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## **Rabbinic-lay relations in Jewish law**

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MINHAG AND HALAKHAH

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## MINHAG AND HALAKHAH

### Toward a Model of Shared Authority on Matters of Ritual

Mark Washofsky

A friend of mine is the *gabai* of an orthodox synagogue in my neighborhood. Assisting him are several *ba'alei batim* known collectively as the "ritual committee." They supervise the many details, both great and small, of their congregation's religious life, and there is always much to do. They hand out the *aliyot* and other honors, determining who shall *daven* and *lein* at every service, especially on the *yamim tovim*. They see to it that the *siddurim* are in good shape, the *talesim* clean and their *tzitzit* kosher, the *yahrzeit* lists up-to-date. They make sure that wine and schnapps are provided for Shabbat, that the *lulav* and *etrog* are ordered in time for *Sukkot*, that the kitchen is closed up before *Pesah* and that the white *parokhet* and Torah mantles are in place at *Selihot*. Their authority over matters of ritual, the dominant aspect of their synagogue's activity, is clear; although many complain about this or that decision, nobody can successfully challenge a ruling of the ritual committee. Nobody, that is, except the rabbi who in this *halakic* community has the final say on all such issues. Moreover, there are a host of ritual questions over which the ritual committee has no say at all. It is the rabbi and not the ritual committee who decides whether the congregants shall stand during every recitation of *qaddish* (they do), whether a *Bat Mitzvah* ceremony can be held in the sanctuary (it cannot), and how high the *mehitzah* shall be currently at the eye-level of the men while seated, but it may soon be raised). Again, people can complain, as they frequently do, about the rabbi's particular decisions. But they do not contest his authority to make them. The congregants accept this division of authority between rabbi and laity, and there is general agreement as to which ritual questions lie on either side of the dividing line.

The situation in liberal congregations is, of course, quite different. The liberal rabbi is seldom the *mara d'atra* whose rulings on questions of synagogue observance claim the status of definitive *p'saq*. In our communities responsibility over ritual matters is shared, rather than divided, between rabbinic and lay leadership. That is, questions which in the orthodox synagogue are the exclusive domain of rabbinic judgement are, in the liberal synagogue, passed upon by the congregation, usually represented through its ritual committee, as well as the rabbi. Liberal Judaism emphasizes the concepts of religious pluralism and autonomy, doctrines which are not particularly compatible with rabbinic *halakhic* authority. Then too, especially on the American scene, the democratic political ideology greatly influences ideas of synagogue governance; the majority rule principle often overcomes the traditional Jewish tendency to submit questions of ritual to rabbinic adjudication.<sup>1</sup> Finally, the ritual committee often embodies the congregation's concern for the preservation of its own traditions against the well-meaning interference of a rabbi who, however, beloved by the community, is not of the community.

Liberal rabbis acknowledge that their role is not, in the main, that of *poseq*, and some renounce on theological grounds even the slightest claim of "authority" over the congregation. Still, shared authority over ritual matters frequently provokes tensions between them and their laity. The liberal rabbi, no less than his or her orthodox colleague, serves the congregation as its resident expert in Judaica. By virtue of academic training and practical experience, the rabbi can justifiably claim that issues of liturgical and ceremonial observance fall within the area of his or her professional competence. As a professional, the rabbi will likely view ritual matters from a perspective other than that of the laity. And as a professional, the rabbi will become perplexed or distressed when the laity, asserting power within the traditional domain of the rabbi-scholar, make decisions which in the rabbi's eyes contradict some higher principle or value of Jewish religious practice. Given

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this arrangement--shared authority among those of substantially differing points of view--conflict between liberal rabbis and their congregations over ritual issues can scarcely be avoided.

If the sharing of authority over matters of ritual is more characteristic of liberal than of orthodox communities, it is hardly a new phenomenon in Jewish religious history. Broadly speaking, the roots of Jewish observance are to be found in one of two major sources: *halakhah*, "lawyer's law," the rules and principles, both Toraitic and rabbinic, developed in the Babylonian Talmud and interpreted and applied by an elite class of scholars, the *talmidei hakhamim*; and *minhag*, "people's law," practices which originate in community custom and usage.<sup>2</sup> The validity of *halakhah*, the more formal of the two, depends upon its location in a discrete judicial or legislative act: it is derived from existing texts through the process of *midrash* or legislated by means of rabbinic *taqanah* or *gezerah*. As such, *halakhah* has been the province of the scholars entrusted with the interpretation of the *Torah*, with "building a fence" around the *Torah*, and with the preservation of oral traditions which claim Toraitic force. *Minhag*, by contrast, has no such precise beginnings. It is simply the long-standing custom of the people,<sup>3</sup> a practice that originated outside the walls of the *yeshivah* and developed independently of the formal, logical rules of rabbinic law. This difference in origin has not resulted in an irreparable conflict within Jewish law. On the contrary, the rabbis over the centuries have developed means by which to integrate *minhag* in the *halakhic* system. They have, first of all, extended their supervision over the *minhagim*, to determine that they are of valid pedigree (*minhag vatiqin*) and that they do not violate the boundaries of logic, reasonability and *halakhah*.<sup>4</sup> Once they have determined that a custom is not forbidden on these grounds, rabbinic authorities have permitted it to operate freely in "neutral spaces" in the law, where *minhag* either does not or need not conflict with formal *halakhah*. This is especially true of *dinei mammonot*, monetary law, where it is presumed that the rules are set

for the mutual convenience of the parties,<sup>5</sup> but it applies as well to some areas of ritual practice, such as liturgical *nusah* and the selection of *haftarot*, where no *halakhic* requirement interferes with the community's choice.<sup>6</sup> In some instances where the formal *halakhah* is either forgotten or disputed, *minhag* is allowed decisory power.<sup>7</sup> Again, this power is justified by a theoretical argument: the existence of an established custom is evidence of a *halakhah* which actually originated in some more formal source (*midrash*, *taqanah*, etc.). Even when a *minhag* appears to contradict the *halakhah*, rabbinic authorities may not rush to denounce it. At such times integration becomes accommodation, as *halakhists* seeking to defend the practice of their community reinterpret the formal legal rules so that the practice, hallowed by time and custom, no longer violates *halakhic* principle. A well-known example concerns *yom edei hem shel goyim*, the festival days of Gentiles. The prevailing custom of Jewish merchants in medieval Europe was to do business with their Gentile neighbors on these days, even though such was a clear violation of *halakhah*.<sup>8</sup> Yet, the rabbis of northern Europe found arguments with which to justify this custom, which at least one of them termed "astonishing."<sup>9</sup> Their willingness to do so, in this and in other cases, has been attributed to a conviction on their part that *minhag avoteinu Torah*: the ancestral customs of a holy community, customs sanctified by years of usage, cannot truly violate the *Torah*, even though they seem to do just that.<sup>10</sup> Practice, as well as abstract law, is understood as being informative of God's will. As God's will is a unity, so too can there be no essential contradiction between the obligations enunciated in the texts of *halakhah* and those which have grown up in the dynamic of religious life. If contradictions nonetheless appear, the scholar-rabbis will undertake to harmonize and to accommodate their elite, intellectual *halakhah* with the folk religion of the Jews, observance born in the laboratory of life.

I want to argue that this aspect of Jewish legal history can serve as guidance for today's communities struggling with the

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ambiguities of shared ritual authority. That is, while rabbis and laity must both pass on the same religious issues, each side has its own distinct role to play in the determination of practice. The rabbi, in the liberal as well as the orthodox setting, is the authority of textbook law, the scholar who declares and interprets for the congregation the rules and principles that govern the institutions of Jewish observance. The laity, for its part, is the creator and guardian of *minhag*, a thoroughly legitimate source of Jewish law. Neither side, in other words, needs to be "boss." The task of both is to maintain the conversation between *halakhah* and *minhag* which has a long and honored history in the literature of rabbinic law. The following three examples can help illustrate this conversation, the encounter between religious observance produced by the dynamic of Jewish life and the existing *halakhah* as understood by the community's teachers.

### 1. HALLEL ON ROSH HODESH.

R. Yohanan said in the name of R. Shimeon b. Yehotzadaq: on eighteen days an individual recites the entire (*gomer bahen*) *Hallel*. They are: the eight days of *Hanukah*, the first day of *Pesah*, and *Shavuot*. In the diaspora, there are twenty-one days (counting an extra day of *yom tov* for *Shemini Atzeret*, the first day of *Pesah*, and *Shavuot*).<sup>11</sup>

This requirement, understood by most authorities as a rabbinic *taqanah*,<sup>12</sup> does not apply to the remaining days of *Pesah* and to *Rosh Hodesh*. The Talmud explains that the concluding days of *Pesah*, unlike the intermediate days of *Sukkot* and *Shemini Atzeret*, are not distinguished one from the other in the number of sacrifices to be offered; *Rosh Hodesh*, meanwhile, is not a "hag," a day on which work is forbidden. For this reason, the early amora Rav, was surprised when, coming to Babylonia from *Eretz Yisrael*, he saw the people recite *Hallel* on *Rosh Hodesh*. He intended to protest this practice, but when he saw that only the half-*Hallel*

(*Hallel bedilug*) was recited, he concluded that "such is their ancestral custom (*minhag avoteihem b'yadam*)." The Talmud<sup>13</sup> concludes by citing a *baraita* which states that an individual praying alone need not begin the *Hallel*, but if he does he may complete it.

Since Rav allowed this *minhag* to stand, subsequent rabbinic authorities saw no need to suppress it. Still, it caused them no little conceptual difficulty. Although the recitation of *Hallel* was ordained for festival days, as a reminder of God's redemptive acts for Israel,<sup>14</sup> *Rosh Hodesh* is not a festival and commemorates no redemptive acts. The people's practice, in other words, contradicts the liturgical theory behind the *Hallel*, a fact which compelled *halakhic* scholars to search for means to remove this contradiction, to accommodate the *minhag* to the existing *halakhah* and the *halakhah* to it. One way to do this was to construct a systemic justification for *Hallel* on *Rosh Hodesh*, to buttress the custom with text and theory. Thus, the suggestion that this *Hallel* is hinted in the twelve mentions of the word *haleluyah* in Psalm 150,<sup>15</sup> or the more mundane observation that the *Hallel* served as a reminder to the Babylonians that today was *Rosh Hodesh*.<sup>16</sup> A second task was to define and adjust the terms of the *minhag* according to the existing *halakhic* prescriptions for *Hallel*. For example, some *gaonic* authorities had already established that there is no legal distinction to be made concerning *Hallel* between the *yahid* (individual) and the *tzibur* (the *minyan* of ten), when the individual does not complete the *Hallel*, neither does the community.<sup>17</sup> On the other hand, the *baraita* on Ta'anit 28b suggests to others than an individual praying without a *minyan* should not recite *Hallel* at all on *Rosh Hodesh*.<sup>18</sup> Eventually, rabbinic opinion reached a consensus that the individual should indeed recite it.<sup>19</sup> A more difficult issue concerned the *berakhot* before and after the *Hallel*. On other days, when the obligation to recite *Hallel* was based upon a rabbinic ordinance, there was no question that a benediction was to be pronounced, since it is entirely proper to say *v'tzivanu*, "who

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has commanded us" over a *mitzvah derabanan*.<sup>20</sup> On *Rosh Hodesh*, however, when the recitation of *Hallel* was based on *minhag* and not rabbinic enactment, it was not at all obvious that a *berakhah* should be said. The Talmud<sup>21</sup> relates that no benediction was recited over the beating of the *aravot* precisely because that practice was a *minhag*. Rashi explains that a *minhag* differs from a *taqanah* in that no benediction is to be recited over it; indeed, how can one say "who has commanded us" over an act which was voluntarily adopted by the people and which was not imposed upon them either by the Torah or the rabbis?<sup>22</sup> Such a blessing is a *berakhah l'vatalah*, a violation of the prohibition of taking God's name in vain.<sup>23</sup> This position is held consistently by the "Rashi School"<sup>24</sup> and by Maimonides, who states flatly that "one does not recite a benediction over a *minhag*."<sup>25</sup> On the other hand, the recitation of a *berakhah* over *Hallel* on *Rosh Hodesh* is attested in *gaonic* times<sup>26</sup> and was accepted in northern Europe, where the Tosafists developed theories to justify the practice. R. Ya'aqov Tam argued that the relevant Talmudic passages prove that a benediction was recited. For example, if no *berakhah* were said, Rav would not have thought at first to stop the Babylonians from saying *Hallel*, nor would the Talmud<sup>27</sup> have raised the issue of interruptions during the *Hallel*. Without a benediction, "*Hallel*" is simply the recitation of psalms, to which there can be no particular objection and which may be interrupted. With a *berakhah* it becomes a ritual act, and *halakhic* concerns--*berakhah l'vatalah*, interruptions--are thereby in order. The fact is, he contended, we do say benedictions over *minhagim*, such as the *qiddush* on the second day of *Yom Tov*. As for the *aravah* we cannot compare that practice, the mere shaking of branches, with the *Hallel*, which resembles reading from Torah, over which we do say a *berakhah*.<sup>28</sup>

These arguments over this issue closely paralleled those surrounding a similar *minhag*: the custom among women in Ashkenazic lands to recite benedictions when performing positive, time-bound commandments to which they were neither Toraitically



nor rabbinically obligated. Here, too, was an existing practice which appeared to contradict the rules of *halakhah*. How could women, when taking the *lulav* or donning *tefilin*, say the formal "who has commanded us" when it is obvious that they are "commanded" to perform neither of these acts? There could hardly be a greater example of *berakhah l'vatalah*, and the *halakhic* authorities of most regions either forbade the practice<sup>29</sup> or counseled that "it is better for women not to say a benediction."<sup>30</sup> Again, it was the Tosafists who created *halakhic* arguments to support this *minhag*. Rabbenu Tam suggested that the unnecessary *berakhah* is not in fact a violation of Exodus 20.7, and he further compared the case of women to that of blind men, who according to one opinion are exempt from the commandments but still recite the blessing when they perform *mitzvot*.<sup>31</sup> These arguments, as the Tosafists themselves recognized, were somewhat forced.<sup>32</sup>

Seeking to avoid the pitfalls of this analysis, other scholars justified the permit on the grounds that, while one normally receives a greater reward for performing an obligatory than a voluntary act, women who observe the *mitzvot* get some reward for doing so and are thus entitled to say the *berakhah*.<sup>33</sup> This logic, too, is difficult: whatever the merit of their voluntary act, women are still not obliged to observe these *mitzvot*. How then may they say "who has commanded us?" This difficulty is resolved in the laconic statement of R. Moshe of Coucy, who links the benedictions over *Hallel* and the blessings recited by women: "When one wishes to oblige himself to a previously voluntary act, he may recite a benediction. And this is not a *berakhah l'vatalah*."<sup>34</sup> Implicit in this reasoning, perhaps, is the notion that an individual who waives a Toraitic exemption is thereby *metzuveh*, obligated on a par with all others, and falls under the category of "who has commanded us." This would mean that the individual, by personal choice, may exalt a *minhag*, a practice not required under the formal rules of the *halakhic* system, to a status synonymous with *mitzvah*.<sup>35</sup> At any rate, both practices - benedictions recited by women and the *berakhah* for *Hallel* on *Rosh Hodesh* - prevailed among Ashkenazic

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Jews,<sup>36</sup> and both were surrounded by argumentation defending their legitimacy within the *halakhic* system.<sup>37</sup>

### 2. EVENING SHEMA BEFORE SUNDOWN.

The very first Mishnah in tractate Berakhot discusses the time at which the evening *Shema* must be recited. While opinions differ as to the *terminus ad quem* of the *mitzvah*, the *tana'im* agree that the *Shema* should not be said before "the priests enter to eat the *t'ruham*." A *Baraita* equates this time with "the appearance of the stars."<sup>38</sup> This became the accepted *halakhah*.<sup>39</sup> It was not an unheard-of practice to recite the *Shema* before sundown; a *baraita* in the *Yerushalmi*<sup>40</sup> notes that such is the custom, but stresses that this early recitation does not fulfill the obligation of saying the evening *Shema*. It serves rather as an introduction to the evening prayer, that we might "rise for the *tefilah* after having studied words of Torah." The *gaonim*, as well, record that some communities recite the *Shema* in the synagogue before sundown, but they did not approve of the practice. Rav Hai Gaon ruled that, in a case where the public worship service would in any event take place before sundown, it was preferable to recite the *tefilah* first and then the *k'ri'at Shema* at its proper time, following the appearance of the stars. In this way, one can pray with the community and fulfill the *mitzvah* of *Shema*. Under no circumstance, however, would the recitation of *Shema* before sundown be sufficient.<sup>41</sup>

In northern Europe, the custom to recite the evening *tefilah* before sundown was widely accepted, undoubtedly due to the great amounts of summer daylight in the northern latitudes which made it difficult to gather the congregation after nightfall.<sup>42</sup> The people assembled at the conclusion of the work day (but well before nightfall) to recite *minhah* and *ma'ariv*. The *Shema* was recited in its proper liturgical context, immediately prior to the evening *tefilah*. *Halakhists*, facing this long-standing *minhag* which so

obviously contradicted Talmudic law, once again turned to the task of forging a *halakhic* justification for it. Rashi, for example, notes that the one who says the *Shema* in the synagogue before sundown does not fulfill his *halakhic* obligation. Why then do we recite it so early? "To rise for the *tefilah* after having studied words of Torah," as the *Yerushalmi* puts it. "Therefore, we must recite it again after it becomes dark. And the recitation of the first *parashah*,<sup>43</sup> which is the practice at bedtime, is sufficient for this purpose."<sup>44</sup> In this way, Rashi upholds both *minhag* and *halakhah*. He sees nothing wrong with the custom as such and even justifies it, so long as the individual takes care to fulfill his ritual obligation later in the evening. The problem with his approach, as our Tosafot point out,<sup>45</sup> is that if the bedtime *Shema* were in fact the fulfillment of that obligation, we would read all three *parashi'ot* of the *Shema* at that time. We would also pronounce the statutory *berakhot*, two preceding and two following the *Shema*, yet in fact, those blessings are recited in the synagogue before sundown. Moreover, the bedtime *Shema* was ordained as protection against evil spirits, which means that *talmidei hakhamim*, whose Torah is their protection, need not recite it at all. Rather, says Rabbeinu Tam, we must conclude that the recitation of the *Shema* in the synagogue is the actual fulfillment of the *halakhic* obligation. As to why this recitation takes place before sundown, R. Tam turns to an analysis of *M. Berakhot* 4.1, the obligatory times for *tefilah*. We hold according to R. Yehudah, who declares that *minhah* may be recited until *p'lag haminhah*, about 4:45 p.m. on the twelve-hour "sun clock," rather than "until evening," which is the position of the *s'tam mishnah*. As soon as the time period for *minhah* ends, "nighttime" begins for *ma'ariv* and for *k'ri'at Shema*. How then do we account for the custom of reciting the afternoon prayer after the time of *p'lag haminhah*. R. Tam replies that since the *s'tam mishnah* holds that *minhah* may be said till dark, and since the Talmud<sup>46</sup> pointedly does not decide between the two positions, we follow both of them: R. Yehudah for *Shema* (so that we may recite it early) and the *s'tam mishnah* for *tefilah* (so that we may recite it

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after *p'lag haminhah*). The difficulty of this position does not escape the Tosafists, who argue that one ought to follow either the view of R. Yehudah or of the *s'tam mishnah* but not the leniencies of each. In addition, those *tana'im* are disputing the time of *tefilah*, which was set according to the time at which sacrifices were offered in the Temple. The evening *Shema*, by contrast, is to be said "when you lie down," a time which cannot be fixed before sundown. No proof, in other words, can be brought for *Shema* from *minhah*.<sup>47</sup> Rather, says R. Yitzhaq of Dampierre, we recite the evening *Shema* early because we hold that the *halakhah* is according to R. Eliezer and R. Meir, who teach in *beraitot* that the *Shema* may be recited from the time that people begin to observe Shabbat eve; i.e., before sundown.<sup>48</sup> Thus, although the accepted view was that the *halakhah* followed M. Berakhot 1.1, that the time for the evening *Shema* begins at sundown, the existence of the established *minhag* indicated to R. Yitzhaq that this understanding was incorrect. The law must follow those sages whose positions accord with our custom.

There is one problem with this analysis: it contradicts some basic rules of *halakhic* decision. In the afore-mentioned *beraitot* R. Eliezer is in dispute with R. Yehoshua and R. Meir with R. Yehudah. According to accepted Talmudic tradition, the law follows the latter authority in both of these cases, and in both, R. Yehoshua and R. Yehudah argue that sundown begins the time of the evening *Shema*.<sup>49</sup> It is clearly for this reason that R. Yehudah Hanasi declares their position as the anonymous (=authoritative, undisputed) view in the first Mishnah. R. Yitzhaq's theory, then, is beset with serious *halakhic* weakness.

We should note that virtually all authorities outside of Ashkenaz reject this custom; "whoever recites the evening *Shema* before the appearance of the stars is saying a *berakhah l'vatalah*."<sup>50</sup> This does not mean that they *abolished* the custom; indeed, like Rav Hai Gaon, several of them concede that the community practice is

firmly entrenched and cannot be changed. They suggest to the observant worshipper various compromises designed to allow him to pray with the congregation and yet recite the *Shema* at its proper time.<sup>51</sup> These "compromises," however, did not indicate *halakhic* approval of the *minhag*: these authorities clearly recognized that the recitation of the *Shema* before sundown does not fulfill one's *halakhic* obligation.

The later *Ashkenazic* authorities, meanwhile, offered a different kind of compromise. The *halakhah*, they acknowledge, does not follow the *tana'im* who allow the evening *Shema* to be recited early. Nonetheless, patterns of communal life decree that we accept their view. The people cannot wait until sundown, quite late in the evening according to the summer clock, to assemble for public prayer. Public prayer, if not Toraitically required, is itself an important religious value. "Therefore, the people are accustomed to recite the *Shema* and pray before the appearance of the stars, relying on these *tana'im*, although in principle, one should not recite the *Shema* until the appearance of stars."<sup>52</sup> These authorities, therefore, draw a distinction between the abstract *halakhah* and *halakhah* in practice. In principle, the evening *Shema* ought to be read after sundown. In the actual circumstances of communal life, however, the *halakhah* must follow the minority opinion, inasmuch as the desire of the community to pray together as a congregation has preserved the *minhag* of early recitation of the *Shema*. The *minhag* thus transforms the nature of rabbinic discourse over the issue. The discussion of the theoretical *halakhah* is accompanied, especially among the *Ashkenazim*, by a rigorous defense of their ancestral custom ("those who reject the words of R. Tam and delay the *Shema* till after sundown are guilty of excessive piety")<sup>53</sup> and by the creation of *halakhic* arguments, however forced they may be, to defend that *minhag* according to the rules of the *halakhic* system. This justification became increasingly difficult; by the fifteenth century, *Ashkenazic* authorities were complaining that *ma'ariv* was being recited much

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earlier in the afternoon than even the Tosafists' theories would permit. Despite that fact, the power and prevalence of *minhag* was such that most authorities found ways to preserve the coexistence of custom and *halakhah*.<sup>54</sup>

#### 3. KOHEN CALLED FIRST TO THE TORAH.

The Mishnah<sup>55</sup> tells us that among the things ordained "for the sake of peace" (*mipnei darkei shalom*) was the rule that the *kohen* is called first to the Torah, followed by a Levite and a *yisra'el*. The Talmud<sup>56</sup> lists various *d'rashot* which base this rule upon Scripture; ultimately, the derivation from Leviticus 21.8 ("you shall sanctify him") is accepted. As the *Baraita* says: "Sanctify him (the priest) in all matters pertaining to holiness. Let him speak first, say the blessing first, etc." If so, then the practice must be Toraitic; why then do we say "for the sake of peace," which implies a rabbinic ordinance?<sup>57</sup> The answer, suggested by Abaye, is that the Torah indeed grants the *kohen* priority in these matters. It is the rabbis, however, who "for the sake of peace" ordain that in the synagogue, unlike the other settings, the *kohen* is not entitled to forego this honor and bestow it upon a non-priest. If he were to do so, "quarrels would ensue." Rav Matana limits the exception to Shabbat and festivals; on weekdays, when fewer people are in the synagogue, the priest may forego his honor. The Talmud objects: Did not Rav Huna (a *yisra'el*) read first from the Torah on Shabbat and festivals? The answer: Rav Huna was different, since even R. Ami and R. Asi, the leading *kohanim* of Eretz Yisra'el, recognized his authority.

The early interpretations of this *sugya* deny the priest the right to bestow his priority upon another, even if that other person is a great scholar. The *gaonic* sources declare that "an ignorant *kohen* precedes a *yisra'el* who is a Torah scholar."<sup>58</sup> Other authorities take a different view. R Ya'aqov ben Asher, citing the opinion of his father, suggests that the example of Rav Huna proves

that anyone who is distinguished (*muflag*) in Torah learning may be called to the Torah before the *kohen*.<sup>59</sup> R. Shelomo ben Adret (Rashba) refers his correspondent to Megilah 28a, where R. Yohanan declares that "if a scholar allows an ignorant person to precede him in reciting a benediction, even if that person is the High Priest, that scholar is deserving of death." The law, concludes Adret, requires that a scholar precede a *kohen* unless the *kohen* is himself a scholar.<sup>60</sup> R. Yitzhaq b. Sheshet (Rivash) is more explicit. "When the *yisra'el* is a scholar and the priest an ignoramus, the scholar is called first. There is no concern of *mipnei darkhei shalom* in this case. On the contrary, it is a sin if this procedure is not followed." Nonetheless, the *minhag* of "all Israel" is for even an ignorant priest to be called first to the Torah, "and one should not change this *minhag*, since this would lead to contention."<sup>61</sup> A similar view is expressed by Maimonides in his commentary.<sup>62</sup> The priest, he says, does not rank above a Torah scholar. It is scholarship and not *yihus* which rules in these matters. Do we not read that "a *mamzer* who is a scholar takes precedence over a High Priest who is an ignoramus?"<sup>63</sup> Unlike R. Asher, Rambam does not require that this other scholar be a *muflag*; the honor of reading first from the Torah should be bestowed in order of the Torah knowledge of those present in the synagogue. It is only when the *kohen* is equal in knowledge to the *yisra'el* that he is forbidden to forego his honor, "for the sake of peace." Rambam is aware, of course, that custom does not follow what he considers to be the plain meaning of the Talmud text. As opposed to Rivash, however, he goes out of his way to condemn the *minhag*. Noting that in all lands even an ignorant priest precedes a scholar to the Torah, he protests that the practice has no root whatever in the Torah, is not mentioned in the Talmud, and is not the intention of the Mishnah. "I am absolutely astonished," he writes, "that this custom exists as well in the southern regions, whose practice ordinarily conforms to the language of the Talmud and who are not afflicted with the sickness of *minhagim* and of the opinions of recent authorities." Nonetheless, the *minhag* exists, and in his Code, Maimonides seems

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resigned to the fact that the *minhag* determines practice: "It is the widespread custom today that even an ignorant priest precedes a *yisra'el* who is a Torah scholar."<sup>64</sup>

Although R. Yosef Karo was a great admirer of Rambam, this was too much. In a lengthy analysis of the issue in the *Beit Yosef*,<sup>65</sup> he comments that "we must at least give an explanation to this *minhag*. It has been accepted by every community, and it is not fitting to say that this acceptance has been in error." Karo posits that the *halakhic* arguments offered by Rambam, Rashba, Rivash, and the Tur assume that to allow an ignorant priest to precede a scholar to the Torah is an affront to that scholar's dignity, and *kevod haTorah* must surely override *kevod hakohen*. This is not necessarily the case: "If the rabbis ordained that a priest should be called first to the Torah 'for the sake of peace,' then this is no insult to a scholar." Indeed, "in these times, the great sages do not insist on the honor of being called first." Rather, it is more honorific for them to receive the final *aliyah* to the Torah, "and in this manner, the *kohanim* do not have to forego their honor for the sake of the great scholars." As for the Talmudic sources cited by the earlier authorities, none of these oblige us to overturn the *minhag*. Even if "a *mamzer*, who is a scholar, takes precedence over a High Priest who is an ignoramus," this applies "to everything other than the reading of the Torah," which has been rendered an exception by the *taqanah* "for the sake of peace."

It is tempting to view the debate between Karo and the other scholars as an argument over the correct *halakhic* interpretation of passages such as Gittin 59b, M. Horayot 3.7 and others. We should resist this temptation. Citing a responsum of the fifteenth-century Italian, R. Yosef Kolon, Karo is aware of the latter's view that "all the *posqim* agree that the leading scholar is called first to Torah," and he even struggles to fit the *gaonic* rulings into this category.<sup>66</sup> The *halakhah*, as understood by a long chain of authorities, either allows the priest to give way to the scholar or



demands that he do so. The *minhag* followed in all communities<sup>67</sup> denies this option to the priest and to the congregation. Faced with a clear conflict between theoretical law and actual practice, Karo presumes that the *minhag* cannot be false. His purpose is not to refute the opinion of the preponderance of rabbinic scholars but rather to incorporate the widespread *minhag* into the system of Jewish legal thought. The justification he offers the *minhag* does not mean that it accords with the plain sense of the Talmud; it most probably does not. It serves instead to legitimize the practice in *halakhic* terms, so that, regardless of the "best" reading of the Talmudic sources, the custom observed by "all Israel" represents at any rate a *good* one, a *plausible* one that does not necessarily stand in violation of *halakhah*.

This "incorporation" might better be dubbed the "naturalization" of *minhag*. As our analysis of these three examples shows, *minhag* is something of a foreign element within the classic *halakhic* system. *Halakhah* is anchored in the lines of sacred text. The "right" or "correct" *halakhah* is determined by interpretation of the text, a study aimed at rendering the best and most convincing account of the text's words and passages. This search for the "best" and "most convincing" is a process of deductive analysis, the logical explication of the Talmudic *sugya*, the declaration of the law in a code, or the elaboration of a scholar in his commentary or responsum. As is the case with most other legal literatures, the authoritative interpretation of *halakhah* is entrusted to a specially trained body of scholars who possess the requisite intellectual talents to follow the logic of the texts and the religious probity to be recognized as *posqim*, decisors of the law.

The "anchor" of *minhag*, by contrast, is the fact of its continuation within a community over a period of time. Its justification lies not in logic, nor even in a Talmudic text, but in the fact that a particular body of Jews has adopted and held fast to it. Its authority derives not simply from sacred text but from sacred

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life, from the veneration of ancestral practice, or from a heritage (especially in *Ashkenaz*) of customary ritual observances which exist alongside of and do not owe their origin to the formal *halakhah* of texts and Talmud. *Minhagim* are authoritative not because scholars derive them but because the people observe them, and the people will most likely resent attempts by scholar-rabbis, through their sharp and ingenious textual gymnastics, to prove that the custom of "all Israel" is somehow in error.<sup>68</sup>

It is hardly surprising, then, that the religious life of the Jews in all its complexity has produced numerous *minhagim* which conflict with and are alien to the rational structure of *halakhic* theory. Our three examples are cases in point. From the standpoint of logic, *Hallel* should not be recited on *Rosh Hodesh*, a day on which no salvation was wrought for Israel. The recitation of a *berakhah* over a customary or voluntary observance violates both the theory and the language of this liturgical form. By all textual indications and the rules of *halakhic* decision the evening *Shema* ought not to be recited before sundown. And the relevant Talmudic passages seem to bear out the interpretations of the great *rishonim*: A *kohen* either may or must allow a Torah scholar to precede him to the Torah. *Minhag*, however, is not the product of the rational analysis of formal rules and principles. It springs from what Jacob Katz calls the "ritual instinct" of the people rather than from logical analysis of text.<sup>69</sup> These *minhagim* have attained power and permanence because they genuinely reflect this instinct: the desire to raise the status of a voluntary act to that of *mitzvah*; the desire to pray together as a community even though that gathering can take place only before nightfall; and the desire to render honor to the *kohanim*. The service of these religious impulses led to the creation of ritual practices which violate the formal *halakhah*.

When *halakhic* authorities confront such a *minhag*, they may assume a variety of postures. They may declare it to be a *minhag*

*ta'ut*, a mistaken practice which deserves to be annulled.<sup>70</sup> They may, as we have seen, note that the *minhag* conflicts with the *halakhah* but acknowledge its obligatory force. They may also find Talmudic-*halakhic* justifications for the *minhag*. These justifications, as we have seen, are not entirely persuasive. There is always another point of view, that of the *posqim* who do not accept the validity of the *minhag*, and we somehow cannot escape the feeling that those authorities have the better argument. Often, the "anti-*minhag*" position seems manifestly in closer accord with the sense of the relevant Talmudic passages or with the conceptual framework of the ritual observance in question. In the end, however, the weakness of the "pro-*minhag*" arguments is not decisive. When a *minhag* has existed over time and when it clearly derives from the legitimate "religious instinct" of the people, it is unnecessary to prove that it represents the one "correct" or "best" interpretation of the Talmudic *sugya*. It is sufficient rather to demonstrate that the custom is not forbidden, that it *can* be justified, that a rather plausible theory can be offered in its behalf so that its existence need not contradict the basic parameters of the *halakhah*. Such theories are not difficult to construct. The *halakhic* sources are rich in intellectual intensity and sophistication, and as the vast literature of the *Tosafot* and *rishonim* amply demonstrates, they afford a virtually limitless range of possibilities for *hiddush* and creative interpretation. Unlike *minhagim*, which are sanctified by tradition and usage prove difficult to change and impossible to annul, the abstract conceptual rules and principles of *halakhah* can be combined, rearranged, and manipulated by a scholar with an agile mind in such a way as to produce a variety of solutions to the same problem. The "most obvious" and the "most plausible" understanding of a text, in other words, does not exhaust its full range of interpretive possibilities. And the *posqim* have frequently abandoned standard, traditionally-accepted interpretations in favor of alternative readings which, though somewhat forced and not as literal, are more congenial to the existence of popular custom. In this way, *minhag* has acted as a

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spur to *halakhic* dynamism and creativity.

In the tension between *minhag* and *halakhah* lies one of the fundamental distinctions between orthodox and liberal *halakhic* writing. In today's orthodox world, this tension has spent its creative force. *Minhag* has long ceased to be a separate source of law in potential competition with *halakhah*. Both are administered and interpreted by the same elite rabbinic authority, which disallows the innovation of new custom and resists any attempt to critique established *minhagim*, even on the basis of solid *halakhic* argumentation. The experience of the early Reformers who argued on Talmudic grounds against *piyutim* and *Kol Nidrei* and in favor of prayer in the vernacular is instructive in this regard. In our liberal tradition, we have taken a more positive view of the continuing creative power of *minhag*. Liberal *halakhic* scholarship, accordingly, has concentrated heavily upon the "naturalization" of the many practices which exist in our communities and which deviate from the accepted norms of *halakhah*. An outstanding example of this work is R. Solomon B. Freehof's *Reform Jewish Practice*, whose introduction expresses a theory of *minhag* as a living source of Jewish observance. While "the chief purpose (of the book) is to describe present-day Reform Jewish practice and the traditional rabbinic laws from which they are derived," its major focus is upon the justification--*bedi'avad*--of existing practices even when they are not derived from rabbinic law.<sup>71</sup> Reminiscent of the *rishonim* Freehof seeks to address the apparently "alien" nature of Reform practice and to "naturalize" it, bringing it under the canopy of the theory of rabbinic law. Many Reform responsa, as well, are marked by this same intellectual process. Ironically, it is the literature of the most "non-*halakhic*," of today's Jewish groupings which continues the drama, debate, and creative conversation between *halakhah* and *minhag* that fill the most interesting passages of the *halakhic* commentaries, codes, and responsa.

This conversation is alive and well in our congregations.

Put differently, the dichotomy between elite and folk religion which we find in the Talmud and the *halakhic* literature reflects the reality of shared ritual authority between rabbi and ritual committee. And the heritage of this scholarly activity can and should inform the efforts of both. That is, it is the function of the ritual committee to preserve the local *minhag* and to suggest, even in the face of a skeptical rabbinic leader, that the community's observances do represent a tradition of "ritual instinct." The role of the liberal rabbi, while not that of *mara d'atra*, is the same as that of the scholar-rabbi, in the traditional literature: To examine these *minhagim* under the light of *halakhah*, the rules and principles which define and give structure to Jewish observance. This examination need not be a sometime thing. While the committee is the conservative element in this model, the rabbi can take the initiative in bringing the entire range of congregational ritual practice before the committee's attention. The results of this process will be as varied as those in the medieval *halakhic* texts. Under the rabbi's careful guidance and instruction, the congregation may discover that a certain practice stands in sharp contradiction with a higher ritual value. The committee may well determine that the practice is a *minhag ta'ut*, a mistake which carries adverse religious implications. In other instances, the rabbi can explore with the committee the possibility that local custom, though not in his or her opinion the best or most desirable ritual option, can be justified according to the theory, rules, and principles of Jewish observance. The *minhag*, of course, will in all probability survive the failure to arrive at such a justification. Still, the rabbi will have fulfilled the supreme rabbinic duty: to encourage the community to study Torah, to measure the reality of its religious life against the ideal standards taught in text and tradition.

Shared authority in matters of ritual need not be grounds for irresolvable conflict. Indeed, such sharing of authority is well attested in the history of Jewish law, in the creative tension between *halakhah* and *minhag*. As that tension resolved itself in

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the "naturalization" of *minhag* and the expansion of *halakhah*, so too can conversation between rabbi and ritual committee be a source of religious growth and development in a congregation. All that is required is a laity willing to examine its customs openly and honestly, a rabbi able to interpret Torah in all its fullness and intricacy, and a readiness on all sides to teach and learn from each other.

### Notes

1. This factor is not limited to liberal congregations. Numerous "orthodox" synagogues of a previous generation resolved knotty ritual controversies--such as the battle over mixed seating--by submitting them to a vote of the membership rather than to the binding *halakhic* decision of the rabbi.
2. On the "legal sources of Jewish law," see the comprehensive treatment by Menachem Elon, *Hamishpat Ha-Ivri*, Jerusalem, 1978. His discussion of *minhag* is found on pp. 713-767.
3. To be legally obligatory, a *minhag* must be "a common practice, performed frequently," (Isserles, *Shulhan Arukh*, Hoshen Mishpat 331.1), and officially declared by the community's scholars to be the accepted practice (*Arukh Hashulhan*, Hoshen Mishpat 331 #5).
4. See the rules and qualifications discussed in R. Haim Hizkiah Medini, *S'dei Hemed*, V. 4, pp. 74-109.
5. On the relationship between *jus cogens* and *jus dispositivum* in Jewish law, see Elon, *op.cit.*, pp. 158-163. The right to stipulate against the rules of monetary law in the *Torah* was developed during the Tanaitic period and accepted by the Amoraim; see M. Ketubot 9.1, Tosefta Qidushin 3.7-8, Ketubot 83b-84a; Rambam, *Yad, Ishut* 12.6-9. Within these lines, a commercial *minhag* is a form of community stipulation which annuls conflicting Toraitic prescriptions; see M. Baba Metzia 7.1 and the accompanying *sugya* in the Yerushalmi.

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6. The theory, as expressed by Rambam in *Yad, Sh'vitar Asor* 3.3, is that *minhag* is valid when it chooses between permitted ritual options but cannot "permit that which is forbidden" by *halakhah*. See *Elon op. cit.*, p. 738.
7. See the famous incident between Hillel and the B'nai B'teirah, B. Pesahim 66a, as well as B. Berakhot 45a ("*puk hazi mai ama dabar*").
8. M. Avodah Zarah 1.1; Alfasi, *ad loc.*; Rambam, *Yad, Avodat Kokhavim* 9.1 (on Rambam's differing attitudes concerning Islam and Christianity, compare *Ma-akhalot Asurot* 11.7 with *Avodat Kokhavim* 9.4 in the uncensored texts).
9. R. Asher b. Yehiel, *Hil. HaRosh, Avodan Zarah* 1.1, who summarizes the arguments. See also *Hagahot Maimoniot, Avodat Kokhavim*, 9.1, 2; *Tosafot, Avodah Zarah* 2a, s.v. *asur*; *Or Zarua, Pisqei Avodah Zarah*, ch. 1, par 95-96.
10. See Haym Soloveitchik, "Religious Law and Change: The Medieval Ashkenazic Example," *Association of Jewish Studies Review*, V. 12, Fall, 1987, pp. 205-221.
11. B. Arakhin 10a and b.
12. Rambam, *Yad Hanukah* 3.5-6, and *Sefer Hamitzvot, shoresh* 1. On the other hand, Nahmanides argues that *Hallel* is a Toraitic commandment on the eighteen days mentioned in Arakhin; see his *hasagot* to *Sefer Hamitzvot, shoresh* 1, where he suggests that *Hallel* is either a *halakhah lemosheh misinai* or is included in the commandment to rejoice on the festivals. See also Rabad, *Hasagot to Yad, Hanukah* 3.6. These arguments, in turn, are rejected by R. Aryeh Lev b. Asher in his *Resp. Sha'agat Aryeh* (Frankfurt a.d. Oder, 1756), #69.
13. B. Ta'anit 28b.
14. B. Pesahim 117a, and Rashbam, B. Pesahim 166b, s.v., *al kol pereq ufereq*, etc. This distinguishes the recitation of *Hallel* on *Rosh Hodesh* from that on the concluding days of *Pesah*. The former is not a festival, while the latter is, and even on *Hol Hamo'ed* unnecessary work is forbidden. See Rambam, quote in R. Nissim Gerondi to Alfasi, *Shabbat*, fol. 11a.
15. *Shibolei Haleqet*, ed Buber, ch. 172, in the name of "gaonim." We repeat the final verse of the Psalm in order to add a thirteenth "*haleluyah*" to correspond to the additional *Rosh Hodesh* of leap years.

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16. And that *musaf* had to be recited. In Eretz Yisra'el, where the new moon was declared by the *Beit Din Hagadol*, no such reminder was necessary; Meiri, *Beit Habehirah*, *Ta'anit*, 28b.
17. *Halakhot Gedolot*, ed. Warsaw, p. 34d, on the grounds that "whenever less than the whole people of Israel is gathered together, they are called 'yahid.'"
18. Rav Natronai Gaon, *Otzar Haga'onim*, *Ta'anit*, #90; Rambam, *Yad, Hanukah* 3.7.
19. *Shulhan Arukh*, *Orah Hayim* 422.2.
20. *Shabbat* 23a, where this rule is derived alternately from Deuteronomy 17.11 and from Deuteronomy 32.7. See Rambam (*Yad, Berakhot* 11.3): "The matter is thus, that He has commanded us to harken to those (the scholars and judges) who command us to kindle the *Hanukah* lamp, to read the *Megillah*, and likewise with all other rabbinic ordinances."
21. B. *Sukkah* 44b.
22. Rashi, B. *Sukkah* 44a, s.v. *minhag*. See also his responsum in *Siddur Rashi*, ed. Freimann, ch. 540, p. 269: while it is permissible to recite the concluding benediction to the *Hallel*, whose formula does not contain the Hebrew *asher qid'shanu...v'tzivanu*.
23. Exodus 20.7; B. *Berakhot* 33b; *Yad, Berakhot* 1.15.
24. *Sefer Ha'orah*, ed. Buber, part 2, ch. 59, p. 200; *Isur Veheter*, ed. Ehrenreich, ch. 55, p. 26; *Sefer Hapardes*, ed. Ehrenreich, p. 349; *Teshuvot Rashi*, ed. Elfenbein, #347, p. 351; *Mahzor Vitry*, ch. 241, p. 206.
25. *Yad, Hanukah* 3.7. As usual, Rambam follows in the wake of Alfasi, *Shabbat*, fol. 11b.
26. *Halakhot Gedolot*, ed. Hildesheimer, p. 359.
27. B. *Berakhot* 14a.



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28. *Sefer Hayashar*, Heleq Hahidushim, ed. Schlesinger, ch. 537, pp. 319-320. See also Tosafot, Berakhot 14a, s.v. *yamin*; Tosafot, Ta'anit 28b, s.v. *amar*; R. Asher, Berakhot 2.5; *Hidushei Ha-Ritba*, Berakhot 14a.
29. See Rambam, *Yad*, *Tzitzit* 3.9; *Hagahot Maimoniot*, *ad loc.*, #40, in the name of Rashi; *Shibolei Haleget*, ed. Buber, ch. 295, in the name of R. Isaiah of Trani.
30. *Tur*, Orah Hayim 17. But compare Orah Hayim 589, where he allows women to recite the benediction over the *shofar* and says that it is not a *berakhah levatalah*.
31. The exemption of the blind is quoted in the name of R. Yehudah in B. Baba Kama 87a. That the blind recite benedictions over voluntary acts is derived from B. Kiddushin 31a, where the blind Rav Yosef expresses joy over the fact that he performs *mitzvot* without being commanded to do so. R. Tam: "If he cannot recite *berakhot*, why is he so happy? Do we not learn that 'If one wishes to be a *hasid*, he should fulfill the requirements of *berakhot*?' (B. Baba Kama 30a). See the following Tosafot passages: B. Berakhot 14a, s.v. *amar*; B. Eruvin 96a, s.v. *dilma*; B. Rosh Hashanah 33a, s.v. *ha*; and R. Asher, Qiddushin 1.48-49.
32. The refutations: 1) blind males are obligated under rabbinic law to observe the commandments, while women are not so obligated; 2) both R. Yohanan and Resh Laqish (B. Berakhot 33a) read Ex. 20.7, as a Toraitic prohibition of the *berakhah levatalah*.
33. B. Qiddushin 31a (*gadol ham'tzuveh v'oseh*, etc.). R. Nissim Gerondi to Alfasi, *Rosh Hashanah*, fol., 9b; Mishnah Berurah, 17, note 4.
34. Tosafot, B. Berakhot 14a, s.v. *amar*.
35. See *Magen Avraham*, Orah Hayim 489, note 1, on women and the counting of the *Omer*. The question of the voluntary acceptance of obligations, forms a major part of the *halakhic* analysis of R. Joel Roth in S. Greenberg, ed., *The Ordination of Women as Rabbis*, New York, 1988, pp 127-187.
36. Isserles in *Shulhan Arukh*, Orah Hayim 17.2 and 422.2.
37. Sometimes, the mere existence of a *minhag* is seen as sufficient justification; see R. Asher, *loc. cit.*: "As we read in the *Yerushalmi* (Pe'ah 7.5): 'If the *halakhah*

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is uncertain, see what practice the people are following.' And the community is already accustomed to saying this benediction."

38. Tosefta, Berakhot 1.1; B. Berakhot 2b.

39. Alfasi, *Berakhot* fol. 1a-b; *Yad, K'ri'at Shema* 1.9.

40. M. Berakhot 1.1.

41. *Otzar Hagaonim, Berakhot #2*. Since the *Shema* is, after all, *d'oraita*, it must be observed strictly. This is not the case with *tefilat aravit*, whose status is not even *derabanan* (B. Berakhot 27b). Rav Hai notes that this procedure makes it impossible to have the *tefilah* follow immediately upon the *ge'ulah* benediction, according to R. Yochanan's prescription (B. Berakhot 4a). Still, if the choice is between following R. Yochanan and reciting the *Shema* at its proper time, the latter course must be chosen. See also Tur, *Orah Hayim* 235, in the name of Rav Paltoi.

42. For a complete treatment of the issue from a historical as well as *halakhic* viewpoint, see Jacob Katz, "*Ma'ariv biz'mano veshelo biz'mano*," *Zion*, V. 35, 1970, pp. 35-60.

43. Deuteronomy 6.4-9.

44. Rashi, B. Berakhot 2a; s.v. *ad sof ha'ashmurah harishonah*. The abbreviated *q'ri-at Shema* at bedtime follows the Talmudic dictum (B. Berakhot 60b). Rashi may have received the theory that the *q'ri-at Shema she'al hamitah* is the one which fulfills the commandment from R. Hananel, whose words to this effect are cited in *Sefer HaRaban* (R. Eliezer b. Natan of Mainz, b. ca. 1090), ch. 122 and 171.

45. Tosafot, Berakhot 2a; s.v. *me'eimatai*. See also *Sefer Hayashar, Hiddushim*, ed. Schlesinger, ch. 422. The position of R. Tam is discussed as well in *Or Zaru'a, Hilkhot Q'ri'at Shema* ch. 1; *Mordekhai, Berakhot*, ch. 1; and R. Asher, *Berakhot* 1.1.

46. B. Berakhot 27a.

47. See R. Asher, *loc. cit.*

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48. B. Berakhot 2b; Tosefta, Berakhot 1.1.
49. See *Hiddushei HaRashba*, B. Berakhot 2a; R. Asher, *ad loc.*
50. R. Isaiah of Trani, quoted in *Shibolei Haleqet*, ed. Buber, ch. 48. R. Shelomo b. Adret, however, argues that the benedictions surrounding the *Shema* are not *birkot mitzvah* such as the blessings for reading the Torah or the *Megilah* and may therefore be recited at a time earlier than that prescribed for the *k'ri'at Shema* (*Resp. Rashba*, I, #47).
51. This was the practice of R. Avraham Av Beit Din of Provence: say "amen" to the *Shema's* benedictions, recite the *Shema* itself "as one who reads it in the Torah," pray *ma'ariv*, and then say the *Shema* with its benedictions after sundown; *Shibolei Haleqet*, *loc. cit.* R. Yonah Gerondi, to Alfasi, *Berakhot*, fol. 1a-b, suggests that one recite the *Shema* with its benedictions along with the community but without the intention of fulfilling the *mitzvah*. Then, following sundown but before the evening meal, one repeats the *Shema* without its benedictions and with the requisite intention. (As long as it is sunset, if not sundown, one may properly recite the benediction *ma'ariv aravim*.)
52. R. Asher and *Tur*, *loc. cit.* A similar *sha'at hadahag* argument is presented by R. Zerayah Halevy in *Sefer Hama'or*, Alfasi, *Berakhot*, fol. 1b.
53. *Sefer Ra'avyah*, ed. Aptowitz, V. 1, ch. 1. See also the words of R. Tam, quoted by Meiri in his *Magen Avot*, ed. Last, pp. 53-54.
54. With the exception of R. Ya'aqov Landau, *Sefer Ha'Agur*, ed. Hershler, ch. 327. See R. Yisra'el Isserlein, *Responsa Terumat Hadeshen*, #1, and R. Moshe Isserles, *Darkei Moshe*, *Tur*, *Orah Hayim* 235.
55. B. Gittin 5.8.
56. B. Gittin 59b.
57. This matter is contested in the *Yerushalmi* (*Gittin* 5.9), where R. Shimeon b. Yohai regards this as a Toraitic rule and R. Shimeon b. Levi sees it as rabbinic.
58. *Otzar Hagaonim*, *Gittin*, #s 306-310 (though in the latter quotation, the *gaon* allows a non-priest to receive the honor on Mondays and Thursdays).

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59. *Tur*, Orah Hayim 135. See R. Asher, *Gittin* 5.20.
60. *Resp. Rashba*, Vol. I, #119.
61. *Resp. Rivash*, #204.
62. To M. *Gittin* 5.8.
63. M. *Horayot* 3.7.
64. *Yad*, *Tefilah* 12.18.
65. Orah Hayim 135. Karo's close attachment to the *halakhah* of Rambam is evident in his introduction to the *Beit Yosef*, where he calls Rambam "the best-known *halakhic* authority in the world," and in the extent to which he provides commentary on Maimonides' *halakhic* rulings, not only in his *Kesef Mishneh* but also in the *Beit Yosef*. See Isadore Twersky, "Harav Yosef Karo ba'al HaShulhan Arukh," *Asufot*, Jerusalem, 1989, V. 3, pp. 245-262; and Mark Washofsky, "The Commentary of R. Nissim b. Reuven Gerondi to the *Halakhot* of Alfsi: A Study in *Halakhic* History," *Hebrew Union College Annual*, Cincinnati, 1989, V. 60, pp. 213-216.
66. *Resp. Maharik*, *shoresh* 9. Karo opines that the *gaonim* would agree that, though even an ignorant priest is normally called first, should the *kohen* willingly forego this honor a scholar may be called in his stead.
67. With some notable exceptions: see Rabad, quoted in Meiri, *Beit HaBehirah*, *Gittin*, 59b, and Maharik, *loc. cit.*
68. Yisrael Ta-Shema argues that *minhag Ashkenaz* predated the arrival of the Babylonian Talmud in that region and for centuries preserved its status as equal or superior to the formal *halakhah*. On this point, as well as the tension between the *Tosafists* as representatives of the "new" *halakhah* and the adherents of the older traditions, see his article in *Sidra*, Jerusalem, 187, V. 3, pp. 85-161.
69. Jacob Katz, *Goy shel Shabbat*, Jerusalem, 1984, p. 176.
70. Elon, *op. cit.*, pp. 760ff; Daniel Sperber, *Minhagei Yisra'el*, Jerusalem, 1989, pp. 31-38.

71. Solomon B. Freehof, *Reform Jewish Practice and Its Rabbinic Background*, New York, 1976, V. 1, p. 15. Compare his treatment of prayer in the vernacular (V. 1, pp. 35-40), where there is much rabbinic law on which to rely, to his defense of the late Friday evening service (V. 1, p. 19) and "Sukkah in the Temple" (V. 2, pp. 27-28). Neither of the latter practices is "derived" from rabbinic law, but both are justified, either as *halakhically* unobjectionable or as symbolically useful.