him from doing so, seeking to preserve the prerogatives and emoluments of Regensburg's established scholars, including himself.

Rabbi Isserlein issued a strong ruling in favor of the newcomer's right to practice in Regensburg.[126] Isserlein was personally acquainted with Rabbi Israel Bruna and knew him to be a well qualified scholar. The only possible legal objection to his activities in Regensburg would be the argument that he was impermissibly reducing the livelihoods of the town's other rabbis by infringing on the economic boundaries they had staked out for themselves. But if this was the argument against him, it was misapplied in his case. According to Isserlein, infringing economic boundaries might be raised as an objection to a foreign tradesman seeking to establish his business in a town already served by existing tradesmen in the same line of work, but it may never be asserted against a Torah scholar to prevent him from settling in a town and practicing as a rabbi. The crown of Torah is resting like "abandoned property" for all who wish to take it and exercise authority in its name.[127]

Rabbi Isserlein acknowledged that the newcomer might deflect some fees from the town's established rabbis. But for Isserlein, "these fees are an embarrassment to us and we have to strain to find legal grounds to accept most of them."[128] Isserlein makes this admission in the context of the traditional strictures against receiving compensation for one's knowledge of the Torah.[129] In his view, compensation with such uncertain legal justification could never rise to the level of a livelihood whose "boundaries" must be respected by other scholars.

Rabbi Jacob Weil, the second authority to issue a ruling in favor of Rabbi Israel's right to practice in Regensburg, based his decision on a factor that Isserlein did not mention at all. Neither Rabbi Israel, nor Rabbi Anshel

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126. RABBI ISRAEL ISSERLEIN (1390-1460), TERUMAT HA-DESHEN, PESAKIM U-KETAVIM § 128.

127. *Id.*

128. *Id.*

129. *See supra* Part II.A-B.

before him, had been formally appointed as the rabbi of Regensburg. Rather, both had achieved their rank by common consent, demonstrating over time their abilities as religious leaders and scholars, and gradually gaining the recognition of the townsfolk. Weil held that Rabbi Anshel's mere priority in time did not confer upon him any superiority of rights.[130] Hence neither had the greater right to practice in Regensburg, and neither could exclude the other.[131]

Both rulings settled the Regensburg controversy in favor of the newcomer's right to practice, yet in the course of time each ruling proved to be a two-edged sword. Later authorities[132] cited Weil's ruling *against* newcomers after formal appointment had largely replaced informal appointment by common consent in the selection of rabbis. They inferred Weil would have ruled against the newcomer in the Regensburg case if in fact his predecessor, Rabbi Anshel, had been formally appointed to his post, something that is not at all clear from Weil's ruling despite his stated reasoning.[133]

Isserlein's ruling also proved to cut two ways. In disputes between established rabbis and newcomers, the ruling clearly favored the newcomer, guaranteeing him the right to earn a living as a rabbi alongside the established scholar in his new town. But in disputes between rabbis, old or new, on the one hand, and the Jewish communities from which they sought their livelihoods, on the other, the ruling favored the communities. As long as rabbinic compensation officially remained a legal embarrassment, rabbis were at a disadvantage in pressing their economic claims too vigorously against the straitened Jewish communities they served.

This impact of Isserlein's ruling was perfectly illustrated by the case of David ibn Yahya, rabbi of the kingdom of Naples from 1525 to 1540. Before accepting the post, community leaders assured him there would be

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130. RABBI JACOB WEIL (d. before 1456), RESPONSA, No. 151.

131. *Id.*

132. *See infra* notes 187-92 and accompanying text.

133. In his responsum No. 151, Rabbi Weil cites a passage from the authoritative halakhic treatise *Or Zaru'a* affirming the right of a new scholar to emigrate to a city already served by a rabbi, engage there full time in the study and teaching of Torah, and benefit from the same public support and tax exemption granted to the first scholar. Commenting on the passage, Weil pointedly notes that it does not distinguish between incumbents who had been formally appointed to their posts and those who had received only informal recognition by common consent; in both cases, the newcomer may come and compete according to the *Or Zaru'a*. There is no hint from Weil that he disagrees with the *Or Zaru'a* in a case where the target of the competition had received formal appointment to his post. Perhaps if Rabbi Anshel had been the official rabbi of Regensburg, Weil nonetheless would have decided the matter in the newcomer's favor on other grounds, just as Isserlein did. Still, unless Weil disagrees with the *Or Zaru'a* in the case of competition against a formally appointed incumbent, it is hard to explain why he would have made Rabbi Anshel's lack of such appointment the touchstone of his ruling in the Regensburg case.

compensation but he went unpaid for his first five years in office.[134] He refrained from pursuing the matter because the Jews of Naples were sorely pressed for cash.[135] They had to raise huge sums for two purposes that were all too common at the time—redeeming Jews who had been sold into slavery by pirates and staving off an edict of expulsion that would have forced the Jews out of Naples in 1533.[136] In addition, Ibn Yahya declined to accept compensation for acting as a scribe. He considered his scribal duties to be beneath his dignity and transcribed his congregants' letters only because he did not want any unworthy Hebrew prose issuing from his community.[137] He finally decided to leave Naples but at that point the elders promised their rabbi an annual salary of 100 scudi in gold.[138] Ibn Yahya thought the agreement would apply retroactively and cover the arrearages as well.[139] The community disagreed, however, because the question of payments for years past was never raised during the negotiations.[140]

Ibn Yahya sought a resolution of the dispute from the prominent authority, Rabbi Meir of Padua. He, however, sided with the community against his colleague. He ruled that the community's silence on the question of the arrearages during the negotiations did not indicate their acquiescence to Ibn Yahya's position since he had never expressly raised the matter with them.[141] He quoted verbatim the passage from Rabbi Isserlein that expressed embarrassment over rabbinic fees in view of their uncertain legal basis. In light of this, he advised Ibn Yahya, there could never be a valid claim for compensation that was at best implicit, such as fees for past services that the community had never explicitly fixed and agreed to pay.[142]

It took many generations for halakhic authorities to gradually overcome the embarrassment over fees that Isserlein so candidly expressed. As we shall see, when they did overcome it, they tended to defend the incumbent rabbi's livelihood from encroachment by newcomers, something Isserlein and Weil were unwilling to countenance.

B. *"The Envy of Scholars Increases Wisdom"*

A scholar's right to take up residence in the community of his choice, affirmed by both Isserlein and Weil in the Regensburg case, was one facet of the broader question of freedom of movement for Jews in pre-Emancipation times. In general, the Jews were precarious inhabitants of their nations and

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134. Alexander Marx, *Glimpses of the Life of an Italian Rabbi of the First Half of the Sixteenth Century (David ibn Yahya)*, 1 HEBREW UNION COLLEGE ANNUAL 605, 609 (1924).

135. *Id.*

136. *Id.* at 610.

137. *Id.* at 613-14.

138. *Id.* at 609.

139. *Id.*

140. *Id.*

141. RABBI MEIR KATZENELLENBOGEN (MAHARAM PADUA), RESPONSA, No. 40 (end).

142. *Id.*

localities, excluded from some territories and welcomed in others but always subject to expulsion en masse by princes and local authorities. Our concern, however, is the narrower question of freedom of movement within and between Jewish communities. We will focus on the internal regulations the Jews adopted for themselves to control the flow of newcomers and how these regulations applied to rabbis, scholars, and teachers.

Under Jewish law, the Jewish inhabitants of a town acquired a right to reside there known as a "residence right" (Heb. *hezkat ha-yishuv*).[143] The right to reside encompassed the right to earn a living in the town.[144] The residence right was based on the charter the original Jewish inhabitants had purchased from local authorities, granting them the right to settle and to trade and limiting the number of Jews permitted to reside in the locality.[145]

To support the residence right, Jewish law enforced a "residence ban."[146] This prohibited a newcomer from settling in a town without receiving the consent of the Jewish residents.[147] In most communities, unanimous consent was required.[148] A Jewish immigrant who took up residence in violation of the ban was subject to severe social and religious ostracism by his co-religionists.[149]

Jews who were fleeing from religious persecution were exempt from the residence ban but upon arrival, their right to engage in trade was restricted.[150] Refugees could engage in trade only to the extent necessary to earn a living at a subsistence level.[151] This minimized the impact of their arrival on the

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143. KATZ, *supra* note 112, at 49.

144. *Id.*

145. *Id.* at 49, 88.

146. Heb. *herem ha-yishuv*; *see* SHULHAN ARUKH, *Hoshen Mishpat* 156:7 (Rema).

Whether the residence ban was the original creation of medieval Jewry or whether it had its origins in Talmudic jurisprudence was uncertain. While some attributed the ban to the tenth century Franco-German authority, Rabbenu Gershom of Mainz, a seminal figure in the organization of the Jewish communities of Europe to whom many regulations of a constitutional nature are attributed, others held the ban was ancient and has a basis in the Talmud itself. *See* LOUIS FINKELSTEIN, JEWISH SELF-GOVERNMENT IN THE MIDDLES AGES 13-14 (1924); on the work of Rabbenu Gershom, see *id.* at 20-35.

147. Ashkenazic and Sephardic Jewish communities differed in the targets against whom the ban might be applied. *See* MEIR TAMARI, WITH ALL YOUR POSSESSIONS: JEWISH ETHICS AND ECONOMIC LIFE 113-17 (1987).

148. L. RABINOWITZ, THE HEREM HAYYISHUB 13 (1945).

149. *See, e.g.*, TAMARI, *supra* note 147, at 114 (noting that an ordinance enacted in 1583 by the Jewish council of Padua, Italy, provided that a Jew who settles in Padua without the community's consent will be ostracized from the community, not allowed to participate in the slaughtering of kosher meat, refused the circumcision of his sons, shunned on festive occasions, and denounced as a renegade in the synagogue every Monday and Thursday until he leaves).

150. MORDECAI BEN HILLEL, SEFER MORDECAI, BAVA BATHRA § 519.

151. SHULHAN ARUKH, *Hoshen Mishpat* 156:7 (Rema).

town's existing businesses while, at the same time, ensuring that they did not become public charges.

The residence ban served many important purposes, such as avoiding overcrowding in the Jewish quarter, excluding the morally objectionable from the community, and reducing anti-Jewish sentiment among the gentile population.[152] These, however, were incidental to its primary purpose of protecting the livelihoods of established residents from the competition of newcomers. What was in form a regulation of residence was in fact a system of trade protection,[153] as the treatment of refugees illustrates. It remained a potent limitation on the free movement of Jews in Europe until Emancipation.[154]

How did rabbis, scholars, teachers, and their students fare during the heyday of the residence ban? They were exempt from its application.[155] The rulings of Rabbis Isserlein and Weil in the Regensburg matter, upholding the right of the newcomer, Rabbi Israel, to emigrate from Brunn and settle in Regensburg,[156] were consistent with the scholar's exemption from the residence ban. Neither based his ruling on Rabbi Israel's status as a refugee nor did either restrict the newcomer's right to earn a living to his bare subsistence needs as required in the case of a refugee.

There was a simple explanation for the scholars' exemption from the residence ban—they did not pose a direct economic threat to the livelihoods of the local residents. Students at the Talmudical academy did not work at all, and a rabbi did not ordinarily compete with local residents in any of their lines of work. Now it is true that if a rabbi engaged in trade, he was entitled to priority in the marketplace, but his trade would be incidental to his rabbinic practice, undertaken to supplement his rabbinic salary,[157] and posed competition of a lower degree of magnitude than that of the nonrabbinic newcomer who engaged in commerce full time as his sole means of support. It is also true that new scholars would increase the tax burden of local residents since, being themselves exempt from taxation, the scholars' taxes would be apportioned among the community at large. This must have occasioned some complaining,[158] but on the whole the impact of such

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152. Rabinowitz, *supra* note 148, at 13; *see* SHULHAN ARUKH, *Hoshen Mishpat* 156:7 (end).

153. Rabinowitz, *supra* note 148, at 10.

154. *See* BARON, *supra* note 94, at 7 (citing for the collapse of the residence ban widespread pogroms in 1648-49 that turned entire Jewish communities into groups of refugees, causing the system of exclusion to break down, and the subsequent Emancipation of the Jews that rendered all forms of internal Jewish communal controls largely ineffective).

155. SHULHAN ARUKH, *Hoshen Mishpat* 156:5-7.

156. *See supra* Part III.A.

157. *Cf.* SHULHAN ARUKH, *Yoreh Deah* 243:2 (discussing tax exemption of scholar who trades only to meet his subsistence needs and not to become wealthy, and spends the rest of his time engaged in study).

158. *See* SCHWARZFUCHS, *supra* note 108, at 18 (citing examples of tax resisters who objected to the tax exemption for scholars). Depending on local practice, the tax exemption

apportionment on any given household hardly would be noticeable and in the community at large the impact would be diffuse and indirect. In any case, any untoward economic effects resulting from the arrival of a new scholar would naturally be offset by the recognized benefits that accrued to a community from having a new scholar, or several, in its midst.

If, however, the ordinary townsfolk who were not threatened economically by the arrival of a new scholar were unlikely to object to his settling in their midst, the local rabbi might view the situation from quite a different perspective. He faced a host of delicate issues occasioned by a newcomer's arrival involving their religious and legal authority vis-à-vis each other, including their entitlement to priority and honors in the synagogue, the community's assessment of their respective ranks as scholars, and the adjustment of their differences should they issue rulings that conflicted. In addition, he faced direct competition from the newcomer for fees.[159] The question arose whether an incumbent rabbi, like the town's merchants and craftsmen, should have the legal right to protect the boundaries of his livelihood against a colleague who settled in his town.

The starting point for resolving questions of this type was a passage in the Talmud that discusses economic competition among the residents of a lane.[160] The passage relates a difference of opinion between two scholars named Huna. The first (Huna I) was of the opinion that a resident of a certain lane who opened a mill can prevent a second resident from opening a similar establishment in the lane by claiming, "You are interfering with my livelihood."[161] The second, R. Huna, the son of R. Joshua, (Huna II) disagreed. In his view, the second resident can open his mill despite the prior miller's objection, and the same rule applies even when the potential competitor is a nonresident, that is, someone who comes from another town

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might be extended to all scholars residing in the community or just some of them. For evidence of the latter practice, see BONFIL, *supra* note 98, at 80-82 and 170 (claiming that rabbis were taxed like anyone else unless appointed to a position of communal leadership).

159. See RABBI SHALOM SCHWADRON (Maharsham, 1835-1911), RESPONSA, Part V, No. 15, for a case illustrating the potential economic threat of a new scholar's arrival. The local rabbi in a town had established a court in his home where he issued rulings, arranged marriages and divorces, and accepted the customary fees for his services. When a new scholar settled in the town, at first he was satisfied with the honor the townsfolk bestowed upon him and did not accept fees. Up to this point no one raised any objections to his presence. When in due course he wished to open a court in his home and accept fees just like his colleague, the established rabbi objected, charging the newcomer with invading his economic territory. *Maharsham* ruled first that the site of a court should not be changed "for the sake of peace," and second that the newcomer will be guilty of trespassing on the incumbent's livelihood if he reduces the type of income rabbis are permitted to accept without embarrassment, such as scribal fees and arbitration fees. This case, which must be emblematic of many similar instances, shows how the economic threat posed by a newcomer could be both insidious and real.

160. TALMUD, *Bava Bathra* 21b.

161. *Id.*

and wishes to open a mill alongside the first, provided the newcomer is willing to pay his share of taxes in the new town.[162]

In a coda to this passage, Rabbi Joseph states a rule concerning competition among schoolteachers.[163] A teacher who runs a schoolroom in a lane cannot object to a second resident opening a competing schoolroom in the same lane.[164] Since teachers of young children were entitled to fees for watching over their charges during school hours,[165] the second teacher posed a direct economic threat to the first. Rabbi Joseph's rule is perfectly consistent with the position of Huna II who favored competition among residents of a lane. But according to Rabbi Joseph, even Huna I, who was inclined to protect the livelihood of the first entrant into a market, would agree with Huna II in the case of schoolteachers because "the envy of scholars increases wisdom."[166] The economic interests of the first teacher must give way to the religious well-being of the community which requires "the maximum availability of Torah teachers."[167]

Rabbi Joseph's statement is limited to schoolteachers, and the passage does not mention rabbis or scholars who instruct mature students. This is understandable since they did not accept fees for teaching Torah in the Talmudic era[168] and the issue of economic competition between them would be a moot point. It is plain, however, that Rabbi Joseph's rationale for allowing competition among schoolteachers—"the envy of scholars increases wisdom"—must apply with equal force to all expositors of the Torah, including rabbis and scholars. Community welfare demands the maximum availability of Torah teachers at every level of instruction, from the elementary to the most advanced.

The rule for schoolteachers is cited in the codes of both Maimonides[169] and Karo[170] as settled law. Neither of their rulings carries the discussion of competition beyond schoolteachers even though, in the centuries after the close of the Talmud, the emoluments of the rabbinate had developed into a significant source of income for rabbis and scholars who teach mature students.[171] It is Rabbi Moses Isserles (Rema) who, in a gloss he appended to Karo's ruling, draws out its implications for the salaried rabbinate, writing as follows:

> Where a rabbi resides in a town and instructs the public, another sage may come and teach also in the same place, even if he deprives the first to a

162. *Id.*
163. *Id.* 21b-22a.
164. *Id.*
165. *See supra* note 28 and accompanying text.
166. TALMUD, *Bava Bathra* 21b-22a.
167. TAMARI, *supra* note 147, at 117.
168. *See supra* Part II.A.
169. MISHNEH TORAH, *Talmud Torah* 2:7.
170. SHULHAN ARUKH, *Yoreh Deah* 245:22.
171. *See supra* Part II.E.

> certain extent of his livelihood. For example, where the congregation accepted the first as their rabbi and he receives compensation from them for this, the second may still settle there and establish himself in all aspects of the rabbinate like the first, provided he is great [in learning] and qualified for this.[172]

Like the first schoolteacher in a lane, the established rabbi in a town cannot object to the newcomer's arrival and rabbinic practice. As we shall see, however, there is an opening for an exception to this general rule where the newcomer deprives the incumbent of his livelihood more than "to a certain extent."[173]

Some cite Rabbis Jacob Weil and Israel Isserlein as authority for the Rema's ruling[174] and indeed the situation he describes in generic terms is very similar to the facts of the Regensburg case that they had considered a century earlier, favoring the claim of the newcomer, Rabbi Israel, over the position of the established scholar, Rabbi Anshel.[175] In his ruling, the Rema endorses the free movement of qualified scholars that both of his predecessors had affirmed. At the same time, he parts company with them over the question of the newcomer's fees. The Rema would permit the newcomer to deprive the resident rabbi of his livelihood "to a certain extent" only, but not entirely. The rulings of Weil and Isserlein contained no such limitation.

This is not a small difference of opinion. It signifies a fundamental difference in their basic approaches to rabbinic compensation. Isserlein had written that most rabbinic fees were an embarrassment because they had an uncertain basis in the law.[176] As a result, he held that rabbinic compensation could never rise to the level of a livelihood that warranted legal protection against newcomers. By contrast, the Rema elevated the status of rabbinic fees to the rank of a livelihood entitled to some degree of legal protection against encroachers.[177] In his view, the newcomer is legally entitled to deprive the incumbent rabbi of his fees to a certain extent but no further.

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172. SHULHAN ARUKH, *Yoreh Deah* 245:22 (end).

173. Heb. *ketzat*, lit. "somewhat" or "a little."

174. *See, e.g.*, SHULHAN ARUKH, *Yoreh Deah* 245:22 (Rema) (parenthetical note).

175. *See supra* Part III.A.

176. *See supra* notes 126-29 and accompanying text.

177. The Rema's position is reiterated in his ruling regarding a visiting rabbi—he may not infringe upon the livelihood of a resident rabbi to any extent. REMA, *Yoreh Deah* 245:22 (end):

> But if a sage has come to the town for a temporary sojourn, he may not infringe upon the livelihood of the resident rabbi by performing weddings and taking fees, for this is the livelihood of the resident rabbi. He is permitted, however, to perform the wedding and remit the fee to the resident rabbi.

Thus, according to the Rema, the visiting rabbi may perform religious functions such as weddings, but only if he remits the customary fee to the resident rabbi. *Id.* In a sense, the fee belongs to the resident rabbi even if he does not perform the service that earns it. Although

The key to understanding the Rema's position is Rabbi Joseph's epigram: "[T]he envy of scholars increases wisdom."[178] This maxim has two connotations. Anyone who has spent time in academia understands the first. Scholars are jealous of each other's accomplishments. Although they are engaged in the world of ideas and learning for its own sake, they nonetheless seek recognition and envy those who advance beyond them in stature, rank, and title. This phenomenon was not entirely unknown among the rabbinic sages, as demonstrated by Rabbi Zadok's admonition against using the Torah as a crown for self-glorification.[179] If at least some of his colleagues were not doing just that, then whom was he addressing? Still, when the phenomenon manifested itself, the sages did not condemn it completely. The striving for recognition acted as a spur to intellectual achievement, generating fresh ideas, new interpretations of texts, and innovative solutions to problems, the net result of which was an increase in the quantum of knowledge of the Torah in the world. In this sense, the maxim expresses an insight into the psyche of the scholar that explains what makes him toil and strive at his intellectual pursuits.

The maxim has a second, purely economic connotation. For this purpose, it is better to translate the Hebrew word for "envy" as "competition" and to render the phrase, "competition among scholars increases wisdom." Competition among scholars is not like competition among merchants or craftsmen. A small local economy can support only so many shops or tradesmen engaged in a given line of work. If, for example, a second cobbler enters a town already served by one, there may be more shoes available to the public for a short time but eventually the situation will change. The local market for shoes being only so large, one of the competitors will be driven out of business and the town will revert to being served by a single cobbler. In the end, there will be no net gain in the number of shoes available to the public. Enforcing the residence ban as a system of trade protection tended to prevent this vicious cycle from occurring.

But the same is not true in the case of rabbinic scholars. Their stock-in-trade is knowledge of the Torah. Wisdom is not like shoes—there is no limit on the market for wisdom. Hence, competition among scholars is not like competition among cobblers, for the Jews can absorb the insights, interpretations, and teachings of an unlimited number of Torah scholars. The arrival of a new one in a town will in no way drive an established scholar out of the marketplace for ideas. For this reason, those who held that Rabbenu Gershom instituted the residence ban[180] also held that he exempted scholars, recognizing that competition among scholars increases wisdom.[181]

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the Rema does not say so, it would seem to follow that the visiting rabbi does not have the option of performing the service gratis unless the resident rabbi agrees to forgo the fee. As the Rema puts it, "this is *the livelihood* of the resident rabbi." *Id.* (emphasis added).

178. TALMUD, *Bava Bathra* 21b-22a.

179. MISHNAH, *Avot* 4:5; *see supra* Part II.A.

180. *See supra* note 146 and accompanying text.

181. RABBI SHALOM MORDECAI SCHWADRON, RESPONSA, Part V, No. 15.

The application of the maxim in this second sense is apt only so long as Torah sages perform their functions gratis. Its application to scholars who accept fees for their services is questionable. When they take fees, an analogy can be drawn between scholars and ordinary tradesmen. There are only so many weddings and divorces for the rabbi to perform, yeshiva students to teach, witnesses to depose, and lawsuits to try in a single community. If a newcomer attracts fees that would otherwise flow to the established rabbi, it is quite possible that in the course of time one of them will not be able to support himself and his family from his rabbinic practice. He will either have to leave town or change his profession. The town will revert to being served by a single rabbi and there will be no net gain of either scholars or wisdom in the town.

A century separated Rabbi Isserlein's decision in the Regensburg matter and the Rema's ruling in the *Shulhan Arukh*. Trends that were just noticeable in Isserlein's day were entrenched by the time of the Rema. We have seen how, once accepting compensation became the norm, there were frequent instances of intense competition among rabbis for positions and fees.[182] As a concomitant development, rabbis began to level the charge of trespass against colleagues who invaded their economic territory.[183] The Rema's ruling takes these developments into account, seeking to regulate and to moderate the impact of the new economic competition on the newly salaried rabbinate. He rules that scholars, while exempt from the residence ban, may encroach on an incumbent rabbi's livelihood "to a certain extent" only, fully understanding that if a newcomer reduces an incumbent's income to a greater extent, and certainly if he deprives him of his livelihood entirely, the incumbent may be driven from the rabbinate. Instead of an increase in the number of scholars in the town, a new scholar's arrival may herald only the replacement of the old rabbi by a new one. Given such an outcome, it would be hard to argue that competition among scholars had resulted in an increase in wisdom. The Rema was willing to protect the incumbent's livelihood to the extent necessary to prevent this from happening, even though it meant departing from Isserlein's view that rabbinic compensation was not to be deemed a "livelihood" entitled to legal protection.[184] As we shall see, the Rema's successors were willing to protect the incumbent's fees even further.

C. *"An Outright Thief"*

The Rema's ruling marked a watershed because of the authoritativeness of the author and the thrust of his position extending legal protection to the

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182. *See supra* notes 117-23 and accompanying text.

183. *See* MORDECHAI BREUER, THE RABBINATE IN ASHKENAZ DURING THE MIDDLE AGES 20-21 (1976) (Heb.) (noting that the charge of *hasagat gevul*, trespassing against another's economic boundaries, was never leveled by one rabbi against another until they began to receive salaries and fees, and that such accusations were most prevalent during the fifteenth century, when accepting compensation became the norm).

184. *See* RABBI SHALOM MORDECAI SCHWADRON, RESPONSA, Part V, No. 15.

established rabbi's livelihood. In the end, it offered little practical guidance for regulating competition among rabbis. Just what marked the "certain extent" by which a newcomer might lawfully reduce the resident rabbi's income? The incumbent might draw the line at any amount that exceeded a *de minimus* reduction of his income. A careful newcomer who wished to remain within the bounds of propriety might not necessarily disagree. This, however, would make it next to impossible for him to earn his own livelihood in the rabbinate, rendering his right to settle in the new town largely useless. On the other hand, if the newcomer interpreted the Rema's ruling as a license to earn from his rabbinic practice at least enough to support himself and his family, he was almost certain to violate the ruling by depriving the incumbent rabbi of more than "a little" of his customary livelihood.

To resolve controversies of this type, the Rema's successors explored the implications of his ruling. In the process, they enlarged the scope of protection afforded the incumbent's fees. In their rulings, one can discern the embarrassment over fees, so candidly expressed by Rabbi Israel Isserlein, dissipating generation by generation as the emoluments of the office become more and more entrenched.

One approach involved giving the Rema's ruling and the passage in Rabbi Isserlein's work on which it was based a very close reading. There are indeed fees paid to rabbis that have an uncertain basis in Jewish law and cause embarrassment, just as Rabbi Isserlein had written. These are the fees paid for core rabbinic functions such as officiating at weddings and divorces. But there are also fees which have a solid foundation in the law and do not cause any embarrassment. Examples are the fees rabbis receive for their scribal activities and for their service as arbitrators. These fees were not the subject of Rabbi Isserlein's condemnation, and rabbis may accept them without any qualms. The Rema's ruling, which limited the newcomer to reducing the incumbent rabbi's livelihood to a certain extent only, applies just to the first category of fees—those that cause embarrassment. As to the second category of fees, the newcomer may not encroach at all.[185]

A second approach to the Rema's ruling afforded even greater protection to the established rabbi's livelihood. It acknowledged the distinction between the two categories of fees but held that the distinction exists purely as a matter of law. The Rema's ruling was accurate in describing the law but the ruling should not govern the newcomer's conduct. It is the custom not to distinguish between the two types of fees. Custom dictates that the newcomer should refrain from depriving the established rabbi of any part of his income, whether derived from one class of fees or the other.[186]

A third approach challenged the view that the Rema's ruling correctly stated the law for his or subsequent generations. This was the approach of

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185. RABBI SHABBETAI BEN MEIR HA-KOHEN, SIFTEI KOHEN (Shakh), *Yoreh Deah* 245, ¶ 16; RABBI SHALOM MORDECAI HA-KOHEN SCHWADRON (Maharsham), RESPONSA, Part V, No. 15.

186. RABBI SHABBETAI BEN MEIR HA-KOHEN, SIFTEI KOHEN (Shakh), *Yoreh Deah* 245, ¶ 16; RABBI YEHIEL MICHAL EPSTEIN, ARUKH HA-SHULHAN, *Yoreh Deah* 245:28.

Rabbi Moses Sofer of Pressburg.[187] In his opinion, when the Rema adopted Rabbi Isserlein's division of rabbinic fees into two classes, one embarrassing and one not, he had affirmed an outmoded rule of law, one that had been superseded. According to Rabbi Sofer, a discerning eye that looks closely into the responsa of Rabbis Weil and Isserlein upon which the Rema's ruling was based would see that their decisions were limited to their day when appointment as rabbi was informal. In those days, when a community turned to a scholar who happened to live in its midst to serve as their rabbi, their fees flowed to him as a natural consequence of his service. But because he had never been appointed to his post officially, no one was prevented from turning to a newcomer to serve those same needs. The newcomer would naturally be rewarded for his services just as his predecessor had been.

In our day, according to Rabbi Sofer, the situation is quite different. Today, a community deliberately invites a candidate to come and serve as their rabbi, often requesting him to relocate from a distant place. They hire him as an employee and as a community, they are obligated to provide him with a livelihood. The best way for the community to discharge its obligation would be to pay the rabbi from its general fund. Instead, many communities delegate their obligation to support the rabbi to those individuals who utilize his services. Their fees discharge the community's obligation to provide its rabbi with a livelihood. This practice is widespread, Rabbi Sofer wrote, and we have completely overcome our embarrassment over these fees. In fact, if the rabbi has any qualms about taking them, we force him to accept them. Anyone who encroaches on his fees to any extent is an evildoer.[188]

In our discussion of the Regensburg case,[189] we noted that only Rabbi Weil had based his ruling on the fact that the incumbent had never been formally appointed to his post, while Rabbi Isserlein had not mentioned this factor at all. Further, it was unclear how Weil would have ruled if Rabbi Anshel, the target of the competition, had been the recipient of a formal rabbinic appointment from the town.[190] Nevertheless, Rabbi Sofer's reinterpretation of their rulings was itself considered so authoritative that it provided the basis for subsequent restatements of the Rema's ruling. Thus, Rabbi Yehiel Epstein in his late code of law, after quoting the Rema's ruling in full, adopts Rabbi Sofer's view of the matter, ruling that it is forbidden in our day for a rabbi to settle in a town already served by a rabbi and to encroach on his fees.[191] A newcomer who deflects fees away from the appointed rabbi to any extent is no better than an outright thief.[192]

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187. RABBI MOSES SOFER (Hatam Sofer, 1762-1839), RESPONSA, Vol. 6, Hoshen Mishpat No. 21.

188. *Id.*

189. *See supra* Part III.A.

190. *See supra* note 133.

191. RABBI YEHIEL EPSTEIN, ARUKH HA-SHULHAN, *Yoreh Deah* 245:28; *accord* RABBI MALCHIEL TENENBAUM, DIVREI MALCHIEL, Part IV, § 82.

192. RABBI YEHIEL EPSTEIN, ARUKH HA-SHULHAN, *Yoreh Deah* 245:28.

The reassessment of the Rema's ruling by his successors achieved two results. First, it strengthened one part of the ruling, the part that protected an incumbent's livelihood, at the expense of the other part of the ruling, the part that exposed an incumbent's fees to some competition from a newcomer. Second, it formally ended the traditional embarrassment over rabbinic fees that Rabbi Isserlein had expressed. The pendulum had swung decisively against the newcomer. Labeled an evildoer by the *Hatam Sofer* and an outright thief by Rabbi Yehiel Epstein, he was liable to feel more embarrassment over deflecting fees from the established rabbi than the incumbent felt upon accepting them. Without the ability to compete for fees, the newcomer's right to settle in a new town, which Isserlein, Weil, and the Rema had all endorsed, was rendered more theoretical than real.

IV. TENURE

Rabbinic tenure is used here to denote a rabbi's entitlement to retain his position for life subject only to removal for cause. It both complements and supplements the principles discussed in Parts II and III, for once the rabbi's salary was legally sanctioned and his livelihood insulated from competition, tenure would guarantee his ability to enjoy the benefits of office for the longest possible time—the remainder of his life. Still, like all legal assurances, a rabbi's ability to realize lifetime tenure varied from time to time and from place to place.

The concept of tenure was a broad one that protected native rabbis as well as those imported from afar, but rabbis who had been invited by a Jewish community to relocate from a distant place and take up residence as spiritual leader in a new town made an especially compelling argument for tenure. Some argued it would be unduly harsh for the appointee to have uprooted himself and his family and traveled to his new post at the town's invitation only to be told after the passage of a number of years that his services were no longer required.[193]

Removal by the community at will could have potentially negative consequences. We have seen how disputes over rabbinic appointments could engender bitter divisiveness within a community.[194] To keep an incumbent rabbi in jeopardy of removal would mean that a new controversy might erupt at any moment and shatter communal calm. Perhaps it was better, once an appointment was made, to regard the matter as closed "for the sake of peace."[195] By the same token, granting a rabbi tenure for life delayed the onset of the next appointment controversy for the longest possible time.

Tenure had additional benefits for the community. The rabbi's long service would permit him to become intimately acquainted with the

193. RABBI MOSES SOFER (Hatam Sofer), RESPONSA, *Orah Hayyim* 205-06; RABBI YEHIEL EPSTEIN, ARUKH HA-SHULHAN, *Yoreh Deah* 245:28.

194. *See supra* notes 122-23 and accompanying text.

195. Heb. *mipne darkei shalom*. *See* MISHNAH, *Gittin* 5:8 and BEIT YOSEF, *Orah Hayyim* 53 (end) (citing Rashba).

community and its affairs. His job security would give him the freedom to render unpopular decisions and, when necessary, chastise his congregation in his sermons.[196] In this respect, rabbinic tenure would serve one of the functions academic tenure serves in modern universities, affording the tenured rabbi the equivalent of academic freedom.

Designating our topic as "tenure" naturally invites comparisons with academic tenure, a concept it resembles in some respects. There is this important distinction between the two, however. While a university professor must earn academic tenure over time, rabbinic tenure is an entitlement conferred automatically upon appointment to a post. For a rabbi there is no probationary period during which his performance is judged by peers applying objective and subjective criteria.[197] Of course, the rabbi's qualifications for office will have been evaluated by the community when considering him for appointment, but it is upon assuming the post,[198] at a time when his actual performance in office is unknown, that his lifetime tenure commences. Thus, alongside the benefits there is some risk to the community in acceding to the rabbi's demand for tenure at the time of his initial appointment.

On a practical level, the community was always in control of the rabbi's employment because it possessed the power of the purse. We have referred earlier to instances in which community leaders, claiming funds were needed for other purposes, neglected to pay a rabbi's salary, in one case for 40 weeks, in another for five years.[199] In the first case, the rabbi went on strike; in the second he threatened to leave his post. But for every rabbi who merely threatened to leave his post, there may have been another who actually did when his salary went unpaid.[200] Apart from his salary from the town, there

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196. In his study of medieval Jewish communities, Baron found that where rabbis did not have lifetime tenure, they tended to curry favor with the electors. BARON, *supra* note 94, at 94. He also found that rabbis who had lifetime tenure tended to become autocratic. *Id.*

197. Where a rabbi is not the recipient of a formal appointment but achieves his status in a town informally by gaining the recognition of the townsfolk over time, there necessarily will be a probationary period of three or five years before he is considered established in his post. *See* RABBI SHALOM SCHWADRON (Maharsham), RESPONSA, Part III, No. 73 (citing *Mabit* for the three year rule and *Rivash* for the five year rule). On formal versus informal appointment to the rabbinate, see *supra* Part III.A.

198. Or even earlier. *See* RABBI MOSES ISSERLES (Rema), RESPONSA, No. 50 (holding that community ordinarily cannot rescind its appointment of a rabbi during the period prior to the date on which he takes office and commences service).

199. *See supra* notes 99, 134-40 and accompanying text.

200. Etkes notes that we lack realistic accounts of disputes of this type because few rabbis wrote autobiographies, and incidents of this sort were not likely to be included in the admiring biographies written by their students and descendants. Etkes, *supra* note 98, at 119. He does cite the following anecdote told of a rabbi in the first half of the nineteenth century, Rabbi David of Novaredok. The rabbi was asked how much he earned and replied, "This week three rubles." When his questioner asked why he responded "three rubles *this* week" instead of

were the rabbi's fees for services. He could be deprived of these as well if people shifted their patronage away from one scholar to another whom they preferred.[201]

In addition to these practical considerations, there is a more fundamental objection to lifetime tenure for rabbis. This arises from the community's acknowledged authority to consent to the appointment of its leaders. That community consent is required for their appointment is a fundamental principle of Jewish law, embodied in a Talmudic dictum which states, "We must not appoint a leader over a community without first consulting it."[202] Communal consent to the appointment is implicit in the dictum, for otherwise the consultation would be an empty gesture.[203] In the archetypal case, the Talmud relates how Bezalel, who was called by God to serve as chief artisan of the Tabernacle, was nonetheless at God's command presented by Moses to the Israelites for their approval.[204] Rabbinic commentators found support in the Mishnah for the proposition that even a king who inherited his office from his father required the consent of the people's representatives before ascending to the throne.[205] That rabbis required communal consent for their appointment was never doubted.[206]

Given the requirement of consent for the appointment of a rabbi, the question arises whether it is not inconsistent to withhold from the community

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"three rubles *a* week," Rabbi David replied, "In a week when they pay I receive three rubles, and in a week when they don't pay I earn nothing." *Id.* at 117 (emphasis added).

201. *See, e.g.*, RABBI MALCHIEL TENENBAUM, *Divrei Malchiel* 4:82 (citing a town that was served by two rabbis, one Ashkenazic and the other Sephardic, where most of the townsfolk, including the Sephardim, preferred the Ashkenazic rabbi and took their matters to him; when he died, the Sephardic community appointed the Ashkenazic rabbi as their own rather than accept the Sephardic rabbi's heir); *see also* RABBI MOSES FEINSTEIN, *Iggerot Moshe, Hoshen Mishpat*, Part I, No. 38. Here members of a congregation broke away from their rabbi to found a synagogue of their own. Their former rabbi protested because their action reduced his income and the value of his synagogue building, which he owned. Rabbi Feinstein held that the breakaway faction (whose reasons for separating he did not regard as legitimate) had impermissibly deprived the rabbi of his livelihood. He conceded, however, that if they closed their new synagogue and prayed instead at a service at an established congregation in a distant location, they would no longer be guilty of invading the complaining rabbi's territory, either economic or geographic. *Id.*

202. TALMUD, *Berakhot* 55a.

203. How the community's consent should be ascertained, whether in a direct fashion or through a representative body such as the Great Sanhedrin of 71 or a local board of electors, and who is entitled to participate in the deliberations are issues that were debated by halakhic authorities and subject to local practices. *See* Menachem Elon, *Public Authority and Administrative Law, in* THE PRINCIPLES OF JEWISH LAW 645-54 (Menachem Elon ed., 1975).

204. TALMUD, *Berakhot* 55a.

205. RASHI, *Rosh Ha-Shanah* 2b.

206. *See, e.g.*, RABBI SHALOM SCHWADRON, RESPONSA, Part III, No. 73 (citing rule that community must consent to appointment of a rabbi and holding that even when board of electors selects a rabbi, the majority of the community must ratify their choice).

discretion over removal, for it is the community's withdrawal of their consent to a rabbi's continued service that will act as the catalyst for seeking his removal. Put another way, why does the need for the community's consent dissipate once a rabbi takes office? Rather, should not an incumbent, when he loses the public's mandate to serve, become subject to removal by them at will?[207]

The following sections of Part IV examine first the halakhic justifications for rabbinic tenure, next the relationship between tenure and merit in the selection and retention of rabbis, and finally the way custom and case-by-case challenges to incumbents preserved for the community a measure of control over its spiritual leadership.

A. *Justifications for Tenure*

In making their case for rabbinic tenure, halakhic authorities developed a variety of arguments. They equated the rabbinate with two tenured positions, those of king and High Priest. They weighed the harm that might be caused to a rabbi's reputation if he were removed from office without just cause. They applied to rabbinic posts the Talmudic maxim, "We elevate in matters of sanctity but we do not decrease." In this Section, we survey these three justifications for rabbinic tenure.

1. *The Analogy to Monarchy and Priesthood*

Halakhic authorities drew an analogy between the rabbinate and two institutions of communal leadership mentioned in the Bible—monarchy and priesthood. It was clear from Scriptural verses that monarchy and priesthood

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207. For the suggestion that the power to remove at will follows logically from the community's necessary consent to appointments, see TOSAFOT, *Yoma* 12b:

> And one may say that the High Priest is appointed orally and removed orally. In the *Yerushalmi* they derive this from Scripture, and it is logical that the matter should depend on the king and his fellow priests.

That the High Priest's *appointment* depends on his fellow priests follows from the general rule, "We do not appoint a leader over a community without first consulting it," for the priests are the community which the High Priest leads, and they must consent to his leadership. The question is whether the same principle applies to *removal*. The clear import of the passage is that logically it does.

Read this way, the passage is problematic for those who would grant communal appointees lifetime tenure and deny the community the right to remove at will. For an attempt to deal with the passage from this perspective, see Rabbi Benjamin Rabinowitz-Teomin, *Ma'alin Be-Kodesh, in* THE LEO JUNG JUBILEE VOLUME 59-66 (M. Kasher ed., 1962) (Heb.) (interpreting passage in *Tosafot* as referring to removal *for cause* only); *see also* 20 RABBI BEZALEL SOLTI, BEHIRAT RABBANIM, TORAH SHE-BAAL PEH 26, 31 (5739) (explaining why priests must consent to High Priest's appointment).

were lifetime callings that passed by inheritance to heirs.[208] It was also plain from Biblical narratives that many kings and high priests served in Israel, while more worthy individuals were available to replace them, and yet the incumbents were never removed from office on this account.[209] By analogy, halakhic authorities invested rabbis with lifetime tenure and held that they were not subject to removal solely because better qualified candidates became available to replace them.[210]

The analogy yielded an additional argument in favor of rabbinic tenure. Most halakhic authorities held that rabbinic posts, like monarchy and priesthood, descended by inheritance to an incumbent's qualified heir.[211] From this they constructed an *a fortiori* argument in favor of lifetime tenure. If a rabbi's appointment guarantees the post at his death to his heir, then it must surely guarantee the post to the incumbent himself for his life.[212]

These arguments have merit to the extent the analogy is apt. Is a rabbinic post rightly to be regarded as sufficiently akin to the office of monarch or High Priest to warrant similar treatment for purposes of tenure and inheritance? Jewish tradition recognizes three separate and distinct spheres of authority—the crown of monarchy, the crown of priesthood, and the crown of Torah.[213] But after the destruction of the Temple, the rabbis, who regarded themselves as custodians of the third crown, also regarded themselves as successors to the first two.[214] The analogy was persuasive for them and they deliberately employed it to afford a Scriptural basis for the rabbinate, essentially a post-Biblical institution.[215]

2. *To Avoid Creating Suspicion*

Under Jewish law, the occupant of every communal office, including rabbis, could be removed for cause,[216] whether due to malfeasance in office,

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208. On the monarchy, see *Deuteronomy* 17:20 and the midrashic comment in SIFRE, *Piska* 162; on the priesthood see *Leviticus* 16:32 and the midrashic comments in SIFRA, *Tsav* ch. 5, ¶ 2 and *Aharei Mot* ch. 8, ¶ 5.

209. RABBI MOSES MI-TRANI (Mabit), RESPONSA, Part III, No. 200.

210. *Id.*

211. RABBI ISAAC BEN SHESHET PERFET (Rivash), RESPONSA, No. 271; SHULHAN ARUKH, *Yoreh Deah* 245:22 (Rema).

212. RABBI MOSES MI-TRANI (Mabit), RESPONSA, Part III, No. 200.

213. MISHNAH, *Avot* 4:13; TALMUD, *Yoma* 72b; MISHNEH TORAH, *Talmud Torah* 3:1.

214. *See* Stuart A. Cohen, *Keter as a Political Symbol: Origins and Implications*, 1 JEWISH POL. STUD. REV. 39, 51 (1989).

215. *See* STUART A. COHEN, THE THREE CROWNS: STRUCTURES OF COMMUNAL POLITICS IN EARLY RABBINIC JEWRY 237-41 (1990) (describing "exegetical transfer" whereby rabbis removed Biblical provisions relating to offices of monarch and High Priest from their contexts and applied them to rabbinic positions).

216. *See, e.g.*, MISHNEH TORAH, *Temple Vessels* 4:21 ("One was never removed from an office in the midst of Israel unless he acted offensively."); HAYYIM BENVENISTE, *Knesset Ha-Gedolah* 53 (same). The official who repented and accepted punishment was returned to his

leading an immoral life, violating precepts, or straying into foreign cultures. This provided an argument on behalf of lifetime tenure for rabbis who were innocent of these faults. Removing someone who was blameless simply because the community changed its allegiance and preferred another would arouse the suspicion, among those unfamiliar with the facts, that the incumbent had been removed for cause. This blemish to his honor was a stain that a rabbi who properly discharged his duties did not deserve. Lifetime tenure thus secured not only the innocent rabbi's post, but also his good name and reputation.[217]

The former Chief Rabbi of Israel, Rabbi Abraham Isaac Kook, wrote movingly of the terrible distress an individual experiences upon removal from office, when he is stripped of his honors and sees his position pass to another.[218] The psychological trauma of removal is compounded when there is no just cause.[219] Rabbinic tenure ensures that the rabbi who is blameless will not suffer this distress gratuitously.

3. *The "Holiness Principle"*

Perhaps the most important justification for rabbinic tenure was rooted in a fundamental tenet of Judaism. The Jewish tradition seeks to attain holiness in the world. When, in the wilderness of Sinai, God revealed His intention to transform the Israelites into "a kingdom of priests and a holy nation,"[220] He commanded them to be holy "for I, the Lord your God, am holy."[221] The course of Jewish history, as well as the trajectory of each individual's life, must be away from that which defiles and towards that which sanctifies.

In the Talmud, this principle is embodied in a legal maxim which states, "We elevate in matters of sanctity but we do not decrease."[222] Sacred status, once achieved, is permanent, and while one may ascend to a higher level of sanctity, one may not revert to a lower level.[223] We shall refer to this principle as "the holiness principle."

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former post. *See* MISHNEH TORAH, *Temple Vessels* 4:22 and *Sanhedrin* 17:8 (citing rule that High Priest who sinned was flogged and then returned to office).

217. JOSEF KARO, *Beit Yosef, Orah Hayyim* 53 (end).

218. Rabbi Abraham Isaac Ha-Kohen Kook, *Hasagat Gevul Be-Rabbanut,* 5 TECHUMIN 285, 286 (5744).

219. *Id.*

220. *Exodus* 19:6.

221. *Leviticus* 19:2. For a discussion of the concept of holiness in Judaism, see Chief Rabbi Hertz's commentary on this verse in 1 J.H. HERTZ, THE PENTATEUCH AND HAFTORAHS 497 (1941).

222. Heb. *ma'alin be-kodesh ve-lo moridin.*

223. MISHNEH TORAH, *Temple Vessels* 4:21.

The principle found many applications in Talmudic jurisprudence,[224] among them two that have a bearing on tenure in office. In the first, the Mishnah relates how, seven days prior to Yom Kippur, an ordinary priest was designated as substitute High Priest.[225] If the High Priest became unable to perform the Temple rites on the holy day by reason of illness or ritual disqualification, then the substitute officiated in his place. Once such an event occurred and Joseph ben Ulam was called upon to substitute. When the High Priest recovered, he resumed his position. As to the future status of the substitute, the sages ruled as follows: He cannot continue to serve as High Priest to prevent the rivalry that was sure to arise if two individuals held the same post. Nor, having attained the status of High Priest, even temporarily, could he revert to his former rank as an ordinary priest because "we elevate in matters of sanctity but we do not decrease."[226]

That the holiness principle should apply with full vigor to the sacred personnel who ministered in the Temple seems clear. That it applies as well to rank and status outside the Temple precincts was demonstrated by a second matter related in the Talmud. After the destruction of Jerusalem in 70 C.E., a group of scholars assembled in the village of Yavne to preserve the oral traditions of the Jewish legal heritage. For almost four decades starting around 80 C.E., a scholar named Rabban Gamaliel served as president of the assembly. The Talmud relates an occasion on which he behaved in an insulting manner towards Rabbi Joshua, a member of the assembly who disagreed with him on a legal point. This was the third occasion on which Rabban Gamaliel had behaved in this fashion and, as a result, the assembly removed him from the presidency. They appointed Rabbi Elazar ben Azariah to replace him. A short time later Rabban Gamaliel and Rabbi Joshua were reconciled. The latter persuaded his colleagues to restore Rabban Gamaliel to his post. This presented the scholars with a dilemma, for restoring Rabban Gamaliel would mean removing Rabbi Elazar and this would violate the holiness principle. They solved the problem by establishing a co-presidency. Thereafter Rabban Gamaliel delivered the president's address on three Sabbaths each month and Rabbi Elazar preached on one.[227]

Rabban Gamaliel's removal did not violate the holiness principle for he had committed an impeachable offense, insulting a scholar, and was removed for cause. But the co-presidency presented difficult problems under the holiness principle. It seemed that both he and Rabbi Elazar were experiencing some reduction in status by having to share the honors of office with each other. Rabbinic commentators offered a number of semantic arguments to explain the result. Conceding Rabban Gamaliel was demoted

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224. MISHNAH, *Menahot* 11:7 (order of removal of Shewbread); TALMUD, *Shabbath* 21b (ascending number of Hanukkah candles); TALMUD, *Menahot* 39a (order of winding white and blue threads on fringes) and 79a (when blemished animal may not be taken down from the altar).

225. MISHNAH, *Yoma* 1:1.

226. TALMUD, *Yoma* 12b; TALMUD, *Megillah* 9b.

227. TALMUD, *Berakhot* 27b-28a.

"somewhat," they argued that he retained "the essence" of his office and that a partial reduction in status did not constitute the degree of demotion that would violate the holiness principle.[228] As for Rabbi Elazar, he, unlike Rabban Gamaliel, was not a descendant of the great sage Hillel who himself had served as president of the scholars' assembly some seventy years earlier. Having been appointed president without the benefit of inherited right to the office, Rabbi Elazar's ascent did not constitute a full-fledged ascent so that his reduction in status did not constitute a full scale reduction.[229] Again, no violation of the holiness principle occurred. It was also possible that Rabbi Elazar had experienced no reduction at all for the reappointment of Rabban Gamaliel may have come within a week of his removal by which time Rabbi Elazar had delivered the president's address only once.[230]

In truth, the efforts to reconcile the arrangement with the holiness principle were not totally successful and the propriety of joint appointments remained open to question.[231] It was clear from the narrative, however, that the holiness principle did apply to rank among the Talmudic sages. Because they were the precursors of the rabbinate, it followed that it applied to rabbinic rank as well. The rabbis' close association with the study and dissemination of the holy Torah fortified the conclusion, for appointment to a rabbinic chair was considered a sacred calling.[232] As applied to rabbinic appointments, the notion that "we elevate in matters of sanctity but do not decrease" means that once appointed, a rabbi, absent cause, could not be removed from his post. In this fashion, the holiness principle served as an important underpinning for the concept of rabbinic tenure.

B. *Tenure and Merit*

Rabbinic tenure as understood by most halakhic authorities entitles an incumbent rabbi to retain his post even after someone more learned becomes available to replace him. The Rema states the rule as follows:

> One who is established as rabbi in a town, even where he established himself in his post, should not be removed from his post even though there may come to the town another who is greater than the first [in learning] . . . .[233]

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228. "A" v. Selection Board of the Ashkenazic Chief Rabbi in City "B", 11 P.D.R. 97, 109 (5735). *But see infra* notes 266-70 and accompanying text.

229. *Id.*

230. RABBI MALCHIEL TENENBAUM, *Divrei Malchiel*, Part IV, No. 82.

231. *See infra* notes 266-70 and accompanying text.

232. *See, e.g.*, RABBI MOSES SOFER (Hatam Sofer), RESPONSA, *Orah Hayyim* 12 (holding that appointment of rabbi, unlike that of king, is a sacred appointment, *minui kedusha*); RABBI ABRAHAM BORNSTEIN (1839-1910), AVNEI NEZER, No. 312, Pt. 34 (disagreeing with *Hatam Sofer* as to king but not as to rabbi and holding that both are sacred appointments).

233. SHULHAN ARUKH, *Yoreh Deah* 245:22.

This preference for incumbency over merit is a problematic feature of rabbinic tenure. It is true that many important values can be cited to support it, including communal peace and stability, the honor of the incumbent, and the value to the community of his accumulated experience. There is also the admitted difficulty of comparing the scholarly attainments of two learned individuals and the ever-present danger of making a mistake, especially serious when the livelihood of one of them depends on the outcome of the assessment. But it seems certain that under the doctrine of rabbinic tenure there will be instances in which the supreme value—the provision of the highest possible level of Torah scholarship to any given Jewish community—will be sacrificed.[234]

Two expectations mitigate to some extent this consequence of rabbinic tenure. First, an incumbent rabbi, obligated like every Jew to study the Torah each day, is expected to continue his studies while in office. Thus, whatever the state of his knowledge upon taking office, he will increase it over time. Second, Divine guidance will counteract any deficiency in his ability. He will be assisted from on High to issue rulings that are correct.[235] The minimum qualifications for the rabbinate, some learning and a fear of Heaven,[236] lend credence to both expectations. Possessing at the very least the rudiments of scholarship, a rabbi will be able to tutor himself, and his fear of Heaven assures that he will not treat the obligation to do so lightly.

In addition, there is an important exception to rabbinic tenure. A rabbi may be removed from office and replaced by a greater scholar when the incumbent is not learned at all, that is, when he is an ignoramus.[237] An ignorant person may never rely on his incumbency to preserve his office against a person with learning for this would dishonor the Torah possessed by the learned individual in favor of an empty vessel who possesses none. Furthermore, there is no hope that an ignoramus will be able to tutor himself adequately to discharge his duties as rabbi.

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234. *See* RABBI MOSES BEN JOSEPH MI-TRANI (Mabit), RESPONSA, Part III, No. 200 (denying request of some community members to replace their rabbi who had served 19 years with a person who, they claimed, was better qualified than the incumbent), discussed *infra* Part IV.D.

235. *See, e.g.*, RABBI JOSEPH NATHANSON (d. 1875), SHOEL U-MASHEEV, Part II, No. 17 (stating that Heaven will assist heir who inherits his post to acquire knowledge and achieve a level comparable to his father's); YAAKOV WEISS, RABBANUT U-KEHILA BE-MISHNAT MARAN HA-HATAM SOFER 47 (1987) (citing Rabbi Moses Sofer for the view that it would be impossible for any rabbi, even of the smallest community, to conduct its affairs without Divine help); *see also* Samuel Leiter, *Worthiness, Acclamation, Appointment: Some Rabbinic Terms*, 41-2 PROCEEDINGS OF THE AMERICAN ACADEMY OF JEWISH RESEARCH 137, 156 (1993) ("This is the paradox of appointment: When one attains office he is endowed with the necessary qualities. His deficiencies are made up by his induction.").

236. SHULHAN ARUKH, *Yoreh Deah* 245:22 (Rema).

237. RABBI ISAAC BEN SHESHET PERFET, RESPONSA, No. 271; RABBI HAYYIM AMARILLO (1695-1748), SEFER D'VAR MOSHE, ORAH HAYYIM, *Hilkhot Shatz* § 1.

It seems startling at first blush that an unlearned person might come to occupy a rabbinic chair, but it could occur quite innocently. Small, poor, distant Jewish communities would always have difficulty attracting and maintaining qualified scholars and might have to settle for someone with minimal qualifications.[238]

It must also be conceded that there were unscrupulous persons who purchased or forged certificates of ordination and then purchased rabbinic offices.[239] Halakhic authorities considered such behavior an abuse,[240] but distinguishing these rabbinic pretenders from persons with the requisite training sometimes proved difficult for the lay leaders of Jewish communities, especially in periods of persecution and natural disaster when learning and scholarship naturally declined and qualified rabbis were few.[241]

A responsum from the prominent Spanish authority, Rabbi Joseph ibn Migash,[242] sheds light on the intermediate category of scholar, that is, the scholar who is neither completely learned nor completely ignorant. He was asked for his view of the rulings of those who had never studied *halakha* under the tutelage of a rabbi and did not understand its operation but are able to read the opinions of the *geonim*, the scholars in Babylonia in the four centuries after the close of the Talmud, and their summaries of the law. Often these individuals issue contradictory rulings and are not aware that the *geonim* sometimes retracted their views in later opinions. Additionally, they fail to realize that the manuscripts on which they rely contain scribal errors. Can one rely on the rulings of someone who uses secondary sources for the *halakha* without the ability to support his conclusions from the Talmud?

For Ibn Migash, these marginal scholars were better qualified to issue rulings than many who had undertaken the task in his day for these individuals lack the ability both to study the Talmud and to read the opinions of the *geonim*. They believe that by consulting the Talmud directly they can

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238. RABBI ISAAC BEN MOSES OF VIENNA, *Or Zaru'a*, No. 113 (stating that impoverished Jewish communities in Central Europe have to accept whatever intelligent person they can find to serve as cantor, teacher, and preacher); *see supra* Part II.C.

239. *See* Bernard Rosensweig, *The Emergence of the Professional Rabbinate in Ashkenazic Jewry*, 11 TRADITION 22, 28 (1970).

240. KATZ, *supra* note 112, at 198-99, 300 n.52 (citing Rabbi Sheftel Horowitz who praised the rabbis of Poland who excommunicated those who purchased a rabbinic office).

241. A notable example of this occurred in the fourteenth century when first the Black Death and then popular uprisings against the Jews decimated Jewish communities and their scholars, disrupting religious and educational life, including the training of rabbis. In the aftermath of the Black Death the Church confronted similar problems, having suffered significant losses in the ranks of the clergy, and it responded by ordaining the minimally qualified. *See* BARBARA W. TUCHMAN, A DISTANT MIRROR: THE CALAMITOUS FOURTEENTH CENTURY 118 (1978) ("To fill vacant benefices the Church ordained priests in batches. . . . Many were barely literate, 'as it were mere lay folk' who might read a little but without understanding."). On the uprisings against the Jews, see *id.* at 112-16.

242. RABBI JOSEPH BEN MEIR HA-LEVI IBN MIGASH (Ri Migash, 1077-1141), RESPONSA, No. 114.

ascertain the correct rules. They are wrong and should be prevented from even attempting to do so for in our day, Ibn Migash writes, we do not have scholars who are able to consult the Talmud and rely on their own conclusions. By contrast, one who consults the works of the *geonim* is less likely to make an error. The *geonim* wrote books which present the laws in a clear and concise manner, very unlike the complex labyrinth of Talmudic argumentation. Anyone who relies on their decisions is relying at the very least on the opinion of an expert court. This approach is praiseworthy so long as the individual is a God-fearing person seeking to do right.[243]

Thus, for a variety of reasons, there was the possibility that a rabbinic chair would come to be occupied by someone whose qualifications were marginal or nil. Our concern is how rabbinic tenure impacts a community's ability to remove such an individual from his post and replace him when, in due course, a more qualified candidate becomes available. Rabbinic tenure, as most halakhic authorities understood it, protected the post of the marginal scholar although no one argued that it protected the post of someone who was completely ignorant.

Not every halakhic authority was willing to concede the case of the marginal scholar. Rabbi David ben Hayyim of Corfu held that a greater scholar can always displace a lesser light, and this is true even with respect to the appointed rabbi of a town.[244] He cited in support of his view the Talmudic dictum, "In a place where there is no man, there be a man."[245] He held that the holiness principle, "We elevate in matters of sanctity but we do not decrease,"[246] applied only where two individuals are equal. In such cases, there are no grounds for removing the incumbent. But in all other cases, the greater scholar takes precedence.

With a view towards improving the quality of the rabbinate, Rabbi David's position has a great deal to recommend it. Under his approach, greater scholars may always replace lesser ones. Over time this approach would weed out marginal scholars from their posts. The net result would be an incremental improvement in the quality of the rabbinate, achieved at the expense of the second-rate scholars' positions. His, however, was the minority view. The majority held that rabbinic tenure protected a lesser scholar who was otherwise blameless, so long as he was not an ignoramus. This preference for incumbency over merit remains a troubling aspect of rabbinic tenure, a striking departure in a tradition which posits excellence in Torah studies as a paramount value.

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243. *Id.*

244. DAVID BEN HAYYIM HA-KOHEN OF CORFU (Radakh, d. 1530), RESPONSA, No. 22, § 11. The *Radakh*, like Ibn Migash four centuries earlier, was concerned about the quality of the rabbinate, writing that "in our day, on account of our many sins, there are judges who are unfit, who ordain empty vessels and who profane the name of God in public and plant an idol next to the altar of the Lord." *Id.* But the situation may have improved for he is willing to concede that the majority of rabbis are not in this category. *Id.*

245. TALMUD, *Berakhot* 63a.

246. *See supra* Part IV.A.

C. *Alternatives to Tenure*

The rabbis' striving for security in their posts was checked in many places by local customs that were inconsistent with granting them lifetime tenure. Because custom is a recognized source of Jewish law,[247] such customs are not necessarily invalid. It is the task of halakhic scholars to distinguish good customs from bad ones and to invalidate those that are erroneous, illogical, or violate fundamental principles of equity.[248] In this Section we examine how they performed this task in relation to customs that provided alternatives to rabbinic tenure.

1. *Rotation in Office*

In some towns, it was the custom to rotate public offices regularly among the learned and distinguished residents, distributing the honors as well as the burdens of public service and preventing any individual or a single family from monopolizing power.[249] Rotation was applied to both paid and honorary positions. In small communities, and especially during the early ages of Jewish settlement in Europe, even the spiritual leadership of the community could rotate in this fashion, for at the head of many families there stood a learned individual able to exercise this function.[250]

Although it was inconsistent with the principle of lifetime tenure, halakhic authorities regarded rotation in office as an acceptable alternative.[251] The practice satisfied most of their concerns regarding removal from office. The greatest threat to rabbinic security was a fickle public, perhaps aroused by the passions of the moment, that could remove a rabbi from office at will. So long as rotation was a regularized practice and applied to all officeholders in a community, turning them in and out of office according to a fixed schedule, then public animus against a particular individual would not be the motivating cause for anyone's dismissal. Further, no suspicions of wrongdoing were

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247. *See* M. ELON, THE PRINCIPLES OF JEWISH LAW 91-110 (1975).

248. *See id.* at 107-09.

249. KATZ, *supra* note 112, at 92, 173.

250. IRVING AGUS, THE HEROIC AGE OF FRANCO-GERMAN JEWRY 259 (1969). Agus believes that high levels of education and life-long devotion to study greatly multiplied the number of the erudite in pre-Crusade Ashkenazic communities, obviating the need for a professionalized rabbinate. Although Agus may exaggerate the extent of Torah scholarship in the general Jewish population, his point, that communities typically contained more than one person learned enough to exercise spiritual leadership, is plausible. *See, e.g.*, Yitzhak F. Baer, *The Origins of Jewish Communal Organization in the Middle Ages*, 1 BINAH 59, 76 (1989) (writing of "the justified assumption that the majority of the community [in 10th and 11th century Ashkenazic Jewry] were learned men; where reality did not match this ideal, it was understood that the 'small obey the great'").

251. Josef Karo, SHULHAN ARUKH, *Orah Hayyim* 53:26; BEIT YOSEF, *Orah Hayyim* 53 (end) (citing Rashba).

aroused when one resident passed from office and was replaced by the next in line according to a pre-set pattern.[252]

2. *Appointments for a Limited Term*

Similar arguments can be made in support of another custom inconsistent with lifetime tenure. In many communities, officeholders served for fixed terms determined at the time of their appointment. Upon the expiration of the term, it could be renewed or extended or the contract could be terminated.

In the case of rabbis, it was the practice in many communities to insert a fixed term, often three or five years, in their contracts of appointment. Early authorities tended to construe such provisions in a straightforward way, giving both parties at the expiration of the term free rein to renew or not to renew.[253] This construction was supported by simple logic and satisfied many of the halakhic concerns regarding removal from office. Leaving at the expiration of a set term would not incite any suspicions that the officeholder was removed for cause. It would not violate his fair expectations regarding the duration of his employment for he had agreed to the term before accepting the post. And, it need not be deemed a violation of the holiness principle if we are permitted to say that appointment for a limited term is not a full elevation in sacred status nor is leaving when a term expires to be deemed a "demotion," for the appointment merely expires of its own accord at the end the term.

There are counterarguments, of course. If the community has the option to renew an appointment and does not, then one might ask why, thereby raising suspicions about the rabbi's performance in office. Nor was the inapplicability of the holiness principle so clear-cut. The substitute High Priest was promoted for a limited time only—until the High Priest recovered—yet the holiness principle applied and he never reverted to the status of an ordinary priest.[254] Rabbi Elazar ben Azariah was appointed president for a limited time only—until Rabban Gamaliel apologized to Rabbi Joshua—and his case was covered by the holiness principle.[255]

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252. *Id.*

253. RABBI YOM TOV BEN ABRAHAM ISHBILI, HIDUSHEI HA-RITVA, *Maccot* 13a (stating that only in the case of a contract in which no fixed term of appointment is stated may a rabbi be removed from office only for cause); REMA, SHULHAN ARUKH, *Yoreh Deah* 245:22 (end) ("[I]n a place where it is the custom to accept a rabbi for a fixed term or to appoint whomever they wish, they have authority to do so."); RABBI HAYYIM BEN ISRAEL BEVENISTE (1603-1673), KNESSET HA-GEDOLAH 53 (stating that the community can remove a rabbi either for cause or at the end of the term fixed in his contract of appointment); *see also* RABBI JOSEPH HAZZAN, HEKREI LEV, *Orah Hayyim*, Part I, No. 18 (stating that a congregation may appoint a temporary cantor for a fixed term and remove him at the end of his term with no violation of the holiness principle).

254. *See supra* notes 225-26 and accompanying text.

255. *See supra* notes 227-30 and accompanying text.

Later authorities adopted a revisionist construction of fixed-term rabbinic contracts that departed from their plain meaning. In order to construe such contracts properly, these authorities held that it was necessary to take into account the context within which the contracts were drafted and signed. Jewish law disapproves of open-ended employment contracts or, according to some, contracts that exceed a term of three or six years,[256] particularly where residence in the community is a condition of employment, because they are too reminiscent of the Biblical institution of Hebrew bondage.[257] In the rabbinic view, this institution violated the fundamental notion that each Jew is subservient only to God.[258] They held that an employment contract should embody at most a term that is appropriate for a hired worker, three to six years,[259] and not a term that characterizes a Hebrew slave, six years or longer.[260]

Interpreting rabbinic contracts in light of this background yielded a result that was not apparent on their face. The stated three or five year term was never intended to give the community the right to remove the rabbi and replace him at the end of the term. Rather, it was a formal or stylistic device inserted to remove any appearance of "Hebrew slavery" from the agreement.[261] This reading was supported by Talmudic dicta that equated leadership positions with "slavery" to the public welfare.[262]

According to this reading, the three or five year term might have been inserted as the minimum number of years the rabbi was committed to serve,

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Rabbi Rabinowitz-Teomin, *supra* note 207, at 63, argues that for purposes of applying the holiness principle, the cases of the High Priest of Israel and the president of the Sanhedrin are not analogous to those of rabbis. The offices of High Priest and president are unique. Once an incumbent is removed, he cannot obtain a post of equivalent sacred status anywhere else. By contrast, a rabbi appointed for a limited term and removed at its expiration can secure another post as rabbi in another location with no loss of sacred status. Hence, one cannot argue from the High Priest and president that removal of a rabbi at the end of a fixed term will violate the holiness principle.

256. SHULHAN ARUKH, *Hoshen Mishpat* 333:3 (Rema) (3 years); HATAM SOFER, RESPONSA, *Orah Hayyim* 205 (6 years).

257. *See Exodus* 21:2-11; *Deuteronomy* 15:12-18. The Hebrew slave served for six years and could go free earlier only upon receipt of a bill of manumission from his master. He could elect not to go free and serve for an open-ended term that would end upon the occurrence of a Jubilee once in 50 years. *Id.*

258. Based on *Leviticus* 25:55 ("For unto Me the children of Israel are servants; they are My servants whom I brought forth out of the land of Egypt . . . ."); *see* TALMUD, *Bava Metzia* 10a ("They are My servants but not servants to servants.").

259. Based on *Deuteronomy* 15:18 ("[T]he double of a hire of a hireling hath he served thee six years . . . ."); *Isaiah* 16:14 ("Within three years, as the years of a hireling . . . .").

260. SHULHAN ARUKH, *Hoshen Mishpat* 333:3 and *Shakh ad loc.*

261. HATAM SOFER, RESPONSA, *Orah Hayyim* 205-206.

262. *See, e.g.*, *Horayot* 10a ("If you believe I am endowing you with leadership, I am endowing you with slavery.") and RASHI, *Horayot* 10a ("For leadership is slavery to the yoke of the many for the person on whom it is bestowed.").

marking the point at which he could voluntarily relinquish his post.[263] The provision solely benefited the rabbi, permitting him to leave. The community, however, was not permitted to remove him. Accordingly, unless the parties expressly stipulated to the contrary at the time of the appointment and, having so stipulated, the community exercised its right to terminate immediately at the end of the rabbi's contractual term and not later, a rabbi was entitled to lifetime tenure despite the fixed term written into his contract.

As a matter of contract interpretation, the revisionist position is not wholly persuasive. This is particularly true when the contract specifies a term other than the standard three or five years. For example, the city of Poznan appointed a rabbi for six years in 1714, ten years in 1717, and nineteen years in 1796.[264] These terms bear the earmarks of hard bargaining that achieved a result that was meaningful to both sides and was not a mere formality. If rabbis generally were not removed when their contracts ended, it is probably because the communities they served were satisfied with the way they discharged their duties. This refraining from exercising a right to remove should have been distinguished from a lack of legal authority to accomplish that result. Instead, halakhic authorities read into the widespread practice of retention a binding custom never to remove upon the expiration of a contract, which rendered the fixed term of years stated in the contract meaningless.[265]

3. *Joint Appointments*

As an alternative to removing an incumbent, some communities or factions within a community sought a partial solution in the joint appointment. They had as a model the arrangement adopted for the return of Rabban Gamaliel as president of the Talmudic assembly of scholars.[266] This arrangement suggested that an incumbent rabbi could accept a colleague to serve at his side without any loss of status or violation of the holiness principle.

The joint appointment found scant support among halakhic authorities. They applied to all leadership positions the rule that governed the

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263. RABBI MOSES SOFER, RESPONSA, *Orah Hayyim* 206. Rabbi Rabinowitz-Teomin, *supra* note 207, at 64, suggests that a fixed term was inserted to negate the inference that upon the incumbent's death, his heir automatically would be entitled to inherit his post.

264. KATZ, *supra* note 112, at 292 n.43.

265. *See, e.g.*, RABBI YEHIEL EPSTEIN, ARUKH HA-SHULHAN, *Yoreh Deah* 245:28 ("[E]ven when the community writes a contract with the rabbi for so many years, we never remove him, and this is the custom that is widespread in all areas of Jewish settlement."); RABBI ISRAEL MEIR HA-KOHEN OF RADIN, *Mishneh Berurah* 53:86 ("[I]n our day [when] it is not the manner to remove [at the expiration of a contract] without suspicion [of wrongdoing] then certainly we should not dismiss for no reason at all in order not to create suspicion."); RABBI MOSES FEINSTEIN, IGGEROT MOSHE, *Hoshen Mishpat*, Part II, No. 34 (holding that a fixed term in a rabbinic contract "is nothing, and in the 40-plus years I have been in America it has never happened that the directors [of a synagogue] should of their own accord remove the rabbi").

266. *See supra* notes 227-30 and accompanying text.

establishment of Biblical monarchy, "Thou shalt surely set over thyself a king,"[267] which they interpreted as a mandate for one king, not two, thus precluding all joint appointments.[268] Common sense dictated the same result both to prevent controversies from erupting between two rivals and to save the community the expense of supporting two people in the same position.[269] Further, most halakhic authorities regarded joining another to an incumbent's post and forcing him to share the dignity, authority, and privileges of his office as a partial demotion in sacred status that did violate the holiness principle.[270] In short, whatever the justification for the arrangement accommodating Rabban Gamaliel's return, later halakhic authorities were not prepared to derive a general rule from a situation that must have been *sui generis*.

In the end, with fixed-term contracts construed restrictively and joint appointments precluded, only the custom of rotation in office remained as an acceptable alternative.[271] But this was an outmoded custom, suitable only for the smallest Jewish communities and an earlier time, when public service was not a full-time occupation and the functions of office involved simple duties the layman could perform. If any trustworthy burgher could serve as custodian of the charity box for a while,[272] the idea of rotating a rabbinic post among the townsfolk became quite inevitably impracticable. Lifetime tenure had become both the written and the unwritten rule.[273]

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267. *Deuteronomy* 17:15.

268. RABBI MOSES MI-TRANI (Mabit), RESPONSA, Part III, No. 200; *but see* RABBI ABRAHAM BEN MORDECAI HA-LEVI, *Ginat Veradim* 3:8 (when rabbi established himself in his post and never received the formal appointment of the community, after his death, community can join another rabbi to his heir).

Whenever the office involved the handling of money, there was a contrary tradition requiring that a *minimum* of two officials be appointed—for obvious reasons. *See* MISHNAH, *Shekalim* 5:2 ("We do not establish authority over the community in relation to money with less than two."); Rabbi Moses Zvi Nariyah, *Serrarah al Ha-Tzibur*, 29-30 SHEVILIN 128-29 (5737) (interpreting the Mishnah in broader terms by dropping the phrase "in relation to money" [Heb. *be-mamon*] from his quotation of the Mishnah).

269. RABBI MALCHIEL TENEBAUM, *Divre Malchiel* 4:82.

270. *Id. But see* RABBI HAYYIM BENVENISTE, *Knesset ha-Gedolah* 53 (in the name of the *Ralnah*) (recommending joint appointment of cantors rather than replacing an incumbent with someone who has a more pleasing voice).

271. Rabbi Moses Sofer attempted to read this result into a ruling by the *Rema* that is worded more broadly. Where the *Rema* writes, "and in a place where it is the custom to accept a rabbi for a fixed term . . . they have authority to do so," SHULHAN ARUKH, *Yoreh Deah* 245:22 (end), Sofer suggests that he never meant to endorse fixed-term contracts in general but only the ancient custom of rotation in office in a community where there are many individuals who are qualified to hold office. RABBI MOSES SOFER, RESPONSA, *Orah Hayyim* 206.

272. SHULHAN ARUKH, *Orah Hayyim* 53:26.

273. *See* BARON, *supra* note 94, at 88 (stating that permanency of tenure became unwritten law).

D. *The Community Versus the Tenured Rabbi*

However elaborate and variegated were the justifications for rabbinic tenure and however circumscribed was the role of custom, whether a rabbi would maintain his position for life was never certain. Lifetime tenure depended on the circumstances of his case and the will of his community. The community was never completely disabled in this regard, wholly apart from its admitted authority to remove an incumbent for cause. The community possessed residual power to challenge the rabbi's continuance in office, a power implicitly acknowledged by the halakhic authorities to whom the communities turned to settle disputes with their rabbis. An unstated underlying premise in their responsa is that the community has the right, based on its practical control over the rabbi's livelihood and its recognized right to acquiesce in its leadership, to come forward and raise objections to the rabbi's tenure. Otherwise they would not have entertained the communities' petitions, sometimes ruling against the incumbent.

The circumstances under which such a challenge might arise were far from uniform, but in all of the cases the tenor and intensity of community sentiment either for or against the rabbi's removal were important factors in determining the outcome. Where a traditional reading of the responsa might suggest that once a dispute arose, public opinion would play little or no role, and the halakhic authority asked to intervene would determine the outcome by applying halakhic principles, our reading suggests the reverse. It suggests that public sentiment played a leading role, for the responsa time and again give the impression that public opinion was assessed first and then appropriate halakhic reasoning brought to bear to effectuate it.

The remainder of this Section presents five cases in which a rabbi's tenure was challenged. In each case, the outcome, whether the rabbi was removed from his post or retained, dovetailed precisely with the reported tenor of public sentiment in the matter.

1. *A Community Perplexed*

In this celebrated case, the Jews, having been expelled from France more than once in the fourteenth century, were readmitted for a brief period around 1360 by Charles V who appointed Matathiah ben Joseph as their chief rabbi.[274] He embarked on a program to restore the vital institutions of Jewish life, establishing a yeshiva which attracted many students and ordained many rabbis. Upon his death, his son, Johanan, who filled his father's place in both learning and fear of sin, succeeded him as chief rabbi with the approval of the community and the assent of the king. Five years into his term of office, however, one of his late father's pupils, Rabbi Isaiah, returned to France from Savoy bearing a writ from the prominent German authority, Rabbi Meir ha-Levi, that contained several startling provisions. It deposed Johanan as chief

274. Solomon Zeitlin, *The Opposition to the Spiritual Leaders Appointed by the Government*, 31 JEWISH Q. REV. 287, 289 (1940).

rabbi of France, replacing him with Rabbi Isaiah, and excommunicated any French rabbi who practiced without Isaiah's consent. French Jewry, while mindful of Meir ha-Levi's great stature, doubted he had authority to dictate affairs in another country. Uncertain how to proceed in the face of two rival chief rabbis, they asked the Spanish authority, Rabbi Isaac ben Sheshet Perfet, to clarify the matter for them.

In his response, Perfet upheld Johanan's entitlement to the post of chief rabbi.[275] Meir ha-Levi's rulings were obligatory on his students and on the residents of his country only. He lacked authority to govern the affairs of French Jewry without their consent.[276] But even had he possessed that authority, Perfet wrote, his removal of Johanan from the chief rabbinate was wrongful on four grounds. Johanan was entitled to the post as the qualified heir of his father; having served five years he was established in the post and not subject to being replaced even by a greater scholar; we elevate in matters of holiness but we do not decrease; and "the law of the kingdom is the law," so that the king's assent to the appointment of Johanan is valid under Jewish law so long as the appointee is qualified and the community consents.[277]

In this instance the challenge to the incumbent was mounted by a colleague and did not issue from the community. Perfet describes French Jewry as perplexed by the unusual situation.[278] The historian, Heinrich Graetz, claims they were indignant at the interference into their affairs by an

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275. RABBI ISAAC BEN SHESHET PERFET (Rivash), RESPONSA, No. 271.

276. *Id.*

277. *Id.* The last point mentioned by Perfet may have been the crux of the dispute. Among Sephardic Jewry, government appointment of rabbis was an accepted practice. In contrast, Ashkenazic Jewry had a long-standing tradition against government interference in religious appointments. A German synod prior to 1220 enacted a decree that "no Jew may accept religious office at the hands of the Gentile powers." FINKELSTEIN, *supra* note 146, at 60. For Ashkenazic authorities like Meir ha-Levi, royal approval would have invalidated Johanan's claim to office, and he felt authorized to intervene in France to rectify the religious error committed by both Johanan and his father. *See* Zeitlin, *supra* note 274, at 294.

Later Ashkenazic authorities endorsed government appointment of rabbis based in part on the Sephardic precedents and in part on the Biblical model of Ezra and Nehemiah, appointed by the Persian monarch Cyrus to their religious offices in Judea. RABBI MOSES ISSERLES (Rema), RESPONSA, No. 123. The Rema incorporated his conclusion in the *Shulhan Arukh*, stating the rule in a fashion that contains a veiled reference to Meir ha-Levi's action in France: "But as to anyone whom the congregation has accepted over them [as their rabbi], and all the more so where they acted with the consent of the government, no great personage has the authority to prevail against him and remove him from office." SHULHAN ARUKH, *Yoreh Deah* 245:22 (end). But a rabbi who receives a government appointment and serves without also obtaining the community's consent "in the end will be destined to answer in Judgment." REMA, RESPONSA, No. 123; *see also* RABBI MOSES SOFER (Hatam Sofer), RESPONSA, *Hoshen Mishpat*, Vol. 6, No. 21 (faulting a rabbi who obtained authorization from the government but lacked consent of the community to his appointment and displaced qualified heir of former rabbi).

278. PERFET, RESPONSA, No. 271.

outsider.[279] Our point is that there was no strong sentiment on the part of French Jewry for Johanan's removal, and Perfet in his responsum marshals all of the doctrines that support rabbinic tenure to ensure his continuance in office.

2. *A Community Divided*

A qualified heir, who had himself served the community for nineteen years, took over the post his father had occupied for forty years. The succession had been ratified during the father's lifetime in a writing signed by a majority of the community. Some who were not signatories sought to replace the son with a candidate whom they regarded as more learned, and hence better qualified. This faction proposed that if replacing the incumbent was not possible, their candidate should serve alongside him. Should the request for a joint appointment be denied, they threatened to break away from the majority and form their own synagogue with their candidate as rabbi.

Rabbi Moses ben Joseph Mi-Trani denied the request in full, holding that the incumbent could neither be removed, nor forced to share the position with another.[280] He cited the holiness principle, the son's inheritance from his father, and his acquisition of established rights to his post with the passage of time in office. The fact that there was present in the community someone who was arguably better qualified did not affect the result.[281]

As noted, it was a minority of the community that sought to alter the status quo. The majority of the community wanted to abide by the signed agreement, to allow the incumbent to continue in office, and not to force him to share his position with another. The *Mabit's* decision tracks the majority's position closely.

3. *Another Community Divided*

In a town that was served by two rabbis, one Ashkenazic and the other Sephardic, most of the townsfolk, including the Sephardic Jews, preferred the Ashkenazic scholar and took their matters to him, apparently without objection from the Sephardic rabbi. When he died, the majority of the Sephardim wanted to officially appoint the Ashkenazic scholar as their rabbi rather than accept the Sephardic rabbi's heir, his brother, whom they claimed was unqualified for the post. The heir sought the post by reason of inheritance and offered to study Torah to eliminate any deficiency in his learning. A minority of the Sephardim supported his claim and wanted him appointed as Sephardic rabbi of the town.

In resolving the controversy, Rabbi Malchiel Tenenbaum cited a number of reasons to deny the heir his inheritance, including the public

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279. 4 HEINRICH GRAETZ, HISTORY OF THE JEWS 153 (1894).

280. RABBI MOSES MI-TRANI (Mabit), RESPONSA, Part III, No. 200.

281. *Id.* On tenure versus merit, *see supra* Part IV.B.

benefit to be gained from the town's having to support only one rabbi.[282] An important factor in his decision was the status of the Ashkenazic rabbi. Even before his Sephardic colleague had died, and by virtue of the fact that most Sephardim were already consulting him, Rabbi Tenenbaum held that the Ashkenazic rabbi had been transformed into the rabbi of the Sephardim. His status was therefore that of an incumbent, in place and serving when the Sephardic rabbi's heir came forward to displace him. This he cannot do, Rabbi Tenenbaum held, because it would violate the holiness principle.[283] Again, we note how the result corresponds exactly to the will of the majority of the Sephardic community.

4. *A Community Misled*

A town's rabbi passed away leaving a son who wished to assume his post, but the heir was the victim of false accusations that led the community to believe he was unfit to serve. As a result, the townsfolk transferred their allegiance to the court of another scholar and took a solemn oath to be subject to his jurisdiction only. In due course they discovered that allegations against the heir were unfounded and that he was completely fit to serve as rabbi. They wished to install him in the post and asked Rabbi Yom Tov Algasi if they could be released from their oath of allegiance to the other rabbi. He replied in the affirmative. Their oath was invalid, either as one sworn in error or sworn to cancel a *mitzvah*, the obligation to appoint the heir.[284] The stated reasons support the result in full but we note that the community was united in its desire to switch from one scholar's jurisdiction to the other's and that Algasi's decision affirmed their right to do so.

5. *A Community Stymied*

In a town that had several Jewish congregations, the residents agreed to appoint a single spiritual leader to serve the needs of the community as a whole. The town's former rabbi having died without a male heir, the candidate for successor, whom most preferred, was his grandson through a daughter. But the members of one congregation believed the grandson was either not ready for the task or unwilling to accept its burdens. They therefore broke ranks with their sister congregations and appointed an outsider to be their rabbi. Later, as matters clarified, it appeared that the grandson was both qualified and willing to serve. The breakaway congregation then sought to remove their rabbi and accept the town's overall choice. But an impasse arose, for the incumbent they had appointed refused to relinquish his post. Quite the contrary, he issued a ban of excommunication against anyone who might enter the synagogue to teach or preach without his permission. The congregational leaders, wishing to rejoin

282. RABBI MALCHIEL TENENBAUM, *Divrei Malchiel* 4:82.

283. *Id.*

284. RABBI YOM TOV ALGASI, *Simhat Yom Tov*, No. 6.

the town's other congregations under the leadership of a single rabbi, asked Rabbi Elijah ben Hayyim whether the incumbent's ban was valid and if they could be released from their undertakings to him.

Rabbi Elijah pursued two lines of reasoning and reached a conclusion in favor of removing the incumbent.[285] First, the assumptions on which were based the congregation's undertakings to him were false assumptions on two accounts. They would never have appointed him, an outsider, if they had known that the local candidate was suitable, and the congregation would never have taken independent action if they had known how strongly the sister congregations would protest. On both accounts, the undertakings to the rabbi were invalid from the outset.

Second, Rabbi Elijah held that in the course of protesting his removal, the incumbent had made certain statements—that he never sought the appointment and agreed to serve only in the face of importuning by the entire congregation acting as one, that he never intended to accept the post if anyone objected, and that he would not wish to serve in the face of communal opposition. In Rabbi Elijah's opinion, the incumbent's declarations were tantamount to renouncing his appointment and relinquishing his post. He had declared publicly either that his own preconditions for serving as a consensus appointee were violated or that the internal opposition created a change of circumstances under which he no longer wished to serve. This oral release of his post was effective because, at bottom, the congregation's obligation to their rabbi consisted of their duty to honor him as such and when a scholar releases others of this obligation, even orally, the release is valid.[286]

This opinion is cited in halakhic literature for the proposition that renunciation of a rabbinic post is effective.[287] Yet, a fair reading of the facts

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285. RABBI ELIJAH BEN HAYYIM (Ranah, c. 1530-1610), RESPONSA, No. 98.

286. *Id.*

287. *See, e.g.*, RABBI HAYYIM MEDINI, SEDEI HEMED, *Hazakah be-Mitzvot* 7:61. That one may relinquish a sacred position cannot be regarded as self-evident under the holiness principle. Renunciation, as a voluntary reduction in sacred status, would seem to be precluded for the same reason dismissal from a post is forbidden—"we elevate in matters of sanctity but we do not decrease." Why should this maxim apply to the congregation but not the officeholder himself? Now it is true that a scholar may disclaim the honors due to him as such. MISHNEH TORAH, *Talmud Torah* 5:11. The *Ranah* cites this principle in support of permitting a rabbi to renounce his office, characterizing a congregation's obligation to its rabbi as essentially the duty to honor him as a scholar, which he may renounce. But the scholar who renounces the *honors* due to him remains a *scholar*, having given up only some of the perquisites of his position. By contrast, a rabbi who renounces his post demotes himself, stripping away his status as an officeholder. Hence, a problem arises under the holiness principle. The answer may lie in the *Ranah*'s reference to the Hebrew slave who can be freed by the oral declaration of his masters in front of witnesses. If a rabbi could not renounce his post, he would be no better than a Hebrew slave, obligated to serve out his term until his "masters" release him. To prevent this, we permit a rabbi to relinquish his post, although such action is

indicates that this is a most peculiar sort of renunciation, for the incumbent is so desirous of keeping his post that he has erected a barricade at the synagogue's entrance, excommunicating whoever may come to replace him. We may note that the incumbent's declarations were made in the course of *protesting* his removal. In fact, this is a case of a forced renunciation, an "involuntary renunciation" at the instance of the congregation—that is, a removal. With the congregation united against their rabbi and pursuing the laudable goal of reuniting with their sister congregations under a single leader, the balance is tipped quite decisively against the incumbent and in favor of his removal.

We have utilized this line of cases to illustrate a suggestion made earlier, that when halakhic authorities were called upon to resolve challenges to incumbent rabbis, adjusting two competing concerns—rabbinic tenure, on the one hand, and communal acquiescence to its leaders, on the other—they did so with due regard to both factors. In this manner, they imparted to the community a measure of on-going control over its spiritual leadership notwithstanding the doctrine of lifetime tenure for rabbis.

V. CONCLUSION

In defining the material contours of the rabbinate, the rabbis themselves were not disinterested parties. The conclusions they reached were not inevitable nor were they compelled by the literary sources they cited, as shown by their many disagreements over interpreting the sources. Hence, in reviewing the distance Jewish law traveled from its origins, at first blush it may seem that a measure of cynicism is warranted. Jewish law, having started with an ideal of uncompensated teaching of the Torah by learned men who engaged in labor to support themselves, progressed to a rabbinate that was salaried, insulated from competition, secure in office for life and entitled to pass on their posts to qualified heirs at death. Here were issues, viz., their own compensation, job security, and inheritance rights, concerning which the rabbis, who on other issues could be quite inflexible, instead found ways to overcome traditional strictures and institute a radically different regime.

In fairness, such an appraisal is to a degree unwarranted. In the first place, the communal need which underlay the rabbis' action on compensation was profound and undeniable. For its very survival in the dark years of Exile, Jewry required the services of a full-time rabbinate to minister to its needs. Its problems were not part-time problems. Because rabbis were universally men with families who required a livelihood to support themselves and their dependents, that support could only be drawn from the communities they served.

That halakhic authorities were able to base the new approach on authentic Jewish legal sources is a tribute to their own legal acuity and to the immense flexibility of Jewish law, its ability to change in light of changing

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not entirely consistent with the holiness principle. Interestingly, a king, once he ascends the throne, may not abdicate. *See* SEFER HA-HINUKH, No. 497 (citing *Kedushin* 32b).

historical conditions when the rabbis themselves recognize and appreciate the need for change. The degree to which they resorted to policy arguments to justify reversing course on compensation was noteworthy. Arguing that no one would be willing to come forward and serve as a rabbi without compensation, that the Torah would be forgotten if committed to the care and custody of part-time scholars, and that the public would never heed the admonitions of rabbis whom they observed engaging in trade or menial labor, halakhic authorities employed policy arguments very effectively to counter Talmudic dicta against compensation.

Second, in devotion to Torah which, in one sense, required the scholar to build a wall between his pursuit of a livelihood and his pursuit of Torah, lay the very factor that in the end made this separation impossible. Devotion to Torah is a demanding commitment that does not readily permit the practitioner to break away temporarily, even if he should want to suspend his studies. Scholars, who are commanded to meditate on the Law night and day, invariably through their love of Torah come to desire this. Maimonides' attempt to endow secular employment with a degree of religious sanctity did nothing to accommodate the scholar's deep yearning for a life completely devoted to Torah. His approach had little resonance among scholars, for the best and the brightest drawn to Torah as a vocation would be the least willing to interrupt their studies for trade, even for the minimal three hours a day he recommended. If earning a living is not considered a complete "waste of time"[288] in relation to study of the Torah, it is at best a necessary evil. Once compensation became available, trade was no longer necessary for rabbis. Then, given the alternatives, a rabbinic post could be regarded as the best way to devote one's entire life to study and scholarship.[289] In the end, devotion to Torah demanded compensation where initially the two were considered incompatible.

It is less clear whether it also required that rabbis be insulated from competition, enjoy lifetime tenure, and have the ability to pass their posts to their heirs upon death, but these issues have to be evaluated with regard to their social contexts. In general, in premodern Jewish communities, the value of unrestricted economic competition was subject to question. Once the rabbinate acquired an economic component, its development would naturally track that of other trades and professions where new entrants could be excluded.

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288. Heb. *bittul zeman*. On the religious strictures against wasting time and the tendency to promote Torah study at the expense of other activities, see KATZ, *supra* note 112, at 136-37.

289. It was an imperfect way to do so, however, because the communal rabbi needed to spend at least some of his time away from his studies, ministering to the needs of his congregants and engaging in public affairs. *See* Etkes, *supra* note 98, at 109-11. Being the principal of a Talmudical academy, a *rosh yeshiva*, was a better way to devote one's life to Torah scholarship, but positions were few and the standards for candidates were extraordinarily high. *Id.* at 125-29.

As to tenure and inheritance rights for his heir,[290] a given rabbi's ability to enjoy them varied from time to time and place to place. As we have seen, a community that wished to replace its rabbi had the power to challenge his tenure and, when strong public sentiment favored removal, might succeed.[291] The same held true when the question was inheritance of the post by his heir. Rabbinic tracts on tenure and inheritance rights were as much advocates' briefs as true reflections of uniform contemporary practices. Thus, what has to be weighed is not the reality of lifetime tenure and inheritance rights for heirs, but the rabbis' yearning for them, and that is completely understandable.

It may be that Jewish law arrived at the best of all possible solutions. The classic ideal of uncompensated Torah service remained always as an ideal. It was never discredited and the new regime never supplanted it entirely. The ideal of uncompensated service, therefore, tended to restrain any tendency to view the rabbinate primarily as a mere means to earn a living. Anyone inclined to utilize his position primarily for this purpose would be subject to the charge of using the Torah as a spade for digging. This in turn would tend to moderate the material demands advanced by the rabbinate and also have an impact on those who would be drawn to the rabbinate as their profession. In the end, the *Tur*'s admonition, "Heaven forbid that the Lord's work should ever be a mere trade!"[292] was always, on some level, taken to heart.

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290. The inheritance of rabbinic posts, as an effort to extend the benefits of office beyond the life of an incumbent by passing the post on to his qualified heir at death, merits treatment in its own right. Space considerations preclude that treatment here but the topic is dealt with separately in a companion article by the author. *See* Jeffrey I. Roth, *Inheriting the Crown in Jewish Law: The Question of Rabbinic Succession*, *in* 9 JEWISH LAW ASSOCIATION STUDIES: THE LONDON CONFERENCE (Edward A. Goldman, ed.) (forthcoming 1997-98).

291. *See supra* Part IV.D.

292. RABBI JACOB BEN ASHER, ARBA'AH TURIM, *Orah Hayyim* 53 (citing the *Rosh*, in which the reference is to cantors).