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The Legal Significance of Custom in the Halakhic Jurisprudence of Rabbi Yechiel Mikhel Epstein's Arukh Hashulchan

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THE LEGAL SIGNIFICANCE OF CUSTOM IN THE *HALAKHIC* JURISPRUDENCE OF RABBI YECHIEL MIKHEL EPSTEIN'S *ARUKH HASHULCHAN*

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I. INTRODUCTION

H.L.A. Hart, one of the great twentieth-century scholars of Western jurisprudence, observed that "custom . . . has a genuine though modest place in most legal systems."[1] Custom enjoys only a modest prescriptive and determinative role in most modern Western legal regimes where laws are largely a product of legislative and administrative activity, and where lawmaking is in an important sense designed to impose deliberate, policy-focused standards from the top down, and to create some measure of order in a complex heterogeneous society where many different customary practices may coexist. At the same time, however, even in modern systems, custom is enmeshed with lawmaking, legal interpretation, and law enforcement in important ways. Customary practices in family and commercial life influence policy and law-making in these areas in substantial ways. Indeed, law in these and other spheres cannot ignore customary norms lest doing so create too great a rift between the way things are socially and the way the law prescribes that they ought to be. In the realm of constitutional jurisprudence, custom arguably plays an even larger

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[1] H.L.A. HART, THE CONCEPT OF LAW 26 (3d ed. 2012).

role. As Jack Balkin has argued, customary modes of constitutional practice do as much—if not more—to define the political norms and standards of American government, and revolutions in constitutional custom represent very real changes to our constitutional order, even absent any formal amendment process.[2]

Still, different legal systems rest of different jurisprudential foundations. While "genuine though modest" may well define the role of custom in English or American law, other legal systems treat customary practices—and different forms of customary practices—in different ways. This article focuses on one specific example of how custom is utilized as both a source of law and as a means of determining correct legal norms in the fact of legal disagreement and indeterminacy within Jewish legal thought.[3] Specifically, we explore the ways in which the late nineteenth-century rabbinic luminary, Rabbi Yehiel Mikhel Epstein (1829-1908) treated *minhag*, or custom, as law in the ritual law sections of the *Arukh ha-Shulhan*, his major restatement of Jewish law. Part II begins by providing some important historical context for Rabbi Epstein's *Arukh ha-Shulhan*, and reviews both Rabbi Epstein's rabbinic career and his goals and methods in writing this work. Part III next reviews various rabbinic approached to the normativity of custom in Jewish ritual law, and distinguishes between personal, family, and communal customs. Finally, Part IV focuses on Rabbi Epstein's own jurisprudence of custom in Jewish law. Using examples of his *halakhic* decision making in the *Arukh ha-Shulhan*, we show that Rabbi Epstein treats customary practices as important sources of law, at times even creatively reinterpreting authoritative formal legal materials in order to keep them consistent with customary religious legal practices in his own time and place.

II. AN INTRODUCTION TO RABBI EPSTEIN'S *ARUKH HASHULCHAN*

Rabbi Yechiel Mikhel Epstein was born on January 24, 1829, in Bobriusk, Russia, and spent his formative years studying rabbinic texts under the tutelage of the town's Chief Rabbi Elijah Goldberg, as

[2] *See* JACK BALKIN, LIVING ORIGINALISM (2011).

[3] For other treatments of custom in Jewish law, *see, e.g.,* Michael J. Broyde, *Custom as a Source of Jewish Law: Some Religious Reflections on David J. Bederman's Custom as a Source of Law*, 61 EMORY L.J. 1037 (2012).

well as in the famous rabbinical academy of Volozhin.[4] After briefly pursuing a career in business,[5] Rabbi Epstein was appointed a rabbinical judge and assisted his teacher, Rabbi Goldberg, in his hometown of Bobriusk.[6] He received his first appointment as a communal rabbi in 1865 when he was selected to become the rabbi of Novosybkov, a Russian townhome to an eclectic population of several thousand Jews, that included Orthodox, secular, and Hassidic communities. At some point prior to his first rabbinical appointment at the age of 35, Rabbi Epstein married Roshka Berlin, the daughter of Rabbi Jacob Berlin and sister of the famous Rabbi Naftali Tzvi Judah Berlin, who would later become head of the Volozhin Yeshivah.[7] The couple ultimately had five children: Rabbi Barukh Epstein (1860-1941), a bookkeeper by trade and an accomplished Torah scholar and author in his own right;[8] Rabbi Dov Ber Epstein, who became an important communal figure in Jerusalem after moving to Palestine in 1902;[9] Braynah Velbrinski, who was twice widowed before settling into her parents' home and managing the publication and distribution of the *Arukh haShulhan*;[10] Batyah Miriam Berlin, who divorced her first husband after only a few months of marriage and subsequently married her uncle, Rabbi Naftali Tzvi Judah Berlin;[11] and Eidel Kahanov, who married into a wealthy family of Jewish merchants from Odessa.[12]

Rabbi Epstein spent ten years as rabbi of Novosybkov, during which time he spent time visiting with Rabbi Menachem Mendel Schneerson of Lubavitch, the third Rebbe of the Chabad Hasidic court.[13] Also, during this time, Rabbi Epstein published his first book, *Or laYesharim*, a commentary on the medieval text, *Sefer haYashar*,

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[4] *See* SIMCHA FISHBANE, THE BOLDNESS OF A HALAKHIST: AN ANALYSIS OF THE WRITINGS OF RABBI YECHIEL MECHEL HALEVI EPSTEIN'S "THE ARUKH HASHULHAN" 5 (2008). On Rabbi Epstein's time in the Volozhin Yeshivah, *see* EITAM HENKIN, TA'AROKH LEFANAI SHULHAN: CHAYO ZEMANO U'MEPA'ALO SHEL HARAV YECHIEL MIKHEL EPSTEIN BA'AL ARUKH HASHULHAN, 57-58, 321-22, 349-51 (2019).

[5] *See* EITAM HENKIN, TA'AROKH LEFANAI SHULHAN: CHAYO ZEMANO U'MEPA'ALO SHEL HARAV YECHIEL MIKHEL EPSTEIN BA'AL ARUKH HASHULHAN, 43-44 (2019).

[6] *See id*. at 349-61.

[7] *See* FISHBANE, *supra* note 4, at 6.

[8] *See* HENKIN, *supra* note 5, at 198-204.

[9] *See id.* at 204-07.

[10] *See id.* at 207-13.

[11] *See id.* at 213-18.

[12] *See id.* at 218.

[13] *See id.* at 55-58.

by the Tosafist Rabeinu Tam. While the *Sefer haYashar* itself is a relatively obscure and not well-studied work, Rabbi Epstein's commentary gained the attention of many important Eastern European rabbis, many of whom gave the book fine reviews.[14]

The publication of *Or laYesharim* improved Rabbi Epstein's rabbinic reputation, and in 1874 he accepted a position as Rabbi of Lubcha, a small town on the outskirts of Novogrudok, in southern Lithuania. Shortly after arriving in Lubcha, the communal leaders of Novogrudok offered the recently vacant position of city rabbi of their own community to Rabbi Epstein. At this time, and indeed until the city's Jewish population was almost completely annihilated during the Second World War, Novogrudok was an important center of Lithuanian Jewish life.[15] Novogrudok was home to several thousand Jews; numerous synagogues and study halls; the important Novogrudok Yeshiva headed by Rabbi Joseph Yozel Horowitz, a student of Rabbi Israel Salanter and a major figure of the Mussar Movement; and a city whose previous rabbis included the famed Rabbi Isaac Elchanan Spektor.[16] Rabbi Epstein continued to serve as Rabbi of Novogrudok until his death in 1908. During this time, he led the community, delivered sermons, answered *halakhic* questions posed by local residents and, increasingly over time, from Jews throughout Europe, Palestine, and the United States, ran the local rabbinical court, and interacted with Russian authorities on behalf of the Jewish community.[17] Most importantly, it was during his time in Novogrudok that Rabbi Epstein wrote his magnum opus, the multi-volume restatement of Jewish law, the *Arukh haShulhan*.

By the closing decades of the nineteenth century, Jewish law had become immensely complex and difficult to discern. The last major codification of Jewish law, Rabbi Joseph Karo's *Shulchan Arukh*, had appeared over three-hundred years earlier, and during the intervening period, Rabbi Karo's relatively terse and clear-cut

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[14] *See id.* at 259-62.

[15] On the significance of Jewish life in Novogrudok, *see generally* YEHUDAH LEIB *NEKRITZ*, "YESHIVOT BEIT YOSEF NOVAREDOK," IN MOSDOT TORAH B'YIROPAH [Hebrew] (S. K. Mirsky ed. *1956*); *See* HENKIN, *supra* note 5, at 51-63; ELIZER YERUSHALMI, PINKAS NOVOREDOK MEMORIAL BOOK (Alexander Harkavy, ed. 1963).

[16] *See* HENKIN, *supra* note 5, at 65-93; *see also id.* at 162-66 (on Rabbi Joseph Yozel Horowitz).

[17] *See* FISHBANE, *supra* note 4, at 8-13. For an overview of Rabbi Epstein's rabbinic activities in Novogrudok based on allusions to his work in the *Arukh haShulhan* itself, *see generally* HENKIN, *supra* note 5, at 83-93.

statements of *halakhic* rules were the subject of dozens of major commentaries that sought to explain, clarify, distinguish, and at times disagreed with the *Shulchan Arukh*'s prescriptions. Additionally, the eighteenth and nineteenth centuries witnessed a massive expansion of rabbinic responsa, the "case law" of Jewish law in which individual *halakhic* authorities provided extensive written responses to legal questions posed to them from across the Jewish world. The Jewish legal landscape at in the second half of the nineteenth century was thus a veritable quagmire of conflicting texts, commentaries, authorities, and competing opinions that made determining the correct course of conduct on any particular question difficult for laypeople and scholars alike. The *halakhic* uncertainty engendered by the state of rabbinic jurisprudence was further exacerbated by the fact that by the late 1800s, the Jewish world was undergoing sustained and cataclysmic changes. The Enlightenment had posed substantial challenges to many aspects of traditional rabbinic thought,[18] and Emancipation and the gradual transformation of Jews into members of European civil society during the nineteenth century raised new questions about the interaction of Jewish legal norms with the prevailing cultural mores and practices of the general societies into which Jews sought to integrate.[19] New modes of thinking and ideologies—secularism, historical criticism, nationalism, socialism, and liberalism, among others—made substantial inroads into various aspects of Jewish life and into various segments of the Jewish community.[20] All this served

[18] *See generally* Eliyahu Stern, *Enlightenment Conceptions of Judaism and Law*, 215, *in* THE CAMBRIDGE COMPANION TO JUDAISM AND LAW (Christine Hayes, ed. 2017); JACOB KATZ, OUT OF THE GHETTO: THE SOCIAL BACKGROUND OF JEWISH EMANCIPATION, 1770-1870, 142-160 (1998); Michael A. Meyer, *Modernity as a Crisis for the Jews*, 9:2 MODERN JUDAISM 151 (1989).

[19] On Jewish Emancipation in Europe generally, *see* PIERRE BIRNBAUM & IRA KATZNELSON, EDS., PATHS OF EMANCIPATION: JEWS, STATES, AND CITIZENSHIP (2014). On the impacts of emancipation on European Jewish life, *see generally* MICHAEL GOLDFARB, EMANCIPATION: HOW LIBERATING EUROPE'S JEWS FROM THE GHETTO LED TO REVOLUTION AND RENAISSANCE (2009); DAVID ELLENSON, AFTER EMANCIPATION: JEWISH RELIGIOUS RESPONSES TO MODERNITY (2004); J.M. HESS, GERMANS, JEWS, AND THE CLAIMS OF MODERNITY (2002); Carol Iancu, *The Emancipation and Assimilation of the Jews in the Political Discourse Regarding the granting of French Citizenship to the French Jews During the French Revolution*, 18 STUDIA JUDAICA 89 (2010).

[20] *See generally* LEORA BATINSKY, HOW JUDAISM BECAME A RELIGION: AN INTRODUCTION TO MODERN JEWISH THOUGHT (2011); NOAH H. ROSENBLUM, TRADITION IN AN AGE OF REFORM: THE RELIGIOUS PHILOSOPHY OF SAMSON RAPHAEL HIRSCH (1976); MICHAEL A. MEYER, RESPONSE TO MODERNITY: A HISTORY OF THE REFORM MOVEMENT IN JUDAISM (1995); David Ellenson, *Antinomianism and Its Responses in the Nineteenth Century*, *in* THE CAMBRIDGE COMPANION TO JUDAISM AND LAW 260 (Christine Hayes, ed. 2017).

to challenge many traditional rabbinic responses to legal and theological question, and indeed raised many new and unprecedented questions that for traditional Jews often demanded *halakhic* answers.[21]

The stage was thus set for a fresh reconsideration of the great body of diverse *halakhic* thought and opinion that had grown up around Rabbi Karo's *Shulchan Arukh* during the preceding centuries. Rabbi Epstein set out to fill this need by writing his own comprehensive restatement of Jewish law, which he titled, *Arukh Hashulchan*, or "Setting the Table." Thus, in his *Introduction* to the first published volume of the *Arukh haShulhan*, Rabbi Epstein noted that the complexity and diversity of thought in rabbinic jurisprudence had led earlier scholars—specifically Rabbis Joseph Karo and Moses Isserles—to collect and analyze the diverse views of their predecessors so as to determine clear standards of *halakhic* conduct.[22] Rabbi Karo recorded his own rulings drawn from the Sephardic tradition of rabbinic jurisprudence and heavily reliant on the pillars of Sephardic *halakhic* thought and practice, and Rabbi Isserles contributed his own conclusions, which drew on the texts, traditions, and customs viewed as fundamentally important among Ashkenazic Jewry.[23] "Together," Rabbi Epstein writes, "the two built the entire house of Israel with [their clarifications] of the laws that apply in contemporary times."[24] However, Rabbi Epstein argues, the *Shulhan Arukh* was never meant to be the last word on Jewish law, and was instead meant to serve as a helpful framework for studying the law in depth using primary sources in the Talmud and earlier codes and commentaries.[25] Consequently and unsurprisingly then, the publication of the *Shulhan Arukh* engendered the production of voluminous commentaries and *halakhic* texts that utilized the framework and guidance of Rabbi Karo and the *Rema's* works to explain further, analyze, and apply Jewish legal norms and principles.[26] As a result, Rabbi Epstein writes, "in the current generation . . . the uncertainty and confusion [about the law]

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[21] *See* Menachem Lorberbaum, *Rethinking Halakhah in Modern Eastern Europe: Mysticism, Antinomiansim, Positivism*, *in* THE CAMBRIDGE COMPANION TO JUDAISM AND LAW 232 (Christine Hayes, ed. 2017).

[22] *See* ARUKH HASHULHAN, INTRODUCTION TO CHOSHEN MISHPAT.

[23] *See id.* at Chapter One.

[24] *Id.*

[25] *See id.* For other rabbinic scholars who adopted this view of Rabbi Karo's *Shulhan Arukh*, and of *halakhic* codes generally, *see* MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 1407-1417 (Barnard Auerbach & Melvin J. Sykes trans., 1994).

[26] *See* ARUKH HASHULHAN, INTRODUCTION TO CHOSHEN MISHPAT.

have returned."[27] Observing this state of affairs, Rabbi Epstein took upon himself to try to rectify and clarify what he saw as the proper rules and standards of *halakhic* practice by, as he says, "writing this book entitled *Setting the Table*, which I have set with all manner of delicacies."[28] Thus, the purpose of the *Arukh haShulhan* is simple: it aims to clarify the confused state of Jewish law at the end of the nineteenth century by resetting the crowded and messy table built by earlier scholars.

In addressing each legal issue, Rabbi Epstein begins by presenting the foundational sources for the rule or doctrine under discussion in the Torah and Talmud, and traces early understandings of the topic and rabbinic interpretations of those primary Talmudic sources through Maimonides, other early scholars, other major codes, including the *Arbah Turim*, *Shulhan Arukh*, and later commentaries as well. In doing so, Rabbi Epstein analyzes these views, presents his own questions and counterarguments, and his own alternative interpretations of the Talmud and other primary rabbinic sources, records points of rabbinic disagreement, and often resolves such disputes, takes note of customary practices, and ultimately reaches and defends his own *halakhic* determinations.[29] Thus, rather than a code like Rabbi Karo's *Shulhan Arukh*, the *Arukh haShulhan* reads as a compressive review and analysis of rabbinic legal literature on every topic covered, but importantly, as one ultimately interested in reaching practical legal conclusions, rather than just offering a digest of rabbinic opinions or learned study of Talmudic dialectics.

Rabbi Epstein began writing the *Arukh haShulhan* in late 1869 or early 1870, shortly after establishing himself in the rabbinate of Novogrudok, and continued working on writing and publishing the work for the next thirty-seven years, with the final published volume of the *Arukh haShulhan* finally appearing shortly after Rabbi Epstein's death in February 1908.[30]

The *Arukh haShulhan* seems to have generally been well received during and in the years following Rabbi Epstein's life.[31] At the very least, the *Arukh HaShulhan*'s comprehensive overviews of the *halakhic* topics it addresses, as well as Rabbi Epstein's own juristic

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[27] *Id.*

[28] *Id*.

[29] *Id*.

[30] For a publication history, *see* HENKIN, *supra* note 5, at 229-230.

[31] *See generally id.* at 248-249.

independence and willingness to disagree with his predecessors and draw his own legal conclusions, quickly made the *Arukh haShulhan* a relevant and important text—and Rabbi Epstein himself an important authority—in rabbinic discourses. The fact that four of the ten volumes of the *Arukh haShulhan* were reprinted in two or three editions during Rabbi Epstein's lifetime is indicative of the demand for these books,[32] and Rabbi Epstein noted in a letter to Rabbi Chayim Berlin that "the work [*Arukh haShulhan*] is found in many places so that anyone who wishes can examine them."[33] Rabbi Epstein's daughter, Braynah, who after being twice widowed returned to her father's house around 1900 and thereafter managed the continued publication of the *Arukh haShulhan*, wrote in 1911 that "the *Arukh haShulhan* has spread throughout the diaspora; it has been sold in the tens of thousands throughout Europe, Asia, and America."[34] Even if this last description may be hyperbolic or not based on hard data of the *Arukh HaShulhan' s* actual distribution, it is clear that Rabbi Epstein's work became a common feature of rabbinic libraries and writings.

Since it was not a simple code of clear-cut rules of *halakhic* behavior, but a complex restatement and analysis of the state of Jewish legal discourse at the end of the nineteenth century, the *Arukh haShulhan* was not a widely popular text among the laity. It was geared towards the those who were at least competent students of Talmud and *halakhah*. Evidence of its reception and impact is thus most evident in the scholarly discourses of Rabbi Epstein's contemporaries as well as those of latter generations of rabbinic decisors. The *Arukh haShulhan* is referenced numerous times in late nineteenth and early twentieth century *halakhic* writings produced both in Rabbi Epstein's own Russia, as well as in other parts of Eastern and Western Europe, England, the United States, and Palestine.[35] Of course, not all references to the *Arukh haShulhan* were positive; many scholars took issue with Rabbi Epstein's tendency to ignore precedent and independently suggest alternative rulings based on his understandings of the Talmud and other primary sources. In such cases, some rabbinic decisors leveled harsh criticism against both

[32] *See id*. at 287-309 (listing the printing dates of various editions of the *Arukh haShulhan*).

[33] Rav Yechiel Michel Epstein, Kitvei haArukh haShulhan, no. 20.

[34] haZman 2:68, 6 (19 Nissan 5672).

[35] For an exhaustive list of references to the *Arukh haShulhan* in Jewish legal literature of this period, *see* HENKIN, *supra* note 5, at 248-254.

Rabbi Epstein and his approach to *halakhic* decision making.[36] Being the subject of strong rabbinic pushback, however, only indicates that other rabbis—even those who fundamentally disagreed with Rabbi Epstein's methodology and conclusions—viewed the *Arukh haShulhan* as a work with which they had to contend and account for in their legal deliberations. It was sufficiently well-regarded that it could not simply be ignored or dismissed as to those issues of ongoing *halakhic* discussion to which it spoke.

III. CUSTOM IN RABBINIC JURISPRUDENCE

Rabbinic jurisprudence has long recognized *minhag*, or customary practice and usage, as an important source and determinant of correct *halakhic* standards. As it is used in Talmudic and rabbinic sources, *minhag* serves three primary functions.[37] Most narrowly, *minhag* serves a law-determining role, in that the customary way of resolving *halakhic* questions or practicing Jewish rituals may determine which one of several competing rabbinic viewpoints should be generally followed on issues subject to legal dispute.[38] In such cases, the existence of a *minhag pesak*, a custom to rule in accordance with a particular authority or in a particular way, is used to cut through rabbinic dispute and determine the correct *halakhic* standard of religious practice. Somewhat more expansively, *minhag* is also widely recognized as helping to fill gaps left by other primary sources and methodologies of rabbinic jurisprudence.[39] Oftentimes, Jewish legal sources prescribe only broad normative limitations on behavior, requiring or proscribing some specific practices while permissively leaving most things to individuals' discretion. This second form of custom was a source of *halakhah* functions to create legal duties and prohibitions within the sphere of discretion left open by the technical rules of Jewish law, thereby creating new norms and standards that flesh-out the open-texture of normative *halakhah*.[40] Third, in some

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[36] *See* HENKIN, *supra* note 5, at 254.

[37] *See* Broyde, *supra* note 3, at 1039.

[38] *See* ELON, *supra* note 25, at 898-900; Babylonian Talmud, *Berakhot* 45a; Babylonian Talmud, *Taanit* 26b; Responsa Maharam meRutenberg, no. 386 (Berlin ed.).

[39] *See* ELON, *supra* note 25, at 901-903.

[40] *See* H.L.A. HART, THE CONCEPT OF LAW 121–32 (1961) (describing the nature of open-textual nature of law); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) (providing examples of what is meant by the "open-textual nature of laws").

cases, *minhag* creates entirely new norms and standards of Jewish religious practice that cut against the otherwise regular rules of *halakhic* practice.[41]

Customary practices that function in these varied ways fall generally into three categories, each of which is more fully explained below. Some customs are forms of personal religious practice that most typically take the form of personal ritual stringencies, practiced in an effort to either avoid genuine violations of *halakhic* requirements or else to express and achieve higher levels of personal religious piety.[42] Other customs are not personal undertakings but family traditions. Such practices, passed on from parents to children over generations, may, like personal customs, provide more rigorous religious frameworks for everyday life, and could also be reflective of a family's unique expressions, preferences, or modes of ritual life.[43] In many cases, what appear to be family customs are actually instances of a third kind of custom known as *minhag hamakom*, or local custom, which may be carried from place to place by families who retain and continue to observe the ancestral practices rooted in their countries of origin.[44] Such local customs include communal preferences for particular rabbinic texts or rulings of particular authorities, cultural practices, and localized ritual preferences. While some *halakhic* authorities have limited the scope of communal customs to those practices formally adopted by local lay and rabbinic authorities,[45] most scholars—including Rabbi Epstein—take a more expansive approach

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[41] *See* ELON, *supra* note 25, at 903-927.

[42] *See* Babylonian Talmud, Nedarim 15a; Shulhan Arukh, *Yoreh De'ah* 214:1.

[43] *See generally* 1 DANIEL SPERBER, MINHAGEI YISRAEL 235-236 (1990). *See also* Babylonian Talmud, Beitza 4b ("[T]heir ancestral custom is in their hands,"); Responsa Chatam Sofer, Orach Chayim, no. 122 ("From all this it seems that the essential law is that while they can nullify it, nevertheless, their children cannot nullify it."); Rabbi Yosef Shalom Elyashiv, He-arot Al Mesekhet *Pesachim*, p. 293:

> And an individual who accepted upon himself a good custom, this obligates his children as it says "do not abandon the teachings of your mother." However, an individual does not have to choose all the customs of his father and act like it – only those things that his father accepted also on his children after him.

Id. But see Pitchei Teshuva *to* Shulhan Arukh, *Yoreh De'ah* 214:5 ("A son is not obligated to follow the customs of his father, besides for those that the son was accustomed to after he became an adult.").

[44] *See* Chadash *to* Shulhan Arukh, *Orach Chayim* 496.

[45] *See* Mishnhah Torah, *Hilkhot Mamrim* 2:2 (describing customs as being enacted into law by a vote of the *Sanhedrin*); Responsa Rif, no. 13; Nachmanides, Commentary on the Talmud, *Bava Batra* 144b (s.v. *ha d'amrinan*).

that gives normative *halakhic* weight to popular religious practices and settled standards of *halakhic* conduct, even if they have not been affirmatively enacted by any formal authorities.[46]

A. Personal Customs

Rabbinic authorities have generally accepted that an individual's personal religious practices can, under certain circumstances, create *halakhic* obligations to observe such customs. The Talmudic rabbis grounded the obligatory nature of such personal religious strictures voluntarily undertaken in the biblical doctrine of personal vows and oaths, which makes certain obligatory kinds of formally accepted personal undertakings. The rabbis extended the original biblical rule requiring individuals to fulfill their voluntary oaths to include self-imposed religious practices and stringencies: "You may not permit things to people that are in fact permitted, but which those people customarily treat as prohibited, as Scripture teaches, 'he shall not break his pledge' (Numbers 30:3)."[47] Based on this Talmudic rule, numerous authorities maintain that when an individual adopts specific non-mandatory religious practices—such as fasting on certain days of the week, beginning the Sabbath early on Friday afternoon or ending the Sabbath late on Saturday night, reciting morning prayers each day at first light, abstaining from meat and wine during the three-week morning period commemorating the destruction of Jerusalem, and myriad other practices—these modes of conduct become obligatory by operation of an implicit vow in the form of personal custom.[48] Thus, Rabbi Joseph Karo rules that "things which are permitted, but which people—knowing that they are permitted—customarily treat as prohibited, are as if they were undertaken as a vow, and cannot be permitted to them."[49]

B. Family Customs

Religious strictures that begin as personal customs that bind only the person who affirmatively decides to undertake them often achieve generational longevity as personal modes of religious practice

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[46] *See* ELON, *supra* note 25, at 927-929.

[47] *See* Babylonian Talmud, *Nedarim* 15a; Shulhan Arukh, *Yoreh De'ah* 214:1.

[48] *See, e.g.*, Arbah Turim, *Yoreh De'ah* 214:1.

[49] *Id.*

become family traditions, passed down from parents to children. When an individual—especially a head of household—adopts a particular religious practice, that practice may thereby become the standard mode of religious behavior within that person's home. Children growing up in households with such practices, and learning to practice Judaism in large part by observing and habituating themselves to their parents' ritual routines, thus become accustomed to parents' personal customs as normative modes of Jewish observance.[50] What were originally personal pious undertakings by a distant ancestor may thereby become routine religious practices within particular families, as individual ritual observances are mimicked and adopted by subsequent generations of descendants. Such practices thus become *minhag avot*, or "ancestral customs," modes of religious observance passed down through family lines from generation to generation. According to some authorities, once children become accustomed to regularly observing certain legally permissive religious practices, as a result of a household religious routine determined by their parents' personal ritual customs, the children can become obligated to continue such practices by the same oath-based mechanism that originally bound their parents.[51] The fact that one's parents observed a certain religious stricture does not, in and of itself, impose a duty to maintain these traditions; however, the fact that children raised in a home with well-settled family customs regularly observe such modes of religious conduct themselves and basically intend to continue doing so in the future may amount to their own affirmative adoption of these traditions as their own personal customs. Rabbi Joseph Steinhardt (1700-1776) explains the mechanism as follows:

> A son is not automatically obligated to follow the customary practices of his father except for those practices that the son accustoms himself to observe once he reaches the age of legal majority . . . but this is not so where a son never began practicing his father's good customs.[52]

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[50] *See generally* Haim Soloveitchik, *Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy*, 28 TRADITION 64 (1994).

[51] *See, e.g.*, Rabbi Chayim ben Atar, Pri To'ar, *Yoreh De'ah 39*; Igrot Mosheh, *Orach Chayim* 3:64.

[52] Responsa Zikhron Yosef, Yoreh De'ah, no. 14, (quoted in Pitchei Teshuva *to* Shulhan Arukh, Yoreh De'ah 214:5).

Those who support the normativity of family customs rely on a Talmudic passage that appears to indicate that children are indeed bound by the personal religious strictures of their parents:

> The people of the town of Beishan had the custom to not travel from Tyre to Sidon on Fridays [in order to avoid being caught in the midst of their trip at the start of the Sabbath]. The children [of those who began this practice] came to Rabbi Yochanan and said, 'For our fathers this [stringent avoidance of travel on Fridays] was possible, but for us it is not possible [so we would like to discard this custom].' He replied to them, 'Your forebears have already accepted this, [and you must maintain the customary practice] as it says, "Listen my son to the instructions of your father, and do not forsake the teachings of your mother" (Proverbs 1:8).[53]

Some commentators read this exchange as reflective of the *halakhic* force of family customs.[54] In this passage, Rabbi Yochanan rules that the decedents of those who originally adopted the custom of not traveling on Fridays must continue the practice because they were bound by their forebears' prior adoption of this religious custom. Indeed, this Talmudic narrative suggests not only that family customs set obligatory religious standards, but that they do so in a manner that is even stronger and less flexible than the initial adoption of personal ritual customs. While personal customs legally grounded in the concept of vows can be abrogated when circumstances change in unforeseen ways that make maintaining the custom particularly difficult,[55] here, Rabbi Yochanan denies just such a request to annul the obligation put forward by the descendants of those who initiated the custom. It is impossible for children to abrogate their obligation to uphold their parents' oath-based customs on the grounds that they regret the original vow in light of changed circumstances because, as Rabbi Epstein himself explains, "were they the ones who undertook the oath such that they could claim to regret undertaking the obligation?"[56]

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[53] Babylonian Talmud, *Pesachim* 50b.

[54] *See, e.g.*, Rabbi Chayim ben Atar, Pri To'ar, *Yoreh De'ah* 39.

[55] *See* Shulhan Arukh, *Yoreh De'ah* 228:1-4.

[56] Arukh haShulhan, *Yoreh De'ah* 214:29. *See also* Jerusalem Talmud, *Pesachim* 4:1.

Similar indications of the obligatory nature of ancestral customs are found elsewhere in the Talmud. For example, the rabbis of the Second Temple period legislated that Jews living outside the Holy Land should celebrate each one-day holiday established by the Torah for two days.[57] This was because, in the Jewish lunar calendar, months may consist of either twenty-nine or thirty days, and no one would know which one until the new moon—signaling the start of a new month—was observed by the *Sanhedrin*, the high court in Jerusalem. Once the moon was sighted and a new month formally declared, the *Sanhedrin* sent messengers to Jewish communities, informing them of the calendrical change so that they would be able to celebrate various holidays on the correct dates.[58] Since it took time for these messengers to bring this information to far-flung Jewish communities in the diaspora, and residents of such communities would therefore sometimes not know on which day a new month had begun in time to celebrate holidays on the right date, the rabbis declared that Jews living in the diaspora should celebrate holidays for two days in order to ensure that, regardless of whether the previous month had run twenty-nine or thirty days, the current months holidays would be commemorated on the correct days of the month. Recognizing that the obligation to observe two-day holidays was tied to the fact that the calendar was once based on actual moon sightings, the Talmud wonders why the practice should be maintained now that the ritual calendar is based on lunar calculations, and does not depend upon messengers sent forth from the *Sanhedrin*.[59] The Talmud's answer is simple: "Be careful to observe the customs of your fathers that have come to your hands."[60] This ruling, which prescribes the continued observance of "the customs of your fathers," even regarding those customs whose underlying rationales are no longer operative, provides substantial support for those who accept the normativity of family customs.[61]

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[57] *See* Mishnah, *Rosh haShanah* 2:1; Babylonian Talmud, *Beitza* 4b. *See also* Ritva, Commentary on the Babylonian Talmud, *Rosh Hashanah* 18a; Ran, Commentary on the Babylonian Talmud, *SukahSukah* 22a (s.v. *itmar*).

[58] Mishnah, *Rosh haShanah* 2:1-7.

[59] *See* Babylonian Talmud, *Beitza* 4b.

[60] *Id.*

[61] *See also* Babylonian Talmud, *Taanit* 28b, which employs the same principle of ancestral custom to uphold a local practice of Babylonian Jews seemingly at odds with the normative *halakhah*.

C. Communal Customs

While some authorities, including Rabbi Epstein, recognize the normativity of *minhag avot*, the vast majority of *halakhic* scholars contend that ancestral practices and family customs do not carry any independent legal weight. According to these authorities, what may at times look like obligatory family practices passed down from generation to generation are actually examples of the third category of legally recognized custom, *minhag hamakom*, or local communal customs.[62] For instance, those who reject the binding authority of family customs understand the Talmudic narrative regarding the residents of Beishan and their custom to not travel on Fridays[63] as illustrating the normativity of local, not ancestral customs.[64] On this view, those who approached Rabbi Yochanan to request permission to abrogate the travel restriction were not literally the children of those who originated the practice; instead, they were simply residents of the town of Beishan whose prior inhabitants had maintained a local custom of not traveling from Tyre to Sidon on Fridays out of respect for the approaching Sabbath. These later inhabitants of Beishan found the custom unduly burdensome, and therefore, inquired of Rabbi Yochanan whether they were bound to uphold the practice in light of the present difficulties attendant to doing so, and given the fact that they had not themselves ever willingly adopted the custom at issue. Rabbi Yochanan's response affirmed that regional communal customs are binding on the community as a corporate body; once properly established, local religious customs become obligatory on all local inhabitants by virtue of their membership in the community.

Many other Talmudic sources reaffirm that communal customs are legally binding, at least on local residents, and that such customs can resolve *halakhic* disputes, add to and enhance ritual practices in areas otherwise left to individual discretion by positive legal norms, and establish proper standards of religious conduct, even when they touch on matters otherwise regulated by normative *halakhic* standards. The Torah, for instance, proscribes the mixing of meat and milk, but by its own terms extends this prohibition only to the meat of livestock,

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[62] *See, e.g.*, Responsa Chavot Ya'ir, no. 126.

[63] *See* Babylonian Talmud, *Pesachim* 50b.

[64] *See, e.g.*, Responsa Chavot Ya'ir, no. 126.

while the Torah itself does not forbid the mixing of milk and fowl.[65] Rabbis of the Mishnaic period disagreed about whether the biblical stricture should be extended to include the mixing of milk and foul since chicken is quite similar to meat and the two are likely to be easily confused. While ultimately, nearly all the rabbis of the time agreed to prohibit the consumption of milk and fowl, at least one, Rabbi Yosei HaGelili, maintained that mixing fowl and milk remains permitted. The near-universal *halakhic* standard thus prohibited mixing fowl and milk. Nevertheless, the Talmud concedes that "in the [town] of Rabbi Yosei HaGelili. . . [fowl] is eat[en] [with] milk,"[66] thereby giving normative legal credence to the local *halakhic* custom of following the local *halakhic* authority, even against the near-universal acceptance of the opposing legal view. Several similar passages endorse the localized adoption of the otherwise rejected rulings of local rabbinic authorities on a range of issues, including, among others, the performance of prohibited labor on the Sabbath in order to perform a ritual circumcision on that day, and the consumption of certain kinds of animal fats whose *halakhic* permissibility was subject to debate.[67] Moreover, in several places, the Talmud utilizes local customary practices to resolve questions and doubts about the correct *halakhic* norm by instructing, "for all those laws which are unclear . . . and with respect to which you do not know what is correct, go out and see what the community practices, and practice accordingly."[68]

The Talmudic rabbis even loosely connected the normativity of custom as a means of resolving *halakhic* uncertainties to a form of revelation. Thus, when the Mishnaic scholars where uncertain as to whether the Passover sacrifice should be offered when Passover Eve fell on the Sabbath, they looked to common custom to resolve the issue.[69] Apparently, the calendrical coincidence of Passover Eve and the Sabbath was a rare enough occurrence that it had not recently occurred. Left unpracticed, the rabbis simply forgot the correct legal rule: Does the slaughtering of the Passover sacrifice, which is generally a type of labor prohibited on the Sabbath, override ordinary

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[65] *See Exodus* 23:19, 34:26; *Deuteronomy* 14:21. *But see* Mikhilta D'Rabbi Yishmael, ch. 20.

[66] Babylonian Talmud, *Yevamot* 14a.

[67] See Babylonian Talmud, *Yevamot* 14a; Babylonian Talmud, *Pesachim* 51a.

[68] Jerusalem Talmud, *Peyah* 7:5. *See also* Babylonian Talmud, *Berakhot* 45a; Babylonian Talmud, *Menachot* 35b.

[69] Babylonian Talmud, *Pesachim* 66a.

Sabbath restrictions, or should the sacrifice not be offered when Passover Eve coincides with the Sabbath? To resolve the question, Hillel of Babylon, an eminent scholar who could not recall the right *halakhic* rule on this issue, declared, "[L]eave it to the Jewish people [to decide]; [for] if they [themselves] are not prophets. . . they are the [children] of prophets!"[70] Ultimately, the matter was indeed resolved by waiting to see what, in fact, the people would do that Passover Eve, affirming that the widespread Jewish customs and practices of the people were understood to be indicative of correct legal norms.

In addition to clarifying the right legal standard in cases of doubt about matters known to be governed by some *halakhic* standard, local customs can also establish new religious norms in areas of life left unregulated by positive *halakhah*. In addition to the previously discussed prohibition against traveling on Fridays adopted by the people of Beishan, the Talmud upholds the *halakhic* normativity of ritual purity practices related to menstruation that was originally adopted as customs by Jewish women for purposes of religious convenience, but which, once adopted, became legally mandatory.[71] In another example, when discussing a variety of different liturgical usages that can be, and in various places are, employed during the congregational recital of *Halel*, a set of thanksgiving prayers recited on certain special occasions and holidays, the Talmud concludes by noting that the correct way to recite *Halel* "depends on the local custom."[72] Likewise, while neither the Torah nor rabbinic legislation formally regulates working on Passover Eve, the Talmud rules that, "where it is customary to work on Passover eve until midday, one may do so; and where it is customary not to work then, one may not do so."[73]

Post-Talmudic scholars have disagreed about the scope of and underlying rationale for the *halakhic* normativity of communal customs. One school of thought holds that, in fact, communal practices *as such* never really create or establish *halakhic* norms. This view, which was prominent among early medieval scholars of the Sephardic tradition, holds that, while local laws can be created, and while such local laws are indeed binding from a *halakhic* perspective, only formal enactment can create such legally valid customs. On this view, the

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[70] *See id.*

[71] *See* Babylonian Talmud, *Nidah* 66a.

[72] *See* Babylonian Talmud, *Pesachim* 119a.

[73] *See* Babylonian Talmud, *Pesachim* 50a.

normativity of local customs is a function of the more general biblical command to obey the judicial rulings and legislative directives of rabbinic authorities.[74] While this biblical rule is traditionally understood to apply to the legal judgments of the *Sanhedrin*, rabbinic jurisprudence has long held that "every rabbinic court in its own city is like the *Sanhedrin* with respect to all of Israel," which lends substantial religious authority to local practices grounded in formal communal enactments.[75] Nachmanides (1194-1279) thus ruled that "a custom is only binding when the local residents or the communal leaders specifically and formally adopt it."[76] According to this approach, if popular practices carry any *halakhic* weight, it is only because widespread modes of religious conduct are taken as evidence of some once-formally enacted but now long-forgotten communal rule. The ultimate source of the normativity of such popular religious practices, however, remains the fact that it was formally legislated by local authorities. As Rabbi Isaac Alfasi explains:

> The source of any customary practice that we follow is that a majority of the community consulted with the elders of the community, and they legislated an enactment with respect to some matter . . . and even if after many years one no longer knows the root of a popular custom except that it is well-established, it should be maintained on this presumption.[77]

In other words, the fundamental normativity of any popular practice—even if only assumed by virtue of the custom's being well-established—is that the local custom reflects the community's observance of some formally enacted communal norm. A similar view is expressed by Rabbi Solomon ben Aderet (1235-1310), who argued that local customs are legally valid and binding because the fact that they are well-established indicates that they were not strenuously opposed by local rabbinic authorities, which in turn supports the conclusion that they are proper applications and expressions of normative *halakhic* standards and practices.[78] Maimonides indicates a similar view, and conflates the normativity of customary practices with

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[74] *See Deuteronomy* 17:11.

[75] *See* Mishneh Torah, *Hilkhot Mamrim* 17:11.

[76] Nachmanides, Commentary to *Bava Batra* 144b (s.v. *ha d'amrinan*).

[77] *Responsa Rif*, no. 13.

[78] *See Responsa Rashba*, no. 3:293. *See also Responsa Rosh*, no. 55; Responsa Maharik, no. 54.

formal rabbinic legislation, maintaining that both forms of supplementary Jewish ultimately law stem ultimately from the findings and determinations of the rabbinic courts of each generation.[79] On this view, the scope of obligatory *minhag*, and its weightiness in the calculus of *halakhic* decision making, is substantially limited in theory, if not necessarily in practice. The community's religious practices are legally significant and valid determinants of correct *halakhic* norms only to the extent to which they accurately reflect the prior formal adoption of such practices by properly constituted and authorized law and rabbinic communal authorities. While *Minhag* is a popular practice per se, it does not carry formal *halakhic* weight.

Another group of scholars rejects this formalistic approach to the authority of *minhag hamakom*. This second school of thought maintains that the popular practices of particular communities are not merely evidence of some ancient formal enactment by communal authorities, but actually create normative obligations in their own right. There are several possible explanations for how and why popular unlegislated practices become mandatory within a given locale. According to some authorities, the normativity of local religious customs is a consequence of the Torah prohibition against sectarianism, which the Talmudic rabbis understood to require substantial uniformity of religious practice within a single community.[80] By this view, popularly observed modes of religious practice in a given community become binding by default because normative *halakhah* prohibits individuals from causing divisiveness within the community by maintaining different practices. The simultaneous public observance of different religious practices makes "the Torah appear to be two Torahs,"[81] creates discord,[82] and is therefore proscribed.[83] The existence of communal customs is simply a consequence of this prohibition; since dissent from settled communal norms of ritual practice is proscribed as a form of sectarianism, established communal customs are determinative of *halakhic* norms by default.

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79 *See* Introduction to Mishneh Torah.

80 *See* Babylonian Talmud, *Yevamot* 13b-14a.

81 *See* Rashi, *Yevamot* 13b (s.v. *lo ta'asu agudot agudot*).

82 *See* Mishneh Torah, *Hilkhot Avodah Zarah v'Chokot haGoyim*, ch. 13.

83 *See, e.g.*, Rema to Shulhan Arukh, *Orach Chayim* 494:3.

IV. THE LEGAL USES OF CUSTOM IN THE *ARUKH HASHULCHAN*

As the foregoing discussion suggests, the role of custom in Jewish law has long been an important subject of rabbinic legal study. Custom is a particularly important consideration in Rabbi Epstein's jurisprudence as well. Rabbi Epstein upholds the *halakhic* relevance of all three kinds of *minhag* discussed and gives special regard for the normativity of the popular religious practices of his own time and place, which are often a critical factor in his determination of appropriate modes of Jewish legal practice.

A. Personal and Family Custom in the Arukh Hashulchan

Personal religious strictures of the kind that constitute personal custom are, by definition, elective and personal; they bind only those who voluntarily undertake them, and do not bind anyone who does not specifically adopt such ritual practices. Consequently, we do not find Rabbi Epstein prescribing the observance of various personal religious stringencies and practices in his *Arukh haShulhan*, which is, obviously, a work of generally applicable *halakhic* norms, in which such prescriptions would be out of place. Indeed, as discussed earlier in chapter eight, Rabbi Epstein affirmatively rejects the idea that particular personal stringencies and pious, private practices can or should be generally recommended or prescribed as a matter of *halakhah*. Still, while he does not prescribe or recommend the performance of specific personal customs, Rabbi Epstein does endorse the normativity and obligatory nature of personal customs from a *halakhic* perspective if such practices are properly undertaken.[84] Thus, in his discussion of the laws of oaths, Rabbi Epstein, following Rabbi Karo, rules that an individual who wishes to engage in a certain ascetic or pious practices like fasting can make such religious strictures legally binding on himself by having the intent to undertake the practice as a permanent feature of his religious life, and by then actually engaging in the practice at least once. Alternatively, even absent any affirmative intent to undertake the relevant personal religious stricture permanently, an elective personal practice can become a binding religious obligation, according to Rabbi Epstein, if it is repeated several times and thereby becomes a settled feature of one's ritual

[84] *See* Arukh haShulhan, *Yoreh De'ah* 214:1-15.

life.[85] While Rabbi Epstein does not recommend such undertakings and even goes so far as to minutely explain how a person can engage in occasional elective piety while also avoiding any continuing *halakhic* obligation to continue the practice in the future,[86] he nevertheless accepts that personal custom can become normative and serve as a source of obligatory *halakhic* norms.

Once personal customs become more deeply rooted through established practice over generations, however, their legal significance becomes more concrete. Thus, Rabbi Epstein often invokes the doctrine of ancestral *minhag avot* to reinforce what he views as correct *halakhic* standards. One example of this concerns the normativity of customary deprivations observed as signs of mourning during the period commemorating the destruction of the Temple. While the Talmud prohibits laundering clothes during the week preceding Tishah b'Av, it limits this prohibition to only a specific kind of fine laundering, which the Talmud calls *gihutz*.[87] Rabbi Epstein rules that, in principle, the Talmud's prohibition on laundering during the week of Tishah b'Av does not apply in his own time and place, since routine modern laundering is not as intensive as the *gihutz* laundering prohibited by the Talmud. While ordinary clothes laundering is thus technically permitted, Rabbi Epstein, notes that the prevailing custom is to prohibit all manner of laundering during the period leading up to Tishah b'Av. He writes, "And since our forefathers accepted this prohibition [on laundering], by default, this becomes legally prohibited to us."[88]

Rabbi Epstein also emphasizes the binding nature of ancestral customs related to the synagogue. Maimonides rules that the *bimah*, the large lectern from which the Torah scroll is publicly read and lectures given, should be placed in the middle of the synagogue and Rabbi Moses Isserles rules accordingly.[89] Rabbi Epstein notes, however, that in his own time, some agitators were seeking to alter this customary placement of the synagogue lectern and instead position the *bimah* to one side of the sanctuary.[90] Rabbi Epstein takes strong issue

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[85] *See id.* at 214:3-4.

[86] *See id.* at 214:2.

[87] *See* Babylonian Talmud, *Taanit* 29b.

[88] *See* Arukh haShulhan*, Orach Chayim* 551:14.

[89] *See* Mishneh Torah, *Hilkhot Tfilah uBirkhat Kohanim* 11:3; Rema *to* Shulhan Arukh, Orach Chayim 150:5.

[90] *See* Arukh haShulhan, *Orach Chayim* 150:9.

with this because, as he writes, "what is right in God's eyes is not to alter our ancestral customs in this matter [of the organization and set up of the synagogue]."[91] In another instance, Rabbi Epstein defends the common practice of using "wine" made by steeping dry raisins in water for an extended period of time for *Kiddush* and other ritual purposes—despite the fact that almost all rabbinic authorities have held that such wine is not fit for ritual use—by simply noting that "it is the custom of our forefathers" to treat such drinks as wine.[92]

B. Communal Custom in the Arukh Hashulchan

Earlier, we discussed two different rabbinic understandings of the legal impact of communal customs. According to one view, local customs are only legally normative in cases where such practices have been formally legislated or ratified by lay or rabbinic communal authorizes. A second school of thought maintains, however, that the prevalent modes of religious practice are legally binding simply by virtue of their being well-established among the practicing Jews of a particular community. Rabbi Epstein is a strong proponent of this second understanding of the basis and scope of popular communal customs, and he often upholds the normativity of *minhag*, relying on the assumption that the religious practices of the Jewish community must not be in error, and that established customs reflect God's guiding hand, helping reveal the law through communal practice over time.

One salient example of Rabbi Epstein's thinking on the normativity of popular customs involves the fundamental rabbinic dispute about the legal definition of a "public domain" for purposes of Sabbath restrictions.[93] Jewish law forbids Jews from carrying things from the public to private domains or within a public domain on the Sabbath.[94] While some of the characteristics of a *halakhic* public domain are defined by the Talmud, post-Talmudic authorities disagreed about whether there is a minimum population requirement for a space to be considered "public." According to most scholars, there is no minimum population threshold for an otherwise open area accessible to the public at large to be considered a "public domain;"

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[91] *See id.*

[92] *See* Arukh haShulhan*, Orach Chayim* 202:15.

[93] *See generally* RABBI YOSEF GAVRIEL BECHOFFER, THE CONTEMPORARY ERUV: ERUVIN IN MODERN METROPOLITAN AREAS 41-50 (3d ed. 2013).

[94] *See* Mishneh Torah, *Hilkhot Eruvin* 1:1-6.

this is in fact the more textually sound position, as the Talmud spends a good deal of space defining the parameters of public domains, but in doing so makes no mention of any population threshold.[95] Some scholars—including many prominent rabbis of the Ashkenazic tradition—disagree. Based on the fact that Sabbath prohibitions are exegetically related to biblical descriptions of the Jews' desert encampment during their forty-year sojourn in the wilderness on the way to Canaan, and that the bible describes the Jewish desert population as consisting of six-hundred thousand military-age men, these authorities maintain that a space must be used regularly by at least six-hundred thousand people in order to be considered a "public domain" in the eyes of *halakhah*.[96] The implications of the dispute are obvious. The less textually justifiable minority view, demanding a population of six hundred thousand before a space will be considered "public," makes it possible for Jews to carry things into and through the streets on the Sabbath, since almost no public streets are traversed by that many people on a regular basis, and are therefore not considered "public domains" where carrying is prohibited. According to the majority position, however, most streets are considered "public domains," where carrying is prohibited on the Sabbath.

By Rabbi Epstein's own time, the dominant practice in Europe's Ashkenazic communities had long accepted the minority position that imposed minimum population requirements on the *halakhic* definition of a "public domain."[97] In his treatment of the issue, Rabbi Epstein expresses the following serious jurisprudential doubts about the *halakhic* credibility of the more lenient position: first, because it is poorly grounded in the Talmud in comparison to the stricter view; second, because *halakhic* jurisprudence generally prescribes that minority opinions be defeated by majority rulings; and third, because the minority view seems to contradict a biblical passage in which the prophet Nehemiah chastises the people for carrying on the Sabbath at a time when the local population was no larger than forty

[95] *See* Arukh haShulchan, *Orach Chayim* 345:14-15.

[96] *See* Arukh haShulchan, *Orach Chayim* 345:17 (noting *halakhic* authorities who rule leniently on this matter, including the *Sefer haTerumah*, the *Semag*, the *Semak*, the *Maharam meRutenberg*, the *Rosh*, and the *Arbah Turim)*.

[97] *See generally* Adam Mintz, *Halakhah in America: The History of City Eruvin, 1894-1962*, at 132-75 (Sept. 2011) (unpublished Ph.D. dissertation, New York University) (discussing the use and justification for the construction of *eruvin* in early modern and modern Europe).

thousand.[98] Despite these very real *halakhic* difficulties with the minority view, Rabbi Epstein accepts it as normative and valid. He writes:

> However, in any case, all this analysis does not matter now that there is widespread acceptance [that carrying in the streets is permitted] in most of the cities of the Jewish people these past several hundred years, in reliance on this [minority] viewpoint. And it is as if a voice has gone forth from the Heavens saying that "the *halakhah* is in accordance with this view."[99]

Rabbi Epstein exhibits similar respect for the presumptive validity of popular modes of religious practice in many other places as well, even when such practices stand in real tension with *halakhic* norms grounded in primary rabbinic texts and methods.

The confluence of these various instantiations and applications of the normativity of *minhag* in rabbinic jurisprudence contribute to a broad understanding among many scholars that the customary *halakhic* practices and interpretations of particular Jewish groups constituted along ethnic, cultural, ideological, and geographical lines are important—even primary—sources of *halakhic* norms. The most widely recognized of such traditions are the Ashkenazic customs of the Jewish communities of Christian Europe, the Sephardic traditions of Spain and North African Jews, *Edot haMizrach* customs of Middle Eastern Jewish communities, as well as a smattering of other traditions of Jewish custom to communities in Yemen, Central Asia, Italy, Germany, and Greece, among other locations. While all of these varied traditions share broad commonalities in religious practice, they differ in important ways in the details of their respective prayer liturgies and practices, holiday observances, dietary laws, family life, and the relative importance they attribute to various rabbinic texts and *halakhic* authorities. For most of Jewish history, and even in Talmudic times, the practices of each of these communities were regarded as normative for members of that community.[100] For most *halakhic* scholars, the normativity of these distinct customary traditions of Jewish law and practice continues in the modern era, even as the heirs

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[98] *Nehemiah* 8:7; *See generally* Arukh haShulchan, *Orach Chayim* 345:16-18.

[99] Arukh haShulchan, *Orach Chayim* 345:18.

[100] *Cf.* Babylonian Talmud, *Pesachim* 51a.

of these once geographically distinct communities now live and practice side by side in places like Israel and the United States.[101]

For Rabbi Epstein, who was raised and educated in the Lithuanian Ashkenazic tradition, and lived and worked in Russia,[102] the customary practices and recognized *halakhic* authorities of the European Ashkenazic tradition generally, and of the Eastern European Lithuanian tradition more specifically, carry substantial normative weight. *Minhag,* in this sense, is both a source of normative *halakhic* standards, as well as an honored reservoir of religious living to be defended in case of tension with other sources of proper Jewish practice.

Customary practice, for instance, determines, for Rabbi Epstein, the correct manner of fulfilling ritual handwashing obligations. There is a disagreement among medieval *halakhic* authorities regarding which parts of the hand must be washed in order to fulfill the obligations of ritual handwashing.[103] According to the *Raabad* and the *Rosh*, one must wash one's fingers up to the "third joint," which commentators understand to mean the knuckles.[104] Maimonides rules similarly, prescribing that, for ritual hand washing, one must wash the entirety of the fingers, but no more.[105] Rabbi Isaac Alfasi disagrees, however, and rules that one must wash one's whole hand up to the wrist.[106] Rabbi Epstein rules that the law follows the more lenient view of the *Raabad* and the *Rosh*, which is supported by the *Zohar*, which teaches that when performing ritual hand washing, one must be careful to wash "fourteen joints" on each hand, the two joints on the thumb and the three joints on each of the other four fingers.[107] This supports the view that ritual handwashing must cover the entire finger, but need not also cover the hand up to the wrist, as prescribed by Rabbi Alfasi. Rabbi Epstein notes, however, that while the *halakhah* thus does not require one to wash the entire hand, because the widespread custom is to wash the whole hand in accordance with

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[101] *See, e.g.*, RABBI ABRAHAM ISAAC KOOK, ORACH MISHPAT, ORACH CHAYIM 17; IGROT HARAYAH no. 576.

[102] *See id.* at Chapter Two.

[103] On the obligation and rationale for ritual handwashing, *see generally* Babylonian Talmud, *Chulin* 105b-106a; Babylonian Talmud, *Shabat* 13b; Babylonian Talmud, *Berakhot* 53b.

[104] *See* Babylonian Talmud, *Orach Chayim* 161:7.

[105] *See* Mishneh Torah, *Hilkhot Brakhot* 6:4.

[106] *See* Arukh HaShulchan, *Orach Chayim* 161:8.

[107] *Id.*

Rabbi Alfasi's view, and he therefore advises people to follow this more stringent practice.[108]

Minhag also establishes the *halakhic* norms of commemorative mourning practices during the period recalling the destructions of Jerusalem and the Temples. While the Talmud prohibits laundering clothes during the week preceding Tishah b'Av, it limits this prohibition to only a specific kind of fine laundering, which the Talmud calls *gihutz*.[109] Rabbi Epstein rules that, in principle, the Talmud's prohibition on laundering during the week of Tishah b'Av does not apply in his own time and place, since routine modern laundering is not as intensive as the *gihutz* laundering prohibited by the Talmud. While ordinary clothes laundering is thus technically permitted, Rabbi Epstein, notes that the prevailing custom is to prohibit all manner of laundering during the period leading up to Tishah b'Av. He writes, "And since our forefathers accepted this prohibition [on laundering], by default, this becomes legally prohibited to us."[110] Relatedly, the Talmud rules that "all the commandments that apply to a mourner are practiced on Tishah b'Av."[111] Since the Tishah b'Av restrictions prescribed by the Talmud are tied to mourning practices, the *Rosh* writes that in truth one should be obligated to wear *tefilin* on Tishah b'Av, since mourners are obligated to wear *tefilin* after the first day following the death of a relative, and mourning practices of Tishah b'Av are no more restrictive than those of mourning following the day of death.[112] Nevertheless, despite the lack of any clear Talmudic prohibition against doing so, the general practice is not to wear *tefilin* on the morning of Tishah b'Av. Rabbi Esptein accepts this custom and rules that, as a matter of law, *tefilin* should not be worn on Tishah b'Av morning.[113] While the Talmud does not instruct that the regular obligation to wear *tefilin* is suspended on Tishah b'Av, Rabbi Epstein thinks that the widespread popular custom not to wear *tefilin* on Tishah b'Av morning is determinative.

The importance of customary practices as determinate of correct *halakhic* norms leads Rabbi Epstein to finds ways to justify established customs, especially when those customs cut against the

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[108] *See id.*

[109] *See* Babylonian Talmud, *Taanit* 29b.

[110] *See* Arukh HaShulchan, *Orach Chayim* 551:14.

[111] Babylonian Talmud, *Taanit* 30a.

[112] *See Rosh on Taanit* 4:37.

[113] *See* Arukh HaShulchan, *Orach Chayim* 555:2.

legal import of other sources of *halakhah*. Rabbi Epstein notes, for instance, that in his own time, many communities had the custom to use various synagogue accouterments for mundane purposes. These practices included using the ark curtains to form marriage canopies, and placing the Torah scrolls on the *bima* and a candle in the ark on the holiday of *Hoshana Raba*.[114] These customs are in tension with standard *halakhic* rules that *tashmishei kedushah*—items used for sanctified purposes—cannot be used for other, non-sanctified purposes, and must be placed in *genizah* storage once their usefulness for their originally designated holy purpose has passed.[115] While many authorities, therefore, severely criticized the kinds of practices Rabbi Epstein described, Rabbi Epstein himself attempts to justify the custom. He notes that that Talmud itself permits the use of sanctified objects for mundane purposes if the items were originally only designated for sanctity on condition that they could also be used for other functions.[116] Based on this idea, and in an attempt to reconcile the *halakhah* with customary practice, the *Terumat haDeshen,* a medieval rabbinic authority, and Rabbi Moses Isserles suggest that one may use various sanctified synagogue accouterments for mundane purposes even without having made any explicit conditions to that effect at the time that the items were initially designated for holy uses.[117] Rabbi Isserles explains that, since it is practically very difficult to ensure that such items are not used for any mundane purposes, it is as though "the court initially stipulated conditions on their sanctified use."[118] While Rabbi Epstein notes that it is difficult to justify the *Terumat haDeshen*'s view that the designation of all synagogue items includes an implicit condition permitting their use for mundane purposes, and points out that even the *Terumat haDeshen* himself finds the idea suspect, Rabbi Epstein ultimately accepts this line of reasoning in order to provide justification for the common customary practice to use synagogue accouterments for mundane purposes.[119]

Rabbi Epstein likewise defends the validity of popular custom in the face of normative *halakhic* challenges in the case of using raisin

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[114] Arukh HaShulchan, *Orach Chayim* 154:11.

[115] Babylonian Talmud, *Megilah* 26b.

[116] *See* Beit Yosef, *Orach Chayim* 154:12.

[117] *See Trumat haDeshen* 263; *Rema to Shulkhan Arukh Orach Chayim* 154:8.

[118] *See Rema to Shulkhan Arukh Orach Chayim* 154:8.

[119] Arukh HaShulchan, *Orach Chayim* 154:11.

wine for ritual purposes. The *Arbah Turim* rules that one may recite the Sabbath *Kidush* over raisin wine.[120] This is based on a Talmudic passage that teaches that raisin wine was even *ex post facto* ritually fit for use as part of the offering services in the Temple.[121] If raisin wine is fit for Temple service, it is surely fit for use to fulfill the rabbinic obligation to recite the Sabbath *Kidush* over a cup of wine.[122] Virtually all authorities include an important caveat to this *halakhic* permission to use raisin wine for *Kidush*: the *Arbah Turim*, Maimonides, Rabbi Isaac Alfasi, and Rabbi Moses Isserles all rule that raisin wine is only ritually fit for use for reciting *Kidush* if it was produced from raisins that themselves still contained some small amount of grape juice within them. If, however, the wine was produced merely by steeping completely dry raisins in water for an extended period of time, the "wine"—which is, in fact, just raisin-flavored water—may not be used for the Sabbath *Kidush*.[123] In light of the strong consensus of authorities invalidating for ritual purposes raisin wine made by steeping dry raisins in water, Rabbi Epstein raises concerns about how, in his own time and place, people routinely used raisin wine for *Kidush*. This is problematic, he says, because "everyone knows that the small raisins we use to make raisin wine are extremely dry and have no moisture in them at all," which renders the "wine" made from these raisins unsuitable for ritual purposes.[124] Despite these very serious grounds for objection, Rabbi Epstein seeks to justify the local custom and therefore offers several different justifications for the widespread practice of using this kind of raisin wine for *Kidush*. First, he suggests that the view that wine made from dry raisins is not legally treated as wine is grounded in another *halakhic* position held by Maimonides and Rabbi Alfasi but rejected by most Ashkenazic *halakhic* authorities. There is a basic dispute among early authorities regarding whether the Torah recognizes that the flavor of a food is considered to be the substance of the food, or if this principle is merely rabbinic in nature. According to Maimonides and others, this is merely a rabbinic rule, and Rabbi Epstein suggests this may be why Maimonides declines to treat as wine drinks made from completely dry raisins, which do not contain any actual juice secreted from the raisins themselves.

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120 *See* Arbah Turim, *Orach Chayim* 727:1.

121 *See* Babylonian Talmud, *Bava Batra* 97a.

122 *See* Arukh HaShulchan, *Orach Chayim* 202:15.

123 *See* Arukh HaShulchan, *Orach Chayim* 272:6.

124 *See* Arukh HaShulchan, *Orach Chayim* 202:15.

Ashkenazic authorities, however, maintain that flavor is regarded as substance even at a biblical level, and based on that line of reasoning, one might be able to treat even water flavored by dry raisins as wine. Rabbi Epstein also offers a second justification for the common practice of using raisin wine for *Kidush* by arguing that the legal definition of "wine" actually depends on what people customarily regard as wine. Since people consider wine made from dry raisins to be "wine," it may be used for *Kidush*. Third, Rabbi Epstein argues that it would be impracticable *not* to treat this commonly used raisin wine as ritually suitable wine, because in his time and place, proper wine was simply not readily available to most people, and raisin wine had to serve as an acceptable substitute.[125]

In addition to the normative *halakhic* value of custom as a means of establishing proper *halakhic* standards, customary practices also create social realities and "facts on the ground" that can put pressure on rabbinic decisions tasked with making legal rulings to understand and interpret legal rules in ways that do not too dramatically conflict with the lived realities of their communities. While this will be discussed in greater detail below, in connection with Rabbi Epstein's ninth methodological principle, it is important to note here that the *de facto* existence of certain modes of religious practice—or, indeed, of normatively incorrect practice—among Jewish populations establishes an important data point in Rabbi Epstein's *halakhic* calculations.

The *halakhic* import of custom is not limitless, however. Aside from the more skeptical rabbinic perspectives on the normativity of *mihag* discussed above, even Rabbi Epstein's expansive respect for the power of customary practices and usages to establish and determine *halakhic* standards is limited. In Rabbi Epstein's jurisprudence, custom only operates as a legitimate source of religious norms in two ways: first, *minhag* can establish standards of *halakhic* conduct within the neutral permissive space left to personal discretion by ordinary *halakhic* sources and methods; and second, *minhag* may function to resolve disputes over correct standards in areas of life regulated by normative *halakhah*.[126] Customary practices cannot, however, change the law in cases where the correct *halakhic* standard is clear and uncontested. In such instances, in Rabbi Epstein's words, "it is

[125] Arukh HaShulchan, *Orach Chayim* 272:7.

[126] *See* Arukh HaShulchan, *Yoreh De'ah* 214:33.

prohibited to follow the *minhag*, and we must eradicate it."[127] True to his methodological leanings, Rabbi Epstein grounds even this secondary rule regarding the scope of legally legitimate customs in a Talmudic norm: "Where there is a [legal] prohibition, of what matter is it that the people customary act [in a different way]?"[128]

In several places, following this approach, Rabbi Epstein strongly condemns popular practices, which he understands as entirely incompatible with accepted *halakhic* norms. For instance, Rabbi Epstein strongly condemns the popular practice of reciting the *Kadish* prayer multiple times during the morning prayer service. The early Second Temple period rabbinic synod, known as the Men of the Great Assembly, legislated the recitation of the *Kadish*, a prayer designed to punctuate the standard prayer liturgy and other important occasions with acknowledgments of God's greatness. Rabbi Epstein notes that many communities customarily punctuate the morning prayer service by reciting *Kadish* many times, indeed, more times than the Talmudic rabbis themselves prescribed. Taking as normative the Talmudic prescription of the correct number of times which *Kadish* should be said during the morning prayer service, Rabbi Epstein rejects this common custom. While Rabbi Epstein generally treats customs with deference, he views the custom of reciting *Kadish* more than is legally necessary as a supererogatory practice carrying negative repercussions. Rabbi Epstein notes that, according to one major authority, reciting *Kadish*, which contains God's name, is akin to reciting blessings; and "just as it is good to be frugal with reciting blessings, it is likewise good to be frugal with the recitation of the *Kadish* prayer."[129] Thus, following the general principle that one does not recite unnecessary blessings, as they involve the possible violation of the biblical injunction against taking God's name in vain, Rabbi Epstein prohibits the unnecessary recital of *Kadish*, and prescribes that *Kadish* should be said only at those points in the prayer service at which it is legally required.

V. CONCLUSION

Rabbi Epstein set out to write his comprehensive restatement of Jewish law, the *Arukh Ha-Shulhan*, at a critical point in Jewish legal

[127] *Id.*

[128] Babylonian Talmud, *Rosh haShanah* 15b.

[129] Arukh HaShulchan, *Orach Chayim* 55:3.

history. In the closing decades of the nineteenth century, the state of rabbinic law was complex and confused. While *halakhic* jurisprudence largely revolved around the Rabbi Joseph Karo's sixteenth-century code, the *Shulhan Arukh*, this text had become obscured by voluminous commentaries, as well as countless other sources that muddy the waters of Jewish law, making it difficult for Jewish laypeople and rabbinic scholars alike to determine the correct standards of *halakhic* practice. At the same time, Jewish society was changing at a rapid pace as political, social, technological, economic, and intellectual developments created great chasms between Jewish law "on the books" and the lived experiences of large numbers of religiously committed Jews. In this context, Rabbi Epstein's liberal reliance on custom as a normative force in *halakhic* jurisprudence plays an important role in grounding his largely independent approach to Jewish legal decision making in Jewish history, religious tradition, and Jewish social context. In the *Arukh Ha-Shulhan*, then, custom operates as a helpful bridge between creative and independent legal decision making that is largely unbounded by rabbinic precedent and the continuity of Jewish religious life and practice.