

From Orthodoxy to Religious Zionism: Rabbi Kook and the Sabbatical Year Polemic

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A. Introduction

The halakhic (Jewish-legal) permit to sell land (*heter mekhirah*) in the land of Israel in order to circumvent the prohibitions of the sabbatical year (*shemittah*) was first issued in 1888 and led to a bitter controversy among various religious authorities in Israel. The climax of the controversy occurred in 1910 when Rabbi Avraham Yitzhak Kook became involved and strongly supported the permit. The bitter debate associated with this issue, nevertheless, still persists a century later. This article examines the writings of Rabbi Kook on the subject of the permit to sell and the reactions of other prominent halakhic authorities to this legal innovation. Our study will shed light on the halakhic and historical significance of this polemic, and offer some explanations for its unusual severity and longevity.

The sabbatical year polemic has been a subject of great interest to scholars writing from a variety of disciplines and perspectives.¹ The

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- 1 The history of this polemic has been well-documented by halakhists and scholars from a variety of methodological perspectives. To the best of my knowledge, the most significant scholarly contributions to this discussion are written in Hebrew. For the halakhic perspectives, see Yechiel M. Tikochinski, *Sefer Ha-Shemittah* (Jerusalem: Mossad Harav Kook, 1952), 59; Menachem M. Kasher, "Al Shtar Mekhirah Be-Shnat Ha-Shemittah," *Noam* 1 (1958): 167; Rabbi Shlomo Y. Zevin, *Le-Or Ha-Halakhah* (Jerusalem: Mossad Harav Kook, 1957), 112-27; Kalman Kahane, *Sefer Shnat Ha-Sheva* (Jerusalem: 1985), 124-43. The polemic had wide-ranging reverberations in the halakhic literature of the period. Some are cited in the surveys mentioned above, and some will be mentioned further on in our discussion. The polemic also merited scholarly analysis from various vantage points. Yosef Salomon analyzed the various positions taken in the polemic of 1889 throughout the Jewish world, and focused on the significance of the polemic for understanding the development of the deliberations on religion and nationalism in the *Hibbat Zion* movement. See Yosef Salomon, *Dat Ve-Tsionut: Immutim*

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writings of Rabbi Kook in this context have also been the subject of extensive scholarly deliberations. Research has focused primarily on two areas of inquiry. The first relates to the broader question of the relationship between halakhah and aggadah in the rulings of Rabbi Kook; in particular, the degree to which his halakhic rulings were influenced by his ideology that supported the settlement enterprise in the land of Israel. The second addresses the apparent inconsistency between Rabbi Kook's lenient ruling on the permit of sale and his rulings in other matters, which seem to reflect a stringent tendency.²

This article builds on previous scholarship, and pursues new methodological directions, with two distinct but related objectives, one conceptual and one historical. The first objective is to understand the unique conceptual characteristics of Rabbi Kook's halakhic thought, in particular as they became manifest in this debate. To that end, we will systematically organize the halakhic issues and arguments involved in

Rishonim (Jerusalem: Ha-Sifriya Ha-Tsionit Publishing House of the World Zionist Organization, 1990), 130-38. Menachem Friedman described the social history of the polemic; see Menachem Friedman, "On the Social Significance of the Polemic on Shemitta (1889-1910)" (Hebrew), in *Shalem: Studies in the History of the Jews in Eretz-Israel 1*, ed. Yosef Hacker (Jerusalem: Yad Izhak Ben-Zvi 1974), 455-79. Eliezer Malkhiel, Avinoam Rosenak, Hagi Ben-Artzi, and Neriya Gutel, whose works are referred to in n. 2 below, focused on halakhic aspects of Rabbi Kook's positions. These writings will be addressed in more depth in this article.

- 2 See Eliezer Malkhiel, "Ideology and Halakhah in Rav Kook's *Heter Me-khira*" (Hebrew), *Shenaton Ha-Mishpat Ha-Ivri* 20 (1997): 169; Michael Z. Nahorai, "Remarks on the Rabbinic Rulings of Rabbi Kook" (Hebrew), *Tarbiz* 59 (1990): 481; Avinoam Rosenak, "Between Prophetic Halakhah and Reality in the Halakhic Rulings of Rabbi A. I. Kook" (Hebrew), *Tarbiz* 69 (2000): 591; idem, *The Prophetic Halakhah: Rabbi A. I. H. Kook's Philosophy of Halakhah* (Hebrew) (Jerusalem: Magnes Press, 2005), 11, 228-31, 259-62; Neriya Gutel, *Innovation in Tradition: The Halakhic-Philosophical Teachings of Rabbi Kook* (Hebrew) (Jerusalem: Magnes Press, 2005), 107-17; Hagi Ben Artzi, "Ha-Rav Avraham Yitzchak Ha-Kohen Kook Ke-Posek: Yes-odot *Hadshani'im* Be-Psikato Shel Ha-Rav Kook" (PhD diss., Hebrew University, 2003), esp. 123-86.

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the polemic, and use this as an opportunity to methodically examine a number of central principles of halakhic thinking: methods of exegesis, halakhic formalism, the role of values and principles in halakhic exegesis, the process of halakhic change, the importance and significance of dissenting opinions in halakhah, and legal fiction in halakhah.

The second objective is to understand the historical significance of this halakhic polemic in shaping the Jewish legal discourse in the generations that followed, and to see the positions of Rabbi Kook as the cornerstone of the new Religious Zionist branch of halakhah that developed in subsequent years in light of the Zionist settlement enterprise and the establishment of the State of Israel. Scholars have already emphasized the sociological significance of this polemic, marking it as a central factor in the division of the Orthodox world into two socio-religious streams.³ I focus on the legal-historical aspect of this split, and argue that Rabbi Kook attempted to diverge – at least in the land of Israel – from several of the fundamental principles of Orthodox jurisprudence that had developed in Europe in the nineteenth century. Aware of the potential implications of such a push for change, Rabbi Kook was careful to stress a strong distinction between the changes that he suggested and the innovations advocated by the Reform movement, which he emphatically opposed.

I contend that in his writings on the permit to sell, Rabbi Kook consciously and openly laid the foundations for a new stream of halakhic ruling – a Religious Zionist one – that from a historical perspective diverged from a number of the assumptions of Orthodox halakhic ruling that had been established in Central Europe in the previous century. I demonstrate that Rabbi Kook anchored the need for this divergence in the reality of the land of Israel, claiming that there was an obligation to deviate from the conventional halakhic path in light of this reality. Rabbi Kook did not rely solely on the argument that lenient halakhic rulings were necessitated by the distress of the

3 See Friedman, *supra* n. 1.

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settlements – a jurisprudential move that is fully recognized by the older, traditional models. He made a more fundamental assertion that there were new and unique considerations that needed to be taken into account when adjudicating halakhic issues in the land of Israel.

It is well known that the Zionist idea caused a stir in the religious community. For Religious Zionists, however, the Jewish national movement and the return to Zion were not viewed as a compromise, and certainly not as a religious aberration, but rather as an opportunity to fully realize religious and spiritual ideals and a halakhic lifestyle.⁴ The sabbatical year of 1889 challenged this idyllic picture, as the conflict between the values of religion and the values of nationalism became increasingly apparent. The claim was that strict observance of the sabbatical year would require giving up the ideal of Jewish agricultural settlement, and, conversely, commitment to settlement would require abrogation of the prohibitions of the sabbatical year. It seemed clear that the two values of Torah observance and settlement could not be reconciled. In this article, I claim that Rabbi Kook faced this challenge and sought not only to find a solution through accepted halakhic means, but also to define a new set of basic principles that would guide halakhic thinking in the Zionist era.

I will contrast Rabbi Kook's position with the approach of the opponents of the permit, and examine the impact of this opposition on the development of the *haredi* (ultra-Orthodox) approach to basic questions regarding halakhah and state, and halakhah and society in the State of Israel. I will contend that the sabbatical year polemic serves as a historical-legal marker for the split between two distinct approaches to halakhic ruling, and that the approaches of the halakhic authorities in this polemic laid the foundations for the jurisprudential principles of the

4 See, for example, the comprehensive works of Dov Schwartz, *The Theology of the Religious Zionist Movement* (Hebrew) (Tel Aviv: Am Oved Publishers, 1996); *The land of Israel in Religious Zionist Thought* (Hebrew) (Tel Aviv: Am Oved Publishers, 1997); and *Religious Zionism between Logic and Messianism* (Hebrew) (Tel Aviv: Am Oved Publishers, 1999).

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two schools. I will discuss these two halakhic schools in parallel, through an analysis of the halakhic controversy.

The participants in the polemic were aware of its great significance. At an early stage in the controversy, they knew that this was not an ordinary halakhic question triggered by new circumstances, but that the question before them would have an impact on – indeed serve as a precursor for – the manner in which halakhah would be decided in relation to the novel phenomena that arose in the new Jewish settlement in the land of Israel. This awareness is reflected both in the unusually large volume of correspondence by all parties to the controversy, as well as the striking intellectual and emotional forcefulness of the arguments.

As the Zionist enterprise strengthened, and certainly after the establishment of the State of Israel, it became clear to leading halakhic authorities that the prevailing normative system had numerous lacunae which would make it difficult to rely solely on halakhah to guide the affairs of a Jewish settlement or a sovereign state. Needless to say, halakhah was shaped in the Diaspora for a minority population and therefore did not address aspects of communal and public life that would arise in the context of political sovereignty. Statehood, in this sense, challenged the belief that halakhah is a comprehensive legal system. The sabbatical year issue served as a precursor in the sense that it presented the first manifestation of this problem. The agricultural laws relating to the land of Israel, which needed to be revived after having been dormant for hundreds of years due to the lack of Jewish agricultural activity in the land of Israel, were deemed insufficient for the new settlement. Despite the particular nature of this problem, it quickly became apparent that the problem of the agricultural laws was a harbinger for the manifold challenges to come. Could the conviction that there is no inherent conflict between settlement and halakhah be maintained?⁵ Responding

5 Eliezer Schweid, *Homeland and a Land of Promise* (Hebrew) (Tel Aviv: Am Oved Publishers, 1979), 167. See also the letter of Y. L. Gordon to Lilienblum

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to these issues would require changes and innovations in the halakhah, a very sensitive matter at the end of the nineteenth century in light of changes to the Jewish community that had occurred in response to the Jewish Enlightenment – and particularly the Reform movement. To proponents of enlightenment, on the other hand, the problem strengthened and galvanized the antagonism to halakhah, characterizing it as a fossilized system that could not serve as the guide for a sovereign and productive society. These claims were known to Rabbi Kook and had an impact on his deliberation, even as he took pains to clearly distinguish his rulings from any association with the Reform movement.

1. Historical Background

The polemic began in anticipation of the 1888-89 (5649) sabbatical year, yet its antecedents were already evident in 1881-82, the previous sabbatical year, corresponding to the initial stages of the agricultural settlement. The young settlements were unstable at that time, suffering from birth pangs and severe financial difficulties. The concern expressed by the settlers and by the representatives of their patron, Baron Rothschild, was that strict observance of the sabbatical year provisions would lead to the collapse of the settlements, and would undermine the entire enterprise.⁶ No support could be expected from the religious

on 14 Nissan 1888: "... See if I was not correct when I said, that in addition to our redemption, we need a freedom of our souls, for without a freedom of our souls from the clutches of these tyrants [the rabbis], the redemption of the land will not succeed ..." (Moshe L. Lilienblum, *Derekh La'avot Golim* [Warsaw: Achiasaf, 1899], 115-16). Shalom Ratzabi held that the sabbatical year polemic in 1888-89 was a turning point, where both secular and religious members of *Hibbat Zion* recognized that a complete life based on halakhah would be impossible; see his "The Polemic Concerning *Shemittah* and Harav Kook's First Essay 'About Zionism'" (Hebrew), *Iyyunim BiTku-mat Yisrael: Studies in Zionism, the Yishuv, and the State of Israel*, vol. 8 (Beer Sheva: Ben-Gurion University Press, 1998), 580.

⁶ It is clear that in the coming sabbatical years, and particularly the 1909-10 sabbatical year in which Rabbi Kook became involved, it would indeed have been impossible to observe the provisions of the sabbatical year in

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leadership in the land of Israel at that time, which was antagonistic to the new settlements. Therefore, the settlers reluctantly turned to halakhic authorities in Eastern Europe. Independently, the representatives of the Baron exerted pressure on the European rabbis to find a way to allow the settlements to continue through working the land during the sabbatical year. The suggested solution was to sell the land, in a fictitious sale, to non-Jews for the duration of the sabbatical year, since the requirement that the land lie fallow applied only to Jewish-owned land in Israel. This solution was patterned on a model that was utilized in the Middle Ages to circumvent a variety of prohibitions, such as the prohibition of possessing leavened products (*hamets*) during Passover and the prohibition against using firstborn animals, which could no longer be observed according to the letter of the law due to the changing historical conditions. Nevertheless, the sale of the land in the sabbatical year raised other serious and unprecedented problems that needed to be addressed.

The idea behind this solution arose prior to the 1888-89 sabbatical year through an assemblage of prominent rabbis who met in Warsaw and was validated by one of the leading authorities of the generation, Rabbi Yitzhak Elhanan Spector of Kovno. The rabbinic cohort included

the entire agricultural settlement without leading to its collapse. In 1888-89, however, scholars have doubted that this was the case, since the agricultural settlements could have survived with the support of their patron, Baron Rothschild, and that the debate in that year was really a debate about the future; see Friedman, *supra* n. 1, at 468. Similarly, the rabbis who opposed the permit also understood that they were dealing with a very significant fundamental question which affected not only the sabbatical year issue, but also the stability of halakhah in a period of dramatic changes. In this regard, see, for example, the words of Rabbi Salant (introduction in Lilienblum, *supra* n. 5, at 116): "If they permit [working the land in] the sabbatical year, it will cause a tremendous breach in the wall of the religion, and the entire *Shulhan Arukh* will be trampled upon by the colonists." It is important to emphasize that the "historical" question as to whether the agricultural settlements would have collapsed is not important for our discussion. The important fact is that the rabbis based their discussion on that assumption.

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Rabbis Yisroel Yehoshua Tronk of Kutna, Shmuel Mohilever of Bialystok, and Shmuel Zanvill Klepfish of Warsaw. The question of whether Jews themselves were permitted to work on the sold land or whether it was necessary to find non-Jews for this labor, remained ambiguous in the original permit. By the next sabbatical year (1895-96), however, Rabbis Spector and Mohilever specifically permitted Jews to work.⁷ The permit was supported by the leading Sephardic rabbis of Jerusalem – Rabbis Ya‘acov Shaul Elyashar and Raphael Meir Panzil – but encountered strong opposition within the Ashkenazic “old settlement” (*Yishuv Ha-Yashan*) in Jerusalem, led by Rabbi Shmuel Salant and Yehoshua Leib (Maharil) Diskin.⁸

- 7 Rabbis Tronk and Mohilever were strong supporters of the *Hibbat Zion* movement. The permit was published in the Hebrew newspaper in Russia *Hamelitz* 29:58, 20 Adar 5649 (1889). The text of the permit and the letter of Rabbi Spector can be found in many places in halakhic literature. See, for example, Tikochinski, *supra* n. 1, at 66-67. Rabbi Tronk discussed the permit in his responsa, *Yeshu'ot Malko*, (repr. New-York: 1958), YD 55; for the responsum of Rabbi Elyashar, see *Responsa Simḥah Le-Ish*, (Jerusalem, 1908), YD 26; for the supportive position of Rabbi Ponizil, see *Ha-Tzvi*, 1888, vol. 16 (also in *Responsa Simḥah Le-Ish* at the end of Rabbi Elyashar's responsum). For the proclamation of opposition of the rabbis of Jerusalem, see Tikochinski, *supra* n. 1, at 68-70.
- 8 A number of the well-known rabbis in the Diaspora at that time expressed their explicit opposition. See, for example, the comments of Rabbi Naftali Zvi Yehudah Berlin (Neziv of Volozhin), *Responsa Meishiv Davar* (repr. Jerusalem, 1968), 2:56. See also the comments of Rabbi Yosef Dov Soloveitchik, *Responsa Beit Ha-Levi* (Jerusalem: Oz Ve-hadar, 1986), vol. 3, end of article 1. The debate crossed the lines between supporters and opponents of *Hibbat Zion*. Thus, for example, the Neziv, who was an ardent supporter of *Hibbat Zion*, was counted among the opponents of the permit. Similarly, Rabbi Yechiel Michel Pines, the representative of *Hibbat Zion*, and Rabbi Mordechai Gimpel Jaffe, one of the settlers in Petaḥ Tikvah. See Salmon, *supra* n. 1. On the other hand, Rabbi Meir Simcha Ha-Kohen of Dvinsk (*Or Same'ah*) was among the opponents, but his opposition to the permit was quite reserved: “...Yet all of this requires the in-depth study with colleagues and halakhic deliberation, but we should not raise our voices to undermine for no reason the entire tractate of the sabbatical year in order to strengthen the settlement. I am not stating a prohibition or a

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The dispute provoked sharp responses in the entire Jewish world with rabbis issuing proclamations and publishing pamphlets both in support of the permit and against it. Nevertheless, in the subsequent sabbatical years (1895-96 and 1902-03), the Jerusalem rabbis moderated their opposition, apparently in light of the fact that their opposition in 1888 had not been effective, as evidenced by the fact that most of the farmers had used the permit and worked the land. In anticipation of the 1902-1903 sabbatical year, one of the leading Hassidic rabbis in Galicia, Rabbi Avraham Borenstein, the Rebbe of Sochaczew and author of the *Avnei Nezer*, joined the supporters of the permit.⁹ The Chief Rabbi of Jaffa, Rabbi Naftali Hertz, refined the halakhic parameters and definitions of the permit. This, in conjunction with the fact that the settlement had grown significantly and that cessation from agriculture for a year would indeed endanger its viability, led Rabbis Salant and Diskin of Jerusalem, as well as Rabbinovitch-Te'omin (the Aderet), to agree to support the permit, or at least begrudgingly moderate their opposition to it.¹⁰

permit. Were I not concerned about the lack of respect of the rabbis of the land of Israel, I would not even write this. Rather, I have responded out of respect” (Rabbi Meir S. Ha-Kohen, *Responsa Or Same'ah* [Jerusalem, 1981], vol. 2, §1, pp. 65-70).

- 9 Rabbi Avraham Borenstein, *Responsa Avnei Nezer*, YD 458. The responsum is not dated, but it was written to the Chief Rabbi of Tiberias, who asked a question on behalf of the members of the agricultural settlement Yama, known today as Yavniel, established in 1901 close to Tiberias. It appears, therefore, that the responsum was written in advance of the 1902-03 sabbatical year (Rabbi Borenstein died in 1910). I do not know how to explain the surprising fact that neither the questioner nor the respondent refers to the permit of 1888 or to the polemic in general.
- 10 In the document prepared by Rabbi Hertz, the trees were sold with the soil surrounding them that was needed to nourish them. See Rabbi Shlomo Zalman Auerbach, *Ma'adanei Eretz* (Jerusalem, 1944), 1:7; the letter of the Hazon Ish published in Kalman Kahane, *Sefer Shnat Ha-Sheva*, *supra* n. 1, at 147-58.

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The storm appeared to have subsided and a degree of tacit agreement seemed to have been achieved. Yet, in 1909, the polemic reopened with a new vocal and heated debate. The main antagonist at this juncture was the Chief Rabbi of Safed, Rabbi Ya'acov David Willovsky (the Ridvaz, 1845-1913).¹¹ Against him stood Rabbi Kook, the Chief Rabbi of Jaffa and the new settlements. Both rabbis had immigrated to the land of Israel in 1904; thus, 1909 marked the first personal experience of the sabbatical year for each of them. Both took unequivocal positions, and both wrote extensively on the subject. Although the permit had already been in use for several prior sabbatical years, Rabbi Kook found himself in the eye of the storm.¹² His numerous writings in this context included the lengthy introduction to his book *Shabbat Ha-Aretz*, written in 1909, and the detailed correspondence with his protagonist, the Ridvaz.¹³ The polemic again inspired a plethora of rabbinic correspondences, from all over the world, in favor of and in opposition to the permit.¹⁴

- 11 The Ridvaz publicized his views in a pamphlet entitled *Kuntres Ha-Shemittah* (Jerusalem, 1909). See also his commentary *Bet Ridvaz on Pe'at Shulhan Al Hilkhoh Shemittah*, Rabbi Yisrael Mishkalov (Jerusalem, 1902).
- 12 See the fascinating description of the historical and social events regarding the polemic by Avinoam Rosenak in his biography of Rabbi Kook, *Rabbi A. I. Kook* (Hebrew) (Jerusalem: Merkaz Zalman Shazar, 2006), 81-98.
- 13 Rabbi Avraham I. Ha-Kohen Kook, *Shabbat Ha-Aretz* (Jerusalem, 1909). This book has been republished in various editions. His letters to the Ridvaz have been published as well, some in the collection of his letters, *Igrot Ha-Reiyah* (Jerusalem: Mossad Harav Kook, 1962), vol. 1, letters 189, 238, and 311; vol. 2, letters 522 and 555, and some in his *Responsa Mishpat Kohen* (Jerusalem: Mossad Harav Kook, 1937), in which most of responsa 60-80 are dedicated to this topic.
- 14 Rabbi Joseph Engel, the Rabbi of Cracow and one of the leading scholars in Galicia at the time, completed a pamphlet on the subject in 1914, in which he supported the permit based on halakhic concepts that were very similar to those espoused by Rabbi Kook in Israel. Rabbi Engel died in 1920 and the pamphlet was published in Vienna in 1928 by his son-in-law; see Yosef Engel, *Otzrot Yosef: Shev'it Ba-Zman Ha-Zeh* (Vienna, 1928), esp. 44b ff.

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Three decades later, with the advent of the 1937-38 (5698) sabbatical year, Rabbi Avraham Yeshayahu Karelitz (the Ḥazon Ish, 1878-1953) led a new opposition to the permit. In addition to expressing uncompromising views on this subject, the Ḥazon Ish enlisted a group of “sabbatical-year observant” settlers who would conduct their agricultural enterprises according to his guidelines. The Ḥazon Ish reorganized the arguments against the permit, and adjudicated the laws of the sabbatical year anew in order to determine the permitted and the forbidden in the sabbatical year in contemporary times.¹⁵ His goal in this approach was to find alternative ways to ease the distress of farmers who were interested in observing the sabbatical year laws without relying on the permit. Like Rabbi Kook before him, but completely disregarding the former’s positions and compositions, the Ḥazon Ish created a comprehensive and systematic corpus on the subject.

15 The Ḥazon Ish became rabbi and spiritual leader of the settlers of the *ḥaredi* Po’alei Agudat Yisra’el movement. See Benjamin Brown, “From Political Isolation to Cultural Entrenchment: Ḥazon Ish and the Path of Israel’s Ḥaredi Society (1939-1954)” (Hebrew), in *On Both Sides of the Bridge: Religion and the State in the Early Years of Israel*, eds. Mordechai Bar-On and Zvi Zameret (Jerusalem: Yad Izhak Ben-Zvi, 2002), 364-413. For an analysis of the positions of the Ḥazon Ish on the sabbatical year, see Kalman Kahane, “*Torat Ha-Aretz Shel Maran ZT”L*,” in his book *Shenat Ha-Sheva*, *supra* note 1, at 144; Benjamin Brown, “The Sanctity of the land of Israel in Light of the Shemittah Controversy” (Hebrew), in *The land of Israel in 20th Century Jewish Thought*, ed. Aviezer Ravitsky (Jerusalem: Yad Izhak Ben-Zvi, 2005), 71-103; *idem*, “The Ḥazon Ish: Halakhic Philosophy, Theology and Social Policy As Expressed in His Prominent Later Rulings” (Hebrew) (PhD diss., Hebrew University, 2003). Rabbi Kook and the Ḥazon Ish did not debate one another face to face. The Ḥazon Ish immigrated to Israel in 1933, shortly before the death of Rabbi Kook in 1935, and only became involved in the sabbatical year polemic after Rabbi Kook’s death. Nevertheless, both dealt with the subject in their writings in great breadth and depth, organized and developed the arguments for and against, and as such created the most important literature on the issue. Beyond their intellectual and academic efforts, both invested immense personal energy in advancing their ideas on this topic, and created two distinct communities, one that relied of the permit of sale and one that refrained from doing so.

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Our study of the controversy between Rabbi Kook and the Ridvaz, and the new arguments advanced by the Hazon Ish later, will enable us to sharpen our understanding of the innovations of Rabbi Kook, the nature of his halakhic thinking, and the central arguments that underlay his support of the permit. The Hazon Ish's utter disregard for Rabbi Kook and his writings reflects, in my opinion, a deep understanding that Rabbi Kook's approach represented a new method for adjudicating halakhic issues from which the Hazon Ish wished to be fully disassociated.¹⁶

16 In his prolific writings on the sabbatical year, the Hazon Ish responded to each of Rabbi Kook's arguments, and offered alternative interpretations and rulings. However, he never mentioned Rabbi Kook or his book by name, contravening the accepted practice in halakhic deliberations, including earlier rounds of this particular polemic. In this manner, the Hazon Ish paved the way for the delegitimization of Rabbi Kook, and subsequently the Religious Zionist authorities in general, as participants in the halakhic corpus. Friedman (*supra* n. 1) views the sabbatical year polemic as an important landmark in the schism of Orthodox Judaism. To this observation, we might add the disregard of Rabbi Kook by the Hazon Ish in the halakhic deliberation. The issue stands out particularly because Rabbi Kook was the author of the corpus to which the Hazon Ish was reacting in his discussion. Rabbi Kook and those who followed him were thus not considered legitimate participants in the halakhic discourse. This fact had far-reaching implications for the schism within Orthodoxy. It seems to me that the person who sensed this and tried to confront this affront to Rabbi Kook was Rabbi Menachem Mendel Kasher (author of *Torah Sheleimah*). In a detailed article on the permit of sale that he published in 1958, he expresses unequivocal support for the permit. He does not refer to the Hazon Ish by name, but refers to him as follows: "In 1939, one of the great scholars of Israel went out to oppose the permit, and based on his objection, the sabbatical year was observed in the *Po'alei Agudat Yisra'el* settlements according to the letter of the law without reliance on the permit, and so there were always a number of individuals who observed the sabbatical year according to the letter of the law" (Kasher, *supra* n. 1, at 168). The Hazon Ish raised the argument, among other claims, that the sale is not valid because it is done by means of an agent and "there is no agency to execute a transgression." In other words, the sale that was permitted by Rabbi Kook was non-existent in his eyes, and was even viewed as a transgression that invalidated the transaction. One can see the beginning of this line of thinking in the words of the Ridvaz, who claimed

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2. The Ideological Backdrop: Halakhah in Modern Times

Two fundamental issues shaped Orthodox halakhic trends in the modern period. One is the attitude toward changes and innovations in halakhah, and the other is the attitude toward Jews who have abrogated observance of Jewish law. I will demonstrate in this article that Rabbi Kook, consciously and candidly, chose to diverge on these two matters from the accepted approach of Orthodoxy in Western and Central Europe and proposed alternative principles for the reality, as he saw it, in the new settlement in the land of Israel.

The first issue, the attitude toward halakhic innovation, traces back to the motto of the Ḥatam Sofer (Rabbi Moshe Sofer 1762-1839), considered the founding father of Orthodoxy: “Innovation is prohibited by the Torah.”¹⁷ Rabbi Kook consciously and explicitly deviated from this principle, declaring that he was introducing an innovation to halakhah. He believed that it fell within his purview, and indeed that it constituted an obligation, to introduce a new model of halakhic analysis. Rabbi Kook was not willing to take cover beneath conservative

that Rabbi Kook’s permit brought destruction to the colonies, perceiving in this the hand of God in history: “In the year immediately after the sabbatical year, God sent a plague of locusts and grasshoppers that destroyed all of the produce of the land of Israel, creating a worthless year. Subsequently, in the second year, God sent a greater punishment – a bad illness ... Listen to what the non-Jewish Arabs are saying – that from the day that the Jews entered Israel to work the land, the blessing ceased and a curse was cast, and the land stopped giving fruit to the degree that it had produced up until now. It is very simple – the non-Jews are not commanded to fulfill the agricultural laws related to the land of Israel, and are therefore not punished ...” (introduction to the pamphlet of the Ridvaz on the sabbatical year, 1909). Rabbi Kook responded: “...God forbid that one should think that because the holy people are following the ruling of scholars, that God would be angry at his people” (*Mishpat Kohen* 43).

17 Moshe Samet, *Chapters in the History of Orthodoxy* (Hebrew), (Jerusalem: Dinur Center for Jewish History, The Hebrew University, 2005); Jacob Katz, *Halacha in Straits: Obstacles to Orthodoxy at its Inception* (Hebrew) (Jerusalem: Magnes Press, 1992).

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rhetoric that disguises innovative measures as something old and authentic; rather, he openly reflected upon his authority and obligation to innovate. He referred to the permit as a *new* permit, and insisted on the right of a halakhic authority to innovate in a changing reality. He based this authority on historical precedents, primarily relating to the sabbatical year, although his historical hermeneutic led to an interpretation of the sources that differed from accepted understandings. Rabbi Kook's approach, I will demonstrate, was adopted in conscious opposition to the principle, "innovation is prohibited by the Torah," itself an innovation of modernity.¹⁸

The second issue, the attitude toward Jews who do not observe halakhah, is more complex, and will be discussed toward the end of this article. The essential question on this subject, both in halakhic literature and in scholarly writings, is how to conceptualize the halakhic status of such individuals in the context of various religious practices. The following questions, among many others, perplexed halakhic scholars: Is the testimony of a non-observant Jew valid? Is his wine, like that of a non-Jew, prohibited? Can he be counted in a quorum of ten for prayer? I am not interested, however, in examining this issue in these standard manifestations; rather, I will focus on a different way this issue has appeared, albeit in a concealed fashion, that has received little scholarly attention. The question is whether the target population that a halakhic authority considers in his rulings should include those who have abrogated halakhah, or whether this population need not be considered. In our case, the question could be formulated as follows: Must the solution to the issue of the sabbatical year be one that is tenable for both the observant and non-observant settlers (even if the latter are not interested in, and would not follow, such a solution), or can a halakhic authority find a solution that speaks only to the religious settlements? Clearly, these two approaches to defining the parameters of the community would yield two highly different rulings. I will show that a

18 See Rosenak, "Between Prophetic Halakhah and Reality," *supra* n. 2, at 228-31.

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significant number of Orthodox leaders excluded non-observant Jews from the target population for halakhic rulings, asserting that “they are not our responsibility.” As such, in issuing a ruling, they did not take the entire Jewish community into account and did not consider the impact of the ruling on the non-observant Jews. Rabbi Kook, by contrast, explicitly rejected this approach. In his writings on the sabbatical year permit, he defined the parameters of the community so as to include those who were committed to the Jewish people, even if they were not committed to halakhah. This reflects an aspect of Rabbi Kook’s legal-halakhic philosophy that has received little attention: the responsibility to maintain halakhah as a functional normative system for all Jews.¹⁹ Since it was impossible for the entire Jewish community to observe the sabbatical laws, it was the responsibility of the halakhic authorities, according to Rabbi Kook, to re-design the law in such a way that it could address all Jews living in Israel without regard for their subjective commitments to halakhah.

B. Rabbi Kook and Halakhic Innovation

Halakhic literature at the beginning of the twentieth century reflects the tensions about change or innovation in halakhah. The demands of the Reform movement for changes, and the inflexible Orthodox reaction, resulted in this issue becoming the line of separation between the two movements. Changes in halakhah based on changing circumstances that

19 This is in contrast with aspects of Rabbi Kook’s philosophy that have received a great deal of scholarly attention, such as his sense of responsibility for the individual and the community and his commitment to the success of the Zionist settlement. Rabbi Kook expressed his support for the settlement as a factor in issuing the permit: “Know that if the settlement of the land requires using it [the permit], then it is completely correct according to the faithful principles. God forbid that we should leave our beloved land because of this” (introduction to *Shabbat Ha-Aretz*). See also Malkhiel, *supra* n. 2, who dealt with this at length.

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had been acceptable in previous generations became illegitimate. Rabbi Kook dealt with this challenge explicitly:

The sabbatical dispensation by a permit of sale on which we rely was never used and does not appear to have been relied upon by the early sages, of blessed memory, at the time of the Second Temple, in all the days of the sages of the Jerusalem Talmud, nor when the population continued to live in the land of Israel afterwards, in the days of the early authorities. This is not surprising, and there are three reasons for this. [...] In the early generations, the need was not so pressing, and so they did not enter into the use of a permit based on evasion, but subsequently, when the necessity intensified, they began to issue such permits, and directed the congregation accordingly; this is exceedingly common. We find this with regard to [the sale of] *ḥamets* [on Passover]. [...] Whenever there was no pressing need, the sages of that generation did not want to publicize dispensations based on legal fiction, following the maxim, “It is the glory of God to conceal a matter” (Prov. 25:2). [...] But when it became necessary to do so due to exigent circumstances, then it was surely meritorious to instruct them [to act] thus, on these and similar matters, in order to remove the stumbling block that the unsteady are facing, and to ease the great pressure of the hour.²⁰

The invention of legal fictions, even in later stages in the history of halakhah, is a phenomenon that cannot be disputed. The sale of *ḥamets* is just one of the examples that Rabbi Kook mentions. The possibility of using legal fiction was clear to the sages, even in earlier generations, but they tried in principle to refrain from using legal fictions as much as possible (“It is the glory of God to conceal a matter”). The necessity resulting from the new conditions (“exigent circumstances”), however, led the sages to acknowledge the need for a new permit and to bring it from potential to practice. This case was analogous, for Rabbi Kook, to the matter of the sabbatical year permit:

20 Introduction to *Shabbat Ha-Aretz*, pp. 59-61.

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And so too concerning our matter: in the early days, when the Jewish population lived primarily from working the land for sustenance, it was possible to observe the sanctity of the sabbatical year according to the details of the law, without any dispensation [...] But in our days, when the existence of the community depends on commerce in the produce and crops of the agricultural settlements, and the effect of preventing commerce would also lead to the destruction of future stability – under these circumstances, it is certainly our obligation to introduce the dispensation by way of sale [of the land].²¹

The halakhic authority is granted broad discretion to determine when halakhic change is required, and accordingly, when it is necessary, in this case, to approve a new permit.²² Rabbi Kook describes this process as highlighting or making explicit a legal option that is hidden within the text, yet because it is not valid until activated by halakhic authorities, it is considered an innovation from a legal perspective.

Interestingly, in 1900 before emigrating to the land of Israel, Rabbi Kook, while serving as the Rabbi of Boyesk, wrote a responsum supporting the permit, with no reference to any necessity for innovation in this context:

Why was this legal fiction not utilized in the times of the sages? Because in their days it was hard to find a non-Jew who was not considered an idolater. In that case, the sale is a Torah prohibition. [...] But in our times, when it is common among the nations [not to

²¹ Ibid.

²² See Meir Dan-Cohen, “Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law,” *Harvard Law Review* 97 (1983): 625. Dan-Cohen distinguishes between laws that are addressed to judges and laws that are addressed to the general population, and emphasizes the acoustic separation between laws that are addressed to different populations that are not aware of each other. He discusses the manner in which this phenomenon helps the law to bridge between competing values and needs.

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worship idols], there is no concern [for the implementation of the sale].²³

In this comment, Rabbi Kook makes the standard legally conservative argumentation of presenting an innovation, while simultaneously claiming that it is no innovation at all. He alludes to a change in reality that now makes possible the implementation of a permit that was allowed, in theory, already in talmudic times, but could not be implemented because of an external obstacle. The fact that non-Jews at that time were considered idolaters was the reason for prohibiting selling them land in Israel, according to the principle of *lo tehonmem* (“do not give them [idolaters] a foothold”). Following the approach of Maimonides, who argued that Muslims are not considered idolaters, Rabbi Kook held that, in modern times, the Arabs living in the land of Israel are also not considered idolaters. Accordingly, it is permissible to sell them land without violating the prohibition.

The essential difference between Rabbi Kook’s legal discussion of the permit before emigrating to the land of Israel and his later discussion in 1909 lends support to our claim that when he was in Israel, he understood that the reality of the new Jewish settlement required the halakhah to adjust itself, a process that needed to be the topic of serious deliberation. Rabbi Kook therefore changed the terms of the discussion from technical legal possibilities to a fundamental discourse, and abandoned the standard halakhic rhetoric that he had utilized in the above mentioned responsum that he had written in Boyesk.²⁴

In his discussion of the innovative nature of the permit and its legitimacy, Rabbi Kook cites two historical cases relating to the sabbatical year. One case involves permits issued by R. Yehudah Ha-Nasi at the end of the second century, and the second involves the sixteenth-

²³ *Responsa Mishpat Kohen*, 58.

²⁴ On the change in his attitude to secularists when he immigrated to Israel, see Aviezer Ravitsky, *Messianism, Zionism, and Jewish Religious Radicalism* (Chicago & London: The University of Chicago Press, 1996), 97-117.

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century ruling of R. Yosef Karo, the author of the *Shulḥan Arukh*, that the produce of non-Jews during the sabbatical year does not have the sanctity of the sabbatical year. Both cases have broad significance beyond serving as examples of halakhic change.

The validity of Rabbi Karo's position regarding the halakhic status of the produce of non-Jews in the sabbatical year is a prerequisite for arguments in favor of the contemporary permit, a matter that will be discussed in more detail further on. At this point, it is important to note that Rabbi Kook viewed Rabbi Karo's ruling as a deviation, justified by a change of historical circumstances, from the halakhic approach that had been accepted for generations.

In fact, the small number of our ancestors who came to the land of Israel in olden days only desired to fulfill the precepts that are attached to the land. [...] And even though they meticulously granted sanctity to the sabbatical year produce of non-Jews, it was not hard for them since there was not much commerce in the land of Israel at that time, and to observe the sanctity of the sabbatical year for the produce that they bought for their own consumption was not difficult. Afterwards, in later years, after the Spanish expulsion, when they came in larger numbers to the land of Israel, even though it was not yet the beginning of the redemption so that people began to work the land, it nevertheless became more difficult for them to be careful with the produce of non-Jews, and they voted in Safed in the time of the *Beit Yosef* [Rabbi Karo] and strongly agreed and accepted that the produce of non-Jews does not have the sanctity of the sabbatical year. Certainly, because of the necessity and urgency of current times, it is appropriate to rely on the permit of sale.²⁵

Rabbi Kook's argument is that the ruling of Rabbi Karo constituted an innovation and a transformation of previously accepted practice, and that it was a consequence of changing historical circumstances, in this case the expansion of Jewish settlement in the land of Israel following

25 Introduction to *Shabbat Ha-Aretz*, p. 44.

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the Spanish expulsion. This historical reading of Rabbi Karo's ruling is certainly plausible, but by no means necessary. It is not based on anything written by Rabbi Karo, and to the best of my knowledge, it was never suggested by any other halakhic scholar.²⁶ Nevertheless, this interpretation enabled Rabbi Kook to bolster his own argument by claiming the authority of a valid precedent for his own innovation based on historical circumstances. In Karo's sixteenth century, in contrast to Rabbi Kook's twentieth century, Jews in the land of Israel did not engage in agriculture ("it was not the beginning of the redemption so that people began to work the land"), and there had thus been no need for the permit that became indispensable in contemporary times.

The first historical precedent brought by Rabbi Kook, the second-century ruling of R. Yehudah Ha-Nasi regarding the sabbatical year, is more significant and foundational. The Talmud attributes to R. Yehudah Ha-Nasi the position that the sabbatical year is only a rabbinic prohibition in post-biblical times, in addition to a number of other leniencies regarding the sabbatical year.²⁷ These statements of R. Yehudah Ha-Nasi occupy a significant place in the writings of Rabbi Kook on this subject. Rabbi Kook implies that R. Yehudah Ha-Nasi's lenient positions arose out of a sensitivity to and understanding of the needs of his time and place. Let us examine some of the sources that Rabbi Kook employed in his discussion of the rulings of R. Yehudah Ha-Nasi. In the Jerusalem Talmud, there is a discussion as to whether the prayer for rain should be recited in the sabbatical year:

26 Furthermore, it appears, at least from Rabbi Karo's statement, that the one who wanted to change the prevailing custom was the Mabit, the adversary of Rabbi Karo; see Yosef Karo, *Responsa Avkat Rokhel*, at the beginning and end of section 24.

27 On R. Yehudah Ha-Nasi and the sabbatical year, see Shmuel Safrai, *In Times of Temple and Mishnah: Studies in Jewish History* (Hebrew) (Jerusalem: Magnes Press, 1994), vol. 2, 421-66, esp. 446-57; and more recently, Aharon Oppenheimer, *Rabbi Judah Ha-Nasi* (Hebrew) (Jerusalem: Merkaz Zalman Shazar, 2007), 74-83.

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We learned: As the alarm [prayer for rain] is sounded in every other [non-sabbatical] year, so it is sounded in the sabbatical year out of consideration for the livelihood of others. Now what does “out of consideration for the livelihood of others” mean? The sages said for the livelihood of Gentiles. R. Ze’ora said for the livelihood of those suspected of transgressing the laws of the sabbatical year.

R. Ze’ora rules in accordance with the view of R. Yehudah Ha-Nasi, and the sages [rule] in accordance with R. Pinḥas b. Yair. [Support to establish] that R. Ze’ora rules in accordance with R. Yehudah Ha-Nasi: A barber was suspected regarding sabbatical year produce. He was brought before R. Yehudah Ha-Nasi. R. Yehudah Ha-Nasi said to them: “And what can the poor man do? He did it for the sake of his life.” And that the sages held like R. Pinḥas b. Yair: Rabbi [Yehudah Ha-Nasi] wished to permit the sabbatical prohibition. R. Pinḥas b. Yair went to him and [opposed him] [...] R. Yehudah Ha-Nasi knew that he did not have support for his position.²⁸

R. Yehudah Ha-Nasi wanted to issue a general permit for sabbatical year prohibitions, but refrained because of the opposition of R. Pinḥas b. Yair.²⁹ Nevertheless, he ruled that one should pray for rain in the sabbatical year for the sake of transgressors who had planted crops. In the actual case narrated here, he refrained from condemning a person who had transgressed the sabbatical year on the grounds that “he did it for the sake of his life.” Elsewhere in the Talmud, other lenient enactments issued by R. Yehudah Ha-Nasi appear regarding the sabbatical year. Rabbi Kook associates himself with the positions of Rabbi Yehudah Ha-Nasi in this context; there are thus compelling reasons to compare their approaches.³⁰

28 *y.Ta’an.* 3:1 (66b-c).

29 See also *y.Demai* 1:3 (22a).

30 Elsewhere, Rabbi Kook states more explicitly that he sees the image of R. Yehudah Ha-Nasi before his eyes: “And with regard to rulings: whenever there is an urgent need to be lenient, then it is a mitsvah and the counsel of God is to be lenient. Yet, when it is possible, even in urgent circumstances,

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But for Rabbi [Yehudah Ha-Nasi], it was all one matter. Since he held that it would have been appropriate to permit [planting in the sabbatical year] because of extenuating needs, he defended the transgressors because of the urgent situation, and required people to pray on their behalf that they succeed in finding sustenance, even though they did so through a prohibition.³¹

Thus, R. Yehudah Ha-Nasi included the transgressors in his consideration. He understood their situation and the pressures that they faced, and tried to find a way to ease their plight. He even established that one should pray for their livelihood. Like R. Yehudah Ha-Nasi before him, Rabbi Kook sought to suspend the sabbatical year, not only because of the extenuating historical circumstances, but also in order to redeem those suspected of violating it. Rabbi Kook's use of these talmudic texts, which had not been mentioned in deliberations on the sabbatical year throughout the Middle Ages, is not coincidental. The precedent set by R. Yehudah Ha-Nasi served the purposes of Rabbi Kook not only in supporting his halakhic position on this particular issue, but also in incorporating the permit within his broader philosophical worldview regarding the halakhic status of "the transgressors" in the contemporary reality of the renewal of Jewish settlement in the land of Israel. This will be discussed in detail in the conclusion of this article.³²

to proceed without contrivance, it is certainly incumbent upon all of us to make every effort to follow the path of restraint. ... Nevertheless, we find several times in the rulings of the sages that they did not refrain from issuing new permits when the need was great, such as the case of Rabbi (*Igrot Ha-Reiyah*, *supra* n. 13, vol. 2, §198).

31 Introduction to *Shabbat Ha-Aretz*, p. 9.

32 Indeed, Rabbi Kook's historical perspective as revealed in his comments quoted above, in which he acknowledges creating a new permit, raises difficulties with regard to his own philosophy. The permit constitutes a retreat from the ideal performance of the commandment in its entirety, which seems to be in conflict with his worldview that the historical process is one of continued advancement toward a more ideal situation, and his

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C. Halakhah and Ideology: The Sabbatical Year Polemic

The halakhic discourse on the permit of sale for the sabbatical year rests on four main questions: (1) Whether the sabbatical year is a rabbinic prohibition (rather than a biblical prohibition) in contemporary times; (2) Whether non-Jewish acquisition of land in the land of Israel suspends its sanctity; (3) Whether it is in fact permissible to sell land in the land of Israel to a non-Jew; and (4) Whether such a fictional sale has enough validity to actually effect the suspension of the sanctity of the land. The latter two questions only become relevant once the first two have been answered in the affirmative. The rabbinic nature of the prohibition and the suspension of the sanctity of the land when owned by non-Jews make possible a consideration of initiating the transfer of ownership of the land to a non-Jew for the duration of the sabbatical year in order to release it from the sabbatical year sanctity. This possibility is raised in the latter two questions. In this section we will explore each of these questions in detail. These questions, already present in the deliberations that preceded the 1888-89 sabbatical year, were sharpened in the writings of Rabbi Kook and in the reaction of the Hazon Ish, in which the ideological elements of the discussion very clearly rose to the surface.

view of Zionism as part of that progress. Yet, Rabbi Kook turns this difficulty into an asset. He repeatedly points out that the ideal reality to which we aspire is to observe the sabbatical year in its entirety. It is that very aspiration that necessitates the temporary leniency regarding the commandment. Eliezer Malkhiel has dealt with this point in his research and his comments are accurate. The progress of history places a responsibility upon man to foster the process, an obligation to help bring the ideal into reality. The permit is a manifestation of this responsibility. Providing help and support to the settlers in the land of Israel advances the current reality toward its ideal goal, which certainly justifies the permit. See Malkhiel, *supra* n. 2, at 178-81.

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1. Is the Prohibition Valid in Our Days?

Rabbi Kook dedicated a significant portion of the introduction to *Shabbat Ha-Aretz* to the question of whether the sabbatical year is considered biblical or rabbinic in contemporary times. It is evident that the validity of the permit depends on his position that the sabbatical year is currently only a rabbinic prohibition.³³ Rabbi Kook's lengthy and complex excursus on this subject emerges from the surprising fact that there is great ambiguity on this question in the Talmud as well as in the positions of Maimonides and Rabbi Karo. Although most halakhic authorities among the *Rishonim* (medieval) and the *Aḥaronim* (early modern and modern) have held that the sabbatical year in contemporary times is a rabbinic prohibition, claiming that this is reflected in the rulings of the Talmud, Maimonides, and Rabbi Karo, Rabbi Kook did not want to simply rely on these opinions. He preferred to analyze the sources and to comprehensively clarify the subject. I contend that this approach was motivated by a number of factors. First, the lack of clarity in the Talmud relates to the position of R. Yehudah Ha-Nasi, and, as we have seen, Rabbi Kook attributed great importance to his opinions on the matter. Second, Maimonides is seen as the most important halakhic authority on issues related to the land of Israel, and

33 It is not necessary to examine the halakhic arguments as to why the sabbatical year is not a biblical commandment in our times. We can briefly explain that two reasons are put forth in halakhic literature. One, attributed by the Talmud to R. Yehudah Ha-Nasi, is that the sabbatical year is integrally connected to the law of the jubilee year, which is no longer observed. The second, a broader argument, is that agricultural laws connected to the land of Israel are not in force in the absence of the Temple, or when a majority of the Jewish people are not living in the land of Israel. On this issue, see discussions in the sources listed in n. 1. On the significance of the distinction between biblical and rabbinic prohibitions in the prophetic-halakhic approach of Rabbi Kook, see Rosenak, "Between Prophetic Halakhah and Reality," *supra* n. 2, at 602. On the significance of the distinction between biblical and rabbinic prohibitions in the prophetic-halakhic approach of Rabbi Kook, see Rosenak, "Between Prophetic Halakhah and Reality," *supra* n. 2, at 602.

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it would thus be essential for Rabbi Kook to explicate his position. Third, Rabbi Yosef Dov Soloveitchik (Beit Halevi), and even more so Rabbi Naftali Zvi Yehudah Berlin (Neziv), the head of the Volozhin Yeshiva and the most esteemed mentor of Rabbi Kook, both deviated from the standard view and considered the sabbatical year to have biblical force.³⁴

In the history of halakhic explication of this subject, three primary stances have been taken. Some have held that the sabbatical year in

- 34 For the positions of Rabbi Soloveitchik and the Neziv, see *supra* n. 8. Rabbi Kook dedicated the first nine chapters of his lengthy introduction to *Shabbat Ha-Aretz* to the normative status of the sabbatical year. In contrast, this issue was not raised in his correspondence with the Ridvaz.
- 35 Rabbi Karo held that this was the position of Maimonides. The following is written in the published writings of Maimonides: "...And the sabbatical year and the cancellation of loans is in any case rabbinic, as we have explained" (*Hil. Shemittah Ve-Yovel* 10:9). Rabbi Karo interpreted that only the cancellation of loans is rabbinic, but that the sabbatical year is a biblical law. This interpretation of Maimonides' words is difficult since it assumes that R. Yehudah Ha-Nasi, who established that the sabbatical year in our times is rabbinic (*b.Mo'ed Qat.* 2b; *b.Git.* 36a-b; *y.Šeb.* 10:1 [39c]), was speaking only about the cancellation of loans, and not the cessation of work on the land. This interpretation of R' Yehudah Ha-Nasi's words in the Talmud is very difficult. Indeed, this law appears as follows in manuscripts of Maimonides: "And the sabbatical year in Israel is rabbinic and so too, the cancellation of loans is in any case rabbinic, as we have explained." See Yitzhak Shilat, *Rambam Ha-Meduyak* (Ma'aleh Adumim: Ma'aliyot Publishers, 2004), who comments that the word "*mi-divreihem*" (rabbinic) appears twice in that law and was therefore omitted by the publisher. Indeed, *Tur YD* 331 wrote explicitly that the sabbatical year in our times is rabbinic, and Rabbi Karo wrote in the *Beit Yosef* as follows: "And such are the words of Maimonides in *Hilkhot Shemittah* 9:10," and, as was observed by Rabbi Y. Mishkalov in his *Pe'at Ha-Shulhan* (Jerusalem, 1912), §29, it appears that these words express Rabbi Karo's retraction of the position that he took in the *Kesef Mishneh*. See also Naḥmanides, *Sefer Ha-Zekhut* on *b.Git.* 18b (in the pages of the Rif); but see his commentary on *b.Mak.* 3b, where he wrote that the sabbatical year in contemporary times is a rabbinic prohibition. Similarly, see his commentary on Lev. 25:7. It is possible that his comment in *Sefer Ha-Zekhut* was only stated as part of his sharp polemic with the Ravad. As stated in the previous note, there were some scholars

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contemporary times is a biblical prohibition;³⁵ a majority have held that it is a rabbinic prohibition;³⁶ and a small group of *Rishonim* from Provence, most prominently Rabbi Zerahyah Ha-Levi (Razah) and R. Avraham b. David (Ravad), held that it is not even a rabbinic prohibition, but rather in the category of *middat ḥassidut* (an extra-legal standard of piety).³⁷ We will not investigate here in detail how Rabbi

among the *Aḥaronim* who held that the sabbatical year is a biblical prohibition in contemporary times, among them Rabbi Yosef Dov Soloveitchik and the Neziv. One of the interesting arguments of Rabbi Soloveitchik was that observance of the sabbatical year is part of the oaths that those who returned to Zion in the time of Nehemiah took upon themselves, as mentioned in Neh. 10: "We entered into a curse, and into an oath, to walk in God's law, ... and do all the commandments of the Lord our God, and His ordinances and His statutes; ... and that we would forego the seventh year, and the exaction of every debt." Rabbi Kook refuted this argument of Rabbi Soloveitchik by claiming that the oath related only to the time when the Temple existed, and that an oath cannot be binding on future generations. In spite of the positions of Rabbi Soloveitchik and the Neziv, Rabbi Shlomo Zalman Auerbach, like other well-respected halakhic authorities, regarded the sabbatical year as obviously a rabbinic prohibition in contemporary times.

36 See *Tur YD* 331; *Responsa of the Rashba*, vol. I, 875; *Sefer Mitsvot Gadol*, Positive Commandments, 148; *Sefer Mitsvot Qatan*, 259; *Sefer Ha-Ḥinnukh*, Precept 84 and the end of Precept 477; and many others.

37 The interconnectedness of the sabbatical year and the jubilee year negates the force of the sabbatical year in our times (see n. 33). Therefore, Rabbi Zerahyah argues that since the jubilee is not in force today even on a rabbinic level, the sabbatical year is also not in force even on a rabbinic level. The opinion of Razah is cited by *Sefer Ha-Terumot*, 55:4; Meiri, *Sefer Magen Avot*, 15. Rabbi Shlomo b. Shimon b. Tsemah Duran (=Rashbash) wrote that this is also the opinion of the *Halakhot Gedolot*, R. Yehudah of Barcelona, R. Yehudah b. Yakar, and the Ittur; see *Responsa of the Rashbash*, ed. Moshe Sobol (Jerusalem: Makhon Yerushalayim, 1998), §258, p. 190. For a discussion of the comments of the Rashbash and his sources, see Kasher, *supra* n. 1, at 177-84. Naḥmanides in his commentary to *b.Giṭ*. 36a-b cites this as the original position of the Ravad that he subsequently retracted; See *Commentary on the Treatise of Abodah Zarah by R. Abraham Ben David Of Posquieres (1125-1198)*, ed. Abraham Schreiber (New York, 1960) 9a, and the comments of Ravad on the Rif, *b.Giṭ* 19a (in the pagination of the Rif).

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Kook came to his conclusion that the prohibition is rabbinic, primarily because those who opposed the sabbatical year permit, including the Ḥazon Ish, agreed with him on this point.³⁸

Yet, although the conclusions of Rabbi Kook and the Ḥazon Ish with respect to this first question are identical, there is great significance to the differences in their deliberations on this point. While the rabbinic nature of the prohibition led Rabbi Kook to support the permit, it led the Ḥazon Ish to strengthen his opposition. One of the central arguments of the Ḥazon Ish against the permit was that the sale of land in the land of Israel to a non-Jew is a biblical prohibition. As such, it defies logic to violate a biblical prohibition (in this case the sale of the land to a non-Jew) in order to find a way to evade a rabbinic prohibition (the sabbatical year).³⁹ Rabbi Kook also discussed the balance between biblical and rabbinic precepts, but from his perspective, the biblical precept that had to be considered was the commandment to settle the land of Israel, which, in the words of the sages, is “equal in weight to the entire Torah.”⁴⁰ It was thus clear to Rabbi Kook that the biblical precept (settlement of Israel) takes precedence over the rabbinic prohibition (sabbatical year), when the latter is likely to impede the fulfillment of the former, “...and to cause by means of this stringency a terrible leniency and reduced fulfillment of the settlement of the land of Israel, which is equal in weight to all of the commandments.”⁴¹

38 Ḥazon Ish, *Shevi'it* 3:7. See also Brown, “Ḥazon Ish,” *supra* n. 15, at 67.

39 See our discussion on the prohibition of selling land in the land of Israel to non-Jews (*lo teḥonnem*) in section 3 of this article. His argument was raised earlier by the Neziv: “In truth, the great rabbi [that supports the permit] fled from the wolf and was attacked by a lion. By trying to flee from the prohibition of the sabbatical year which is, according to most authorities, a rabbinic prohibition, they were attacked by the prohibition of selling the land to idol worshippers, which is a biblical prohibition in everyone’s opinion (*Responsa Meishiv Davar, supra* n. 8, “*Ve-Ra’iti Le-Ga’on*”).

40 *Sifre Deut.* (ed. Finkelstein) §80, p. 146.

41 *Shabbat Ha-Aretz*, Introduction, p. 44. For the statement that the settlement of the land of Israel is equal in weight to the entire Torah, see *Sifre Deut.* (ed. Finkelstein), §80, p. 146; *b.Ketub.* 110b-111a.

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Interestingly, Rabbi Kook's and the Ḥazon Ish's respective arguments agreed, formally, on the primacy of biblical commandments over rabbinic ones, but differed in the choice of which biblical commandment should serve as the focal point of the argument. The question of how Rabbi Kook approached the prohibition of selling land in Israel to non-Jews (the commandment that the Ḥazon Ish emphasized) and conversely the question of how the Ḥazon Ish dealt with the commandment to settle the land of Israel (Rabbi Kook's focal point) are critical to understanding the respective approaches of these rabbis. We will discuss these questions further on.

Rabbi Kook's conclusion that the sabbatical year is a rabbinic prohibition in contemporary times prompts one of the most fascinating innovations in his long treatise on the sabbatical year. He questions why the rabbis instituted a prohibition altogether if the biblical law of the sabbatical year was no longer valid. In response, he suggests that the enactment is part of the educational enterprise of the sages designed for remembrance and preservation of the commandments: "Its performance is primarily as a remembrance."⁴² When a particular precept is not in force due to conditions of time and place, it should nevertheless be observed in order to achieve the educational effect of the precept, as well as to express the aspiration for the renewal of the

42 *Shabbat Ha-Aretz*, Introduction, p. 59. This idea is based on the well-known midrash in *Sifre Deut.* which posits that the reason for the fulfillment of the commandments in the exile is for the purpose of "setting for yourself road markers," that is, to remember the commandments so that they not be forgotten and can be observed when we merit returning to Israel; see *Sifre Deut.* (ed. Finkelstein) §43, p. 102. This idea was developed by Naḥmanides in his Torah commentary to Lev. 18:25 and Deut. 11:18. See also *Responsum Beit Ha-Levi*, vol. 3, §1:7; Aviezer Ravitsky, "Waymarks to Zion: The History of an Idea" (Hebrew), in *The land of Israel in Medieval Jewish Thought*, eds. Moshe Halamish and Aviezer Ravitsky (Jerusalem: Yad Izhak Ben-Zvi, 1991), 1-39.

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times in which the commandment can be observed in its ideal form. Rabbi Kook argues, in a fascinating innovation, that these goals of remembrance and aspiration can be achieved by means other than the full observance of the precept. Paradoxically, these goals can be achieved even through circumvention of the commandment; for circumventing the commandment – legal fiction in halakhic terms – is also a form of remembering. Selling the land every sabbatical cycle, a gesture that demonstrates remembrance of the biblical precept, would thus be transformed from a legal fiction to a fulfillment of the rabbinic ordinance, whose goal is remembrance of the biblical precept.

In the precept that we are discussing here, the primary reason for its observance being to commemorate it, legal fiction is certainly permissible. Since the evasion is carried out according to the prescriptions of the law, it constitutes a commemoration of the precept. ... so that the sabbatical laws will not be forgotten, in order that when the time comes for them to again be observed as a biblical law, all the laws will be known. We thus have to say that even if the precept is set aside by means of some permissible legal fiction, there is, even in this evasive act itself, remembrance of the precept.... And when we are lenient in times of urgency by utilizing a legal fiction, we remind [the people] that we do not currently have the ability to observe the commandment in its completeness, and all that we are able to do is to remember it, in order to make its complete fulfillment dear to us.⁴³

The sale of the land, Rabbi Kook argues, is itself a reminder of the precept. In essence, this act expresses commitment to and longing for the ideal and complete performance of the commandment of the sabbatical year. This claim may explain why Rabbi Kook, somewhat surprisingly, did not adopt the position of Rabbi Zerahyah Ha-Levi and the Ravad mentioned above, that the sabbatical year is not in force in our times even as a rabbinic prohibition, and that its observance is an

43 *Shabbat Ha-Aretz*, Introduction, p. 59.

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extra-legal act of piety. It is surprising that Rabbi Kook didn't follow this position, because one of the fundamental pillars of his halakhic approach is that in extenuating circumstances, one may rule in accordance with the refuted minority opinion, such as, in this case, the opinion of Rabbi Zerahyah and Ravad. This principle arises repeatedly with regard to all of the halakhic issues upon which the permit is based. But Rabbi Kook did not think it was appropriate to rely on a minority opinion that nullified the sabbatical year altogether, because he believed that it is always preferable to perform a precept than to nullify it through reliance on a minority opinion, and as we have seen, he viewed the permit as means of fulfillment of the precept.

Indeed now, when there is a permissible way to remove the prohibition by means of sale of the land, it is not considered a state of urgency at all, and it would be a travesty to abandon something permitted and eat something that is forbidden and transgress a prohibition [by adopting the position that there is no prohibition in our time].⁴⁴

Rabbi Kook's view of the permit as a remembrance of the sabbatical year commandment sets the stage for understanding the basic principles that persist throughout his polemic, principles that are strongly and fundamentally opposed by his antagonists. Rabbi Kook viewed the Zionist enterprise as the beginning of an ongoing, developing process, and believed that it would ultimately lead to the development of a society that would live according to halakhah. This fact leads to two conclusions. First, that it is important to "remember" the sabbatical year, to yearn for it, and to aspire to observe it in its ideal sense. The "remembrance" is justified as part of this broader process. Second, it is acceptable to forego partial adherence (i.e., adherence on the rabbinic level) at this point, for this concession will ultimately lead to the possibility of observance in the full sense (i.e., on the higher level as a biblical commandment). On this point, Rabbi Kook differs fundamentally

44 *Shabbat Ha-Aretz*, Introduction, p. 44.

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not only from his opponents, but also from some of the other supporters of the permit. For example, Rabbi Ya'akov Engel and Rabbi Avraham Borenstein, and subsequently Rabbi Shlomo Zalman Auerbach, discussed the permit utilizing the standard halakhic concepts of emergency legislation, such as danger to life, the loss of sustenance, and extreme financial loss – all of which were relevant to the discussion. These authorities, unlike Rabbi Kook, sufficed with the use of these concepts and ignored the ideological context of the Zionist settlement of the land of Israel.

2. Can the Sanctity of the Land be Suspended?

Does the sale of the land to a non-Jew actually liberate it from the sabbatical year prohibitions? Without an affirmative response to this question, no further discussion of a permit based on the sale of the land would be possible. This question was the source of a heated debate between Rabbi Yosef Karo and Rabbi Moshe De-Trani (Mabit) in Safed in the sixteenth century.⁴⁵ The debate then was not about the sale of land prior to the sabbatical year, but about the use of produce grown by non-Jews in the sabbatical year. Rabbi Karo contended that the talmudic concept, “the acquisition of the land by a non-Jew does not suspend its sanctity,” applied only to a situation in which a Jew subsequently reacquired the land or a Jew gathered the produce. He contended that in any other instance, the acquisition of the land by a non-Jew suspended its sanctity. In reality, Rabbi Karo established that the sanctity of the land that derives from the agricultural laws related to the land of Israel is not an objective concept, but rather a normative concept. It is, therefore, as with all other precepts, obligatory only to Jews.

45 Rabbi Karo and the Mabit debated this issue between the years 1532-1574. See Rabbi Karo, *Responsa Avkat Rokhel*, §§22-25. On this debate, see David Tamar, “*Ha-Maḥaloket Bi-Tsefat Be-Inyanei Shemittah U-Ma’asrot*,” *Ha-Ma’ayan* 35 (1995): 29; Ya’akov Navon, “*Pulmus Ha-Bet Yosef Ve-ha-Mabit Be-Peirot Nokhrim Ba-Shevi’it*,” *HaMa’ayan* 35 (1995): 12.

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Rabbi Kook followed Rabbi Karo, but went even further by claiming that the concept applies only to biblical precepts, not to rabbinic enactments. In other words, Rabbi Kook held that with regard to rabbinic enactments, such as the sabbatical laws in our times, the halakhah is that the acquisition of the land by a non-Jew suspends its sanctity. As such, the sabbatical year sanctity in modern times would be suspended by the sale of the land to a non-Jew.⁴⁶ This line of argument enabled Rabbi Kook to refute all of the talmudic proofs marshaled by the Mabit in his debate with Rabbi Karo to support the claim that the produce of a non-Jew has the sanctity of the sabbatical year. Rabbi Kook claimed that the Mabit's sources predated the destruction of the Temple, and thus emerged from a context in which the sabbatical year was a biblical prohibition.

It is thus clear that the permit operates through the following principle: The sale of the land to a non-Jew in advance of the sabbatical year suspends its rabbinic sanctity. There is a conspicuous paradox in this approach, noted by the Ridvaz in his treatise attacking Rabbi Kook. An ideological commitment to the settlement of the land of Israel and its sanctity leads Rabbi Kook to encourage the removal of that sanctity by means of a sale. Rabbi Kook was aware of this apparent inconsistency, and it was with an eye toward this difficulty that he established one of his most important and fundamental innovations.

Even though for other things, such as the portion given to the priests and tithes [...] the acquisition of the land by a non-Jew does not suspend its sanctity, nevertheless, regarding the sanctity of the sabbatical year, the acquisition of the land by a non-Jew suspends its sanctity, since its sanctity is on a rabbinic level. And it is not correct to say that it is impossible for the suspension of sanctity to be

46 Introduction to *Shabbat Ha-Aretz*, beginning of ch. 11. With this statement, Rabbi Kook follows the opinion of Rabbi Baruch of Worms, author of *Sefer Ha-Terumah*, *Hil. Eretz Yisrael*, p. 63; the Vilna Gaon in his comments on *Shulḥan Arukh YD 331:28*; and the commentary *Beit Yisrael* on *Pe'at Ha-Shulḥan*, *supra* n. 29, at 16:40.

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variable, for this is the measure: in a situation where the biblical level of sanctity remains, the acquisition of the land by a non-Jew does not suspend its sanctity, but when the level is rabbinic, the acquisition of the land by a non-Jew suspends its sanctity.⁴⁷

It seems that “the sanctity of the land” in Rabbi Kook’s approach is a modular or variable concept. There is a sanctity that relates to commandments and a “general” sanctity; put differently, there is a normative sanctity and a “real,” ontological sanctity. While the ontological sanctity remains constant, the normative sanctity changes from commandment to commandment. Each commandment is associated with the level of sanctity that is parallel to the level of its legal force. The sanctity of the land with regard to tithes, which is a biblical precept, is unlike the sanctity of the land associated with the sabbatical year, which is a rabbinic precept in our times. As such, the acquisition of the land by a non-Jew suspends the sanctity of the land as it relates to the sabbatical year commandment, but not as it relates to the obligation to tithe.

In addition, Rabbi Kook established that the general ontological sanctity of the land is inherently different from the normative sanctity. As he writes in *Mishpat Kohen*:

For the sanctity of the land and the sanctity of the commandments are two separate things, and even if the sanctity of the commandments is suspended by [sale to] a non-Jew, the settlement of the land of Israel is nevertheless a very important precept because of its inherent sanctity.⁴⁸

The significance of this point for Rabbi Kook is emphasized by the fact that he dedicated the final chapter of his introduction to it:

Because the settlement of the land of Israel is in itself equal to all of the other commandments of the Torah [...] and is not only a means for performing the commandments. [...] **The sanctity of the land of**

47 *Shabbat Ha-Aretz*, Introduction, p. 45.

48 *Mishpat Kohen* 63, p. 129.

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Israel is a value unto itself, separate from the sanctity of the agricultural commandments relating to the land of Israel.⁴⁹

Rabbi Kook thus suspended the normative sanctity of the sabbatical year, while still advancing the fulfillment and realization of the real sanctity of the land of Israel. There is also an important normative significance to the “real” sanctity of the land, according to Rabbi Kook, which foregrounds the obligations to rebuild its ruins, to settle the land, and to reinstate it to its prior perfection; to enable all Jews, as individuals and as a collective, to draw from its spiritual and existential sanctity. Rabbi Kook created harmony between the halakhic and aggadic sources that exalt the land of Israel and its settlement, and the halakhic sources which indicate that the sabbatical year in our times is only a rabbinic precept:

... [The sages] said: “Settling in the land of Israel is equal to all of the other commandments of the Torah.” This means that settling there in itself is the [manifestation of the] primary sanctity of the land of Israel. The merit of the agricultural commandments relating to the land are drawn along with it as a result. Yet even when they [the precepts relating to the land] are suspended due to an urgent situation, it [the primary sanctity] remains intact. And it is incumbent upon the heart and soul of every Jew to yearn to come and hold onto the precious land. [...] And there should be no weakening of the desire of the Jew for the land of Israel, whether because of the necessities of the deteriorated situation after the destruction of the Temple, the maliciousness of the nations, or economic pressures, that they should misleadingly cause the suspension of any commandment.⁵⁰

The distinction between categories of sanctity has significance in Rabbi Kook’s worldview far beyond the provision of a solution to the particular halakhic issue of the sabbatical year. By means of this

49 *Shabbat Ha-Aretz*, Introduction, pp. 62-63.

50 *Ibid.*

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distinction, he gave normative, halakhic force to the otherwise seemingly homiletic or aggadic talmudic dictum that settling in the land of Israel is equal to all of the other biblical commandments. The settlement of the land of Israel actualizes its sanctity, which is distinct from the sanctity connected to the agricultural precepts relating to the land. In the calculus of interests, the balance of gains and losses incurred by fulfilling or suspending certain commandments, the settlement of the land of Israel, equal to all of the other biblical commandments, rests on one side of the scale opposite the rabbinic sabbatical year precepts that are associated with a rabbinic level of sanctity. It is clear that the greater sanctity, associated with the ontological sanctity of the land, tips the scales. **Rabbi Kook's argument here is consistent with the importance and religious significance he attributed to settlement of the land, even if the settlers were not fulfilling the agricultural commandments relating to the land.** This immigration to the land advances and improves the status of its sanctity. The commandments are connected to the land, but the sanctity of the land is not dependant on the sanctity of those particular commandments.⁵¹

51 See Brown, "Sanctity of the land of Israel," *supra* n. 15, at 71. The Ḥazon Ish did not recognize sanctity other than the sanctity connected to the commandments, and thus the meaning of the sabbatical year as a rabbinic enactment is that the rabbis established sanctity with regard to the sabbatical year. Furthermore, the Ḥazon Ish held, in opposition to the distinction of Rabbi Kook, that when the rabbis enacted the sabbatical year sanctity in our times, they gave it the same status as if it were from the Torah. As a result, in his opinion, acquisition by a non-Jew does not suspend the sanctity of the land even on the rabbinic level. The essence of the rabbinic enactments is to return the situation to its original status as prescribed in the Torah, and there is therefore no reason to believe that they would have established a "lower" level of sanctity than that prescribed by the Torah. (See *Ḥazon Ish Al Shevi'it*, §20, "*Din Shevi'it Be-Sedot Nokhrim*") Indeed, the land in Syria never had sanctity, so when the sages enacted it, they established that it would be limited and could be undermined by sale of the land to a non-Jew. Thus, Rabbi Kook held that the concept of "rabbinic sanctity of the land," which by its very nature pertains only to the sanctity related to commandments, is a uniform concept that in

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The controversy between Rabbi Karo and the Mabit was never officially resolved. Yet, of profound interest is the practice that prevailed between the time of that debate and the commencement of the Zionist settlement activity a number of centuries later. One of the important sources from that intermediate period is the testimony of Rabbi Yisrael Mishkalov, one of the students of the Vilna Gaon who immigrated to the land of Israel in the nineteenth century. In his book, *Pe'at Ha-Shulḥan*, he writes that the practice in the land of Israel in his time was in accordance with the position of Rabbi Karo. Despite challenges to this testimony, it seems that the proofs in its favor are conclusive.⁵² It is thus no wonder that Rabbi Kook adopted the position of Rabbi Karo.

all instances indicates that the force of the commandment is on the rabbinic level, including both the sabbatical year in our times and the status of the land in Syria, while the Ḥazon Ish held that the concept of “the sanctity of the land” in relation to the sabbatical year is a uniform concept whether referring to a rabbinic or biblical commandment. Benjamin Brown points in this context that “from a classical rabbinic perspective, the position of the Ḥazon Ish has a better internal logic, because the biblical status is understood as complete, all-encompassing and absolute, while the rabbinic level status can be limited, divided, or conditional” (Brown, “Sanctity of the Land,” 92-93). However, this is difficult to accept. Rabbi Kook relates directly to the normative source of the precept from which the sanctity derives. The normative source of the sabbatical year in our times, as well as the obligation to tithe the produce of Syria, is rabbinic. Also, it seems from the section of the Talmud in *Gittin* mentioned above, that the Talmud does not mention different levels of sanctity as suggested by the Ḥazon Ish, but about sanctity from two different normative sources – biblical or rabbinic.

52 For the testimony of Rabbi Mishkalov, see *Pe'at Ha-Shulḥan*, *supra* n. 29, §23:12. In a later responsum, the Maharit claimed that Rabbi Karo retracted his position in his later years; see *Responsa Ha-Maharit*, vol. I, beginning of §43) Yet, this testimony seems very problematic since in a responsum from 1573, the last sabbatical year in his life, Rabbi Karo still debated the Mabit (see *Responsa Avkat Rokhel* 25, “*Amar Yosef*”). The Ḥazon Ish preferred the approach of the Mabit, and even adopted the testimony of the Maharit that Rabbi Karo retracted (See Ḥazon Ish, *Zera'im*, Section 20; and the discussion by Brown in his dissertation, *supra* n. 15, at 397). This affair is summarized by Navon, *supra* n. 36. He implies that the testimony tends to

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The Safed debate centered around the question of the sanctity of land owned by a non-Jew, but not necessarily land that was sold to a non-Jew for the specific purpose of circumventing the sabbatical year commandments. Thus, it serves as essential but preliminary background to our discussion. Even according to the position of Rabbi Karo, adopted by Rabbi Kook, it remained an open question whether it was permissible to initiate a sale of the land for this purpose. This question rests on two larger concerns: first, whether it is permissible at all to sell land in Israel to non-Jews, and second, whether it is acceptable to initiate a fictitious sale intended solely to circumvent the law. These two questions were at the heart of the controversy between Rabbi Kook and the Hazon Ish. These issues will be examined below.

3. Is it Permissible to Sell Land in the Land of Israel?

The biblical prohibition known as “*lo teḥonnem*” was spliced by the sages into three different prohibitions, one of them being to sell land in Israel to a non-Jew: “*lo teḥonnem* – do not give them [non-Jews] a foothold in the land.”⁵³ This prohibition, *prima facie*, constitutes a serious impediment to adopting the permit. As discussed above, one of the powerful arguments against the permit was that avoiding the rabbinic prohibitions of the sabbatical year in this manner required transgressing the biblical prohibition of selling land to a non-Jew.⁵⁴

clearly support the thesis that in the land of Israel, the prevailing practice was in accordance with the position of Rabbi Karo, that the sabbatical year sanctity does not apply to the produce of non-Jews.

53 Deut. 7:1-2. The midrash is cited in *b.ʿAbod. Zar.* 20a. The other interpretations are: “*lo teḥonnem* – do not give them favor; *lo teḥonnem* – do not give them a free gift.” It appears that the simple meaning of the verse deals with granting amnesty. This law is also included explicitly in *m.ʿAbod. Zar.* 1:8 as the opinion of Rabbi Yose, which is the accepted opinion. See *b.ʿAbod. Zar.* 21a; Maimonides, *MT, Hil. Avodat Kokhavim* 10:3; *Shulḥan Arukh, YD* 151.

54 See the comments of the Neziv, *supra* n. 33.

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Rabbi Kook suggested several ways of deflecting this challenge. In his discussion in *Shabbat Ha-Aretz*, he gives prominent attention to the suggestion of his contemporary colleague, Rabbi Zalman Shach, a judge in the rabbinical court of Jaffa. Rabbi Shach claimed that the prohibition of giving “a foothold in the land” could only be transgressed by selling land to a non-Jew who did not already have “a foothold,” i.e., did not own land in Israel prior to the sale. There remained only a rabbinic prohibition against selling land to a non-Jew who already had land, since this changed the degree of their ownership but not the fact of ownership. Rabbi Shach’s argument was expressed by Rabbi Kook as follows:

An increase in degree of this nature is only rabbinic. And if it is only rabbinic, one could claim that since this [the sale of the land] is needed to promote the settlement of the land of Israel [which is a biblical injunction] ... [the prohibition of selling land to non-Jews] was not enacted under these circumstances.⁵⁵

The emphasis of the prohibition against selling land to non-Jews, according to this interpretation, is not about the act of selling per se, but rather about giving “a foothold.” Elsewhere, Rabbi Kook argued that this sale does not constitute “giving a foothold” for another reason: because it is for a specified, limited period of time.⁵⁶

The meticulous, almost pedantic close readings of the concept of *hanaya* (giving a foothold) seem to constitute a legal formalistic approach in Rabbi Kook’s interpretation. This is a classic example, however, of a facially **formalistic analysis that serves in reality as a tool for the actualization of the spirit of the law**, when the implementation

55 *Shabbat Ha-Aretz*, 54.

56 *Responsa Mishpat Kohen* 68. The Hazon Ish differed categorically with these ideas. In his opinion, adding to the foothold constitutes a transgression too. He thought that it is logical and does not need a source, but he also cited a talmudic source that prohibits even the sale of a palm tree to a non-Jew, and Rashi explains that the reason is the prohibition of *lo teḥonnem* (*b. Abod. Zar.* 14b, Rashi: “*Ein Mokhrin Lahen Be-Mehubbar La-Karka*”).

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of the letter of the law, without this formalism, would undermine its broader purpose. Rabbi Kook held that the purpose of this law is to preserve the Jewish possession of the land of Israel, and that prohibiting the sale of land for the sabbatical year would result, ironically, in the land falling into the hands of non-Jews.⁵⁷ Before emigrating to the land of Israel, Rabbi Kook implied in a responsum that the sabbatical year permit endeavors to achieve the exact same goal as the prohibition against selling the land. He claims that the prohibition applies only when the sale will benefit non-Jews, but not when it is in the interest of the Jews.⁵⁸

The prohibition of not giving them a place to settle on the land does not apply to this type of sale [...] which is for our benefit, so that the Jews will become strengthened in the land. [...] And the matter is logical that the Torah would not forbid it since it is fundamentally for the benefit of the Jews, particularly since it is known that the land will not remain in the possession of the non-Jews, in that after the seventh year, the one who bought it from him will re-sell it to a Jew.⁵⁹

57 Regarding “values” as opposed to “formalistic” considerations as a characteristic of Rabbi Kook’s “prophetic halakhah,” see Rosenak, *supra* n. 2, at 506. In addition, Rabbi Kook wrote: “they only made a decree ... when making a real sale that will endure to place it in the hands of the non-Jew. However, when he sells it in order to suspend the prohibition, they did not make a decree” (*Shabbat Ha-Aretz*, Introduction, 54). The sale of the land for the sabbatical year is not a real sale, but solely a formalistic sale to suspend the prohibition, and is therefore not considered a sale that fundamentally transgresses the prohibition of *lo teḥonmem*. It appears that with this argument, Rabbi Kook puts himself in a difficult position, by claiming that the sale is not a sale. Later in the section on legal fiction, we will discuss how Rabbi Kook dealt with the fictitious foundations of legal fiction.

58 See Ra”n on *b.Gif.* 38b (page 20b in the pagination of the Rif), “*Kol.*” Ra”n discusses another prohibition derived from *lo teḥonmem*: “do not give them a free gift,” indicating that the prohibition applies only when the gift benefits the non-Jew. This point was relied upon already by Rabbi Yehoshua of Kutna (*Responsa Yeshu’ot Malko*, YD 55), and by Rabbi Kook’s father-in-law, the Aderet (*Adar Ha-Yakar* 9, p. 87).

59 *Mishpat Kohen* 58.

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This example provides additional support for our contention that after immigrating to the land of Israel, Rabbi Kook was more open to transparently and courageously innovative interpretations, designed to achieve the values inherent in the law. Another solution suggested by Rabbi Kook in that responsum relates to the distinction between non-Jews who are idolaters and those who are either monotheists or resident aliens. It is well known that Rabbi Menahem Ha-Me'iri (the Me'iri, 1249-1315) claimed that monotheistic religions are not considered idolatry.⁶⁰ A halakhic thinker who was unwilling to go as far as the Me'iri could still adopt the position of Maimonides that Islam is not idolatry. Similarly, one could rely on Ravad, who believed that any non-Jew who fulfilled the seven Noahide laws – most non-Jews in the modern period – has the status of a resident alien; it was thus permitted to sell him land.⁶¹ On this point, Rabbi Kook stated: “We can simply say that it is helpful with anyone who is clearly not in this category [of idolatry], particularly entire nations that are so by virtue of their religion.”⁶² In fact, contrary to Maimonides, Rabbi Karo ruled that Muslims are legally considered to be idolaters.⁶³ Nevertheless, Rabbi Kook argued:

In any place that there is someone on whom to rely in an extremely urgent situation such as this – it is obligatory to rely on it in order to be lenient.⁶⁴

60 *Beit Ha-Behirah, Abod. Zar.*, p. 46. See Jacob Katz, *Halakhah and Kabbalah* (Hebrew) (Jerusalem: Magnes Press, 1986), 291.

61 Furthermore, Rabbi Karo, in *Kesef Mishneh*, minimized the controversy between Maimonides and Ravad until they were practically in agreement on this point. See Maimonides, *MT, Avodah Zarah* 10:6, as well as Ravad and *Kesef Mishneh* there.

62 *Mishpat Kohen* 58, p. 122.

63 *Beit Yosef on Tur, ḤM* 249.

64 *Mishpat Kohen* 63, p. 128. This approach is categorically rejected by the Ḥazon Ish. In his opinion, Maimonides should be understood in the literal sense, indicating that only an explicit acceptance of the seven Noahide laws before a court grants the status of resident alien. Similarly, the position of Ravad should be understood in a limited sense that recognizes only acceptance of the seven Noahide laws that derived from faith, and not

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It is evident that Rabbi Kook openly made every effort to give legal teeth to the permit, and was prepared to build his arguments upon multiple layers of minority opinions. The essence of his argument regarding whether it is permissible to sell land to non-Jews, facially prohibited under the rubric of *lo teḥonnem*, is in fact permitted for the sabbatical year permit. After all, the ultimate purpose of the prohibition of *lo teḥonnem*, the prevention of the transfer of the land of Israel to non-Jews and **the preservation of Jewish ownership of the land, is best served, according to Rabbi Kook, by sale of the land in the sabbatical year.** Rabbi Kook was thus prepared to interpret the halakhah in a most radical manner; since the classic understanding of this particular halakhah would have an opposite effect from the intended outcome, it was necessary to find a way to circumvent it.⁶⁵

out of a sense of the ethical value that they embody. In *Mishpat Kohen* 60, Rabbi Kook brings more arguments to support his position.

- 65 According to the Ḥazon Ish, the purpose of the *lo teḥonnem* prohibition is not related to the sanctity of the land, but is rather designed to distance idolatry from the land of Israel: “That the land be settled by Jews and that idolaters not live there. And it is the ‘land of Israel’ even during our exile” (*Ḥazon Ish Al Ha-Shevi’it* 24:1). As such, the prohibition is in all situations a biblical prohibition. The reason that this prohibition applies only in the land of Israel is not related to the sanctity of the land, but rather to the fact that only there is it our land that we are permitted to govern and where we are required to fight idolatry. The commandment to rid the land of idolatry is a perpetual precept that is unrelated to its sanctity or lack thereof, and thus the prohibition of *lo teḥonnem* applies on a biblical level in our time. See Brown, “Ḥazon Ish,” *supra* n. 15, at 392-401. In conclusion, we see that Rabbi Kook distinguished between two types of sanctity related to the land, while the Ḥazon Ish proposed that the prohibition is unrelated to the sanctity of the land. In the final analysis, there is a proximity between the “real,” ontological sanctity of the land proposed by Rabbi Kook, and the prohibition against idolatry of the Ḥazon Ish. However, the approach of each serves his ideological needs and the resulting goals. For Rabbi Kook, the sanctity of the land requires action on behalf of the Zionist settlement, while for the Ḥazon Ish, the definition of the prohibition as a law relating to idolatry allows him to attack the permit of Rabbi Kook.

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4. Are Legal Fictions Acceptable?

Given that the sale of the land to a non-Jew for the sabbatical year is permitted, the question remains whether such a sale, which involves a legal fiction, is actually legally valid. This question troubled Rabbi Kook immensely as evidenced by his extensive discussion on the subject. There are two underlying questions: Are legal fictions permitted in general, according to Jewish law? And, if so, how can the fictitious sale be formulated in such a way that it has legal validity? Generally, by its nature, legal fiction involves exploiting a loophole in the law that allows its circumvention, i.e., acting contrary to the spirit of the law without formally violating it. In rabbinic literature, there is ambivalence about the legitimacy of legal fiction. In some contexts, the sages viewed legal fiction positively as a means of solving difficulties, or even attaining desirable and positive goals. On the other hand, many instances of legal fiction in rabbinic literature are viewed as attempts to evade the obligations of the commandment.⁶⁶ After examining several precedents, Rabbi Kook ruled as follows:

And it seems, therefore, that we cannot deduce from one case to another, and it is proper to judge each case independently, in accordance with how vital a matter it is. The Jerusalem Talmud states that to be merciful with the property of Israel, it is permissible to evade [the law].⁶⁷ And where there is great necessity, as seems to be the case regarding the question of the sabbatical laws, in view of the current situation, it is proper, according to this [principle], to rule leniently.⁶⁸

66 Ephraim E. Urbach, *The Halakhah: Its Sources and Development*, trans. R. Posner (Jerusalem: Massada, 1984), 233-59; Moshe Silberg, *Talmudic Law and Modern State*, trans. B. Z. Bokser (New York: Burning Bush Press, 1973), 22-44.

67 See *y.Beṣah* 3:2 (62a).

68 *Shabbat Ha-Aretz*, Introduction, p. 57.

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These comments, however, only provide an answer to the general question of whether legal fiction is permissible, but do not address our specific question of the validity of a fictitious sale that does not actually include full intent to transfer ownership, which is required in such a transaction. There are two halakhic precedents indicating that a fictitious sale has legal validity: the sale of leavened products on Passover and the sale of a firstborn animal. Both examples involve biblical prohibitions that are circumvented by fictitious sales to non-Jews. In both cases there is no intention of full transfer of ownership; the leavened products sold prior to Passover will return to the ownership of the Jew after Passover, while the firstborn offspring of an animal effectively remain in the ownership of the Jew. Rabbi Kook explains how these can nonetheless be understood as valid transactions:

We must certainly say that in a transaction for the purpose of making a business deal, the primary intent is the fulfillment of the deal ... but when the essence of the transaction is to suspend a prohibition, and both the seller and the buyer have the intent to sell and buy, this intent is enough. ... For the fact that he buys it so it will be considered his for the purpose of suspending the laws of the sabbatical year, on this they definitely have intent and it is of benefit to the Jew to sell it and to the non-Jew to buy it.⁶⁹

Through his ingenuity, Rabbi Kook turned the primary difficulty of the permit – the fictitious nature of the sale – into an asset. Although the transaction does not constitute a “real” sale, it is a sale for the singular purpose of suspending the sanctity of the land. Thus, the sale is actually only about transferring ownership rights to such a degree as to suspend that sanctity. This does not entail a complete sale of all of the rights with all of the legal implications associated with ownership; rather, the sale affects only one facet of ownership – the suspension of sanctity. Indeed, a collateral result is that this also solves the issue of selling land in the land of Israel to a non-Jew.

⁶⁹ *Shabbat Ha-Aretz*, Introduction, p. 58.

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Rabbi Kook's stance on legal fiction generated vigorous opposition and was used by detractors to attack his positions. The Ridvaz wrote:

If the Rabbi of Jaffa wrote on a piece of paper a deed of sale to the barefoot Arab that all of the land of Israel owned by the Jews belongs to him, did the Arab actually acquire the land and suspend the sanctity of the land of Israel?⁷⁰

The Ḥazon Ish, by contrast, acknowledging that legal fiction is an accepted halakhic instrument, did not attack Rabbi Kook on this issue. Nevertheless, he claimed that the intent in this case cannot be considered sufficient for legal purposes. He compared the intent in the sale of the land with that of the sale of *ḥamets* on Passover, arguing that there is intent in the latter case but not in the former:

In the sale of leavened products on Passover, which is in order to avoid transgressing the prohibition of seeing and possessing [leavened products on Passover], he has the intent to sell. But in this case, in order to circumvent the law of the sabbatical year, he would not sell all of the land of Israel to a non-Jew. On the contrary, it is more palatable for us to observe the sabbatical year than to sell all of the land of Israel to a non-Jew.⁷¹

The Ḥazon Ish's claim can be challenged. The statement that he makes with regard to Passover could also be made with regard to the sabbatical year, given the striking similarities between them. In both cases there is a desire to circumvent a prohibition by means of the same legal fiction of sale to a non-Jew. In fact, the Passover legal fiction seems more problematic than the sabbatical year one, since leavened products on

⁷⁰ *Kuntres Ha-Shemittah*, Introduction.

⁷¹ Ḥazon Ish, *Shevi'it*, 27:7. Two additional points arise in the writings of Ḥazon Ish: 1) that the sale is not registered in the government registry, which would invalidate the sale according to the law of the state; and 2) that the sale is effected by an agent, and, being forbidden, would be invalid based on the principle that there is no agency for transgressions.

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Passover are biblically prohibited, while, as we saw above, the sabbatical year is only a rabbinic prohibition. It seems, then, that the controversy between the Ḥazon Ish and Rabbi Kook is not over the essential legitimacy of the legal fiction as such, but rather over the broader overarching **values and principles that justify the use of legal fiction**. This point will be further explicated in the article's conclusion.⁷²

D. Signposts of the Creation of a New Stream in Halakhah

This section explores Rabbi Kook's halakhic worldview and the overarching principles that guided his legal interpretation in the case of the sabbatical year. Rabbi Kook's vision will be contrasted with his opponents' approaches to halakhah. I argue that **the sabbatical year controversy centered on a fundamental disagreement about which target population should be favored when less rigid understandings of halakhah are adopted under extenuating circumstances**. Rabbi Kook's attitude to this question, I argue, reflects the innovative ways in which he, as a Zionist religious authority, parted company with the Ḥazon Ish, the paradigmatic *haredi* religious authority. Before addressing the debate about target populations, it is important to understand the discretionary power of a halakhic authority and the methods available to him when issuing rulings in "hard cases." We turn now to a brief discussion of the tools at his disposal and the parameters of what constitutes a hard case, or a time of pressing need.

72 Brown brought sources for the claim that the Ḥazon Ish distinguishes between the desire to circumvent a commandment and the desire to avoid a transgression (Brown, "Ḥazon Ish," *supra* n. 15, at 401-406). With regard to Passover, a Jew wants to avoid the transgression, and he therefore has full intent, but with regard to the sabbatical year, he is circumventing a precept, and it is therefore difficult to ascribe to him full intent. It is difficult, however, to accept this distinction if we consider the other example of the firstborn animal, in which case he also circumvents a precept.

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1. Dissenting Opinions as a Tool Available to Halakhic Authorities

As we have seen, Rabbi Kook openly relied on existing minority opinions in his deliberations on each halakhic question relevant to the sabbatical year permit.⁷³ He expressed this reliance as a principle of legal interpretation in extenuating circumstances: “Anytime there is an opinion on which to rely in such a situation of severe need, it is required to rely on it to rule leniently” (*Mishpat Kohen* 63). This principle, which is rooted in the Talmud, grants discretionary power to halakhic authorities in difficult cases, according to Rabbi Kook. It is well known that halakhah preserves a range of opinions on halakhic questions, even when there is one opinion that is considered normative.⁷⁴ Rabbi Kook’s approach to halakhic interpretation treats these minority opinions as “decision rules,” as opposed to “conduct rules.”⁷⁵ These opinions are not preserved for intellectual or spiritual posterity, but to enable the halakhic authority to appeal to them in times of urgency, at his discretion.

Rabbi Kook thought that the use of minority opinions was particularly necessary in cases **when such opinions enabled the goal or spirit of the law to be achieved more effectively than the majority opinion**. More radically, he believed minority opinions should be relied on when halakhic authorities with discretionary power deemed it necessary to suspend the law in favor of other overarching values. These justifications for using minority opinions constituted a divergence from standard practices and functions of halakhic interpretation, granting a great deal of discretion to the halakhic authority in determining the

73 On this issue, see Yitzhak Shilat, “Semikhah Al Da’at Yaḥid Be-Sha’at Ha-Deḥak (Le-Berur Maḥaloket Ha-Rav Kook Veba-Ḥazon Ish),” in *Berurim Be-Hilkhot Ha-Reiyah*, eds. Moshe Z. Neriya and Aryeh Stern (Jerusalem: Bet Harav Publishing, 1992), 451; Malkiel, *supra* n. 2, at 194.

74 See Hanina Ben-Menaḥem, Neil S. Hecht, and Shai Wosner, eds., *Controversy and Dialogue in Halakhic Sources* (Hebrew) (Jerusalem: The Hebrew University in Jerusalem Institute for Research in Jewish Law, 2002), vol. 2; Avi Sagi, *Elu Va-Elu: A Study on the Meaning of Halakhic Discourse* (Hebrew) (Tel-Aviv: Hakibbutz Hameuchad, 1996).

75 See Meir Dan-Cohen, *supra* n. 20.

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balance between conflicting halakhic values. The halakhah, he believed, grants the halakhic authority the ability to withdraw to a “second defense line,” to an opinion that exists in the halakhic corpus but is not the conduct rule.

At a time of extreme urgency, such as the situation of the settlement, it is acceptable, even if we rely on a lone opinion instead of the majority opinion. And we find similar rulings in several matters where they relied on a lone opinion when the need was pressing, and the rabbis did not prevent them, which was appropriate and respectable. And they did so even regarding biblical prohibitions, as was practiced in a number of matters.⁷⁶

The refuted opinion cannot be selected by an ordinary person, of his own accord, to determine his own course of conduct, but it is incumbent on the halakhic authority to utilize it in extenuating circumstances. Yet, it is the halakhic authority himself who determines what is considered a valid extenuating circumstance. The halakhic authority is equipped with an equitable tool for situations in which the accepted law would lead, in his opinion, to a problematic and undesirable result that is inconsistent with the values of the law.

The principle that minority opinions could be relied upon in extenuating circumstances subject to the discretion of the halakhic authority, found in the Talmud,⁷⁷ was accepted by the Hazon Ish and other opponents of the permit. The Hazon Ish differed from Rabbi Kook, however, concerning the application of this principle. He radically curbed the potential discretionary power latent in this principle by

⁷⁶ *Mishpat Kohen* 63.

⁷⁷ See *b.Nid.* 9b. The basic idea appears already in the Mishnah; See *m. Ed.* 1:5: “And why do we mention an individual opinion along with the majority, though the halakhah follows the majority? That a court may approve an individual view and rely on him; for a court cannot contradict a decision of its fellow court unless it is greater in wisdom and number. If it was greater in wisdom but not in number, in number but not in wisdom – it cannot contradict its decision, only if it exceeds it in wisdom and number.

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ruling that it does not apply to laws that have already been ruled upon in the halakhic codices, or even when there is a recognized precedent. It seems that he was driven by an overarching concern to limit this principle as much as possible.

The Ḥazon Ish's minimalist reading of this principle accords with general methods for responding to issues of change and innovation in Orthodox jurisprudence. An Orthodox halakhic authority, from his defensive posture, would prefer to respond to changing circumstances through creative exegesis rather than conscious and explicit reference to a need for change. Reliance on a refuted opinion is an explicit deviation from an accepted halakhic ruling, even though it is formally within the halakhic framework. Even the most radical exegesis, by contrast, does not project itself as an innovation or a change. Its novelty is concealed by the fact that it is based on a reading of an accepted text, an interpretation of an existing law. The Ḥazon Ish endeavored to close the door on demands for halakhic change motivated by the realities of changing times. The ironic result is that in the case of the sabbatical year permit, Rabbi Kook, who was explicit about the need for change, made use of a recognized halakhic principle, while the Ḥazon Ish, who denied the need for change, departed in significant ways from classic interpretations, through innovative readings of the talmudic sources regarding minority opinions.

The Ḥazon Ish did, in fact, issue lenient rulings, but they preferred that they only be based on innovative and creative interpretations of accepted classical sources. In fact, he is considered by some scholars to have been quite responsive to the need for change in halakhic matters relating to agriculture in the land of Israel in general, and the sabbatical year in particular.⁷⁸

78 Brown, "Ḥazon Ish," *supra* n. 15, at 408 ff. Thus, for example, it is permitted to irrigate an orchard [in the sabbatical year] in order to prevent long-term damage: "That if it will not be irrigated, the earth will become salty and all of the trees will die" (Maimonides, *Hil. Shemittah Ve-Yovel* 1:10; see *Shabbat Ha-Aretz*, *Hil. Shemittah* 1:5; *Mishpat Kohen* 79). The

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Having clarified that the interpretive principle of relying on refuted opinions was traditional, it is important to reiterate that Rabbi Kook applied this principle in an innovative manner. The principle grants discretionary power in situations of great urgency, as noted above. The question, then, is what constitutes a situation of great urgency? What are the values that would justify divergence from an accepted halakhic ruling through reliance on a minority opinion in order to preserve them? In the lexicon of halakhic authorities, values such as the preservation of life and the prevention of extreme financial loss have classically been defined as such. Rabbi Kook, however, added new values to this list, a fact that may shed light on the strong resistance of the Ḥazon Ish to this method of interpretation. The Ḥazon Ish was wary of the winds of change in the twentieth century, and he feared the potential of unbridled and dangerous innovation latent in the possibility of adding new fundamental values to the lexicon.

Ḥazon Ish, however, interprets these words differently: “It appears that what our teacher wrote that the earth would become salty did not refer to the possibility that the trees will never give fruit, but that it will die and not bear fruit in this year ... even if there is no loss in the coming year” (Ḥazon Ish, *Shevi'it*, 21:14). Ḥazon Ish adds to his innovation: “Therefore, in a situation of loss, that the tree will die or that it will **lose all of its fruit**, there is a basis for leniency, i.e., one does not have to consider every single activity if there is concern that the tree might die. The only thing that is forbidden is something that will generate growth, e.g., if one application would suffice, two applications are forbidden. Similarly, one is obligated to fertilize and to weed before Rosh Hashanah 5712 so that it need not be done during the sabbatical year, even if it will last for the entire year – he must reduce prohibited activities as much as possible (Ḥazon Ish, *Al Ha-Shevi'it*, 21:14-17). As scholars have already indicated, this interpretation of the Ḥazon Ish is quite innovative. It should be noted, however, that the Ḥazon Ish placed a great deal of responsibility on the farmer to continuously determine the level of basic sustenance, while Rabbi Kook issued more of a blanket permit. This point is very important when considering the target population of each halakhic authority.

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2. Protected Values

The permit of sale was first issued in 1888-89, as discussed above, in order to “save hundreds of lives.”⁷⁹ Although the expression “saving lives” relates to the law of *pikuaḥ nefesh*, the saving of physical, sentient life, it is clear that in this context, it actually refers to saving people from major financial loss. The implicit justification for the ruling was the concern for the future viability of the settlement in Israel. Rabbi Kook departed from the other supporters of the permit by making this justification explicit. He proclaimed his obligation as a halakhic authority to support the Zionist settlement enterprise and to hasten the redemption by removing halakhic obstacles. Rabbi Kook thus added to the lexicon of overriding halakhic values the concept of preventing “the demise of the settlement and the desolation of the Holy Land.”⁸⁰ For him, the set of extenuating circumstances that granted him halakhic discretion was not the need to save lives, but the need to promote the settlement.

This all [reliance on a minority opinion] related to a state of urgency of an individual. If so, what would we say in a situation that affects the nation as a whole in reference to the settlement of the Jews in their land? Would not everyone certainly agree that it is permissible to rely on a lone opinion in matters that are rabbinic by nature?⁸¹

Rabbi Kook’s maximalist halakhic interpretation is motivated not by of the needs of an individual or a group, but rather by **the needs of the nation** – the aspiration to expand Jewish control of the land of Israel. The commandment to settle in the land of Israel is “equal in weight to all of the other commandments,” and therefore tips the scales in favor of the permit over the commandment of the sabbatical year. Elsewhere,

79 In the words of Rabbi Yitzhak Elhanan Spector in a letter supporting the permit, and also in the language of the permit itself. See n. 7 above.

80 Kook, *Mishpat Kohen* 58.

81 *Ibid.*, 63.

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Rabbi Kook clarifies the underlying ideology in this approach to halakhic interpretation:

Therefore, anyone who acts to expand the boundaries of Israel, so that they serve as a catalyst for advancing the ingathering of the Jews to the land of Israel, is a catalyst for hastening the redemption since it has been established that the ingathering of the exiles precedes the advent of the messiah.⁸²

Rabbi Kook's great innovation in the sabbatical year debates thus lay not in the use of minority opinions per se, but rather in his definition of "a time of pressing need."

For it is clear that the redemption depends on an increase in the number of our brethren, the holy people, in the Holy Land, when we will merit in any case to fulfill all [of the commandments]. And it is similar to "violating one Sabbath [in order to save a person] so that he will be able to observe many Sabbaths." And even though God can hasten the redemption through wonders without an active initiative on our part, nevertheless, He in his wisdom decreed that we should initiate the beginning of the redemption. [...] And since stringency regarding the sabbatical year will impede the settlement, many will be deterred from acquiring land [...] but when they are informed that there are permits based on the urgency of the situation [...] because we rely on minority opinions, then many will want to come, and the increased settlement of the redeemed will increase the heavenly blessing to actualize the redemption.⁸³

In these comments, Rabbi Kook raises an additional ideologically-based argument in support of the sabbatical year permit: Strict observance of the sabbatical year would cause halakhically observant individuals to fear emigrating to Israel, since they would understand the financial impossibilities imposed by the sabbatical year. Rabbi Kook was

82 Rabbi Kook, *Igrot Ha-Reiyah*, *supra* n. 13, vol. 2, §555.

83 Kook, *Mishpat Kohen*, 63.

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concerned that the settlement enterprise would thus become completely secular.⁸⁴ This concern – that future redemption, hastened by the settlement of the commandment-observing Jews in the land of Israel, should not be impeded – also features in his determination of what constitutes a state of urgency.⁸⁵ For Rabbi Kook, the reality in which observant people were afraid to emigrate because of halakhic road-blocks attested to the fact that in the case of the sabbatical year, strict observance of halakhah as it was classically understood would lead to a general undermining of the possibility of observing that very halakhah.

The novel position of Rabbi Kook in defining the future status of the settlement as “a state of urgency” was not acceptable to the *Hazon Ish*. He took into account only the present reality, and determined whether it was possible to survive it while fully observing the sabbatical year laws. In his opinion, although the sabbatical year would pose challenges to farmers, they would realistically be able to endure it. He believed that arguments to the contrary emerged out of a less-than-ideal respect for the Torah:

And all of the murmurings that this is a situation of danger that demands life-saving measures derives only from cold hearted-ness

84 See *Igrot Ha-Reiyah*, *supra* n. 13, vol. 2, §555, pp. 184-85, 197: “I know that this causes a decrease in expansion of the settlement in the Holy Land, and in particular it distances those who are completely God-fearing from settling the land of Israel. And, on the contrary, all of our efforts to attract God-fearing people to the Holy Land should increase.” See also *ibid.*, vol. 1, §311: “If they do not export their produce abroad the wine, oranges, almonds, and so forth the country will be utterly desolate, heaven forbid, and the new community will be destroyed. And perforce, the old community will, heaven forbid, be destroyed along with it, for as anyone who looks at it insightfully will see, the two are interdependent. And spiritual harm, since publication of the prohibition will bring it about that entry into the land of Israel will be barred to all who would build it up by means of planting trees and sowing [fields], and marketing the produce barred to all among Israel whose faith is complete. And were that to come about, only those who reject religion out of hand would come.”

85 Malkhiel, *supra* n. 2, at 196.

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and a lack of the respect that is due to performance of the Torah and its precepts.⁸⁶

The Ḥazon Ish thus disagreed with a fundamental premise of Rabbi Kook's argument that the sabbatical year requirements were impossible to observe. For the Ḥazon Ish, the real question was whether individuals who were prepared to sacrifice for the sake of observing the commandments, as the Torah demands, would succeed. The Ḥazon Ish expressed this view through a fictional letter he composed, through the persona of a farmer in the land of Israel:

I am a farmer [...] The thought stole into my heart that I ought to observe the sabbatical laws obstinately. I was alone and by myself, ridiculed by all my neighbors. How can you do such a thing? Not to sow and not to gather! You cannot fight reality. [...] In spite of all these [negative responses], half the year has gone by and reality has nurtured me lovingly. I sowed everything before the New Year, in the sixth year, and rested in the seventh. I did not plow and did not sow, and with regard to the yield of the sixth year that came up in the sabbatical year, acted in accordance with the sanctity of the sabbatical year... And now I would like to extend a request to those who permit work during the sabbatical year that they forgive me for disobeying their directives. And may they be so kind as to study this issue once more. Perhaps this time the brain in their head will understand that the Torah will never be replaced, and the observance of the sabbatical year laws depends only on good will.⁸⁷

The Ḥazon Ish certainly recognized the difficulties associated with observance of the sabbatical year, but his response to these challenges differed strongly from that of Rabbi Kook. He did not view settlement of the land as a religiously significant enterprise unless the commandments

86 *Igrot Ḥazon Ish* (Collection of the Letters of the Ḥazon Ish) (Hebrew) (Bnai Brak, 1990), vol. 3, 85.

87 *Ibid.*, vol. 2, 69. See Brown, "Ḥazon Ish," *supra* n. 15, at 407-408.

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were observed; nor did he think that love of the land of Israel devoid of readiness to sacrifice for the observance of the commandments was religiously meaningful. Yet, while he took a stringent approach with regard to the observance of the sabbatical year in general, he nevertheless took a lenient position regarding the observance of particular laws of the sabbatical year, as demonstrated previously.⁸⁸

Rabbi Kook, I contend, would not have disagreed with the sentiments expressed in the letter cited above. He too would have thought that the “obstinate farmer” should observe the requirements of the sabbatical year. Nonetheless, a solution for a few singular “obstinate farmers” was not sufficient for Rabbi Kook, who sought a solution that would be useful for his entire target population. We now turn to the crux of the controversy between these two halakhic authorities, the question of what constitutes the target population of the halakhic decision-making process.

3. The Target Population of the Halakhic Authority

Rabbi Kook saw the entire settlement as the target population of his rulings, while the Ḥazon Ish viewed only the religious farmers as his target population. I argue in this section that this difference lies at the heart of Rabbi Kook’s deviation from traditional approaches to legal decision in Orthodox halakhic jurisprudence. We will discuss the underlying motivations for Rabbi Kook’s view on this matter, as well as its centrality in his systematic thinking about halakhah. We will also probe, from a historical perspective, the degree to which Rabbi Kook’s understanding of what constituted the target population was innovative.

88 See Shlomo Cohen, *Pe'er Ha-Dor: The Life of Ḥazon Ish* (Hebrew) (Bnai Brak, 1969), vol. 3, 245-52. The Ḥazon Ish once granted a permit to plow fields during the sabbatical year in the *ḥaredi* agricultural settlement (“*Maḥaneh Yisrael*”). This lenient ruling was based on the existence of a threat that the Arabs from the adjoining village would take control of the unattended fields. This ruling was based on the statement of Rabbi Yannai: “Go out and sow in the sabbatical year because of the arnona [Roman tax]” (*b.Sanh.* 26a).

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In advance of the 1909-10 sabbatical year, the Ridvaz suggested to Rabbi Kook that they travel to Europe together in order to raise money for the settlers who wished to observe the sabbatical year according to the law without relying on the permit. Rabbi Kook responded as follows:

And all of our efforts [in the trip to Europe to collect donations] will only have a limited effect, perhaps enabling us to provide help to the owners of fields, vegetable gardens, and olive trees, and individuals who own vineyards and orchards who have the fear of God in their hearts and wish to observe the sabbatical year with self-sacrifice. **But this is currently not possible for the general population.**⁸⁹

Indeed, as the Hazon Ish had written, God-fearing individuals who wanted to observe the sabbatical year could manage without the permit. Rabbi Kook, however, was concerned about “the general population.” He was willing to partner with the Ridvaz in fundraising efforts, but demanded, as a precondition for his participation, that the Ridvaz express his support for the permit prior to their departure:

...Under current circumstances, it is impossible for them to observe the laws of the sabbatical year, like the vineyards and orange orchards that transact millions, and those engaged in the business rely on this after the sabbatical year. [...] Heaven forbid that we should ignore this and leave Israel to transgress the sabbatical year without a permit. [...] As such, the solution of the sale must be implemented, and after that we can travel...⁹⁰

According to Rabbi Kook, raising funds could solve the problem for the handful of farmers committed to observance, but this solution was severely limited in scope. Rabbi Kook was not willing to close his eyes and ears to the plight of the remaining farmers, and to advocate a

⁸⁹ *Igrot Ha-Reiyah, supra* n. 13, vol. 1, §190.

⁹⁰ *Ibid.*

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solution only for those who wished to observe the sabbatical year. From his perspective, there needed to be a halakhic solution that was feasible for everyone, and he was not prepared to seek a solution exclusively for halakhah-observant Jews.

In a letter to the Rabbi of Rosh Pinah, written prior to the 1909-10 sabbatical year, Rabbi Kook wrote:

To the degree that we have the ability to support people who observe the sabbatical year without any suspension [of sanctity], I will not withhold the good [...] but from all those who are unable to do so – and certainly it is impossible for the majority of the population to fulfill it without the permit – we must enact a suspension [of sanctity] by means of sale.⁹¹

Rabbi Kook expressed here his belief that it was feasible for religiously-committed farmers to observe the sabbatical year, but he was also concerned with what would become of the general population. The question thus arises: Why did he not believe that everyone could fulfill this commandment? Why did he think it was justified to label this situation as an extenuating circumstance? Clearly, for Rabbi Kook, the issue revolved around the fact that not everybody was capable of the requisite self-sacrifice. He believed that a halakhic ruling could not merely target the elite who are prepared to sacrifice for the performance of the commandments, but should take into account the realistic inclinations of the entire community.

Moreover, Rabbi Kook was aware that, of necessity, some agricultural activities would have to continue in the sabbatical year. A handful of religious farmers could indeed observe the sabbatical year, but only by relying on the fact that a majority of the farmers were working. For example, the problem the sabbatical year would pose for international trade was a serious concern for Rabbi Kook, which he focused on in his writings prior to the 1909-10 sabbatical year:

⁹¹ Kook, *Mishpat Kohen* 64.

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I know well that in this situation, it is impossible not to issue a permit [...] primarily for commerce of wine and oranges that make in the millions. Not only would they lose a large amount in the sabbatical year, but commerce would terminate because the commercial institutions in the Diaspora would not deal with suppliers who periodically do not provide the product, and it would lead to a tremendous crisis.⁹²

The Ḥazon Ish, by contrast, did not refer to exports because his target population, the small minority of halakhically-observant farmers, would not have had a significant impact on exports if they did not produce during the sabbatical year.⁹³

92 Kook, *Igrot Ha-Reiyah*, *supra* n. 13, vol. 1, §245. The issue of export is very central in Rabbi Kook's arguments and thus it is mentioned in many places. See, for example, *ibid.*, §§177, 190, 197, and 311.

93 In light of this analysis, it would be interesting to examine the positions of various rabbis regarding the permit of sale. This is, of course, beyond the scope of this article. Nevertheless, I will cite one ruling that will demonstrate the phenomenon. The position of Rabbi Tzvi Pesach Frank (1873-1960), who became the Chief Rabbi of Jerusalem in 1936, serves to clarify the position of the Ḥazon Ish and its implications. The following is an excerpt of his writings in anticipation of the 1937-38 (5698): "Already at the beginning of the new settlement, the initiation of the building of agricultural settlements in the land of Israel, the issue of the sabbatical year surfaced on the agenda of the great sages of Israel, at their head Rabbi Yitzhak Elhanan Spector of Kovno, of blessed memory, and Rabbi Yehoshua of Kutna, of blessed memory. They came to the conclusion that it was impossible for all of the settlements in the land of Israel to observe the sabbatical year as prescribed, **for reasons that were known to them but not known to anyone who does not understand the nature of the land in terms of time and place**. They therefore voted and concluded that in advance of the sabbatical year, they would arrange the sale of the land to a non-Jew with specific details and conditions, in a manner that would suspend the sabbatical year requirements for the sold land, and they would not transgress by working the land in the sabbatical year." Nevertheless he added: "Everyone agrees that the sale is only to "avert evil" so that they

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With all of this background in mind, we are now ready to turn to the question of **what motivated Rabbi Kook to circumvent, and in fact annul, the sabbatical year for the *secular* settlers?** Two distinct answers to this question appear in his writings. The first reason is the

could work without transgressing, but that it did not achieve the level of “do good,” for they are losing the opportunity to fulfill a great precept that is learned in a complete section of Leviticus. How wonderful and how beautiful is the tiding that there are whole collective farms that are prepared to fulfill this beloved precept, and have accepted upon themselves to refrain from working the land in the seventh year as prescribed in the Torah. I now turn to all who cherish the Torah, that they contribute to this great thing, to give financial support to something of substance, to aid those who take upon themselves to refrain from working the land” ... (This letter was published in the introduction to Rabbi Frank’s book *Hadrat Ha-Aretz* [Jerusalem, 2007]. The book contains a collection of Rabbi Frank’s writings on the sabbatical year, and includes a photo-copy of this letter.) The difference between the approach of Rabbi Frank and that of the Hazon Ish is clear and important. Rabbi Frank did not indicate that the permit lacked validity, nor did he denigrate it in any way. On the contrary, he stressed that it is in the category of “averting evil,” and that those who utilize it are saved from transgression. Furthermore, he also established that anyone who understand the nature of the land knows that it would be impossible for all of the settlements to observe the sabbatical year, and for that reason, the initiators of the permit” came to the conclusion that it was impossible for all of the settlements in the land of Israel to observe the sabbatical year as prescribed ...”. Nevertheless, he added that there is a higher level of “doing good,” and urged financial support for collective farms that desire to observe the sabbatical year without reliance on the permit. It seems to me that in spite of the fact that Rabbi Frank here supported the initiative of the Hazon Ish to raise money for the Po’alei Agudat Yisra’el agricultural settlements, on the level of principles, he was closer to the position of Rabbi Kook. He established that anyone who relies on the permit has not transgressed the sabbatical year prohibitions. In addition, and of primary significance, he agreed that the permit is justified by the fact that anyone who knows the nature of the land, understands that it is impossible for all of the settlements to observe the sabbatical year. In other words, although he supported the settlements that wish to observe the sabbatical year, and saw this as the higher level, he understood the responsibility of halakhah to those who cannot take on this observance, a responsibility that is manifested in his acceptance of the permit.

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well-known and oft-discussed desire of Rabbi Kook to draw these settlers closer to the Torah. This is a conservative understanding of Rabbi Kook's motivations for his halakhic innovations regarding the sabbatical year. Rabbi Kook described at length his love for the pioneers and their noble qualities. He felt that it was his task to gather their holy sparks, and to draw them near. There is no question that his approach to the sabbatical year was part of that broader project.

I abhor the wickedness of the evil people, and I value their good side, and love it because it is part of divinity. One who merits to truly taste the flavor of the mysteries of the Torah knows that all perfect worship is built upon this: to bring distant ones near and to gather holy sparks from every place that they have been scattered. With regard to beliefs, we should study their sources in depth with the zeal of Torah study for its own sake. [...] With all of this – that I see good qualities even in these empty people, a certain ethic and truth, or even a pleasant conversation with good manners – I draw them near because of this. **And I always hope that through this, they will return to good, be it the masses or a minority.**⁹⁴

In addition to drawing the secular Jews closer, Rabbi Kook believed that halakhic leniency would reduce the antagonism within the settlement, and would help the faithful of Israel to participate in the immigration enterprise.

The Hazon Ish disagreed, fundamentally, with some of these claims. In his mind, as discussed above, immigration to Israel that was devoid of Torah observance lacked value and significance, and included no “holy sparks.” He found Rabbi Kook's claim that Torah-observant Jews should learn from the ethics of the pioneers (“With regard to beliefs, we should study their sources in depth with the zeal of Torah study”) to be unacceptable. The heroes of the Hazon Ish, by contrast, were, in the words of the sages, “Powerful men who fulfill their word – these are the

94 Kook, *Igrot Ha-Reiyah*, *supra* n. 13, vol. 2, §522.

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men who observe the sabbatical year.”⁹⁵ For the Ḥazon Ish, one who wished to observe the sabbatical year could and must do so, and those were not interested should not be considered by the halakhic authority.

Yet, I argue that there is a second, less studied motivation for Rabbi Kook’s aspiration to shape the halakhah in a manner that would make it inclusive of all Jews that is much more important and innovative. In his letter to the Ridvaz in 1913, shortly after the 1909-10 sabbatical year and its polemics, Rabbi Kook responded to his interlocutor’s claim that the permit draws closer the transgressors who should be kept at a distance. From context, it appears that the Ridvaz had referred to the *malshinim* who are denounced in the Eighteen Benedictions prayer. The term literally means slanderers; but the sages understood it to correspond to all Jews who had cast off the yoke of the commandments. Maimonides described the historical impetus for the creation of this prayer: “In the days of Rabban Gamliel, the number of heretics increased in Israel, and they would cause the Jews distress and entice them to stop following God... And he and his court stood up and enacted a benediction that asked God to destroy the heretics ...”⁹⁶ The Ridvaz challenged Rabbi Kook by implying that the latter was undermining the very purpose of that prayer by making concessions to heretics.

This disagreement epitomizes the developing schism between the Orthodox world and the Jewish secular world that progressed over the course of the nineteenth century. Feelings of distance and disassociation were transplanted from Europe to Israel and perpetuated by the leadership of the “old settlement” (*Yishuv Ha-Yashan*) as new settlers arrived. Rabbi Kook sought to problematize and complicate these prejudices by distinguishing between those who had “cast off the yoke” and abandoned Judaism, on the one hand, and secular settlers in the land of Israel, who, although not observant of halakhah, were clearly devoted to the Jewish people and the land of Israel.

95 See *Lev. Rab.* 1:1; Friedman, *supra* n. 1, at 470-72; Brown, “Ḥazon Ish,” *supra* n. 15, at 407-15.

96 Maimonides, *MT, Hil. Tefillah* 2:1. See also *b.Ber.* 28.

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Regarding your bewilderment over my befriending everyone, even the transgressors of Israel in order to return them to Judaism, [...] you find that this contradicts the prayer against apostates and slanderers in which we pray for their uprooting and destruction. [...] You should know that there are two main elements that together create the holiness of Israel and the Divine connection with them. The first element is *segullah* (treasure), that is to say the nature of the holiness that is in the soul of Israel as a legacy from the patriarchs [...] The second element is the aspect of free will, which is dependent on good deeds and Torah study. The aspect of *segullah* is incomparably greater and holier than the aspect that depends on free will. [...] Indeed, at times the darkness becomes so strong that it stops the revelation of the *segullah*. This, however, is possible only when a person has reached the point that he is, heaven forbid, a hater of Israel, wishing to cause them harm and perpetrating it, as the *minim* who, as Maimonides explains in the laws of prayer, used to oppress Israel. [...] In our generation, there are many souls who, although lowly with regard to the exercise of free choice, and therefore infected with many evil acts and thoughts – may God protect us – but are still enlightened by the light of *segullah* and therefore deeply love the community of Israel and have a passion for the land of Israel ...⁹⁷

The distancing of uncommitted Jews as expressed in the prayer against the slanderers, according to Rabbi Kook, is relevant only to Jews who cut themselves off from *segullat yisra'el* and have abandoned all ties to fellow Jews. This did not apply to the settlers whose immigration to the land of Israel attested to the fact that *segullat yisra'el* burned within them. Since they viewed themselves as Jews, and worked for the benefit and the future of the nation,⁹⁸ it was inappropriate to distance them; rather,

97 Kook, *Igrot Ha-Reiyah*, *supra* n. 13, vol. 2, §555, pp. 186-88.

98 It is important to keep in mind that at the time of the second aliyah (wave of immigration to Israel), the gates of America were open to Jewish immigrants. Thus, the factor that would bring a Jew to Israel rather than to

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argued Rabbi Kook, it was incumbent upon observant Jews to draw them near.

Rabbi Kook's words here constitute a **dramatic divergence from mainstream Orthodox jurisprudence**, and they are, in my opinion, the key to understanding the unique position of Rabbi Kook that takes Jews who have abandoned observance into account when making halakhic decisions. He saw the new settlers as Jews who "deeply love the community of Israel and have a passion for the land of Israel." He thus understood it to be incumbent upon the halakhic authorities to draw them near, by means of halakhic rulings that took them and their realities into consideration. Rabbi Kook understood this task to have the status of an obligation or commandment. The phenomenon of non-observant Jews participating in rebuilding the land of Israel famously had deep religious and messianic significance for Rabbi Kook; it is less well known that he attributed to the phenomenon normative, halakhic significance.

In reality, we can see in the words of Rabbi Kook cited above an acknowledgment of a national-secular Jewish identity, or at least an attempt to reconcile to it. This recognition was not merely an awareness of an existing reality on the ground; rather, Rabbi Kook valued the national-secular identity to the extent that he was willing to interpret halakhah in ways that would support this identity.

The ironic and problematic aspect of this approach lay in the fact that the very people for whom he was pushing innovative positions in halakhah did not ask for halakhah to change in order to accommodate them, and in fact had no interest in halakhah. This irony raises the question whether Rabbi Kook essentially accepted national-secular Jewish identity, or whether, to the contrary, his attempt to justify national-secular behavior within a halakhic context indicates that he

America was Jewish identity. It was therefore clear to Rabbi Kook that such a Jew was part of the target population of the halakhic authority. From his standpoint, this reflected a deep process that could not be ignored.

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actually rejected it? It is a fascinating paradox that while accepting the phenomenon of secular Zionism, Rabbi Kook sought to reduce the gap between halakhah and non-observant Jews. Drawing on the halakhic concept that all Jews are responsible for the halakhic observance of other Jews, he interpreted halakhah in a manner that improved their halakhic status by limiting their degree of transgression. By making room within halakhah for the behavior of secular nationalists, Rabbi Kook may have actually been defining the secular-nationalist identity as, in fact, a religious identity:

For my desire and approach is only to grant merit to Israel, and predominantly on the holy people who dwell in the courtyard of God [...] that they not slander them as evil people and transgressors.⁹⁹

The primary responsibility, according to Rabbi Kook, is to ensure that other Jews not engage in sin. This responsibility primarily consists in drawing non-observant Jews closer to Torah through education. Most of Rabbi Kook's peers, including the *Hazon Ish*, would have fully agreed with this articulation of the responsibility. Yet, Rabbi Kook went further, endeavoring not only to educate non-observant Jews, but to "educate" the halakhah and its interpreters to have more flexibility so as to limit the degree of their transgression.

Flexibility of halakhah to accommodate non-insiders was important for Rabbi Kook, but he felt that it was not sufficient for the needs of the times. Between the lines of the passage cited above, Rabbi Kook expresses a sentiment that halakhah in its current form was not capable of sustaining a comprehensive society such as the Zionist settlement that included a modern economy and a flourishing international trade. He felt, therefore, that it was incumbent upon the halakhah to reconcile itself to the new reality so that everyone could observe it. Rabbi Kook's approach might be expressed as "the pioneering of the halakhah toward

99 Kook, *Igrot Ha-Reiyah*, *supra* n. 13, vol. 1, §311, p. 349.

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the redemption” – the self-corrective process of the halakhah in order to prepare itself for the time of redemption when it would have to function within and govern an all-inclusive society.¹⁰⁰ The more localized, ad hoc solutions proposed by the Hazon Ish were designed exclusively to satisfy the needs of his small community, while the majority of the settlers were “not his responsibility.”¹⁰¹

Rabbi Kook’s arguments, and his focus on examples such as international trade, describe a reality in which society would essentially fall apart if the halakhah were observed by all. As such, the problem was with the halakhah, and not with the settlers. As a normative system, the halakhah was exposed to have significant lacunae; it required a re-fashioning in such a way that people could actually live by its standards. **Rabbi Kook believed that it needed to be possible for every Jew living in the land of Israel to live by the halakhah, regardless of his subjective commitment to observance or intention to observe.**

100 In fact, other Religious Zionist leaders raised this claim without association to the concept of redemption, their argument being that the halakhah has to be appropriate for a comprehensive society. See the collected articles of Yeshayahu Leibowitz on this issue in *Torah U-Mitzvot Ba-Zman Ha-Zeh* (Tel Aviv: Massada, 1954). See also Asher Cohen, *The Tallit and the Flag: Religious Zionism and the Concept of a Torah State, 1947-1953* (Hebrew) (Jerusalem: Yad Izhak Ben-Zvi, 1998). See also my article on Rabbi Goren in this context: “War, Halakhah, and Redemption: The Military and Warfare in the Halakhic Thought of Rabbi Shlomo Goren,” *Cathedra Quarterly* 125 (2007): 120-48.

101 This fact is evident in the comparison that the Hazon Ish made between the sale of *hamets* and the permit of sale which was cited above. His comments appear to be somewhat surprising. He explains that the sale of *hamets* is valid because its goal is “not to transgress the prohibition of possessing *hamets*.” In this way, by legitimizing the motivation for the sale, he justified the use of legal fiction. Yet, this was not the case with regard to the permit of sale. In the latter case, the settlers did not request a method that would enable them to avoid a transgression. Rather, it was Rabbi Kook who sought to prevent their transgression. The position of the Hazon Ish in such an instance was not to intervene. In his opinion, the role of the halakhic authority is to come to the aid of an innocent Jew who is in need of a leniency in certain circumstances, and no more.

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The Ḥazon Ish, by contrast, held that the halakhah had to be capable of satisfying the needs of any Jew who wished to observe it, but not to address theoretical situations. When all of the Jews would observe the halakhah, and only then, might there be a need to respond to insufficiencies in halakhah by seeking new solutions.

From this perspective, the sabbatical year polemic essentially foreshadowed the major split that would ultimately divide these two primary groups of Orthodox Jews in Israel. The schism emerged from two fundamentally different attitudes toward the relationship between halakhah and the state: One group would demand that the State of Israel bend in order to allow it to live according to its own halakhic standards, while the other group would demand that the halakhah bend in order to make it realistically possible for the state to live according to halakhah. In the next section, I historically contextualize these arguments in order to identify the ideological sources of the Ḥazon Ish's position, and the reasons that Rabbi Kook chose to deviate from his approach. I will argue that Rabbi Kook's deviation from the mainstream Orthodox approach was conscious, transparent, and based on the reasons discussed in the preceding sections.

E. Shaping Communal Parameters: The Secular Jews in Modern Halakhic Thought

The academic study of the history of Orthodox Judaism was for many years primarily engaged with Orthodox opposition to innovation and halakhic change. In recent years, however, scholarly interest has shifted to the attitude of Orthodoxy toward non-observant Jews. The most significant transition in modern Jewish history in this context is the fact that observance of halakhah ceased to be the exclusive sign of Jewish identification. Thus, the attitude toward non-observant Jews became a critical issue within Orthodox discourse, representing the perennial modern struggle with communal identity and the problematic of

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defining the parameters and scope of a community. The status of those “who have cast off the yoke of the commandments” is a recurring topic in halakhic literature from talmudic times throughout the Middle Ages. Nevertheless, this discourse fundamentally changed shape in the modern period. Two major historical changes lay the foundations for the new direction of this discourse. First, the Jewish community lost the coercive power of enforcement that it possessed in the Middle Ages. Second, whereas in the Middle Ages there were only cases of isolated individual Jews abandoning halakhic observance, in the modern period large groups of Jews “cast off the yoke” for ideological reasons, and in some places they quickly became the majority. Jews in the Middle Ages who repudiated halakhah did so, primarily, in order to leave the community entirely and join a different faith community. In the modern period, however, many who “cast off the yoke” saw themselves as Jewish reformers; they broke away, but wished to remain part of the Jewish community and to change its way of life. These modern phenomena demanded a measured and careful rabbinic strategy and reaction. How should halakhah relate to Jews who repudiate it or try to reform it, who view their actions as beneficial to the community or even to halakhah itself? It was difficult to find an appropriate response, especially since there was little guidance to be found in history and tradition. The historical precedents at the rabbis’ disposal, such as the Sadducees of the Second Temple period and the Karaites of the Middle Ages, were historically distant and fundamentally different. The rapid nature of the changes that began in the modern period further contributed to the difficulty of formulating a moderate response.

Sociologists have established that every group requires at least a minimal normative system that unites it and constitutes a component of its identity, creating a line that defines legitimacy. Scholars have characterized the methods by which societies define group boundaries and exclude deviants; the role that exclusion plays in fashioning and fostering the coalescence of the group has been well documented. In recent years, several important studies have emerged applying these

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models toward understanding the struggle of Orthodoxy in the nineteenth century.¹⁰² Orthodox rabbinic leaders sought to avoid rigid insider-outsider exclusionary boundaries; they instead created multiple circles of Jewishness, so as to exclude the repudiators of halakhah from one circle while including them in another broader circle. In other words, the mechanism for exclusion in Orthodox Judaism in the modern period was the creation of a wide Jewish circle that would include the repudiators while maintaining a smaller internal circle that included only Jews who were true to their ancestral tradition.

Defining Jewish boundaries in terms of multiple circles dovetailed nicely with the traditional halakhic principle, and the corresponding Jewish ethos, that it is impossible to abandon the Jewish fold: “A Jew who has sinned, even though he has sinned, is still a Jew.”¹⁰³ It allowed for the acceptance of a broader Jewish communal structure, while still creating room for exclusion, as a means of dealing with the new reality. This double model of simultaneous exclusion and inclusion led Adam Ferziger, scholar of Orthodoxy in modernity, to deem Mary Douglas’s hierarchical model as the most appropriate model for understanding the attitude of the Orthodox community to divergence.¹⁰⁴ German and Hungarian Orthodoxy both formed an internal Jewish hierarchy, including a small inner community protected by virtual walls that were shaped by a variety of halakhic rulings, viewing anyone outside of that inner circle as having diverged from the correct path of Judaism. It viewed itself as the elite community of believers, while viewing Jews outside of its community as lesser Jews in the hierarchy of those dedicated to Judaism.

102 See Adam S. Ferziger, *Exclusion and Hierarchy: Orthodoxy, Nonobservance, and the Emergence of Modern Jewish Identity* (Philadelphia: University of Pennsylvania Press, 2005); Donniel Hartman “Deviance and the Limits of Tolerance in Orthodox Halakhah in the Modern Era” (PhD diss., Hebrew University, 2003); Brown, “Hazon Ish,” *supra* n. 15, at 361.

103 *b.Sanh.* 44a. See also Jacob Katz, “Though He Sinned, He Remains an Israelite” (Hebrew), *Tarbiz* 27 (1958): 203.

104 Ferziger, *Exclusion and Hierarchy*, *supra* n. 102, at 1-17.

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This issue caused a storm in the Jewish world and generated sharp controversies over the definition of divergence and the status of those who diverge. It is thus an oversimplification to speak of a singular rabbinic response. The Ḥatam Sofer laid the foundations for the debate by taking a radical position. He demonstrated a strong intolerance toward “ideological” repudiators, but was relatively tolerant toward “traditional” repudiators, transgressors like those in previous generations who did not belong to an ideological group. This distinction reflects an awareness of the new reality, that the ideological repudiator is fundamentally different from the transgressor of previous generations. The Ḥatam Sofer issued unequivocal statements that it was necessary to distinguish between Jews who are faithful to halakhah and those who are not and for observant Jews to separate themselves in every way from Reform Jews. The strength of his words has echoed for decades:

One who desecrates the Sabbath [...] is separate from the congregation of Israel, and is judged as one who has left the religion, and is neither a Jew, nor a Christian, nor a Turk [Muslim]. It is therefore forbidden for any Jew to eat in his house, and meat that he has slaughtered is forbidden to us [...] as if his name has been erased from Israel, until he returns to God and He has mercy on him.

The consequence of this is that it is forbidden for anyone called a Jew to open his store, sell his wares, or load and unload his wagon on Sabbath or the Festivals. And if he does not obey, and it is impossible to force him through the agency of the government officials, then he must be separated and excluded from the congregation of Israel, and he has no religion, and he is invalid to serve as a witness or for an oath or any other matter, and the meat that he slaughters is forbidden, and all of his food and drink must be considered forbidden because he has forfeited his trustworthiness.¹⁰⁵

105 *Responsa Ḥatam Sofer*, vol. 5, 195 (at the beginning of the responsum and the section commencing “*Ha-Yotze*”).

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At the close of his famous responsum on the establishment of the Reform synagogue in Hamburg in 1818, the Ḥatam Sofer wrote:

And nonsense he said: How can we allow individuals, who have separated from Israel without the advice of the scholars, build synagogues (lit. “altars” forbidden outside of the confines of the temple) of their own for fear that they will build altars to themselves? This in itself is the building of the altar that we have feared. Lest you say that we must fear that they may leave the religion, know that our sages were not concerned about that. Rather, they feared that they might remain within the Jewish faith and build altars and draw other Jews after them, like Tsadok and Baitos at the time of the Second Temple and Anan and Sha’ul during the time of the Ge’onim. We are not responsible for them.¹⁰⁶

Beyond the sharp and unequivocal declaration that Reform Jews are “separate from the congregation of Israel,” the Ḥatam Sofer took measures toward and implementation of their exclusion. He issued a variety of halakhic rulings that gave them an inferior social and halakhic status. He implemented many of the prohibitions associated with idolaters; he prohibited eating their food, purchasing their merchandise, and relying on their slaughtering of meat. Reform Jews also had inferior status in the Jewish courts and other institutions; their testimony and oaths were declared invalid. In addition, he stated that it was preferable in his eyes to lose them completely to Judaism and that they change their religion than to compromise and blur the borders between them and the “faithful” community. Ironically, between the lines he seems to

106 *Responsa Ḥatam Sofer*, vol. 6; *Likutei She’elot U-Teshuvot Ḥatam Sofer*, 86. See also his comments there in §89: “And if the law was in our hands, my opinion would be to drive them from our borders, and not to let our daughters marry their sons or our sons their daughters, so that they not draw others after them, and their congregation be like the congregation of Tsadok, Baitos, Anan, and Sha’ul. They will be in their place and we in ours. All of this appears to me to be the halakhah, but not in practice without the permission of the government.”

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support the building of the Reform temple because it sharpens the borders of the community and frees him from responsibility for them.

The Ḥatam Sofer's radical position was not adopted by everyone. Ferziger demonstrates that Rabbi Akiva Eger, the father-in-law of the Ḥatam Sofer who was acknowledged to be among the greatest scholars of the generation, had a more measured response than his son-in-law to this issue. In a well-known responsum, Rabbi Eger permitted a *mohel* (person trained in circumcision) who profaned the Sabbath to continue to perform circumcisions in his community. An examination of his reasoning can shed light on the different approaches to this issue from halakhic, historical, and social perspectives. Rabbi Eger's dispensation to the errant *mohel* hinged on the question of whether it is possible to prove that he was a transgressor. Since he typically associated with people like himself who profaned the Sabbath, there were not enough valid witnesses to attest to his character and invalidate him. It was impossible to declare someone a transgressor without valid witnesses testifying to the transgression. Rabbi Eger's argument seems to involve circular logic: He validates the transgressor as a *mohel* by invalidating him and his friends as witnesses. I suggest that in this halakhic argument, Rabbi Eger was consciously speaking in two voices, with two messages addressed to two different target populations. To the Reform Jews of Germany he sent a conciliatory message by ruling that the *mohel* was not disqualified from performing circumcisions. To his own community of believers, however, he made it clear that this was a radically circumscribed dispensation toward Reform Jews, since they were disqualified from testimony. Those who would read his scholarly argument – his own community – would understand his negative attitude toward transgressors; those who would only hear about the conclusion of the argument regarding the *mohel* would be pleased. The dual nature of Rabbi Eger's position is affirmed by the following comments at the conclusion of the responsum:

[...] It is appropriate that a God-fearing person not honor this person by having him circumcise his son. However, one should not prevent

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him from circumcising if there is no other *mohel* in the city or if it is a case of extreme need, for as I have written above, in such a case even one who has converted from Judaism is qualified to perform a circumcision. Perhaps regarding [circumcisions by] those who profane the Sabbath publicly it is considered a case of extreme need, to not create conflict and quarrels. [...] But wisdom is with those who are unassuming.¹⁰⁷

As Rabbi Eger emphasizes, a God-fearing person would know not to employ such a *mohel*. Nonetheless, it was preferable for Rabbi Eger to come to this conclusion in such a way that would avoid causing the “conflict and quarrels” that emerge from vociferous exclusion.

The difference between the approaches of Rabbi Akiva Eger and the Ḥatam Sofer is not merely tactical. The former refrained from unequivocal halakhic pronouncements and rulings that would create walls within the community, while the Ḥatam Sofer wanted to create clear boundaries. The Ḥatam Sofer believed that the distinction between the faithful Jews and the transgressors should be stated clearly and vociferously. Rabbi Eger, by contrast, wished to create a sense of separateness in the consciousness and lifestyle of his followers, while at the same time creating a sense of connectedness in the consciousness of the rest of the community. In essence, the Ḥatam Sofer tried to foster the creation of a schism within the community because he feared that otherwise the transgressors “might remain within the Jewish faith and build altars and draw other Jews after them.” Rabbi Eger, while valuing the separateness of his community, emphasized another value: “not to create conflict and quarrels.” He did not see a contradiction between

107 Prov. 11:2, cited in the notes of Rabbi Akiva Eger on *Shulḥan Arukh*, YD 264:I in relation to R. Moshe Isserles’s statement that “an apostate for the entire Torah, or an apostate regarding only the commandment of circumcision, is considered like a non-Jew (and cannot perform a circumcision).” For Ferziger’s discussion on this responsum, see his *Exclusion and Hierarchy*, *supra* n. 102, at 81-83.

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these two values; he created a sense of elitism in his followers while simultaneously remaining open to a connection with other Jews.

Ferziger explains the difference between the positions of Rabbi Eger and the Ḥatam Sofer in accordance with their respective degrees of exposure to Reform Judaism. Since the Ḥatam Sofer had been away from Germany for many years, he understood neither the severity of the situation nor the dominance achieved by Reform Judaism. He therefore thought that a radical exclusionary approach could change the situation.¹⁰⁸ This explanation can be challenged, however, since these two approaches persisted in the next generation, when the situation was clear to all. Interestingly, Rabbi Shlomo Eger, the son of Rabbi Akiva Eger and the heir to his father's rabbinic position in Posen, argued a generation later that Reform Jews should "not be considered as Jews in any way." His colleague Rabbi Jacob Ettlinger presented a more moderate position.¹⁰⁹

The rabbinic world in Central and Western Europe was perplexed, yet in spite of the differences in approaches, rabbis were unified in their desire to create a hierarchy and some degree of separation between the observant and non-observant Jews. The differences between the various approaches did not necessarily emerge out of different levels of awareness of the reality, but rather from differences in personality, temperament, and ideology. It seems to me that a study of the writings of the Ḥatam Sofer reveals that he was well aware of the crisis and the fact that it was irreversible. It was his readiness to view the situation realistically that, in fact, led him to advocate radical separation.

108 Ferziger, *Exclusion and Hierarchy*, *supra* n. 102.

109 Katz, *Halacha in Straits*, *supra* n. 17, at 70; Adam S. Ferziger, "Orthodox Identity and the Status of Nonobservant Jews: A Reconsideration of the Approach of Rabbi Jacob Ettlinger" (Hebrew), in *Orthodox Judaism: New Perspectives*, eds. Yosef Salmon, Aviezer Ravitsky, and Adam S. Ferziger (Jerusalem: Magnes Press, 2006), 179-210, esp. 187 and the sources in n. 29.

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As traditionalists increasingly saw themselves as a defensive minority, and as Reform and Orthodox Judaism both became increasingly radicalized, the Orthodox group finally sought formal communal separation, to be recognized by the national government. This difficult episode is described in detail by Jacob Katz in *A House Divided*.¹¹⁰ The Orthodox leaders in Hungary and Germany argued that since they were a minority, they could no longer receive essential religious services from a centralized Jewish community that included all denominations. Reform Jews, by then constituting a majority of the community, were thus its primary spokesmen. Since they did not require basic Jewish ritual institutions necessary for living a traditional Jewish life, such as the *mikveh* (ritual bath), the *beit midrash* (institution of Torah study), and *shehitah* (ritual slaughtering), they could not guarantee these services for the Orthodox community.

The power to supervise religion given to the state by the Hungarian Emancipation Law of 1867 required the creation of central Jewish institutions. At the opening session of the preliminary conference preparing the Hungarian Jewish Congress in 1868, one of the speakers argued that it was no longer possible to speak of one Jewish religion, for in reality, there were now two distinct religions – the new Judaism and the old Judaism. He concluded that it was therefore impossible to have one umbrella organization; rather, it would be appropriate and necessary to establish two different organizations for members of the two religions.¹¹¹ The explicit reference to two religions, old and new, would reappear later in the writings of Rabbi Samson Raphael Hirsch (1808-1888) and his successors in Germany, Hungary, and ultimately, in Israel. The Congress of 1868, however, witnessed the first such reference, raised by a somewhat influential lay leader.

110 Jacob Katz, *A House Divided: Orthodoxy and Schism in Nineteenth Century Central European Jewry* (Boston: Brandeis University Press, 1998).

111 See *ibid.*, 114.

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In 1870, at the end of a long struggle waged by the Orthodox communities, the Hungarian parliament recognized their right to secede from the National Organization of Jewish Communities, essentially recognizing Orthodoxy as a separate religion.¹¹² Soon after the acceptance of the law, Rabbi Moshe Schick (Maharam Schick), an elite student of the Ḥatam Sofer who was considered one of the dominant halakhic figures of the time, wrote a responsum in which he declared it a religious obligation for Orthodox communities to join the separate Organization of Orthodox Communities. He anchored the obligation in halakhic sources and harshly disparaged anyone who considered abrogating this obligation.¹¹³

In Germany, the process of the separation of the Orthodox communities from the broader Jewish community was more emotionally charged. Rabbi Samson Raphael Hirsch led the struggle for government recognition of the right of the Orthodox communities to establish a separate organization. He demanded the cessation of the payment of fees to the broader community on the grounds that it funded activities that were objectionable and forbidden according to the halakhah. Hirsch's lobby gained momentum over the years until the Prussian parliament passed a law in 1876 recognizing Orthodox Judaism as a separate religious community. Hirsch ruled, like Maharam Schick in Hungary, that separation was an absolute halakhic and religious obligation incumbent upon all Orthodox Jews.

In light of the new Prussian law, the Frankfurt Community, which was controlled by a Reform majority, proposed a compromise in order to avoid separation. They offered to set up a two-tiered leadership

112 See Katz for a description of these events in great detail. The regulations of the Orthodox congress, which allowed membership only for communities that recognized the *Shulḥan Arukh* as the basis of their by-laws, were passed in 1871 and became part of the laws of the state. See Katz, *ibid.*, 214.

113 *Responsa of Maharam Schick*, vol. 1, OH 307, "Ve-Od Ba Shlishit" (Muncocz, 1880). The responsum was written in 1872.

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schema, wherein the Orthodox communities would remain under the administrative aegis of the broader community, but would have all required religious services provided under separate, exclusive Orthodox supervision. The Orthodox communities would also be exempt from contributing to the funding of organizations that ran counter to their worldview. This proposed compromise had far-reaching implications from the perspective of the Reform community, as it essentially addressed and obviated all of Hirsch's halakhic arguments for the need for separation. Nevertheless, Hirsch strongly rejected the proposal, and insisted on a formal separation of the community into two distinct religious communities.¹¹⁴ Hirsch's refusal demonstrated that the real issue at stake was not the ability to observe a halakhic lifestyle, but rather, the aspiration toward a separate religious and communal identity for the Orthodox community. Hirsch argued that there could be no distinction between Jewish religious identity and communal identity. The claim that Judaism had become divided into two religions – new Judaism and old Judaism – now came to fruition. Rabbi Hirsch not only demanded that the state recognize this fact, but also obligated his followers, based on halakhic grounds, to actualize this declarative process.¹¹⁵

The conciliatory compromise proposed by the Reform majority led to a significant internal Orthodox controversy that will shed light on the positions of Rabbi Kook in the sabbatical year polemic. Rabbi Yitzchak Dov Bamberger of Wurzburg, one of the noted halakhic authorities of the time and an initial supporter of Rabbi Hirsch's demand for separation, was moved to change his position in response to the compromise. Bamberger argued that under the circumstances, there was

114 Katz, *A House Divided*, *supra* n. 90, at 267.

115 In contrast to his obstinacy in this matter, Hirsch demonstrates a great openness to modernity. Hirsch was the founder of the *Torah Im Derekh Eretz* ("Torah with Worldliness") ideology which viewed positively the openness to western culture. These ideas found expression in many of his writings, such as *Igrot Tzafon* (Nineteen Letters on Judaism). See Jacob Katz, "Rabbi Shamshon Rafael Hirsch: Ha-Meyamin Veha-Masmil," in *idem*, *Halacha in Straits*, *supra* n. 17, at 228-45.

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no need to create a schism within the broader Jewish community.¹¹⁶ Rabbi Hirsch and Maharam Schick attacked Bamberger sharply for his position.¹¹⁷ In his correspondence with Bamberger, Hirsch referenced the comments of the Ḥatam Sofer regarding what he believed to be an analogous historical situation, the building of the Reform temple in Hamburg in 1818:

According to the circumstances then, the halakhic opinions dealt only with Reform itself and association with it, but there was no possibility of separation from the community and establishing an alternative structure, since the law of the state did not allow it. Perhaps from the sixth volume of the responsa of the Ḥatam Sofer that appeared now, one can learn about the opinion of the Grand Rabbi of the Diaspora of blessed memory regarding communal cooperation between observant Jews and the reformers.¹¹⁸ [...] Behold, that because of the permission and acquiescence of the government, the legal possibility, has now been realized in the law of separation passed on July 28, 1876. Thus, the ruling of the Ḥatam Sofer, which at his time was only theoretical, has now become practical. As such, the decisive opinion of the greatest authority of our period tips the scales to the side of separation.¹¹⁹

To Hirsch and Maharam Schick, a distinct communal identity was of utmost importance. Rabbi Bamberger understood this position, but distanced himself from it. In the following letter to Rabbi Hirsch, he expressed his views on the importance of remaining part of the community:

116 The lengthy and one might say bitter correspondence between Hirsch and Bamberger was published in its original German, and later translated to Hebrew. See Meir Saidler, *A Controversy That Endures: The Secession Controversy (1877)* (Hebrew) (Ramat Gan: Faculty of Jewish Studies, Bar-Ilan University, 2005).

117 *Responsa of Maharam Schick*, *supra* n. 86, vol. 1, OH 306.

118 See the responsum of Ḥatam Sofer, above in text adjacent to n. 79.

119 Saidler, *A Controversy That Endures*, *supra* n. 116.

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[We] declare publicly: “We agree to remain part of the community together with you on condition that our legitimate and holy religious rights are guaranteed to the highest degree. Know that we are disgusted by the Reform doctrines and that we refute them with scorn. Nevertheless, we do not wish to break the bonds of friendship and reciprocity between us for this reason. We do not give up the hope that in the future, you will come to recognize and value the truth as we do.”¹²⁰

The reverberations of this controversy reached Eastern Europe, the nerve center of halakhic Judaism at that time, but the issues were less clearly discernible there, since the Jewish communal reality was significantly different from Western Europe. The Eastern European halakhic authorities, who were not exposed to an active Reform movement, did not fully understand the situation in the west. In a retrospective look decades later, in 1913, Rabbi Hayyim Ozer Grodzinski, the Rabbi of Vilna, responded to a question regarding the Hirsch-Bamberger controversy. He claimed that the controversy related to an unusual halakhic question that could not be answered simply by studying the books. Rather it required a thorough understanding of the reality in which the petitioner lived. As such, he claimed that he could not fully understand the problem, and therefore could not issue a decision.¹²¹ Rabbi Grodzinski’s comments

120 Ibid. at 60.

121 The letter of Rabbi Grodzinski was published in a memorial volume for Rabbi Jehiel Jacob Weinberg. In the continuation of his comments, Rabbi Grodzinski summarizes the lack of clarity, and the two sides of the issue: “That which they said: ... ‘It is better for a friend to do a lesser prohibition than to do a greater prohibition.’ ... There the weight of the prohibitions is known. ... But on the issue of joining forces with transgressors, the separatists see this as a great danger to Judaism because people will learn from their ways and will be influenced by a generation born into evil. It is understood that something which impacts upon the very foundations of Judaism is a serious prohibition. According to those who wish to draw them near, this is a great mitsvah – to not repel part

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must be understood against the backdrop of the founding convention of Agudat Yisrael in 1912. At that convention, the representatives of German Orthodoxy, Dr. Isaac Breuer and Rabbi Jacob Rosenheim, tried to market the position of Rabbi Hirsch and proposed that it be adopted by the entire rabbinic world. Rabbi Grodzinski, who was known for his moderate approach, politely evaded the question by claiming that the controversy was not relevant to Eastern Europe.

This controversy, despite its historically and geographically specific origins recognized by Rabbi Grodzinski, had a dramatic impact on the Jewish world in general because of the separatist influence that took hold in the land of Israel. The separatist tendencies in Israel certainly had a dramatic impact on the halakhic polemic that is the subject of this article. We now turn to Rabbi Kook's reaction to this issue from a historical perspective, and the relevance that he ascribed to it for his time and for his halakhic rulings.

F. Rabbi Kook and the Division of the Communities

In his 1921 article, "*Orot Ha-Teḥiyah*" ("Lights of Rebirth"), Rabbi Kook discussed the division of the Jewish communities in Germany and Hungary:

The controversy over how to guide the community: Whether in our times, because of the increase of the villains who vociferously raise the banner of anarchy, it is appropriate to divide the nation so that

of the people of Israel, and to give them the benefit [of having contact with the faithful]. They do not see any loss to the God-fearing community that is in any case separate for its religious functions. And this is not related to the maxim: 'Should we say to a person: sin in order to benefit your friend?' For according to those who wish to bring them near, there is no sin involved. On the contrary, it is only a merit for the public. Thus, that which the separatists see as a big transgression, those who wish to draw them near see as a great mitsvah. Accordingly, the question in this instance is essentially whether it is a mitsvah or a transgression.

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the righteous who proclaim the name of God will have no relationship with the transgressors who have thrown off the yoke [of the commandments], or perhaps the power of peace within the community will determine everything [...] There is no end to the evil, both physical and spiritual, that will be caused by dividing the nation into different groups, even though the complete separation envisioned by the “surgeons” is impossible and will never occur. This is truly an idolatrous thought, for we are certain that it will never come to pass.¹²²

In the continuation of these comments, Rabbi Kook compared this controversy with the famous judgment of King Solomon, and thus compared the separatists to the imposter mother who said to cut the child, while the real mother objected vociferously. Rabbi Kook described the judgment as follows: “The Holy Spirit shouted: ‘Give her the live child for she is his mother.’”¹²³ These are very strong words, particularly given the clear fact that they cast judgment on some of the greatest Torah sages of the previous generation. In the biography of Rabbi Kook written by his disciple, Rabbi Yehuda Leib Fishman-Maimon (1875-1962), the author describes Rabbi Kook’s visit in 1914 to Kissingen, Germany, where he stayed in the home of Rabbi Yitzchak Zakil Bamberger, the grandson of Rabbi Bamberger, mentioned above as the opponent of Rabbi Samson Raphael Hirsch with regard to separating the communities. During this visit, Rabbi Kook discovered the letters that Rabbi Bamberger had written to Rabbi Hirsch at the time. Maimon relates that “[w]hile staying in the house of Rabbi Bamberger, our Rabbi found literary and Torah satisfaction in a matter that was close to his heart. He found in the manuscripts of Rabbi Yitzchak Dov Bamberger, of blessed memory, a legal responsum

122 A.I. Kook, *Orot, Orot Ha-Teḥiyah* (Jerusalem: Mossad Harav Kook, 1985), ch. 20, 76.

123 Ibid.

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relating to the question of the division of the communities that was raised at that time by Rabbi Samson Raphael Hirsch...”¹²⁴

Rabbi Kook’s position against dividing the community appeared as well in an entirely different and fascinating context. In 1922, a subgroup within the Jewish community of Klausenberg, Transylvania, decided to separate from the community and establish its own independent communal structure, because the broader community supported Zionism. The separatists issued a pamphlet with the support of a

124 Yehudah L. Maimon, *Ha-Reiyah: Rabbi Avraham Yitzhak Ha-Kohen Kook* (Jerusalem: Mossad Harav Kook, 1965), 123. Rabbi Kook came to Berlin for the convention of Agudat Yisra’el in 1914, but World War I broke out and he was not able to return to Israel. His son, Rabbi Tzvi Yehudah Kook, in an interview that appeared in *Ha-Tzofeh*, Friday, 27 Tevet 5733 (January 18, 1974) spoke more explicitly about this event: “... Rabbi Samson Raphael Hirsch, of blessed memory, chose separation and caused a schism, with disregard for the opinions of Torah sages such as R. Ya’acov Ettlinger, R. Yitzchak Bamberger, and others, who vociferously attacked those who would divide the House of Israel into two. On my visit to Kissingen together with my father, of blessed memory, we stayed at the house of Rabbi Dr. Yitzchak Bamberger who was among the most important *haredi* rabbis in Germany at that time, and the grandson of the Gaon of Wurzburg. Among his many halakhic manuscripts, we found the responsum forbidding the establishment of two separate communities. The great Torah scholars in Germany – Rabbis Ettlinger and Bamberger – felt that instead of isolation, it was better to strengthen Judaism by establishing religious schools and yeshivot, and by spreading the light of Judaism throughout all parts of the community. But the separatists were strengthened in their opinion to split from the majority of the local Jews and worry only about themselves. As is known, there were not separate communities among the Jews of Russia, Poland, and Lithuania, which were under the influence of the great Torah sages. The Neziv of Volozhin wrote that separation from the whole is ‘as serious as the destruction of the body of the nation and its existence.’ This was also the opinion of Rabbi Yisrael Salanter. But, in Germany and Hungary, the approach of separation spread, and the radical members of the Agudah in Jerusalem continued on this path. They are now trying to foster it in the State of Israel as well.” See also Tzvi Y. Kook, *Le-Netivot Yisra’el: Kevutsat Ma’amarim Me-Et Ha-Rav Tzvi Yehudah Kook* (Bet El: Me’avnei Hamakom, 2007), vol. 2, 82.

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group of rabbis in which they described the development of the issue, and justified the separatist position. Subsequently, the original Jewish community issued an opposing pamphlet negating the claims of the separatists, also with the support of noted rabbinic leaders from various parts of Eastern Europe who denounced the idea of dividing the community based on ideological grounds such as these.¹²⁵ One of the contributors to this pamphlet was the Chief Rabbi of the land of Israel at that time, Rabbi Kook, who had a staunchly negative view of the very idea of separation and bifurcation. He referred expansively in his article to the concept of Jewish unity based on the teachings of Judah Loew b. Bezalel (Maharal of Prague, 1520-1609). He wrote unequivocally that “the very foundation of the idea to exclude transgressors from the community is invalid and a heresy.”¹²⁶ In the continuation of his comments, Rabbi Kook related to the schisms in Hungary and Germany that were supported by some of the great Torah scholars of the generation, and tried to distinguish between separation from the reformers in Europe and separation from the Zionists. This distinction is important in our context. The separation from the Reform Jews could be justified because:

...the transgressors were cutting off the sprouts of Jewish unity, and wanted to actually destroy the nation from its foundations by creating their own special character in matters of religion, by erasing the names Zion and Jerusalem from the prayers, by adopting the ways of the non-Jews in building synagogues, by attacking rulings on ritual matters, etc. If so, the idea behind the separation promoted by those sages of blessed memory was designed to strengthen the unity of the nation as a whole.¹²⁷

125 The pamphlet of the separatists was *Mishpat Tzedek: Be-Divrei Ha-Rivot She-Bein Kehal Ha-Arta U-Bein Kehal Arta Sefard Poh Klausesh* (Klausenberg, 1922). The opposing pamphlet was *Yashuv Mishpat* (Klausenberg, 1922).

126 Rabbi Kook's article in this pamphlet was republished. See Rabbi Avraham Y. Kook, “Perek Be-Hilkhot Tzibbur,” in *Ma'amare Ha-Rei'yah* (Jerusalem: Goldah Katz Foundation, 1984), vol. 1, 55 (the quote is from page 58).

127 *Ibid.*, 58.

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Although Rabbi Kook had also expressed explicit opposition to the separationists in Hungary and Germany, as described above, he found them to have been somewhat justified when he compared them with those who would separate from the Zionists. In Hungary and Germany, the communities had been faced with Jews who wished to “cut off the sprouts of unity,” to imitate the non-Jews, to erase “the names Zion and Jerusalem from the prayers,” and to blur the uniqueness and the exclusivity of the nation. But the Zionists were exactly the opposite:

But to say that there is a set position that transgressors who say that Israel is one nation and that they must retain the national character of the nation as unique and unified, even though they err at times on many things because of the oppression of the exile – to decide that they are outside of the people of Israel, and that the nation only includes the good and the righteous, is heresy.¹²⁸

Preservation of the unity and exclusivity of the nation was the determining criterion for Rabbi Kook. He could not entertain the idea of viewing as outside of the parameters of the Jewish people those “who say that Israel is one nation and that they must retain the national character of the nation as unique and unified.” It must be kept in mind that the division proposed in Klausenberg was a split within the Orthodox community; the opponents of Zionism wished to separate from the rest of the community.

Rabbi Kook’s distinction between the reformers and the Zionists had already appeared a year prior to the Klausenberg controversy, in the continuation of the section of “*Orot Ha-Teḥiyah*” cited above. In that context, the issue was not the preservation of the unity of the Orthodox community, but rather the vision of a unified body of religious and secular Jews in the land of Israel. It is not coincidental that Rabbi Kook expressed his opposition to the bifurcation of the communities in “*Orot Ha-Teḥiyah*,” an article dedicated to the idea of

128 Ibid.

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redemption. In his view, division has the power to prevent the redemption, while unity is a prerequisite to it:

True Torah scholars increase peace in the world and foster peace between Israel and their father in heaven by realizing the potential holy light that is hidden in every individual in the nation, anyone called by the name Israel, and particularly anyone who raises the banner of hope for the nation and desires its vitality, who has the love of the land to which God casts his eyes and the love of Zion and Jerusalem etched on his heart in whatever form or understanding...¹²⁹

This quote appeared as a direct continuation of the comments cited above regarding the bifurcation of the communities, in which Rabbi Kook repeatedly emphasized the distinction between the reformers, the “villains who vociferously raise the banner of anarchy” and the secular Zionists “who raise the banner of hope for the nation and desire its vitality.” Nevertheless, while Rabbi Kook argued that peace with the latter was an obligation, he also opposed separation from the former, albeit in less unequivocal terms.

Years later, Rabbi Tzvi Yehudah Kook described his father’s opposition to Hirsch’s approach in Germany. His father had considered the dispute in Germany to be analogous to the debates between the Mizraḥi movement and Agudat Yisrael: “Here [Mizraḥi] the unity of Israel is at the very foundation, and there it [the agenda] is schism between Jew and Jew.”¹³⁰ **This fact can shed light on one of the**

129 Kook, *Orot Ha-Tehiyah*, *supra* n. 122, ch. 21, 74.

130 In an interview with *Ha-Tzofeh* (*supra* n. 102), Rabbi Tzvi Yehudah Kook reacted to the *haredi* demand to divide the Chief Rabbinate after the appointments of Rabbis Shlomo Goren and Ovadiah Yosef as Chief Rabbis. Rabbi Sha’ar Yashuv Kohen, the son of the Nazir who was one of the confidants of Rabbi Kook, also wrote about Rabbi Kook’s opposition to the bifurcation of the communities, particularly in the Israeli context, and indicated that this was characteristic of Religious Zionism, and an aspect of the approach of Rabbi Kook that distinguished him from the

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fundamental reasons that Rabbi Kook fought for the permit of sale – his sense of responsibility for the entire Jewish community. Before returning to this point, we turn to an additional element of the compartmentalization and the stratification that was created in the Jewish world in the wake of the Reform movement – a schism in Jewish law. In contrast to the social schism discussed above, already a subject of much scholarly discussion, the related halakhic schism has hardly been addressed by scholars.

G. “We are Not Responsible for Them”: Social Division and Halakhic Division

Certainly, there is another corpus of halakhic rulings by Orthodox rabbis of the time that was not designed to create a stratified hierarchy, but nevertheless assumed the exclusionary aspect as self-evident and granted it a greater significance. I will bring two examples of such rulings that have been discussed by two well-known scholars of Orthodoxy, and will try to demonstrate the added significance that I see in these rulings.

The first issue we will consider was the raging controversy over the question of whether it was permissible for men to shave on the intermediate days of Jewish festivals (*ḥol ha-mo'ed*).¹³¹ Rabbi Ezekiel Landau (the Noda bi-Yehudah, 1713-1793) issued a ruling in which he permitted shaving on *ḥol ha-mo'ed* despite the fact that it is a talmudic prohibition accepted and observed for generations. His ruling was based on a new interpretation of a rejected opinion of Rabbi Jacob b.

ḥaredim. See Rabbi Sha'ar Yashuv Kohen, “Mishpat Shlomo,” in *Neshamah Shel Shabbat: Osef Ma'amarim Toraniyim Le-Zikhro Shel Ha-Rav Eliyahu Shlomo Ra'anani*, ed. Menachem Arieli (Hebron, 1999), 393.

131 This issue was the subject of an in depth examination by Moshe Samet, *supra* n. 17, at 93-152; Meir Benayahu, *Shaving on the Intermediary Days of the Festival* (Hebrew) (Jerusalem: Yad Harav Nisim, 1995).

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Meir (Rabbeinu Tam, twelfth century), a prominent Tosafist.¹³² Rabbi Landau's ruling was attacked from various fronts, especially on the grounds of his use of an opinion that for generations had not been accepted. He responded to these attacks in a later responsum:

It has been many years – twelve or fifteen – since I was asked the question by someone for whom it was critical to shave on *ḥol ha-mo'ed*. And at that time, I clarified the law and recorded it for myself, but I concealed the reason from the person who had asked the question, and presented it as an emergency ruling (*hora'at sha'ah*). I indicated to him that the permit that I had given to him was relevant only to that instance, and not to any future circumstance, and I hid the permit from him. Indeed, my reasoning was [...] that since in other instances, people stumble by shaving with a razor, which constitutes five biblical prohibitions, why should I initiate a permit for them to shave on *ḥol ha-mo'ed*? Would that we could find a way to be stringent at other times. Indeed, last year, when I was organizing and looking through my writings, I decided to conceal this responsum and to refrain from publishing it. Yet, when I reflected on the matter, I understood that, on the contrary, since the generation is reckless on this issue, it is better to publicize the permit, and the reason is concealed in my heart, and I cannot reveal it. And if someone were to beg me, I would not respond.¹³³

Rabbi Landau confided that although he had permitted a particular individual to shave on *ḥol ha-mo'ed*, he had initially refrained from publicizing this opinion. There is a biblical prohibition against shaving one's beard with a razor, and Rabbi Landau knew that many in the Jewish community were transgressing in this area. He did not want to publicize the opinion because he hoped that the belief that it was forbidden to shave on *ḥol ha-mo'ed* would prevent people from violating this biblical prohibition for at least a few days of the year. Subsequently,

132 Ezekiel Landau, *Noda bi-Yehudah*, OH 13.

133 *Responsa Noda bi-Yehudah*, OH 99.

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however, he came to the opposite conclusion, that it was better to publicize the permit, but he would not reveal the reason for this change of heart.

The Ḥatam Sofer, a vociferous opponent of Rabbi Landau in this decision, offered to “be a tale-bearer and reveal the secret.” He claimed that, according to Rabbi Landau, the biblical prohibition against using a razor applied only to beards of a certain minimal length. If a man shaved daily during *ḥol ha-mo’ed*, his beard would not reach that length. Since he knew that people were in fact using razors to shave, he wanted them to shave daily on *ḥol ha-mo’ed* in order to save them from transgressing the biblical prohibition. In other words, the Noda bi-Yehudah wanted to save people from violating a biblical prohibition by permitting them to violate the rabbinic injunction against shaving on *ḥol ha-mo’ed*. The Noda bi-Yehudah was well aware of the spirit of the generation, and understood that if he publicized the reasoning behind the permit, everyone would realize that a person who shaves daily with a razor does not transgress a biblical prohibition, and it would lead to the complete nullification of the prohibition of shaving with a razor. The Ḥatam Sofer wrote the following comment which is the most important from our perspective:

For those who fear God and consider His name, who do not eliminate their beards [i.e., shave with a razor], why should they shave on *ḥol ha-mo’ed* and brazenly transgress a rabbinic prohibition?¹³⁴

His question, in other words, was why should those “who fear God and consider His name” be allowed to transgress the rabbinic decree against shaving on *ḥol ha-mo’ed* in order to save transgressors who shave with a razor from a biblical prohibition? The disagreement between the Noda bi-Yehudah and the Ḥatam Sofer is clear. **While the ruling of the Noda bi-Yehudah reflected a view that all Jews were part of the virtual Jewish community, that of the Ḥatam Sofer did not.**

134 *Responsa Hatam Sofer*, vol. 1, OH 154.

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The ruling of the Ḥatam Sofer did not serve to create social stratification, but rather reflected and gave added significance to an already existing hierarchy and exclusivity in Orthodox halakhic decision-making. The rulings of the Ḥatam Sofer briefly touched on in earlier sections were designed to *create* a division and social hierarchy between the observant and non-observant members of the community. The ruling regarding shaving, by contrast, focuses on halakhah and not on society. It purports to protect and defend the halakhah from distortion. The price that the Ḥatam Sofer was willing to pay for this defense of halakhah, however, had deep social significance in that it widened the gap between the different subcommunities. **This ruling is based on an explicit declaration of the halakhic authority that the target population of his ruling is not the Jewish community as a whole, but only the observant component of the community.**

Halakhic jurisprudence, by its very nature, necessitates dealing with situations in which it is difficult to implement the halakhah in its literal sense (“hard cases,” in the language of contemporary Anglo-American jurisprudence). A broad variety of contributing factors can lead to a situation in which a halakhic authority must entertain issuing a leniency, deviation, or exception to the law. Therefore, the halakhah provides the authorities with a series of considerations and principles for emergency situations. Of course, the halakhic authority must always balance the deviation that he allows with the need to maintain the stability of the halakhic system. Clearly, a large degree of deviation or leniency relating to a particular law can turn the exception into the rule. The Noda bi-Yehudah was prepared to deviate from the halakhah and permit a rabbinic prohibition in order to save those who shaved using a razor from a biblical transgression. The Ḥatam Sofer, by contrast, argued that it was not appropriate to take transgressors into consideration, or to pay the price of deviation from the halakhic standard in order to save them from transgression. His position, nevertheless was based on a concern for the integrity of halakhah, not on a desire to create social stratifications.

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The Ḥatam Sofer's position is further demonstrated in a ruling that deals with the rabbinic decree that a woman who is pregnant or nursing a child from a previous relationship not marry another man until the baby is two years old. Rabbi Moshe Isserles, in contrast to most of the halakhic authorities, permitted marriage to a pregnant or nursing "illicit" mother in situations where the child had been conceived out of wedlock.¹³⁵ The Ḥatam Sofer, however, based on a number of previous rulings, came out against this position and established that even in the case of a pregnancy out of wedlock, it was better to be stringent and prohibit the marriage.¹³⁶ In a number of instances, the Ḥatam Sofer was asked to permit the marriage of a nursing mother lest she cast off religion altogether. The questioner, in these cases, believed that potential estrangement from Judaism was a stronger consideration than the fact of rabbinic prohibition, especially since some authorities had permitted marriage in the case of a pregnancy out of wedlock even without the additional concern for her casting off her religion. Consider the following representative case:

In the matter of Gomer bat Deveilim, who, after nursing her son that was born out of wedlock for three weeks and weaning him, left him in the land where she was and came to our land. Eighteen months have passed since that incident, and a young man has connected with her and wants to marry only her, and they are strongly pressuring his honor to arrange their marriage. If not (if they cannot get married here), they will wander far away, and there is reason to be concerned that his elderly father might die of starvation because his son sustains him. [...] **And there is also a concern that, heaven forbid, they will change their religion** in their

135 Glosses of the *Rama*, *EH* 13:11.

136 Benjamin Brown discusses this ruling of the Ḥatam Sofer, and tried to conceptually define the type of stringency employed. In his opinion, the Ḥatam Sofer did not see an imminent religious value in the stringency, but rather an effective instrument for fortifying the social walls around those faithful to the halakhic tradition. See Benjamin Brown, "Stringency: Five Modern-Era Types," *Diné Israel* 20-21 (2001): 123-237.

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village. Even without this, her milk supply stopped long ago, and if she gets married now and gets pregnant, it will be over six months until she gives birth and is ready to nurse, by which time her son that was born out of wedlock will be twenty four months old. These are the things that his honor should evaluate when seeking a permit in this matter.¹³⁷

Beyond the danger of estrangement from the religion, the writer adds a number of other grounds for leniency in this instance. One is the danger posed to the father of the man, if his son has to go to another place. In addition, the main reason for the prohibition has almost ended and certainly will by the time another child is born. Furthermore, in any case, the mother is not still nursing the child. Nevertheless, the Ḥatam Sofer stood firm in his refusal to make any allowances. He stated:

[...] And behold, in our case under discussion, all of the reasons to permit suggested by his honor are vanity. For one, to permit a rabbinic prohibition on the basis of the sustenance of the elderly man: and what would the elderly man do if the child dies in his lifetime? All of Israel are obligated to support him among the poor of Israel. Not one jot of the words of the rabbis should be nullified for his sustenance. Secondly, the concern that they will go to another place and marry each other: I would be shocked if we would help transgressors lest they transgress without us, and we should therefore be zealous and initiators in helping transgressors? [...] But here **even the concern that they might convert, as his honor wrote, does not force us to permit a rabbinic prohibition.** [...] We must reinforce the words of the sages and their enactments, and they [the couple] will do what they will do – **we are not responsible for them. Let a thousand of these be lost rather than nullify one enactment of our sages.**¹³⁸

137 *Responsa Ḥatam Sofer*, vol 3, EH 1:35.

138 *Ibid.* The Ḥatam Sofer emphasizes that in this case, the infant is somewhere else, and that were the life of the baby a consideration here, the outcome might have been different. In addition, the Ḥatam Sofer was

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In another responsum, the Ḥatam Sofer reiterates his position that a mother's potential apostasy was not a relevant halakhic consideration when justifying the violation of a rabbinic decree:

We have no concern for the ruination of the girl, for we are only dealing with the life of the child, and **what is she to us?**¹³⁹

The Ḥatam Sofer was unwilling to compromise on his position; rather, he endeavored to fortify the halakhah out of concern for a breakdown of its parameters. Even presented with the possibility that this might result in the estrangement of a girl from Judaism, his response was, "What is she to us?" The Ḥatam Sofer's language – "we are not responsible for them" and "what is she to us?" – unequivocally expresses his belief that Jews who were not committed to halakhah were outside of the parameters of the community that is taken into account in rendering halakhic decisions.

This reading of the Ḥatam Sofer's position is reinforced by an examination of a responsum in which he does allow a woman to re-marry while still nursing a child from a previous marriage. This time, the case does not involve an illicit woman, but rather a good Jewess who belongs to the observant community and whose husband died,

cognizant of the fact that his lack of concern for estrangement from the religion was a significant innovation. He therefore added: "Nevertheless, I state that one might say: 'It is possible that our case is not similar to the other case, and nevertheless opposite this there is a concern for the apostasy of two people, and to save two people from destruction is a consideration as in the reasoning of the Pnei Yehoshu'a.' For one to whom it is clear that we must be concerned about the apostasy of two people, Heaven forbid, and wants to take action and rely on himself, I do not acquiesce or agree, for there is no effective argument or response to permit, as stated above."

139 *Responsa Ḥatam Sofer*, vol 3, *EH* 1:34. In the same responsum, the Ḥatam Sofer declared explicitly: "In all of my days, I never agreed to permit a nursing mother by any leniency, and I will explain here the root and reason for the decree in order to shut the mouths of the evil ones who are suspicious of the decrees of the Rabbis."

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leaving her a widow. The Ḥatam Sofer's more open approach in this case is discernible in the way he narrates the circumstances, even before he discussed the meat of the halakhic issues:

On the matter of a woman who had a number of children in her husband's lifetime: She nursed the first baby for several months ... and the doctors said that if she would continue to nurse, it would endanger her and the baby. [...] In the end, her husband died, leaving her pregnant, and she gave birth. [...] She is poor and destitute with five children and without support, even a place to live. [...] Now, God made it happen that one of the exalted figures among the abundantly wealthy men of the city wants to marry her in his old age in order to fulfill the commandment to have children, since he does not yet have progeny, and he wants to spread his wings over her brood and to give her and her children an inheritance, after one hundred years with God's grace. Now he is asking from the goodness of his heart if he may marry her during the period of nursing her baby, since she never nursed a child because of the danger that it would cause to both of them, and also to save the woman and her children from ruination.¹⁴⁰

The softness and the empathetic manner in which both the man and the woman are described stands out, particularly in comparison with the harsh and unsympathetic manner tone taken in the previous responsum. The unfortunate state of the woman, as well as the "goodness of his heart" of the man, are described in a fashion that is designed to evoke sensitivity and identification, paving the way for an openness to the lenient ruling that the Ḥatam Sofer is about to issue. The empathy that the Ḥatam Sofer tries to induce has great halakhic significance. The fact that the man under discussion is "one of the exalted figures among the abundantly wealthy men of the city" who "wants to spread his wings over her brood" and who "is asking from the goodness of his heart" makes him deserving of leniency. The fact that the man and the woman

140 *Responsa Ḥatam Sofer*, vol 3, EH 1:30.

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are “exalted” members of the traditional halakhic community who obey rabbinic instruction is the determining factor in convincing the halakhic authority to seriously consider the potential damage that could result from maintaining the rabbinic decree. In the other instances in which the Ḥatam Sofer declared that he would not diverge at all from the rabbinic decree in the matter of marriage to a nursing mother, it involved “Gomer bat Deveilim,” an “illicit nursing mother,” and “that evil one.” For this reason, his halakhic conclusions were “we are not responsible for them” and “what is she to us?” Halakhic concession can only be made for one who is deserving. The price of losing a Jew who is integrally part of the halakhic community is intolerable, but losing a Jew who is already outside of the parameters of that community is a cost that is tolerable.

It is important to note that in the latter lenient responsum, the danger to the woman was not tangible. It does not refer to a woman who threatens to leave the religion or anything similar to that. In fact, the opposite is the case, and it is this fact that works in her favor. The only potential consequence mentioned is that she will move to another city with the resulting dangers that were prevalent at the time. The danger to the children is also not tangible. In a previous responsum in which there was concern for the welfare of the father if the son would be forced to move, the Ḥatam Sofer stated: “All of Israel is obligated to support him among the poor of Israel. Not one jot of the words of the rabbis should be nullified for his sustenance.” Here too, the Ḥatam Sofer could have said that all of Israel is obligated to support her and her children among the poor of Israel, and not one jot of the words of the rabbis should be nullified for her welfare. Yet, as we have mentioned, the position of the Ḥatam Sofer was that the **identity of the questioner determines whether it is a case worthy of halakhic leniency**. The halakhic authority must be very careful and weigh any halakhic concession at times of emergency or pressing need against the potential damage that threatens the stability of the halakhic system through erosion of the prohibition on the slippery slope of leniency. It makes

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sense that one of the determining variables is the worthiness of the questioner, as determined by whether he is a member of the halakhically observant community. Indeed, the conclusion of the Hatam Sofer in this instance was to permit the marriage on the following condition:

That the husband commits himself to deposit the amount needed to hire a teacher for this child until he reaches the age of thirteen and can be self-sufficient, so that he be raised on the knees of the scholars – and this nurturing is better for him than milk and honey.¹⁴¹

In a situation where the significance of saving the child is the maintenance of his education by the husband, who is “God-fearing” and obligates himself to pay the cost of his Torah education until the age of thirteen, it is clear that this nurturing [Torah education] is better than milk and honey [the nurturing of the mother]:

The ruling on this law is that the exalted elderly man take upon himself to deposit the money for providing nursing for twenty-four months and completely commit himself to provide him Torah study during his lifetime, and leave a certain amount after that so that in any case, he can be raised on the knees of the scholars until he reaches the age of thirteen. And since she also cannot nurse children because of danger to the mother and the baby, the woman remains open to marry the exalted elderly gentlemen, may his light shine, that he see offspring and have length of days.¹⁴²

The deep schism that developed in the modern Jewish community is reflected in the fact that that a prominent halakhic authority openly declares that the defining population for his rulings is exclusively the part of the community that observes the commandments. In his overriding considerations, the halakhic authority, like any other jurist, must always take into account the population for whom the ruling is intended, and the ruling is shaped by its essence, its character, and its

141 Ibid.

142 Ibid.

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needs. The definition of communal parameters has thus become a fundamental question in halakhic thought.

The process of schism within the community was imported from Europe to the land of Israel by the radical Hungarian community, consisting of the students and disciples of the Ḥatam Sofer, that was part of the old settlement (*Yishuv Ha-Yashan*). They succeeded a few decades later in gaining a permit from the British Mandate to establish the *Edah Ha-Ḥaredit* as a community that was separate from the larger *Knesset Yisra'el* organization.¹⁴³ In addition, this ideology was imported by Dr. Isaac Breuer (1883-1946), the grandson of Rabbi Samson Raphael Hirsch, with whom the concept underwent a fascinating transformation. Breuer, a noted and influential thinker and writer, saw the Balfour Declaration as a manifestation of God's role in history, and therefore decided to dedicate himself to fostering Jewish immigration to Israel, attempting to convince the Council of Sages of Agudat Yisrael to adopt the concept. Yet, he also argued in favor of urging the League of Nations to embrace Rabbi Hirsch's framework of "old Jews" and "new Jews," and to persuade them that it was the "old Jews" who had the right to a homeland in the land of Israel. He transformed his grandfather's concept of *Torah Im Derekh Eretz* (Torah with Worldliness) into *Torah Im Derekh Eretz Yisra'el* (Torah on the path to the land of Israel). We could paraphrase by saying that he wished to change his grandfather's concept of a separate community into a concept of a separate Zionism – Zionism combined with the ancient and authentic Torah.

Breuer had a significant impact on the struggle over the sabbatical year in Israel, for he was the ideological and political leader of the *ḥaredi*

143 Menachem Friedman, *Society and Religion: The Non-Zionist Orthodox in Eretz-Israel – 1918-1936* (Jerusalem: Yad Izhak Ben-Zvi, 1988), 195-213; Isaac Breuer, *Moriah* (Hebrew) (Jerusalem: Mossad Harav Kook, 1982), 218; Katz, *House Divided*, *supra* n. 83.

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settlement enterprise. The rabbi who served as the halakhic authority for the *haredi* settlements, and to whom Breuer was strongly connected, was the Hazon Ish. As was already demonstrated by Brown, the Hazon Ish was not interested in the separation of the community in its political sense. The energy exerted by the *Yishuv Ha-Yashan* to separate from *Knesset Yisra'el* seemed unimportant to him. It was rather the separation of the community for the purpose of halakhic ruling – the definition of the Torah observant community as the exclusive defining population for halakhic decision-making – that was important to the Hazon Ish. This issue stood at the very foundation of his controversy with Rabbi Kook on the sabbatical year.

H. Conclusion: From Orthodoxy to Religious Zionism: Communal Schism and Halakhic Schism in the Sabbatical Year Polemic

This article opened with the claim that in the sabbatical year polemic, Rabbi Kook deviated from the accepted methods of Orthodox halakhic jurisprudence prevalent at the end of the nineteenth century. We explored one of the characteristics of Orthodox jurisprudence in modernity, the attitude toward innovation, and explored Rabbi Kook's unique approach to this issue. Rabbi Kook staunchly argued that halakhic authorities are obligated to innovate as necessitated by changing circumstances. Moreover, he insisted on being explicit about innovation, and refused to employ traditional methods of presenting change as something that had always existed.

As we have demonstrated, Rabbi Kook adopted this approach after he moved to the land of Israel, presumably in response to what he saw as a new reality in Jewish life that demanded bold innovation. This transformation found expression in his rulings related to the sabbatical year. When he was still in Lithuania, he suggested that the permit of sale had always existed, but could not be implemented because, unlike

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today, all non-Jews at the time of second temple and the Talmud were idolaters, making it prohibited to sell them land. After settling in the land of Israel, however, Rabbi Kook presented the permit of sale as an innovative solution that did not exist previously, and that was justified by the changing reality brought about by the new Jewish settlement in Israel. Nevertheless, it is clear that Rabbi Kook's approach did not involve a reduction in dedication to halakhah or a deviation from it; allowing one innovation does not imply a *carte blanche* allowance for every innovation. Similarly, the recognition of the need for a solution in a particular situation, according to Rabbi Kook, does not justify any solution.

Rabbi Kook recognized both the need for a solution to the problem of the sabbatical year and his own authority to innovate. He exerted tremendous personal and intellectual effort in order to base his innovation firmly within the halakhic framework by utilizing classical halakhic rules and principles. This was particularly important at his time, given the shadow that had been cast by the Reform movement upon any claim for halakhic change, rendering all innovation suspect. The need for halakhic change resulted from the fact that Rabbi Kook attached a very high value to the commandment to settle the land of Israel, which applied to the secular settlement activity as well. The reality that the Jewish settlement could not survive if it observed the sabbatical year prohibitions was thus in itself sufficient reason for halakhic change. Nevertheless, it was important to Rabbi Kook to ground the change in traditional halakhic processes. We dedicated a good portion of this article to a discussion of this point. His meticulous halakhic discourse on the subject reflected his strong opposition to the Reform movement, in spite of his demand for halakhic change. We discussed the primary halakhic questions that Rabbi Kook considered in his effort to base the permit of sale on solid halakhic ground. We showed how this example shed light, more broadly, on Rabbi Kook's halakhic thought and the ways in which ideology can influence and shape halakhic discourse. Thus, for example, we saw how Rabbi Kook

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transformed the talmudic statement that “the settlement of the land of Israel is equal to all of the commandments of the Torah” into a normative halakhic dictate that obligates the halakhic authority to neutralize the pressure between halakhah and the settlement enterprise. Accordingly, Rabbi Kook saw it as his responsibility to issue rulings that could theoretically be embraced by the entire settlement, unrelated to the needs and desires of the settlers themselves.

We then turned to the second characteristic of Orthodox jurisprudence from which Rabbi Kook deviated – the attitude toward non-observant Jews. Research on Orthodoxy has related to the schism that developed in the Jewish world in the modern period, and the manner in which the halakhic authorities formulated their rulings in order to create a community of halakhically observant Jews. Less attention has been given in this context to the fact that the most halakhic authorities redefined the target community for their rulings as exclusively the Orthodox community, which had far-reaching implications for Orthodox jurisprudence.

We analyzed the sabbatical year polemic with an eye toward the ways in which the targeted community that a legislator or judge envisions has a significant impact on his ruling. A common denominator between the two halakhic authorities who were the focus of this article – Rabbi Kook and the Hazon Ish – is that they each addressed an agricultural community, and therefore neither ignored the needs of the farmers and the difficulties that they faced. Nevertheless, each addressed a *different* agricultural community, and this difference led to the wide gap between their rulings. The Hazon Ish addressed the Orthodox agricultural communities consisting of the Po’alei Agudat Yisra’el settlements. Rabbi Kook, on the other hand, had the entire Jewish agricultural settlement in the land of Israel in mind.

Accordingly, the Hazon Ish provided solutions for the *haredi* farmers that required them to pay very close attention to their work, constantly distinguishing between permitted and prohibited activities, as he identified them. Indeed, the Hazon Ish explicitly declared, that

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observance of the sabbatical year requires strong will and readiness for self sacrifice. It is the farmers who have that will that he addressed. Similarly, he suggested solutions that enlisted support from communities in Israel and the Diaspora on behalf of these “heroic” farmers. These solutions were clearly not suitable for the general agricultural population, not just because the farmers were not prepared for self sacrifice, but mainly because the rulings were designed only for a limited group of farmers. The modern agricultural system of an entire country cannot suspend activity for a year, not to speak about the obvious fact that support can naturally be provided for some, but not for the entire community. Rabbi Kook understood this in 1909, and he therefore repeatedly addressed the issue of export, claiming that markets could not be sustained if there would be no export in the sabbatical year. It is clear that were all of the farmers in the land of Israel observant, the Ḥazon Ish would also seek a halakhic solution to the problem of export. It is also clear that such a solution would require some compromise from the halakhic ideal. The position of the Ḥazon Ish, however, was that such an effort would be justified only on behalf of Jews who are dedicated to halakhah and prepared to sacrifice on its behalf. In this approach, the Ḥazon Ish followed the path paved by the Ḥatam Sofer: “They are not our responsibility.”

It is important to emphasize that the Ḥazon Ish saw no value in minimizing the transgressions of sinners without some demonstration of their desire to do so. Nevertheless, he did not promote the concept of communal separation adopted by Agudat Yisra’el in the land of Israel. This approach was advocated by Dr. Isaac Breuer, who viewed the secular nationalists as the “new Jews,” and claimed that they have no value or significance from a Jewish perspective. Although the Ḥazon Ish distanced himself from this political controversy, he adopted it as a guiding principle in his approach to halakhic jurisprudence.

Rabbi Kook argued that even those who supported the separation from the Reform movement should strongly oppose any schism in the land of Israel. He explained that, in contrast to the situation in Western

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Europe, the secularists in the land of Israel were sacrificing themselves for the sake of the nation and its future. His arguments are compatible with his theological perspective on secularists, galvanized in the land of Israel in light of his encounter with the pioneers who, according to his vision, had spiritual dimensions that were lacking in Orthodoxy. Rabbi Kook tried to create harmony and reconciliation between the forces, and it was inherently clear to him that separatism was impossibility. This approach took on unique significance in the sabbatical year polemic with regard to its impact on his halakhic rulings. Rabbi Kook wished to provide a leniency for the secularists and to draw them near, a fact that he declares explicitly in several places. In one place, he also stated that he wanted to dispel the argument that the halakhah works against settlement, that it prevents potential immigrants who are observant from immigrating. Yet, his primary argument was that the proposed alternative solutions do not provide a solution that can be observed by the entire settlement. Once the halakhic authority defines his target population, he must ask himself whether his ruling addresses the needs of that community. If the laws of the sabbatical year are addressed to the entire settlement, then it is impossible to survive without the permit of sale, as Rabbi Kook repeatedly argued. One of the consequences of opposition to the permit is that the observant community relies on the fact that part of the community is not observing the sabbatical year laws, an unacceptable approach for Rabbi Kook. Only a solution that enables the entire settlement community to function can be adopted. The deeper understanding of his position is that **Rabbi Kook's primary goal in adopting the permit was not to be lenient with the settlers, but to repair halakhah in order to make it suitable for implementation in the new reality.** In the 1909-1910 sabbatical year, most of the settlers were socialists who could be categorized as those who had "cast off the yoke of the commandments." The situation could not have been defined as a real situation of "pressing need," for the settlers would have certainly worked the land with or without the permit. Rabbi Kook introduced a new meaning to

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the concept of a “pressing need” related not to the needs of the settlers, but to the needs of the halakhah.

Many have asked why the leniencies demonstrated by Rabbi Kook in the permit of sale did not find expression in his rulings in other areas.¹⁴⁴ I believe that our analysis in this article can contribute to an understanding of Rabbi Kook’s other rulings as well. **His position in the sabbatical year polemic was not one of leniency or stringency. Rather, the critical point was defining the law in a way that it could be observed by the entire population.** Thus, for example, regarding the issue of milking cows on the Sabbath, Rabbi Kook held that the entire settlement could cope within the established halakhic guidelines, and he therefore saw no reason for issuing a leniency. In that instance, halakhah was able to sustain the entire society, so there was no motivation for change. It is not coincidental that the permit of sale for the sabbatical year aroused such a heated debate in its time, and that the debate has remained active for over a century. The positions presented in the above discussion represented the two fundamental approaches to halakhah in the Orthodox world in the age of renewed Jewish sovereignty, which was without a doubt a turning point in the history of halakhah. The sabbatical year controversy signaled not only a division of the Orthodox community into two camps, but also a split in the halakhah itself into two streams. The sabbatical year polemic raised for the first time the claim that the normative Jewish legal system in the Zionist period would have to take the entire society into account, in contrast to the situation in the Diaspora, where the halakhah was addressed to a minority population. Such a transformation of halakhah into a comprehensive normative system would naturally impact significantly on its processes and content.

144 See Rosenak, *The Prophetic Halakhah*, *supra* n. 2, at 591-94, and the references cited there; Ben Artzi, “*Ha-Rav Avraham Yitzchak Ha-Kohen Kook Ke-Posek*,” *supra* n. 2, at 282-88.