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A Critique of Solomon B. Freehof's Concept of Minhag and Reform Jewish Practice

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Chapter 4



A CRITIQUE OF SOLOMON B.
FREEHOF'S CONCEPT OF *MINHAG* AND
REFORM JEWISH PRACTICE

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In 1944 Solomon B. Freehof was, to all appearances, at the height of his rabbinic career. Ordained at Hebrew Union College in 1915 after an outstanding academic performance, he had served as a chaplain with the American Expeditionary Forces in France and with the army of occupation in Germany,¹ as a faculty member at HUC, as rabbi of KAM Congregation in Chicago, and since 1934, as senior rabbi of Rodef Shalom Congregation in Pittsburgh. He was about to complete four years as vice-president and then president of the Central Conference of American Rabbis, during which time he was actively involved in the struggles over Zionism within the CCAR and the UAHC and its member congregations which resulted in the emergence of the American Council for Judaism.² He had over 20 years of experience on the CCAR Liturgy Committee and had served as its chairman since 1930; under his leadership the Conference produced its revised *Union*

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Prayer Book. During the war years he also served as chairman of the CCAR Emergency Committee on Placement, which worked to provide chaplains for the military while not denying the people at home some rabbinic presence,³ and as chairman of the Responsa Committee of the Jewish Welfare Board's Committee on Army and Navy Religious Activities,⁴ which resolved questions of Jewish practice for the military.

In 1944, however, Freehof published a volume, which, in retrospect, must be seen as the theoretical and practical foundation for what would become his life's crowning achievement: the Reform responsa. This work, to which he added a second volume in 1952, was titled *Reform Jewish Practice and its Rabbinic Background*. Its "chief purpose," as he stated in the introduction, was "to describe present-day Reform Jewish practices and the traditional rabbinic laws from which they are derived."⁵

It was a work without precedent. Other giants of Reform scholarship had produced essays and responsa on individual questions, of course, but no one had written such a systematic survey. The body of the work displays Freehof's textual erudition and confirms his emergence as the successor to Kaufmann Kohler and especially Jacob Z. Lauterbach, both of whose responsa he cites repeatedly. But Freehof goes further than Kohler or Lauterbach by presenting in his introduction an original theory concerning the relationship of Reform Judaism to traditional Jewish law. It is his desire to demonstrate not only that specific Reform practices are rooted in traditional practices, but that the very process by which Reform Judaism has developed its distinctive practice is itself grounded in—indeed, identical to—the actual process by which Jewish practice has always developed.

Since Judaism has always been a religion in which "deed" came first, changes in Jewish practice are also "religious revolutions," according to Freehof.⁶ The destruction of the Temple in the year 70 C.E. and the subsequent growth of the Diaspora occasioned two such revolutions in ancient times.⁷ At these times, Jewish law required massive readjustment. But the law itself was incapable of such readjustment because without the Sanhedrin,⁸ there was no way for Jewish law to have the requisite flexibility. Thus problems such as the *agunah* remain unsolvable in Jewish law. Whatever flexibility and adaptability were present in the past in Jewish law was due to the "creative power" of the people, not the rabbis. Freehof identifies this creative power as *minhag*,

"the raw material which the law took up and shifted, rearranged, justified, and embodied as the legal practice. The law itself did not create. The people created and the law organized."⁹

In modern times, too, argues Freehof, historical change has necessitated a religious revolution in Judaism. Emancipation, the end of Jewish corporate existence, destroyed the community for which Jewish law was developed and intended. In the modern world most Jews ignore most of Jewish law, and even "the small percentage who still observe the dietary laws, the Sabbath and Jewish marriage laws, even for them, loyal, self-sacrificing Orthodox Jews in a bewildering modern world, the whole Jewish civil law code, the Choshen Mishpot, no longer exists."¹⁰ Once again, the people's creativity is stepping into the breach, creating new *minhagim*. Reform Judaism is the oldest of such coping attempts and it has succeeded in retaining many Jews within Judaism for several generations. In Reform Judaism,

[t]he rabbis have expressed certain principles, certain theological ideals, but the people by themselves by their rejections and their acceptances, by their neglects and their observances have largely determined their own religious practices. Reform Jewish practice is not fixed. It is still changing. But by this time it has fairly well crystallized. It has arrived for the present at least at a definite form. It must therefore be of interest to all who are concerned with the problem of the adjustment of Jewish life to the modern world to study how this group of Jews has adjusted itself.¹¹

Freehof will therefore describe contemporary Reform practice in his book and, wherever applicable, illustrate its roots in older Jewish practice. He notes, however, that he will include

[o]nly those traditional laws and customs ... which are connected with actual prevalent Reform practice. Thus, those branches of traditional law which have left very little mark upon present-day life of the Reform Jew are not dealt with. To put it bluntly, there is, unfortunately, as little observance of the dietary laws among Reform Jews as there is among millions of other modern Jews and also as little observance of the traditional laws of Sabbath rest. Hence, these branches of Orthodox law are not dealt with.¹²

Freehof's theory is an attractive one for Reform Jews in that it conceptualizes Reform not as a radical innovation in Jewish life, but as the latest manifestation of a venerable Jewish response to changes in the historical circumstances of the Jewish people. On

both halakhic and historical grounds, however, it is highly suspect. This article is an initial critique of his theory. "The law itself did not create. The people created and the law organized."

While it is clear that the process of halakhic change involves extensive interplay between the rabbinate and the people, to state categorically that the true creativity in the process comes from the people and not from the rabbinate is a radical assertion. In fact, Freehof's very first example of popular creativity in response to changed circumstances is none other than the paradigmatic model of *rabbinic* creativity taught to every elementary school student of Jewish history, namely, the story of Rabban Yohanan ben Zakkai and the sages of Yavneh who, by their daring and creative halakhic activity, saved Judaism in the wake of the destruction of the Temple. No less a historian than Salo Baron refers to R. Yohanan as "the rebuilder of national life during the great crisis"¹³ to underscore the importance of his leadership and that of his colleagues and the innovations in law and practice with which they are credited. More recent historians tend toward the view that the phenomenon we know as "rabbinic Judaism" was, in fact, the creation of a small group and only very gradually (with great help from the Abbasid caliphate's support for the Gaonate and the Exilarchate) did it become the normative way of life for the vast majority of Jews.¹⁴

Whether one views the rabbis as representing the will of the majority of the people or as a small minority whose form of Judaism was only gradually accepted, neither opinion, however, validates Freehof's view of the development of rabbinic Judaism after 70 C.E. as primarily a grass roots phenomenon.

We may adduce numerous other examples of rabbinic authorities who issued drastic decisions in response to the needs of the hour: Hillel's *prosbul*, Rabbenu Gershom's *taqqanot*, and the Polish rabbis' decisions after the Cossack uprising¹⁵ come readily to mind. In fact, the very phrase *et la'asot lashem heferu toratekha* underscores both the ability and the obligation of the rabbinate to initiate change. Why, then, is Freehof so insistent that change comes from the bottom?

The notion that Jewish practice evolves among the people and is then regularized and codified by the rabbinic leadership is, indeed, reflected in the history of at least one significant Jewish movement: Reform Judaism, particularly in the United States.¹⁶ Although there were many instances of rabbinically instituted

reforms prior to the formation of the CCAR, the rapidity of change, the paucity of rabbis in the second half of the nineteenth century, and the great variety of practice gives the impression that the initial impetus for religious reform among American Jews, as among German Jews earlier, came from the people. Yearbooks from the early decades of the CCAR's existence reveal the rabbis' urgent desire to systematize the practice of American Reform Jews—rarely to cancel, retract, or oppose the changes that had manifested themselves in their synagogues and personal lives, but to order them, and to reorganize Jewish religious practice on a basis that reflected the people's actual practice. During Kaufmann Kohler's tenure as president of the Hebrew Union College (1903-1926) and as a dominant personality within the CCAR, he labored mightily to produce unity of thought and practice in the movement. "Classical" Reform Judaism, which owed its shape more to him than to any other single individual, remained largely unchanged in outward form throughout the interwar period.

Solomon B. Freehof was ordained at HUC in 1915 and served on its faculty until 1924. The evidence before Freehof's eyes in Reform Judaism was that the people initiated or desired change as circumstances changed, and the rabbinate organized and regularized the changes. The rabbinate did not lead the way in making change (except, as he notes, "[t]he rabbis have expressed certain principles, certain theological ideals ..."¹⁷). What Freehof learned and saw of Reform in his years as a student and as a rabbi up to the time he wrote this book conforms precisely to the model he presents here.¹⁸ "The doctors of the law understood ... that they depended upon the creative imagination of the people."¹⁹

As proof of his theory that Reform is simply continuing the time-honored process of creating new *minhagim*, Freehof cites six passages: two each from the two Talmuds and the *Shulhan Arukh*. A closer examination of these passages, however, will reveal that their support for his argument is problematic.

1. Berakhot 45b

M. Berakhot 6:8 reads: "If one drinks water to quench one's thirst, one should say [beforehand the blessing], ... by whose word all things exist." R. Tarfon says: [one should say] "... who creates many living beings." The Gemara explains: R. Tarfon says: [He

should say] "... who creates many living beings. Rabba bar Rav Hanan said to Abaye, and some say [he said it] to R. Yosef: What is the law? He said to him: Go and see what the people do".²⁰

The Mishnah gives two opinions regarding the correct blessing to recite before drinking water, that of the anonymous Mishnah and that of Rabbi Tarfon. The Amora Rabba bar Rav Hanan asks which is the proper procedure. This is a logical question, because the Mishnah here gives two individual opinions²¹ and does not decide between them or offer a more authoritative statement from the Sages. Abaye (or Rav Yosef) responds, "Go and see what the people do." In other words, the people's actual practice will determine what the *halakhah* should be in this case. Their actual practice was, presumably, the way in which the *halakhah* was eventually fixed: one recites Rabbi Meir's version before drinking water and Rabbi Tarfon's version after—even though Rabbi Tarfon was of the opinion that this was the blessing *before* drinking, and neither Tannaitic opinion says anything about a blessing *after* drinking. In this case, the "normative practice" of the people was apparently the source of the rabbinic law as it was eventually codified.²²

Is this a case of *minhag* creating *halakhah*? It is to the extent that "custom determines which view is to be accepted when the halakhic authorities disagree as to what the law is with regard to a particular matter."²³ It is impossible to see this, however, as an example of Freehof's "people's creativity." "The people" did not formulate either of these blessings. The rabbis did. Nor did the people even originate the idea that one must recite a blessing before and after consuming food. The rabbis did, through their exegesis of Torah. The people, in other words, were already operating within parameters defined for them by rabbinic scholarship.

2. Pesahim 66a

The question at hand is how to offer the Pesah offering when Pesah begins at the conclusion of Shabbat. The offering has to be slaughtered on the fourteenth of Nisan, that is, on Shabbat. How are the people supposed to carry their slaughtering knives to the Temple?

They said to [Hillel]: Master, If one forgot and did not bring a knife before Shabbat, then what? He said to them: I learned this *halakhah* and forgot it. But leave it to Israel [to show you the answer]—if they

are not prophets, they are the children of prophets. On the next day, whoever had a lamb for the pesah had stuck the knife in the wool; whoever had a kid had stuck the knife in between the horns [so that the animals were carrying the knives, and no one was violating Shabbat by carrying]. [Hillel] saw what they were doing and remembered the halakha, and said: This is the very tradition I received from Shemaya and Avtalyon.

In this passage Hillel says that there already is a law to answer the question put to him, but that he has forgotten it. When he sees what the people actually do, he recognizes their practice as being exactly what the rabbinic legislation prescribed. So what is the weight of the people's practice in this case?

The significance of this passage is far from clear to later rabbinic authorities. The narrower, minority view is that the people's custom merely proved that there was a prior law and is valid only for that reason. The majority view, however, is broader: "[T]he people can create law through custom, and ... custom does more than merely prove the existence of a law created by some other means."²⁴ For Elon, this *baraita* is an example of "the creative force of custom."²⁵

The reason why the people's custom can be relied on to create law in this and similar instances is "because there is a presumption that the people ... base their conduct on the *halakhah* [and] intend their practices to be true to its spirit."²⁶ In other words, the people's conduct in the absence of rabbinic guidance is valid because it is assumed that the people are acting out of devotion to Torah.

Freehof, like all committed Reform Jews, sees in the Reform modification of traditional practices not rejection of Judaism, but rather clear evidence of the people's desire to remain Jews under greatly changed historical circumstances. Therefore, the changes made by the movement in liturgical and other practices meet this criterion of devotion to Torah in his estimation and constitute examples of popularly generated *minhag*. *Pesahim* 66a implies that the people's devotion to Torah makes them a reliable source of Jewish practice. But is this true in every instance? What about, for example, Freehof's own brief acknowledgement that the observance of the Sabbath is virtually absent from the lives of Reform Jews? "Of course, not every custom of the people could be permitted to abrogate any law. ... [C]ustom abrogates the law only if it is the custom of respected people."²⁷ Contrary to his

sweeping endorsement of popular creativity, there is, in fact, a limit to his enthusiasm for it. The customs he will describe as *Reform Jewish Practice* are not the sum total of what Reform Jews do; rather, they are only those parts of the behavior of Reform Jews to which he and the rest of the CCAR have given their approval. In other words, the rabbis do not merely "organize"; they actively approve and disapprove and shape Jewish behavior. On the whole, then, while *Pesahim* 66a does justify at least some authority for popular creativity, Freehof's own life's work indicates that that authority is not without limits.

3. Y. Yevamot 12:1 (12c)

M. Yevamot 12:1 reads: "*Halitzah* takes place before a court of three judges, even if all three are laypeople. If he released her with a shoe made of leather, it is valid; with a shoe made of cloth, it is invalid; with a sandal with a heel, it is valid; but without a heel it is invalid."

The relevant passage for Freehof is:

R. Ba b. Judah [said] in the name of Rav: If Elijah should come and say that they perform *halitzah* with a leather shoe, they listen to him. If he should say that they do not perform *halitzah* with a sandal, they do not listen to him. For the community is accustomed to perform *halitzah* with a sandal, and custom overrides the law. R. Zeira [and] R. Jeremiah [said] in the name of Rav: If Elijah should come and say that they do not perform *halitzah* with a leather shoe, they listen to him. If he should say that they do not perform *halitzah* with a sandal, they do not listen to him. For the community is accustomed to perform the rites of *halitzah* with a sandal, and custom overrides the law.²⁸

In both versions of this slightly garbled Amoraic pronouncement, the first supposed decision from Elijah relates to the shoe which the community does not use. Whether he tells them it may be used or it may not be used, this statement is to be regarded as authoritative. In the former case, he would be confirming the Mishnah and, in the latter case he has the halakhic standing to forbid that which the Mishnah permits. In both versions, however, his second supposed decision would prohibit that which the community customarily practices. Nevertheless, Elijah does not have the halakhic standing to force the community to alter its

custom. The community's custom is authoritative even over a suprahuman authority.

This is not, however, an issue of popular creativity, either in an area not addressed by law or in terms of established law; rather, it is the right of a community to continue to engage in a halakhically sanctioned practice in the face of new law mandated by another halakhic authority.²⁹ This citation neither proves nor disproves Freehof's theory.

4. Y. Bava Metzia 7:1 (11b)

M. Bava Metzia 7:1: "One who hires workers and tells them to start early and finish late—in a place where it is not the custom to start early and finish late, he may not compel them to do so. In a place where customarily they provide [the workers with] food, he must provide food; [where they] supply a sweet, he must supply a sweet. Everything is according to the custom of the province."³⁰

The Gemara says:

Rav Hoshaiyah said: This means that custom overrides the law. Rav Imi said: In every case but this, the burden of proof rests on the one who seeks to receive something from his fellow. In Tiberias they do not begin work early or leave late; in Bet Maon they do. Tiberians who go up to hire workers from Bet Maon [must follow the custom of] Bet Maon; Bet Maonians who go down to hire workers in Tiberias [must follow the custom of] Tiberias. ... What about a place where there is no fixed custom? R. Judah b. Boni, R. Ammi, and Rav Judah say: The court has stipulated that the starting time is determined by the workers and the end time is determined by the employer. What is the reason [i.e., scriptural basis]? "You bring on darkness and it is night, / when all the beasts of the forests stir. / The lions roar for prey, / seeking their food from God. / When the sun rises, they come home / and couch in their dens. / Man then goes out to his work, to his labor until the evening." (Ps. 104:20-23).³¹

Once again, the issue at hand is not one of new practices changing accepted usage. Here, existing custom is invoked as the explicitly stated, valid halakhic basis for certain conduct and, when there is no existing custom, one falls back on *halakhah* and not popular creativity.³²

5. Shulhan Arukh OH 690:17

"It is the custom of all Israel that the [*megilla*] reader spreads the scroll out as he reads, like a letter, in order to show the miracle. And when he finishes, then he goes back and rolls it all up and recites the blessing. [Isserles:] Some have written that people are accustomed to say the four verses of redemption aloud [with the reader], namely: Esther 2:5, 8:15, 8:16, 10:3, and such is the custom in these lands (*Hagahot Maimuniot* 8; *Kol Bo*; *Abudharam*), and then the *chazan* repeats them. They have also written that the children are accustomed to draw the likeness of Haman, or write his name, on pieces of wood and stones, and to strike them against each other in order that the name of Haman be blotted out, as in 'You shall wipe out the memory of Amalek' (Deut. 25:19)¹⁷ and 'the name of the wicked will rot.' (Prov. 10:7) From this the custom got mixed up and turned into the practice of striking Haman when they read the *megilla* in the synagogue (*Abudharam*). But one should not abrogate a single custom or mock it, for they were not established for nothing (*Bet Yosef* in the name of *Orhot Hayim*)."³³

In the enumeration of the many and varied customs associated with the reading of the *megillah*, we do, indeed, see an example in which the people's creativity leads to the diffusion of practices which are then recognized as *halakhah* and codified by the rabbinic authorities, who explicitly acknowledge that what they are recognizing is *minhag*. The same is true in the following passage.

6. Shulhan Arukh YD 376:4

"At present it is the custom that after the grave is filled with earth (or after the mourner turns his face from the grave), they remove their shoes and sandals, go some little distance away from the cemetery, and recite the burial Kaddish. After that they pull up dirt and grasses and throw them behind their backs, and wash their hands with water. [Isserles:] Some say that they sit down seven times, because the spirits are accompanying him, and each time they sit, the spirits flee (*Maharil*, resp. No.23, in the name of "some say"). But in these provinces they are only accustomed to sit three times, after they wash their hands, and each time they say [Ps. 90:17 and Ps. 91:1]. When the deceased is

buried on a festival, they may sit these three times as on a weekday (No.20 in *Hagahot Minhagim*). The same is true if the burial took place just before Shabbat: They may do this on Shabbat. People are accustomed to be very careful not to enter a house before washing and sitting three times, and the custom of our ancestors is Torah (Maharil, *ibid.*). ...³⁴

According to Freehof, these two and the hundreds of other appeals to the durability of custom by Isserles are evidence that "the rabbinical authorities appreciated the fact that the creative material in Jewish law which the official law could only analyze, sift and organize, was the true basis of the continued vitality of Judaism." The great emphasis on custom, he asserts, proves that practice was not a "mood" imposed on the community by the rabbinate, "but ... a mass reaction, a mass creativity which produced practice and observance whenever Judaism needed to readjust itself to new conditions."³⁵

Freehof is certainly correct in seeing in Isserles' comments evidence for flourishing popular creativity, but his argument has a serious weakness. In the halakhic system, the power of *minhag* to create, change, or overrule *halakhah* varies widely depending on what sort of *halakhah* is in question. Custom does not carry equal weight in all realms of the law.

Menachem Elon's halakhic taxonomy divides the *halakhah* into two realms, *mammon* and *issur*. "Although all parts of the *halakhah* are rooted in the same source, share the same principles and methods of analysis, and provide and receive reciprocal support, nevertheless, study of the halakhic sources reveals that the *halakhah* did make very fundamental distinctions between its two major categories, namely, monetary matters (that part of the *halakhah* included in the concept of *mamon*) and non-monetary matters (that part of the *halakhah* included in the concept of *issur*)."³⁶ One of the significant differences between these two areas of *halakhah* concerns the force of *minhag*. "The distinction between *issur* and *mamon* is also an important factor in regard to the binding authority and the creative power of custom, particularly with regard to the fundamental principle in this field that 'custom overrides the law' (*minhag mevattel halakhah*), which applies exclusively to matters of *mamon* but not at all to matters of *issur*."³⁷

In matters of *mammon* parties may agree between themselves "to contract out of a law contained in the Torah," so long as no

prohibition is violated. Two individuals may agree to conduct their business by Torah law, by any customary procedure developed over the centuries and recognized by the halakhic authorities, or by some new procedure they themselves develop or adopt. This principle allowed for maximum flexibility to meet changing commercial conditions. Over the centuries, vast structures of *halakhah* dealing with commercial transactions, communal taxation, and other "civil" matters were thus constructed and reconstructed, virtually all based on *minhag*. *Minhag* easily outweighs *halakhah* in the entire realm of *mamon*.

The reason why the same flexibility cannot apply in "'religious' law," as Elon's translators render the term, is evident. In the words of R. Simeon ben Solomon Duran: "Obviously, if we may repeal a prohibition on the basis of custom, then all prohibitions may be repealed one by one; and the Torah, God forbid, will be abrogated."³⁸ In other words, from the perspective of *halakhah*, no matter how normative in any Jewish community civil divorces and eating lobster may be, such "customs" can never override the laws which regard that woman as *eshet ish* and which declare that food to be *treif*.

Elon notes one great exception to this rule in the realm of *issur*. *Minhag* plays an enormous and highly valued role in the area of liturgy and ritual practice. "[T]he principle 'custom overrides the law' was used to establish various rules that relate neither to *mamon* nor to *issur*, such as laws relating to prayer ..."³⁹ Indeed, even a very casual perusal of the halakhic literature through the marvel of computerized databases bears this out: The phrase from Berakhot 45b, "Go and see what the people do," occurs overwhelmingly in *mamon* or in matters of ritual and liturgical practice. By contrast, there are few if any instances where *minhag* determines practice in matters of *ishut*, *gerut*, *kashrut*, or other questions of *issur*.

What, then, are we to make of Freehof's misrepresentation of the meaning of several halakhic texts? From a halakhic perspective he has made an egregious error in using proofs from *mamon* and liturgical and ritual practice to justify changes in *issur*. Yet given his prodigious scholarship, it is impossible to believe that he simply erred. The even more dismaying alternative, however, is that he deliberately blurred the meaning of his sources to buttress his argument—a disturbing tendentiousness that would fatally weaken his case and certainly would do him no credit.

There is a third alternative: We must recognize that although Freehof was a prodigious scholar of the *halakhah* and knew its categories and its distinctions, in this introduction he is not writing as a halakhist but as a Reform ideologue. He is reading the *halakhah* through a Reform lens, but he confuses the reader because he does not explicitly admit this.

"Reform practice," as Freehof candidly admits, is limited almost entirely to the realm of liturgy and ritual (primarily life cycle ritual)—areas of *halakhah* in which *minhag* historically played a crucial role. *Reform Jewish Practice* reflects the reality that for most Reform Jews, "Judaism" meant (means?) going to the temple on holidays and perhaps Friday nights, and life cycle events, and no more.⁴⁰ It happens that these fall within an area of *halakhah* in which *minhag* has traditionally been given an important voice. In particular, a fascination with *minhag* was a hallmark of the Ashkenazic rabbinic culture which produced R. Moses Isserles.⁴¹ Isserles' glosses to Karo's *Shulhan Arukh* not only delineated the differences in *halakhah* between Ashkenazim and Sefardim but, as we have seen above, they painstakingly preserved and codified the customary practices of the Ashkenazim in liturgy, ritual, and daily life. In writing this book Freehof thought he was doing for twentieth century Reform Jews what Isserles had done for sixteenth century Polish Jews—using the tools of the rabbinic tradition itself to justify and validate the distinctive religious culture of a particular Jewish community. That is why the two citations from Isserles were excellent sources for him to cite.

Nevertheless, although Freehof knows and uses halakhic sources, he does not approach them from a halakhic perspective but from a classical Reform perspective in which no Jewish *practice*, however beloved or important, can ever rise above the level of "ceremony."⁴² The essential truths of ethical monotheism are distinct from "ceremonies." "Indispensable" and valued though the latter may be, they are only human attempts to express divinely revealed truths.⁴³ Thus, though the halakhic sources themselves accord very different weights to different "practices" (*de-oraita*, *de-rabbanan*, *halakhah le-moshe mi-sinai*, *halakhah*, *minhag*, etc.) for Freehof it is all the same: Everything his Jews do is "practice" and carries equal weight, whether it is conversion without *milah* and *tevilah*, changes in the order of the weekly Torah reading, or having flowers at a funeral. Freehof can claim continuity

with tradition for Reform on the basis of the power of *minhag* only because he has tacitly collapsed the distinction between *minhag* and *halakhah*. It is all merely "practice" or "custom."

For example, in describing Reform practice around the public reading of the Torah, Freehof uses the terms "custom" or "customary" to refer to the traditional annual and triennial cycles, the modern Reform use of a combination of the two, the practice of calling up two members of the congregation to unroll and roll up the Torah, raising the Torah, reading the Haftarah, and calling a certain number of men to the Torah on Sabbaths and other days.⁴⁴ These matters fall within the realm of liturgical and ritual practice, the area of greatest flexibility with regard to *minhag*, yet even so, not everything is reducible to *minhag* from the point of view of the *halakhah*. Calling seven to the Torah on Shabbat morning is mandated by the Mishnah without discussion or alternative, and is properly understood as law, not mere custom.

Realizing that Freehof is writing about *halakhah* through a classical Reform perspective also explains why, in a book which is essentially a *sefer minhagim*, he can include without further distinction questions of *issur* such as the rejection of special marriage laws relating to *kohanim*,⁴⁵ conversion without *milah* or *tevilah*,⁴⁶ elimination of "legal" aspects of Jewish marriage in favor of civil guarantees and replacing the *ketubah* with "an ethical homily,"⁴⁷ replacement of the *get* with civil divorce⁴⁸ attendance by *kohanim* at funerals, and the permissibility of cremation.⁵⁰ From a halakhic perspective none of these is subject to change on the basis of *minhag*.

One other tacit assumption, also a hallmark of the classical Reform era, also undergirds Freehof's thought: the conviction that Orthodoxy is a system of the past, that it is inevitably doomed to disappear in the modern world, and that Reform Judaism is the next stage of Judaism's evolution and the form in which it will survive into the future. Freehof's invocation of the post 1970 changes in Judaism as precedent for contemporary changes initiated by Reformers, his assertion that traditional practice was for a world that has now completely disappeared, his description of Orthodoxy as "an ideal, an heroic self-discipline"—honored more in the breach than the observance⁵¹: all these reflect the certainty that Reform would eventually become the Judaism of all religious Jews, not merely one movement among several. In this context the following passage becomes

intelligible and sheds further light on his use of his chosen halakhic sources:

Certainly even for the small percentage who observe the dietary laws, the Sabbath and Jewish marriage laws, even for them, loyal, self-sacrificing Orthodox Jews in a bewildering modern world, the whole Jewish civil law code, the Choshen Mishpot no longer exists. They no longer, except in rare instances, resort to rabbinical law for the settlement of their business matters....They go to the civil law courts. Scholars, of course, still study Jewish civil law....It is as the introduction to the Even Haezer of the Shulhan Arukh puts it: "There are many laws in this book which are not customary in Israel these days ... but he who studies these matters ... nevertheless fulfills the commandment of learning the Law." A few generations ago the law governed life. Now the study of the law is intellectual exercise and pious self-absorption.⁵²

Freehof's point, implicit here but far more explicit in subsequent writings, is that the Orthodox resort to secular courts in matters of *mamon* constitutes an abandonment of Jewish law different only in degree but not in kind from the Reform abandonment of Jewish law.⁵³ The autonomy of the corporate Jewish community made it possible for Jewish civil law to exist; now that there is no more autonomy, that part of the law has no purpose. Freehof implies that those who still adhere to Jewish law in the other three sections of the *Shulhan Arukh* are fighting a losing battle. Like the Reformers, they, too, will eventually give in to the inevitable tide of history and will begin to "practice" Judaism in the way which is suitable to the modern world.

Freehof is correct, strictly speaking, in asserting that by turning to the civil courts even Orthodox Jews are violating Jewish law. There are numerous halakhic pronouncements warning of dire consequences to any Jew who turns to the Gentile courts for redress against a fellow Jew.⁵⁴ But a scholarly examination of the issue of Jewish use of non-Jewish courts to adjudicate matters of *mamon* cannot overlook the crucial historical question, namely, the extent of Jewish self-adjudication allowed and enforced by non-Jewish rulers. As Elon notes, the rabbinic prohibition against use of non-Jewish courts "was promulgated at a time when the Jewish legal system was about to set out on the long and difficult course of maintaining juridical autonomy without a sovereign state; and this pronouncement established one of the sturdiest bulwarks protecting the continuous existence and development

of the Jewish court in all the periods of the exile."⁵⁵ Jewish "civil law" was not necessarily distinctive, as were the practices governed by Jewish "religious law," but the broader the scope allowed to Jewish civil law, the more distinctive the Jewish polity was as a whole. Maintaining juridical autonomy was therefore desirable. It was difficult, however, to maintain the authority of Jewish courts when they lacked powers of enforcement. The inescapable historical observation is that Jewish courts adjudicated matters of *mamon* when the Gentile government allowed and enforced such jurisdiction or when Jews voluntarily submitted to their jurisdiction (which usually meant only until A or B realized s/he could obtain a more favorable verdict by going to the Gentile courts). Yet even when Jewish civil jurisdiction was minimal, as it was in many early modern German communities,⁵⁶ Jews did not conclude from that, as Freehof does here, that they would or should abandon "religious" law as a corollary.⁵⁷

Here we see revealed yet another element of Freehof's Reform lens. For Reform Judaism, the end of separate Jewish status and the integration of the Jews into western societies as a religious group was an unmixed blessing. Emancipation brought the abrogation of Jewish "civil law" and made it possible for Reformers to create a new definition of Judaism-as-religion-only using a western, Protestant paradigm of "religion" in which *dinei mammonot* were ipso facto defined as not "religious" because the very category of law had no place in religion, other than the divinely revealed moral law. For traditionalists it was not an unmixed blessing, because it removed the communal structure within which Jewish life had always existed.⁵⁸ Thus in conflating the post-Emancipation non-functioning of *halakhah* in the realm of *mamon* with the abandonment of ritual practices, Freehof offers an ideological historiography to complement his ideological reading of *halakha*.

But if, as Freehof has it, the abandonment of Jewish civil law is only the first step on an inevitable continuum of change in "practice," if all realms of Jewish law are alike in that they are equally subject to the transformatory winds of modernity and the people's decision to abandon them or change them, then they were also alike in the past, in the people's decision to create them. Hence, for Freehof, there is no contradiction in using *J. Bava Metzia*, which deals with *mamon*, as justification for changes in ritual or "religious" practice. Elon's taxonomy and the conceptual

approach of *mishpat ivri* are irrelevant, as are the historical realities that mitigated for or against the existence of a functioning Jewish legal system beyond the realm of *issur*.

To be sure, he realized that there are problems with such an approach, chief among them the vexing question of Shabbat. He certainly did not want to say that the fact that Reform Jews largely ignore Shabbat means that the ongoing process of *minhag* has eliminated the day of rest from Judaism, though in print its absence is merely "unfortunate."⁵⁹ But in truth, his collapse of the entire halakhic system into the amorphous category of *minhag*/practice leaves him no consistent way to criticize that non-observance. For Freehof, *vox populi* may not be *vox dei*, since "ceremonies" are not in any case divinely ordained,⁶⁰ but essentially, Jewish practice is whatever Jewish people want to practice at any given historical juncture.⁶¹

Conclusion

Freehof's Introduction to *Reform Jewish Practice* employs halakhic sources to justify an argument which is not halakhic but ideological. Freehof understands Reform Judaism to be, as a result of the Emancipation, the successor to Orthodoxy. Its succession is demonstrated and legitimated through the concept of *minhag*, a halakhic concept which Freehof tacitly redefines in order to equate it with what he labels Reform "practice." However, this equation is flawed, as is his historical analysis, rendering his entire approach problematic.

Postscript: In his Introduction to *Reform Jewish Practice* Freehof wrote, "Reform Jewish practice is not fixed. It is still changing. But by this time it has fairly well crystallized. It has arrived for the present at least at a definite form. ... [A]ll the Reform practices together form a fairly harmonious unity ..."⁶² This passage reflects the essential unity of form which still marked Reform Judaism at mid-century. When that status quo began, however, to change in subsequent decades—*id est*, when the process of *minhag*, as Freehof had defined it, threatened to undermine the practice he regarded as normative, his response was not always positive. He was no longer as open to "popular creativity." Although in his published work he struggled toward a consistent accommodation to the ongoing process of *minhag* within

Reform Judaism, his private responsa correspondence frequently revealed criticism of popular practice and a resistance to change. For example, in reply to an inquiry concerning the wearing of a *tallit* but not a head covering, he wrote:

A case could be made for wearing the tallis and not the hat, the tallis being originally with fringes and the fringes commanded by the Bible, for everybody, whereas the wearing of the hat is of dubious origin, as you know. However, this would be artificial. In actual Jewish life for the last ten centuries, a hat was as sacred as a tallis. I cannot understand why we have the tallis altogether and not the hat, and why any of them, but there we are in the realm of sentiment. Why do our people shudder at pork chops and eat ham and bacon? What is the principle? ... Someone ought to make a study of the psychological basis for the strange choice of the people, and this applies to Orthodox Jews too in America, as to what they will observe and what they will not observe. I suppose that to our people the putting on of the hat would sound like a reversion to Orthodoxy, while the wearing of the tallis does not seem quite that Orthodox. *However, all I can say to you is that this is a choice based upon popular feeling, and I can see no more logic in it than you can.*⁶³ [Emphasis added]

Freehof's evident distaste for the "illogi" of popular practice belies his earlier enthusiasm for "popular creativity." Clearly, another limit to popular creativity is when it concerns ritual practices already declared meaningless and discarded by the classical Reform rabbinate.

Or consider the irony in his response to an inquiry concerning changing from Ashkenazic to Sefardic pronunciation of Hebrew:

It is almost a consensus that it is wrong to change an inherited minhag. ... There is a strong feeling in the legal literature that a minhag, especially an old one, is a very precious thing, a source of devotion which binds the generations together. Our Ashkenazic pronunciation is, first of all, *ours*, and also has an honored history. ... To discard it means to discard an unbroken mode of Hebrew pronunciation (with some small variation) in which our Ashkenazic ancestors have prayed for a millenium and a half. Practically speaking, it means destroying the sense of familiarity of whatever Hebrew sentences our worshipers have, and making the entire service strange to them, especially nowadays, when our Reform Movement in America is growing and for many of our new members the English part of the service and the singing of the choir are already strange. ... It is, of course, praiseworthy to express our solidarity with Israel. Let us do it with our contributions, with [our] visits, and with our contact with

Israeli art. As for our *religious* life, based upon our own traditions, this should remain *ours*.⁶⁴

This passage and many others like it reveal the fundamental paradox inherent in *minhag*: at some point, every *minhag* is a new behavior, and while some people welcome the new, some are still deeply attached to the old. In upholding the Reform Judaism of *Reform Jewish Practice* against subsequent change, Freehof is merely articulating his own version of the Hatam Sofer's famous dictum, *hadash asur mi-d'oraita*.

Notes

1. Lee Levinger, *A Jewish Chaplin in France*, (New York, 1921), pp. 86-87.
2. See Howard Greenstein, *Turning Point: Zionism and Reform Judaism*, Chico, CA, 1981, pp. 37ff. and pp. 66ff. Freehof was known to sympathize with the Zionists (in a personal conversation June 20, 1999, Rabbi Theodore H. Gordon stated that Freehof's sympathies were common knowledge in the CCAR, because in conversations on other subjects he would make offhand allusions) but was always a moderate by nature and had a great aversion to public controversy. He had friends on both sides of the divide and it was natural for him to attempt a mediating role.
3. The committee also struggled to oversee pulpit changes on the home front so that those rabbis who had volunteered for the military would not feel that they were sacrificing their postwar careers. They were not always successful.
4. His Conservative and Orthodox colleagues on the committee were Milton Steinberg and Leo Jung. (*Responsa in War Time*, New York, 1947, p.i).
5. Solomon B. Freehof, *Reform Jewish Practice and its Rabbinic Background*, combined edition. New York, 1963, p. 15.
6. Freehof, p. 5.
7. Here Freehof characteristically avoids controversy through masterful circumlocution: "When the Jewish community in Palestine grew smaller and smaller, the Jewish community all over the world grew correspondingly larger and Jewry became primarily a Diaspora people." (P. 5) His readers could decide for themselves whether this change in geographical circumstances constituted "exile" or a God-given opportunity for Israel to fulfill its "mission."
8. The question of the historicity of the Sanhedrin and how Freehof presents it is a thorny issue which we need not enter into for purposes of this discussion.
9. Freehof, p. 7. Menachem Elon defines *minhag* as "a particular normative behavior that has been continuous and unquestioned" Menachem Elon, Jew-

- ish Law: History Sources. Principles, trans. Bernard Auerbach and Melvin Sykes, Philadelphia, 1994, vol. II, p.885.
10. Freehof, p. 11..
 11. Freehof, pp. 13.
 12. Freehof, pp. 14-15.
 13. Salo W. Baron, *A Social and Religious History of the Jews*, New York, 1958, vol. II, p. 277.
 14. See e.g. Shaye J.D. Cohen, "Roman Domination," in Shanks, ed., *Ancient Israel*, Washington, DC, 1988, p. 235: "The absence of other organized groups in post-70 Judea] does not of course mean that all Jews everywhere instantly became pious followers of the rabbis. The contrary was the case. In Second Temple times most Jews did not belong to any sect or group but were content to serve God in their own folk way This pattern continued in the rabbinic period as well, as the rabbinic texts themselves make abundantly clear But in the end the masses recognized the rabbis as the leaders and shapers of Judaism." Neusner's work underscores the extent to which the rabbi' view of a proper Jewish life did not match the people's view see, e.g., ch. 1, "The People and the Law," in Jacob Neuser, *The Wonder- Working Lawyers of Talmudic Babylonia*, Lanham, MD, 1987, but his perspective only further undermines Freehof's argument, since in the end the rabbis succeeded in imposing their form of Judaism on the entire Jewish people. Shmuel Safrai offers a more conventional picture in which the rabbis and their institutions quickly emerge as the "backbone" of Jewish existence after 70, but he also states that "the people [were] led by the sages." S. Safra, "The Era of the Mishnah and Talmud" in H. H. Ben-Sasson, ed., *A History of the Jewish People*, Cambridge, 1976, pp. 309-311.
 15. In the wake of the Chmielnicki uprising a rabbinical synod met in Lublin in 1650 and found ways to free many *agunot* and otherwise regularize devastated Jewish family life. Heinrich Graetz, *Geschichte der Juden*, Leipzig, 1882, vol. 10, p. 75.
 16. "When religious leaders, familiar with the theory as well as the practice of the Reform movement in Germany, came to America they found a lay impetus for religious reform already present. The task the laymen assigned them—and they to themselves—was to give it an intellectual foundation and to direct its course." Michael Meyer, *Response to Modernity: A History of the Reform Movement in Judaism*, New York, 1988, p. 236. See also Leon Jick, *The Americanization of the Synagogue*, Hanover, NH, 1976.
 17. Freehof, p. 13.
 18. Whether and to what extent Freehof's model of popularity initiated change in fact holds true for any other period of "religious crisis" in Jewish history, or whether he was grossly overgeneralizing on the basis of his own time and experience, is a worthwhile inquiry for another time.
 19. Freehof, p. 7.
 20. See also Eruvin 14b and Menahot 35b.
 21. Sanhedrin 86b.
 22. *Mishnah Torah*. H. Berakhot 8:1; *Shulhan Arukh* OH 204:7. Note that even Alfasi does not resolve it. See Rashi *ad loc*.
 23. Elon, vol. II, p. 896.
 24. Elon, vol. II, p. 884, n. 14.

25. Elon, vol. II, pp. 901-902.
26. Elon, vol. II, p. 882.
27. Freehof, p. 8, citing Tractate Sofrim 14:16.
28. J. Yevamot 12:1 (12c).
29. This is also Elon's conclusion, Vol. II, pp. 907-909 and notes *ad loc.*
30. M. Bava Metzia 7:1.
31. J. Bava Metzia 7:1 (11b).
32. Tosefta Bava Metzia 11:23 (Lieberman, ed.) explicitly states that the residents of a city are free to determine local wages and working conditions.
33. *Bet Yosef* 690. In other words, Karo first cited the customs and their importance and their base, however tenuous, in Scripture. Then in the *Shulhan Arukh* he eliminated them. Isserles supplemented the *Shulhan Arukh* with Karo's own words, but eliminated the reference to a scriptural basis.
34. Yoreh Deah 376:4.
35. Freehof, p. 9. The notion that there is an entity called "Judaism" which "needs readjustment" at certain specific times requires a separate critique.
36. Elon, vol. I, pp. 122ff.
37. *Ibid.*, p. 131.
38. Elon, vol. II, p. 910, citing Resp. Rashbash #419.
39. *Ibid.*, p. 903, n. 27.
40. The first volume contains chapters on Public Worship, Marriage and Divorce, Naming of Children and Circumcision, and Burial and Mourning; the second volume adds chapters of The Synagogue Building. The Synagogue Service, Marriage and Conversion, and Death, Burial and Mourning.
41. See the brief overview by I. Ta-Shma, "Minhagim Books," *Encyclopedia Judaica*, Jerusalem, 1972, Vol. 12, col. 27-29.
42. On September 1, 1978, in an interview recorded by Rabbi Kenneth J. Weiss, Dr. Freehof stated: "The Reform movement was born on the world of enlightenment, of culture and science, in which things were judged by what sense and what logic and what proper justification they had. And if a ceremony seemed to have no logical meaning it could be dropped, it would be dropped, without any [unintelligible]. We moved out of the age of philosophy into the age of psychology. That means now, things are judged, not by what they make sense, but what they do to you. Once, I would say, 'I can believe in this.' Now I say, 'It sends me.' So therefore, ceremonies which had no justification in the past still don't have justification but have appeal in the present. So [because of this change] there is a different attitude toward the meaning of ceremonialism. But we can adopt whatever sends us—provided we know that *we* are adopting it. And if we know that we are adopting it, and if it ceases to have meaning we can again drop it, then we are Reform Jews. Not by what ceremonies we observe or don't observe, but what we think of the ceremonies that we observe. ... If we believe that we have the right when they cease to have meaning to us ... So our congregation never had bar mitzvah, now has bar mitzvah. The spirit has changed. Our congregation never had a chuppah, our ladies have embroidered a magnificent chuppah. Our congregation that never had a chazzan now has a Reform chazzan, a lady chazzan. We call it, however, with a self-satisfying name, a cantorial soloist, so we feel more Reform at it. In other words, we're in a period where we need pictorialization of Judaism again and it might as well

- be the old ones. But only if we understand that we have adopted them, and not that it's Torah mi-Sinai." (AJA C-229)
43. In the words of Kaufmann Kohler: "For the pagan mind in general the ceremonies constitute religion, which is viewed as a mode of worship void of ethical purposes. In the course of time, however, the original object of these ceremonies is forgotten, and they become empty forms until upon a higher stage they are invested with new meaning and made to convey higher thoughts. There is, consequently, a singular affinity noticeable between the ceremonies of various peoples and classes, since, as a rule, they have a common origin in primitive life. Ceremonies are never the creations of individuals; they grow and change like languages. ... Each ceremony may thus be traced to its origin in primitive time. ... We, who behold in religion an ever-progressive force working through the inner consciousness of man, first collectively and afterwards individually, must ascertain the origin and purpose of each and every ceremony in order to find out whether by appealing to our minds and hearts it fulfills a religious function or whether it has become an empty shell with the kernel gone. ... In thus reviewing the entire system of Jewish observances as they have come down to us through the centuries, we find them to be indispensable forms of expressing the religious feelings prompted by the various events of life. As we advance in culture, enlightenment, and refinement, these various ceremonies may appear to us as empty shells void of meaning, but we must never forget that nothing grows on the tree or in the soil without shielding leaf and husk. Abstract truth and ethical practice fail to satisfy the religious craving of man. He needs ceremonies that impress him with the nearness and the holiness of the divine." Kaufmann Kohler, "The Origin and Function of Ceremonies in Judaism," *CCAR Yearbook*, Vol. 17, 1907, pp. 208, 210, 221.
 44. Freehof, pp. 31ff.
 45. Freehof, p. 56.
 46. Freehof, p. 71.
 47. Freehof, pp. 88-89. Although he does not explicitly mention it here, the Reform decision to rely on "the legal safeguards" of the "law of the state" and to regard the religious dimension as the marriage's "spiritual and moral side" has been frequently justified by appeal to the halakhic principle of *dina de-malkhuta dina*. Halakhically, however, this principle, however, does not function in the realm of *issur*. *Elon*, vol. I, pp. 132ff.
 48. Freehof, pp. 99ff. The section on civil divorce is by far the lengthiest single section in both volumes and constitutes a history of the issue and a discussion of all the complexities inherent in the Reform acceptance of civil divorce. The source of this complexity is the fact that the modern state regulates marriage and divorce, considering them to be matters of civil law; but for Jewish law they are both in the realm of *issur*, although there are matters on *mamon* subsumed within *tem*. In drawing the dividing line between "civil" and "religious" matters for Jews in the modern state, Reform eliminated the legal aspect from marriage and the religious aspect from divorce. The latter has more serious consequences for individual Jews.,
 49. Freehof, p. 118f.
 50. Freehof, p. 133ff.

51. Freehof, p. 10. Of course, he was far from unique in failing to discern the adaptability of Orthodoxy to modern life and its resurgence both in modern and *haredi* forms.
52. Freehof, p. 11.
53. See "Introduction," *Reform Responsa*, Cincinnati, 1960, pp. 8ff.; "Reform Judaism and the Legal Tradition," Annual Tintner Memorial Lecture, Association of Reform Rabbis of New York City and Vicinity, New York, 1961; "The Reform Reevaluation of Jewish Law," The Louis Caplan Lectureship on Jewish Law, Cincinnati, 1972, pp. 13ff.
54. See numerous citations in *Elon*, vol. I, pp. 13ff.
55. *Elon*, vol. I, p. 14.
56. The *Landjudenschaften* of this era generally were granted less internal autonomy and were subject to more government supervision than their *medieval* counterparts. See e.g., Josef Meisl, ed., *Protokolbuch der juedischen Gemeinde Berlins, 1723-1854*, Jerusalem, 1962, pp. 11ff.
57. Those very few *Hoffjuden* and other wealthy Jews of the eighteenth century who neglected ritual observances are exceptional. The vast majority of Jews continued to observe the ritual laws, whether or not their courts were allowed jurisdiction in matters of *mamon*.
58. "In the wake of the passage of the Declaration of the Rights of Man, Ashkenazi policy ... changed reluctantly. ... [T]he leaders of the Ashkenazim tried desperately to retain the right to Jewish communal organization. They argued that it could not be the intention of the government to give them the benefit of equality while at the same time demeaning them by taking away their autonomy. Their inherited practices had been their consolation in adversity and they wanted to preserve them in happier times ..." Arthur Hertzberg, *The French Enlightenment and the Jews*, New York, 1968, p. 344. The French Ashkenazim of Alsace-Lorraine were far more similar to the Jews of Germany than they were to the French Sefardic community centered in Bordeaux, and the reaction of its leadership therefore sheds light on attitudes with German Jewry.
59. Freehof, p. 15.
60. See n. 43.
61. This is not the only instance in which Freehof's ideas carry echoes of Mordecai Kaplan's. With regard to his responsa, he was fond of saying that "the past offers guidance, not governance;" a phrase strangely reminiscent of Kaplan's dictum that "the past has a vote but not a veto." Kaplan, however, was a system-builder and Freehof was not. Freehof frequently stated in his correspondence that because the Reform movement had not yet decided how to deal with questions related to Shabbat observance, he could not give official answers to many questions submitted to him as Chairman of the Responsa Committee. (AJAA MS-435)
62. Freehof, pp. 13-14.
63. Letter to Rabbi Philip S. Bernstein, October 16, 1963, Temple Brith Kodesh, Rochester, NY. (AJA MS-435)
64. Letter to Rabbi Harold Silver, Temple Emanuel, Pittsburgh, April 16, 1962. (AJA MS-435)