

## *Introduction* Who Is a Jew? What Is a Jew?

### *Jewish Identity, Jewish Status, and the Challenge of Conversion*

Lev Paschov certainly could never have imagined that he would be buried twice. An Israeli soldier who had immigrated to Israel from the former Soviet Union through the Law of Return, Paschov was killed along with another soldier while on active duty in southern Lebanon in 1993. Because Paschov's mother was not Jewish, the Israeli army's rabbi insisted that Paschov be buried outside the official military cemetery, which was consecrated exclusively for Jewish burial. After a public outcry, Paschov's corpse was exhumed, and he was buried a second time—this time, inside the Jewish military cemetery, though at its edge.<sup>1</sup>

Classical Jewish law defines a Jew as someone who either is born of a Jewish mother or has converted to Judaism before a valid court. As Paschov satisfied neither criterion, Israel's Orthodox religious authorities did not regard him as a Jew and ruled that he could not be buried in a Jewish cemetery. Many Israeli citizens were appalled by this decision. They were outraged that a man who had died defending the Jewish State and his fellow citizens, and who had immigrated to Israel under the Law of Return as a "Jew," could be denied the dignity of burial in a Jewish cemetery.

To many, Paschov and his life signaled that the classic criteria for defining and identifying a Jew were simply too narrow for the modern setting. Paschov exemplified a new and expansive model of how the Jewish community ought to be defined and how membership in the Jewish community ought to be determined today. Under Israel's Law of Return, which permits people with even one Jewish grandparent to immigrate to Israel as Jews, Paschov had been granted Israeli citizenship immediately. He died while defending his country, the Jewish

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State, as a Jew. His fate and destiny were unquestionably and inextricably bound up with the fate of the Jewish people and a sovereign Jewish nation. Were these factors not sufficient to count him as a Jew?

In the ensuing debates surrounding his burial and reburial, many Israelis who were disturbed by what had transpired could not articulate the central questions that his case brought to light. Against the backdrop of the powerful social, political, religious, and demographic changes that have gripped the Jewish people since the onset of the modern period, this event demonstrated the complexity of the issues that surround the determination of Jewish status and the parameters of Jewish identity and community in the modern world.

Issues of how Jewish status should be resolved and what it means to be a Jew have hovered over Jewish legal discourse throughout Jewish history. Positions on these issues have never been universally held, and the assumptions upon which they rest have largely remained unarticulated. However, with the collapse of the Jewish community as a semi-autonomous political entity in Western Europe and the United States from the late 1700s on, and with the concomitant entry of the Jew as an individual citizen in the modern political arena, the modern period of Jewish history has seen the rise of these issues—as the Paschov case demonstrates—in a novel and intense fashion.

In this book, we will focus on the modern period of Jewish history and provide an analysis of nineteenth- and twentieth-century legal opinions and other writings by Orthodox rabbis regarding conversion. We will preface the analysis of these opinions with a discussion of these modern writings as parts of an ongoing legal tradition draw upon classical Jewish sources. We will employ these works as the lens through which we can understand the overlapping but distinct ways in which traditionalist religious authorities have gone about the task of defining the core of Jewishness—Jewish identity, status, and community—in the modern situation. In so doing, we hope to illuminate the larger phenomenon of how Jews and Judaism have responded to the challenges of the modern world regarding the continuity and borders of the Jewish people.

In order to reflect upon why modernity has so complicated and heightened the stakes of the debate surrounding the questions of

“who is a Jew” and “what is the nature of the Jewish community,” it is instructive to employ the contrasts that historians and sociologists routinely draw between the notion of “status” and the concept of “identity.” While these two terms often overlap, they are two distinct referents that are not necessarily identical.

“Status,” stemming from a Latin word meaning “standing,” refers to the condition of a person in the eyes of the law. When employed with regard to a person’s relationship to a group, the person’s own conception of that relationship may be irrelevant. Authorities external to the group or within the group itself may well make status designations with no regard for the individual’s sense of self-definition. For example, there were self-defined Christians who, living in Nazi Germany, were defined as Jews under the Nuremberg Laws of 1935. Similarly (though with very different implications), a person born of a Jewish mother who has sworn allegiance to another religious faith would still be considered Jewish by nearly all traditional Jewish legal authorities.

Conversely, despite an individual’s own sense of identification and belonging, a group might well deny him legal status as one of their own. For example, the child of a woman converted to Judaism under non-Orthodox auspices would be denied Jewish status by Orthodox rabbinical authorities in virtually every case and would be refused the right to marry as a Jew within the Jewish State. Along the same lines, a Conservative rabbi would likely not perform the wedding of a patrilineally descended child (the child of a Jewish father and a non-Jewish mother) raised in Reform or Reconstructionist circles without a ceremony of formal conversion to Judaism. Other examples could be provided, but these should suffice to indicate that “status” is a legal designation indifferent to the subjective judgments or self-definitions of the individual.

“Identity,” in contrast, embraces a more specific and personal component. Its etymological root, derived from the Greek *idios*, means “private” or “individual.” When the term “identity,” as opposed to “status,” is employed to refer to a person’s relationship to a group, it may simply signify the psychological orientation of the individual toward that group. It reflects the individual’s autonomous understanding of who he or she is. Individuals who participate in the life of a given Jewish

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community might well identify as Jews despite not having undergone any formal rite of conversion to Judaism. Identity, in this instance, would not address the Jewish legal relationship that obtains between a person and the Jewish community. It would, rather, reflect a personal definition of self in reference to a group and might even be affirmed by one or more sectors of that group, though not necessarily—as we saw in the case of Paschov—the one with any legal authority to determine status.

The issue of “who is a Jew,” along with the determination of membership in the Jewish people, grows particularly complex in the modern situation precisely because it involves considerations of both status and identity, which are no longer coterminous, as shown in the cases cited above. Many factors—the individual, the group, certain sectors of the group, and bodies external to the group that possess authority over it—may be involved in determining a given person’s status as a Jew. These factors deserve special attention when we contrast the nature of Jewish existence in the premodern world with Jewish life in the modern world in settings such as the United States or the State of Israel.

Within the framework of a premodern political order, status was corporate. Individual citizenship in a modern nation-state, as present in many contemporary political models, did not exist. To compound matters, the Jewish community was politically autonomous or semiautonomous in governing the lives of its members, and it informed their sense of self-identity even as they internalized the cultural norms and teachings of the community. There was little or no dissonance between public and private spheres, or between individual and collective realms, with regard to Jewish status and identity. In a world where pluralism was controlled politically in such matters and where individualism and voluntarism had not yet arisen as they have in a modern setting, being Jewish was more than an expression of religious affiliation; it defined a person’s political status, informed his culture, and determined his identity. Only in rare instances did conflict arise between individuals and public political bodies as to who was a Jew. Status and identity were virtually one and the same in almost every case. Individuals who defined themselves as Jews would have done so with the assent of a politically self-governing Jewish community that knew nothing of

denominationalism as well as the assent of Gentile authorities who permitted Jews to enjoy semiautonomous political status.

Modernity has dissolved the “synonymity” of status and identity and has thrust upon Judaism a number of lasting changes that have redefined the terms under which Jews live. As Peter Berger, speaking of “Jewishness” in the premodern world, has observed, to be Jewish was “a taken-for-granted given of the individual’s existence, ongoingly reaffirmed with ringing certainty by everyone in the individual’s milieu.”<sup>22</sup> Being a member of the Jewish collective was not a matter that was subject to an individual’s own beliefs or desires but was dictated by the rules of Jewish law and the communal structures that enforced them. The lines between Jew and non-Jew were clearly drawn.

In today’s world, the ever-changing contours of modern Judaism complicate the process of defining who is Jewish, as seen in the instance of Lev Paschov. These developments are evident not only in individual cases, but also more broadly. For example, in 2008, Rabbi Avraham Sherman, an ultraorthodox (*haredi*) rabbi on the Israeli High Rabbinical Court, decided to invalidate thousands of conversions conducted by the Conversion Authority of the chief rabbinate under the supervision of Orthodox Rabbi Haim Druckman because of serious disagreements with Druckman as to the obligations of belief and practice that prospective converts were required to take upon themselves. We shall return to this episode in later chapters, but we mention it here because it highlights the intricacy of determining Jewish status and identity in the modern setting.

Of course, modernity did not descend on the Jewish community in one fell swoop. When we speak of the profoundly altered state of the Jewish community in modernity, we are actually referring to a number of factors that have coalesced during the last three hundred years. First, the Enlightenment of the late eighteenth century, along with its Jewish complement, the Haskalah, encouraged Jews to integrate into secular society and raised questions about personal autonomy, the theological origins of Jewish law, and the authority of the Jewish community that would have been virtually unthinkable just a few years earlier.

Second, particularly in Western Europe, Jews enjoyed a political emancipation that granted them rights of citizenship on par with their

non-Jewish counterparts. This political emancipation ultimately destroyed the legal borders of the Jewish community and transformed the community from a legal corporation into a voluntary association of individual members.

This change provided individual Jews the option of abandoning the Jewish community and led to a third major factor: the waning influence of the rabbinate on its constituents. When Jews did not possess the legal option of leaving the communities that their rabbis controlled, and when the community functioned as a semiautonomous legal corporation, the rabbis possessed what scholars of law and culture have called “coercive legal authority.” They were essentially civil magistrates. As soon as the legal power of the community as a distinct political entity dissolved or became severely limited, the rabbis faced unprecedented challenges and could, at best, exercise what these same scholars of law and culture label “influential authority.” As rabbis were now religious authorities who could no longer function as civil magistrates with police powers, they could exert authority only among those whom they could persuade to obey and “command” only those Jews who had internalized the norms that they had promulgated. Yet, in an era in which traditional religious observance and belief among vast numbers of Jews had either severely attenuated or even dissolved, the rabbis were compelled to recognize that large numbers of Jews would not affirm their authority or their teachings in crucial areas of life.<sup>3</sup>

Primary among these areas was the social arena. It is vital to emphasize that, in the wake of the cultural, religious, and political changes that marked the transformation of Jewish life as Jews entered the modern world, a fourth change took place in the sphere of social relations: Jews and non-Jews came to intermingle regularly as social equals. The pace of Jewish exogamy soared to high levels in the generations following Emancipation and Enlightenment as Jews acculturated and as Gentiles saw Jews as desirable marriage partners.

As Jewish religious leaders struggled to evolve and to cope with these sweeping changes, the creation of Israel as the Jewish nation-state in 1948 only reinforced the urgency of addressing these changes. In offering a novel setting for considerations of Jewish status and identity in the modern world, the State forced a reconceptualization of what it

meant both to be Jewish and to belong to a Jewish polity. Yet, even in Israel, the rabbinate, by and large, has never had control over civil law. It is true that the state-supported chief rabbinate and its arms possess sovereignty over matters of personal status, such as marriage, divorce, and burial, for its Jewish citizenry. Here the powers accorded the rabbinate are parallel to what they were in premodern times, and the Israeli rabbinate is called upon to adjudicate and determine questions of Jewish status for all who seek to be married, divorced, or buried as Jews within the Jewish State. These factors that mark the Israeli situation will receive special consideration in the analysis that we will provide in this book. However, even within Israel, the presence of a large number of secular Jews, as well as the emigration to Israel of hundreds of thousands of persons who identify themselves and are identified by others culturally and politically as Jews but lack halakhic (religious-legal) status as Jews, has made the issues of conversion and Jewish identity paramount and controversial topics on the Israeli scene.

In order to understand the issues of Jewish status and identity as well as the nature and framework of the Jewish community, this book will analyze a broad range of representative Orthodox rabbinic legal writings—principally *responsa*—on conversion, status, and identity against the backdrop of the changes that we have mentioned above. *Responsa* are elite, technical documents—case discussions and their holdings in modern Western jurisprudential nomenclature—and rabbis throughout the centuries have used them as opportunities to apply the insights, meanings, norms, and precedents provided by the literary and legal texts of the Jewish past (Bible, Talmud, codes, and other *responsa*) to the pressing and often novel issues of the present age. Consequently, a single *responsum* can be seen as part of a vast body of Jewish case law that stretches over the centuries. *Responsa* are the crossroads at which text and context meet in the ongoing tradition of Jewish legal hermeneutics. Each *responsum* is an autonomous text, written by a specific author; each should also be viewed as an individual reflection of a continuous body of Jewish literature with its own style, language, and logic. These idiomatic expressions of Jewish thought provide an excellent lens through which to witness the role of the classical Jewish literary tradition (Bible, Talmud, and, less often, midrash) and later rabbinic

texts (codes, responsa, and occasionally commentaries and philosophical literature—for example, Maimonides), as well as the input of contemporary social, psychological, and ethical factors in the development of Judaism.<sup>4</sup>

In each era, *posekim* (authorities in the Jewish legal tradition; sing., *posek*) have had to determine how they stand with respect to all that comes down from the past, but they must do so as persons who are embedded in a present moment. Throughout history, these religious leaders have been compelled to mediate between a received religious tradition, on the one hand, and the inescapable demands of a contemporary cultural, social, and political context combined with influences of personality and personal values, on the other. In this sense, the history of the Jewish legal tradition, like other legal traditions, is fundamentally a history of diverse interpretations. Each interpretation and *posek* is linked to the past while offering opinions that open various portals to the future. This is not to say that *posekim* substitute their own values for those embedded in the legal materials and traditions that they have inherited and revere; they are expected to adhere to established principles and rules. They are not expected to create ideas out of thin air but to follow precedent as contained in the legal texts of Jewish tradition. Precedent, *stare decisis* in legal terminology, places constraints upon the *posek*, and *posekim* are never permitted to break self-consciously from the past because their authority rests upon their fidelity to original texts and prior holdings. A traditional account of Jewish legal adjudication emphasizes the faithful application of precedent to novel situations.

However, this straightforward description of the legal process is too narrow to capture or to explain the full range of factors that mark the adjudicatory process. A responsum functions on an immediate level as a ruling that is binding upon the questioner; but on a broader level, a responsum enters as a single precedent, an individual voice, in the larger body of Jewish legal discourse. In this broader sense, we would emphasize—and this is crucial for our book—that legal decision-making is analogical and always requires an interpretive performance on the part of those charged with rendering judgment. As David Hume pointed out over two centuries ago in his *Enquiry Concerning the Principles of Morals*, juridical reasoning must optimally be characterized



by its dependence upon “imagination.”<sup>35</sup> The rationale that determines whether and how the rule contained in a precedent can be applied does not lie exclusively in the merits of the rule or the case itself. Rather, the question is how the jurist understands the rule and how he then extends the rule and its logical entailments to the case at hand, and this determination depends upon a host of logical, contextual, and personal factors. Consequently, case law is *supple*. Legal decision-making and the rationales and causes that support the holdings that emerge from the adjudicatory process are best treated as highly persuasive rather than absolutely incontestable.

Our book treats the *responsa* of exclusively Orthodox rabbis because they share an unremitting commitment to the authority of Jewish law. Halakhah is unquestionably binding on all of them and—in theory, at least—on their congregants. It also serves as a control for determining a common framework from which their rulings derive. Yet, despite this common framework, these *responsa* will display widely varied understandings of what constitutes the essential core of Jewish belonging and identity. They also reveal the diverse approaches of these rabbis as to how they believe that the resources of the Jewish legal tradition can best be applied to guide the Jewish community in a modern world beset by what they would regard as threatening social and demographic trends. Some of these rabbis were keenly aware of the weakened power of the rabbinate in the face of an ever more open civil society, which significantly influenced the decisions that they rendered. Others were indifferent to such changes. Some *responsa* that these rabbis issued were focused on stringently maintaining the boundaries of the traditional community; others demonstrated a wide-open flexibility that permitted them to adopt a policy of “constituency retention”<sup>36</sup> in keeping with their understanding of how Jewish law could be applied in the modern context. In order to illuminate and grasp the dynamics at play in the works of the *posekim* we analyze in this volume, we will employ the philosophical writings of different philosophers and conceptions of secular law ranging from classically positivist notions of law to images of law as public policy.

Our book is divided into five substantive chapters. The first presents the classical sources of Jewish law and legend upon which all the rabbis

we study in this volume—as persons committed to the authority of Jewish law—drew upon in issuing their own opinions. These texts constitute the raw material with which all these authorities had to grapple.

In the second chapter, we move to Germany, and in the third chapter to rabbis in central Europe during the nineteenth century, for it was in these places that these rabbis were first compelled to confront a world in which Jewish exogamy was common and in which the concomitant demand for conversion and the expansion of communal borders first arose in the Jewish encounter with modernity.

In the fourth chapter, we turn to the twentieth century and consider the setting of America and Germany to see the multifaceted responses that this time and these places elicited from leading Orthodox legal writers on these matters. Finally, Israel itself will occupy our attention: chapter 5 attempts to define the impact that reconstituted Jewish sovereignty has had upon Orthodox jurists as they have struggled with the problems of defining Jewish status and identity for a diverse population of secular and religious Jews who have returned to the Jewish homeland after two millennia.

We then offer a concluding chapter, summarizing what we have learned from this analysis of the various decisions that Orthodox *posekim* have rendered in their legal rulings on this topic during the past two hundred years.

A plethora of books that tackle the topic of conversion to Judaism in the modern era—including some that look specifically at responsa literature—have appeared in recent years. Foremost among them are *The Boundaries of Judaism*, by Donniel Hartman; and *Transforming Identity: The Ritual Transition from Gentile to Jew*, by Avi Sagi and Zvi Zohar.<sup>7</sup> In the former book, Hartman investigates a much smaller range of modern decisors and notes how the factionalism of modern Jewish life makes it difficult to define the collective identity of the Jewish people. In the latter, rather encyclopedic, work, Sagi and Zohar explore the totality of Jewish legal history and the disagreements that arise among interpreters of Jewish law throughout the centuries as experts assign diverse valence to religion, nationality, kinship, and autonomy in offering their conceptions of membership in the Jewish community. Most encyclopedic of all is Menachem Finkelstein's *Conversion:*

*Halakbah and Practice*,<sup>8</sup> a translation of Finkelstein's original work in Hebrew, which offers an unparalleled amalgam of traditional and modern sources from the earliest rabbinic sources through contemporary responsa.

What distinguishes our book from others is that our intent is not to be encyclopedic; our focus is limited to the work of nineteenth- and twentieth-century Orthodox rabbis. Nor have we sought to cover every authority in that more narrowly defined category. Our aim is much more constrained, focusing on the ways in which conversion responsa speak to the challenge of making Jewish public policy in our postmodern world, in which issues of identity have become more complex than ever. We seek to understand the legal opinions of the scholars we examine regarding the diverse ways in which Orthodox authorities understand what ought to be the kernel of commitment for those who seek to join the Jewish community, and how Orthodox authorities, who are essentially making public policy for the Jewish world, ought to navigate the uncharted waters of a rapidly changing and permeable Jewish world.

What is unique about our focus is the claim that these *posekim* should not be understood as legal arbiters in a narrow sense. Rather, as judges in their decisions, these men must be understood principally as framers of public policy directions. These *posekim* have struggled to address the overarching issues of what constitutes Jewish identity, status, and conversion for a Jewish community that exists in an era rife with intermarriage and religious nonobservance. Through the legal decisions they render, these rabbis strive to be faithful to the integrity of a tradition that they honor and revere. At the same time, they attempt to direct the community they serve in the present while preparing that community for the future.

While the attention of this book is devoted to writings taken solely from representatives of the Orthodox denomination of Judaism, our aim is to employ a presentation and analysis of their writings to illuminate the large and increasingly complex task that all contemporary Jewish leaders undertake as they seek to establish borders and define commitments and obligations for Jews and the Jewish community in the modern period. In this sense, our book moves beyond the specific

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denominational focus of the material to speak to the larger dynamics marking the contemporary Jewish situation as Jews of all persuasions respond to the challenges of the modern world. Even though we concentrate on the issue of conversion, we will essentially be examining the larger issue of the place of Jewish legal interpretation in Jewish public discourse and the dimensions of Jewish identity and status as the Jewish community and its leaders attempt to understand and define what it means to be a Jew in the modern world.